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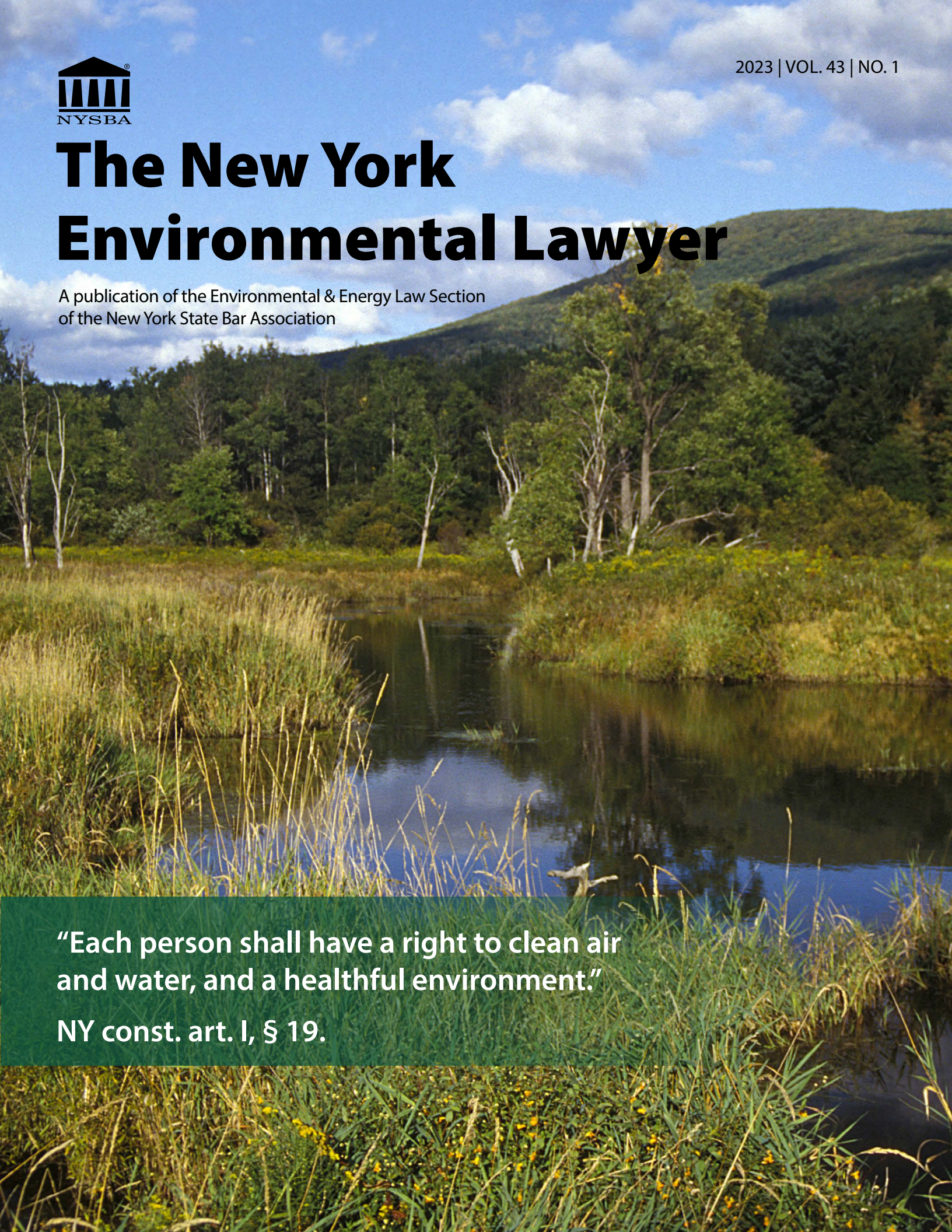
NYSBA

The New York Environmental Lawyer

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



"Each person shall have a right to clean air and water, and a healthful environment."

NY const. art. I, § 19.

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Cover photo credit: Ralph Tiner, USFWS. This photo was taken in the Wetlands in Southern New York, Catskills region.

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James L. Simpson and L. Margaret Barry, Co-Editors-in-Chief

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Message From the Section Chair

Environmental Regulatory Agencies Must Be More Responsive

By James P. Rigano

The recent events in East Palestine, Ohio involving a train crash and the release of toxic chemicals publicly illustrates the slow and inadequate response of the federal and state environmental agencies to address public concerns regarding possible exposure to toxic chemicals in the air, surface water, and groundwater. Apparently, the fire was allowed to burn, which I understand is an option with a toxic fire. Either let it burn or address the fire, which could result in subsurface contamination. I understand the fire was allowed to burn to avoid subsurface contamination, which could have been addressed if the agencies were prepared to substantially investigate and remediate potential subsurface contamination. Apparently, the federal and state agencies did not issue air, surface water, and groundwater tests to adequately address public concerns.

The public outrage was on display nationally and around the world in response to the perceived lack of a federal and state regulatory response. The slow and inadequate response of regulatory agencies is an ongoing and repeated issue. Things take years to decades to be addressed. Human health and the environment are at stake and the agencies, including the New York State Department of Environmental Conservation and the U.S. Environmental Protection Agency, are incredibly slow. A typical superfund investigation is measured in years if not decades. Meanwhile, contamination spreads and causes issues.

After practicing environmental law for several years and working on numerous locations, I have never heard a regulatory agency express a concern regarding human health impacts from an environmental exposure. The agencies would respond that they have a lack of resources. While the agencies may have a lot to do with their limited personnel, there is

Continued on page 4

Message From the Co-Editor-in-Chief

By James L. Simpson

As many articles in this issue note, in November 2021 New York voters chose to amend the New York Constitution. This was not just an amendment for a procedural issue, but an addition to the Bill of Rights—the amendment enshrines the liberty that "Each person shall have a right to clean air and water, and a healthful environment." (N.Y. Const., Art. 1, Sec. 19.) This issue of *The New York Environmental Lawyer* focuses on this Green Amendment to the New York Constitution. New York courts have only begun to interpret the amendment, and its full scope and import remain in their infancy. We asked scholars, experts, and EELS members (not a mutually exclusive group) to dive into the basic question of: what happens now?

Inside are several articles discussing the Green Amendment, including one from the EELS Task Force on Implementation of the Green Amendment with an overview of recent cases raising claims under it. In addition, Professor Nick Robinson reflects on legal issues likely to emerge from it, and Professor Rebecca Bratspies looks at what New York can learn from other states with similar constitutional amendments.

Joining these pieces are many other terrific ones that we hope you enjoy. These include an article by Ivonne Norman and Jose Almanzar on extreme heat and environmental justice, and an article by Walter Mugdan on PFAS and Superfund. We also welcome new faces and familiar ones to our agency updates. Notably, thank you to NYSERDA for its contribution and important updates on energy development. A personal thank you to my former EPA colleagues for joining me with the EPA Update column.

Thank you to Margaret Barry, my co-editor-in-chief, for her great work behind the scenes. Thank you to Keith Hirokawa (this issue editor) and the Albany law students for their great editorial work and enthusiasm. And most of all, thank you to the contributors for this issue.

James L. Simpson

Message From the Issue Editor

By Keith Hirokawa

It is an exciting time to be an environmental lawyer. On the one hand, we are witnessing a surge in interest in environmental rights. In November 2021, New York voters amended the New York Constitution to recognize a universal and fundamental basic liberty: "Each person shall have a right to clean air and water, and a healthful environment." (N.Y. Const., Art. 1, Sec. 19.) On the other hand, we find ourselves in a moment of environmental reckoning when we must ask ourselves who our existing systems of environmental law, including environmental rights, protect. In this potentially transformative moment, it is essential that we directly interrogate whether New York's new environmental "right" will advance not just environmental protection for some, but environmental equity for all.

Our environmental history is one of inclusion and exclusion, of gaps between those who reap the benefits from healthy environments and those who bear the disproportionate burdens of environmental harms. Those with means have always been capable of pursuing "a healthful environment," either by litigation, political participation, property acquisition, or the power of mobility. Indeed, those with political and economic means have historically been quite successful at creating captive environmental spaces that provide access to areas of beauty and pristine resources, while actually or effectively keeping others out. Our environmental movements and, at times, our environmental laws, too often operated to protect environmental amenities and healthful environments in ways that benefit the few while excluding the many, sometimes even to the extent of controling the market so that those less fortunate are precluded from purchasing, renting, or even borrowing a healthful environment.

Even today, affluent litigants often pursue litigation to prevent undesirable development in their neighborhoods (often referred to as NIMBY, or, Not In My Backyard). These efforts are often directed at intensive land uses (prisons, mining operations, public transportation, and high-density dwellings) that historically are associated with lower income areas. Efforts to create zones of environmental wealth and well-being is not new. Affluent residents have always had greater access to the political system and, thus, greater abilities to shape zoning decisions that benefit and protect affluent neighborhoods and keep them separated from other people and other land uses—that keep their environments safe and healthy. Finally, affluent people are more able to move when their environments are disturbed. They are able to relocate away from intensive land uses and toward suburban or rural landscapes. Affluent populations, that is, have the power to influence political processes or, if things go wrong, to exit unhealthy environments.

Keith Hirokawa is the Associate Dean of Research and Scholarship and Distinguished Professor of Law at Albany Law School.

What New York now refers to as "historically disadvantaged" people have not shared such opportunities. Whether through exclusionary signage (Whites only), discriminatory land use and loan practices (racially based zoning and redlining), erection of monuments to historical figures and moments (that have been overwhelmingly white), the disproportionate siting of environmentally intensive industry and activities, or land use planning that makes space for white employment opportunities, white priorities, and white neighborhoods, low-income people and persons of color have frequently been denied access to a healthful environment, or even the ability to protect their environments from further degradation. In New York, as in much of the United States, historically disadvantaged communities not only are denied the right to healthful environments, but also bear the brunt of environmental harms.

This is the context within which we must consider the power and potential of the new environmental right. Perhaps this new formulation of an environmental right is aimed at resolving this embarrassing history of exclusion and inequality. Achieving this change, however, requires not just a passive hope and intent that a new environmental right will unravel the old environmental harms. Instead, it requires a forthright reckoning with the past and an intentional reshaping of the future.

So, the question at issue is whether the "each person" reference in this potentially potent right will do the work of unraveling past harms and advancing future good, or whether it will continue to serve our white, affluent neighbors who already have the best access to natural spaces. That is, can this new right truly serve "each person"?

Message From the Section Chair, continued from page 3

no excuse for taking years and years to address these risks, especially when leaving endless questions and concerns. The federal, state and local environmental agencies must be more responsive and address the issues more expeditiously. One answer is to rely on licensed environmental professionals to a greater degree to address issues.

James P. Rigano

Message From the Student Editorial Board

A Testament to Our Predecessors, and Hopefully Our Descendants: The Future of New York's Green Amendment

By Priscila Galambos

Air rife with rich oxygen and shallow seas—warm bodies teeming with plankton—harmonized over millennia to create the lush, black soil that will come to be known as the South's Black Belt, 139 million years later.[1] Like these pioneering organisms, we come from dust and so will one day return. These life-giving wanderers, with thin, carbonite skeletons, decomposed into chalk. Back then, the creatures lined the shores. Now, their remains clearly shape political separation in the southern United States.

For centuries, slavers transported enslaved Western Africans to southern colonial territory to work in fields where the crop yield was notoriously high due to the nutritious earth. This led to legacies of Black voters, after the Reconstruction Amendments, residing in regions reflecting long gone cretaceous shorelines. In the most recent decades, voters of color, especially Black and African-American populations, have predominantly voted for Democratic candidates. Here, and across the country, the line was drawn very clearly in the sand with this lesson: No matter what, our history will always follow us, even if we did not start the journey ourselves.

The environment affects everything, from our decision to grab a jacket on our way out the door to significant historical events like the Dust Bowl. Changing climate and the efforts of many have led to legislative decisions across the United States. The codification of New York's Green Amendment is a great step in the right direction, but it is hardly a catchall to the issues within our current public policy regarding the environment. Everyone in New York now has a constitutional right to "clean air and water, and a healthful environment." But that is a very ambiguous order, and one that is open to varying interpretations that will be forced to come from future case law. While we have other states like Pennsylvania and Montana to look to for guidance, the real battle for rights will be fought in our state appellate courts. There are many unanswered questions. Will the newly given rights leave room for private action? Or will the broad scope stop short and merely protect collectives?

So far, we have had a case of first impression regarding the Green Amendment: *Fresh Air for the Eastside, Inc. v. State*.[2] Residents of Perinton, New York brought suit against High Acres landfill, the New York State Department of Environmental Conservation, and the city of New York because New York granted a permit to New York City that allowed them to dispose of waste via rail transportation to High Acres landfill. This fast delivery system led to a substantial increase in waste and fugitive emissions in the surrounding area, directly affecting the population and environment of Perinton. Those affected now had an action through the new amendment. The court identified its right to compel New York to follow its own constitution, with this complaint coming in a little less than a month after the Green Amendment's application. While the state filed a motion to dismiss, the court found itself with the authority to try the case and denied the motion. Like many of us, the court was left wondering what the future might hold for similar cases that hinge on our right to clean air, clean water, and a healthful environment.

While the Green Amendment has already allowed actions to be brought without the need for additional grants of authority, the future of enforcement remains to be seen. With their vote to approve the amendment last year, New Yorkers planted a seed—hopeful that the eventual case law would prove bountiful for future generations seeking relief from environmental injustices. Will our descendants look back at this time and trace our investment in their futures to fruit that gives them sustenance? It would be easy to say, "time will tell." More difficult will be the wisdom and tenacity required of lawyers and judges to cultivate, prune, and harvest this emerging environmental jurisprudence.

Priscila Galambos is a rising 3L at Albany Law School with interests in criminal and international law. She hopes to become an advocate for victims of human trafficking.

Endnotes

1. McClain, C., *How presidential elections are impacted by a 100 million year old coastline*, Deep Sea News, Feb. 28, 2023, https://deepseanews.com/2012/06/how-presidential-elections-are-impacted-by-a-100-million-year-old-coastline/.
2. *Fresh Air for the Eastside, Inc. v. State*, 2022 N.Y. Slip Op. 34429(U) (Sup. Ct., Monroe Co. 2022).

January 2023 Annual Meeting: An In-Person Festival

By James P. Rigano

In late January, the Energy and Environmental Law Section had its first annual meeting in three years. What a joy! The 115 attendees were delighted to be present with their colleagues after three years of video conferences. Of course, the sessions were most informative on a range of issues with a focus on New York state's cutting-edge renewable energy development and climate change initiatives. The main session was a half-day with a number of speakers from both state agencies and the private sector, with several members traveling from around the state to participate. As in past live conferences, the session was held at the Hilton in Midtown Manhattan.

The day before, the section held its Executive Committee meeting with about 50 members present in person and many others present virtually. We covered a lot of ground at the Executive Committee meeting, including our diversity initiatives to sponsor two fellowships this summer, and associated fundraising and upcoming sessions at several law schools to promote the section and energy initiatives in the state. We also covered the development of brownfield issues with the New York State Department of Environmental Conservation, in addition to several items of business. As explained, the budget surplus for the section is very healthy, largely thanks to sponsorships for our different conferences.

We also [had and] have conferences planned for this spring: the Legislative Forum in Albany in late April, the petroleum seminar in early May and a conference in Buffalo that will focus on western New York issues in early June.

Former Section Chair and Chair of the Awards Committee Nick Ward-Willis presented Immediate Past Chair Linda Shaw an award of appreciation for her outstanding leadership during her tenure.

Virginia Robbins and Kevin Healy accepted the Section Council's Award of Merit on behalf of the Environmental & Energy Law Section's Global Climate Change Committee.

Julie Tighe, President NY League of Conservation Voters accepted the Environmental & Energy Law Section Award for distinguished service to protect the environment.

Outside the EPA Update

By Margo Ludmer, Mary McHale, Joseph Siegel, and James L. Simpson

This EPA Update covers U.S. Environmental Protection Agency (EPA) activities from approximately Sept. 15, 2022 through Feb. 15, 2023. The article doesn't cover every single action taken by EPA during this time but attempts to summarize the highlights with a focus on EPA activities affecting New York.

The EPA Update should be read cafeteria style: take what you want and leave the rest. First, the column discusses climate change. Second, it discusses some general EPA goings-on. Third, the article discusses environmental justice issues. Fourth, the article discusses water issues. Fifth is a discussion of issues under the Clean Air Act. Lastly, but certainly not least, the article discusses updates in the Superfund program.

Margo Ludmer authored the Superfund section; Mary McHale authored the Clean Air Act section; Joseph Siegel authored the Climate Change section; and James L. Simpson authored the remainder.

Climate Change

Climate Change Adaptation

On Oct. 6, 2022, EPA released 20 Climate Adaptation Implementation Plans (Plans) including a Plan developed by EPA Region 2. The 20 Plans include a total of 400 commitments and recognize that climate impacts often hit hardest in already underserved and overburdened communities.[1] Region 2's Plan, which builds on an earlier 2014 version, includes a vulnerability assessment, 42 priority actions, training plans and identification of the Region's climate science needs.[2]

Region 2's Plan was developed after meetings with federally recognized Indian Nations and virtual outreach meetings, in both Spanish and English, for all interested governmental partners and non-governmental stakeholders.[3] As a result of the input from the meetings, which followed release of a draft Plan, the final Plan incorporates additional priority actions on topics such as "building capacity in communities to access funding, healthy public housing, heat island effect, youth engagement, green infrastructure, native plants, food security and coral reefs."[4] Many of the priority actions are contingent on Region 2's receipt of additional resources to implement the actions.[5]

Inflation Reduction Act

EPA received $41.5 billion in appropriations under the Inflation Reduction Act to support and develop programs that "monitor and reduce greenhouse gas emissions and air pollution, protect public health and advance environmental justice."[6] On Nov. 4, 2022, EPA announced its initial public engagement on a set of programs funded by the Inflation Reduction Act and sought comment on aspects of core Inflation Reduction Act elements, including, among others: (1) $5 billion for climate pollution reduction grants; (2) $4 billion to reduce transportation sector emissions through activities such as zero emissions equipment at ports; (3) $1.55 billion to reduce methane emissions from the oil and gas sector; and (4) $38.5 million to reduce high global warming potential hydrofluorocarbons under the American Innovation and Manufacturing (AIM) Act.[7]

The agency also announced the availability, on Jan. 10, 2023, of $100 million to advance environmental justice in underserved and overburdened communities through two programs: (1) the Environmental Justice Collaborative Problem-Solving Program Cooperative Agreement Program, which will provide $30 million directly to community based nonprofit organizations; and (2) the Environmental Justice Government-to-Government Program, which will provide $70 million to states, local governments and Indian Nations with community based organization partners.[8] In awarding the funding, special consideration will be given to projects addressing climate change, disaster resiliency, and/or emergency preparedness, among other goals. Projects are expected to begin on Oct. 1, 2023.[9]

On Jan. 19, 2023, EPA sought public input on the Inflation Reduction Act's lower carbon construction materials program which provides $350 million to support substantially lower embodied carbon associated with construction materials and products.[10] Comments [were] due to EPA by May 1, 2023.[11]

Following a robust stakeholder engagement process, EPA announced on Feb. 14, 2023 initial guidance for its design of the Inflation Reduction Act's Greenhouse Gas Reduction Fund, which is intended to provide financing to states, Indian Nations, local governments and nonprofit green banks for reduction in climate pollution.[12] EPA indicated that it would hold two competitions by summer 2023 to distribute

money under the Greenhouse Gas Reduction Fund, including (1) a $20 billion General and Low-Income Assistance Competition; and (2) a $7 billion Zero-Emissions Technology Fund Competition.[13] These programs, along with others under the Inflation Reduction Act, will be implemented in a manner that is consistent with President Biden's Justice40 Initiative which requires that 40% of the overall benefits of investments flow to "disadvantaged communities."[14]

In addition, in February and early March 2023, EPA held a series of webinars to roll out its Climate Pollution Reduction Grants program, which will provide grants to states, territories, air pollution control agencies, Indian Nations and local governments to plan and implement greenhouse gas reduction programs.[15] The grants will be awarded in two stages: (1) $250 million for noncompetitive planning grants; and (2) $4.6 billion for competitive implementation grants. EPA is expected to announce the first-phase grants as early as March 2023.[16]

Mobile Sources and the Bipartisan Infrastructure Law

Under EPA's Clean School Bus Program, Region 2 announced on Nov. 1, 2022 rebate awards of nearly $18,500,000, funded by the Bipartisan Infrastructure Law, to New York City school districts.[17] The awards will allow for the purchase of 51 new clean school buses.[18] The Clean School Bus Program, which prioritizes low income, rural, and Tribal communities, will reduce greenhouse gas emissions and other pollution linked to health impacts, such as asthma, while saving school districts money. The award to New York City is part of the first $1 billion disbursed in a five-year $5 billion national program to advance the transition to clean school buses under the Bipartisan Infrastructure Law.[19]

American Innovation and Manufacturing Act

As part of EPA's continued work under the American Innovation and Manufacturing (AIM) Act, and to address petitions under AIM granted by the Agency in October 2021, EPA proposed a rule on Dec. 9, 2022 that would restrict the use of high global warming-potential hydrofluorocarbons (HFCs).[20] The proposed restrictions, which would begin in 2025, are for HFCs used in certain foams, aerosol products, and refrigeration, air conditioning, and heat pump equipment.[21] EPA also announced a proposal on Oct. 20, 2022 that establishes a methodology for allocating HFC production and consumption allowances for 2024 and beyond.[22]

Methane

On Nov. 11, 2022, at the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), EPA announced a supplemental proposal to strengthen methane controls at hundreds of thousands of existing oil and gas sources.[23] Methane is responsible for approximately one-third of the greenhouse gas warming we see today and EPA estimates that the supplemental proposal, if finalized, would reduce methane at covered sources by 87% below 2005 levels by 2030. Upon announcing the supplemental proposal, EPA Administrator Michael Regan stated that the United States "must lead by example when it comes to tackling methane pollution—one of the biggest drivers of climate change."[24] The supplemental proposal also includes a "super-emitter response program" that would rely on remote methane detection technology to identify large-scale emissions of methane at oil and gas sources. The supplemental proposal expands and strengthens EPA's November 2021 proposal on several items including, among others, fugitive emissions, monitoring of wells, reporting requirements, alternative methane detection technologies, the super-emitter response program, and requirements for flares and other equipment.[25]

Other Climate Change Developments

On Jan. 19, 2022, EPA proposed to add climate change as a 2024-2027 fiscal year enforcement initiative under its National Enforcement and Compliance Initiatives (NECI), which the agency updates every four years.[26] EPA took public comments on this addition and other changes to the NECI.[27] Also on Jan. 19, EPA announced the availability of $50 million under the Bipartisan Infrastructure Law to assist states, Tribes and territories develop and implement Underground Injection Control (UIC) Class VI programs under the Safe Drinking Water Act for the purpose of geologically sequestering carbon dioxide.[28] Applicants for funding must demonstrate how environmental justice will be incorporated into their programs.[29] On Feb. 15, 2023, EPA published its draft annual Inventory of U.S. Greenhouse Gas Emissions and Sinks for the period 1990-2021.[30] Pursuant to the requirements of the UNFCCC, EPA submits the inventory each year to the Secretariat of the UNFCCC. The draft report can be found at https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks.

General

EPA Proposes To Add Environmental Justice, Climate Change, and PFAS to Its NECIs

On Jan. 19, 2023, EPA proposed to include environmental justice, climate change, and PFAS contamination in its NECIs.[31] Every four years, EPA selects national initiatives to focus resources. These are areas EPA sees as serious and widespread environmental problems. The purpose is for EPA to get the most effective use of its resources and where federal enforcement can make a difference. The primary objective of these initiatives is to protect human health and the environ-

ment by holding polluters accountable through enforcement and assisting regulated entities return to compliance.[32]

EPA proposed to continue four of the six current national initiatives during the FY 2024-2027 cycle. In addition, EPA proposed to address environmental justice concerns in all NECIs, and to add two new NECIs on mitigating climate change and addressing PFAS pollution, for the upcoming four-year cycle.[33]

Importantly, careful followers of these initiatives will note the return of the word "enforcement" to them. The Trump administration dropped this term, letting the initiatives focus on compliance instead. The Biden administration has proposed to return to EPA's long history of enforcement for both specific and general deterrence, while continuing with compliance assistance.

Specifically, EPA proposed continuing these four current NECIs:

1. Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants.

2. Reducing Risks of Accidental Releases at Industrial and Chemical Facilities.

3. Reducing Significant Non-Compliance in the National Pollutant Discharge Elimination System (NPDES) Program.

4. Reducing Non-Compliance With Drinking Water Standards at Community Water Systems.[34]

EPA proposed adding: (5) Mitigating Climate Change and (6) Addressing PFAS Contamination. EPA proposed addressing environmental justice across all six of these initiatives.[35]

Environmental Justice

EPA Releases Updated Legal Guidance To Address Cumulative Impacts To Advance Environmental Justice, Equity

On Jan. 11, 2023, EPA announced an action to identify and address cumulative impacts from pollution and non-pollution sources.[36] Specifically, EPA's Office of the General Counsel (OGC) released the "Cumulative Impacts Addendum to EPA Legal Tools to Advance Environmental Justice."[37] The addendum is a collection of EPA's legal authorities to identify and address cumulative impacts through a range of actions, including permitting, regulations, and grants, all geared toward advancing environmental justice.[38]

EPA Announced $550 million To Advance Environmental Justice

On Feb. 23, 2023, EPA announced $550 million from the Inflation Reduction Act to expedite investments through EPA's new Environmental Justice Thriving Communities Grantmaking (EJ TCGM) program.[39] EPA expects this program to expedite investments to reduce pollution in disadvantaged communities. This new program will fund up to 11 entities to serve as "grantmakers" for community-based projects that reduce pollution. Selected grantmakers will develop an efficient process so that organizations that historically have faced barriers receiving funding can more seamlessly apply for grants that address environmental harms and risks.[40]

EPA Finalizes Environmental Justice Action Plan for Land Protection and Cleanup Programs

On Sept. 30, 2022, EPA announced it finalized the agency's EJ Action Plan: Building Up Environmental Justice in

EPA's Land Protection and Cleanup Programs (EJ Action Plan).[41] The EJ Action Plan highlights tools and practices to apply to the Superfund, Brownfields, Emergency Response, Solid Waste Management, Resource Conservation and Recovery Act Corrective Action, and Underground Storage Tank programs.[42] The plan further demonstrates EPA's commitment to EJ issues.

The plan includes these main goals: (1) strengthening compliance with core environmental statutes; (2) incorporating environmental justice considerations during the regulatory development process; and (3) improving community engagement in rulemakings, permitting decisions, and policies.[43]

Water Issues

EPA and Army Corps Finalize Rule Establishing Definition of WOTUS

When Congress passed the Clean Water Act, maybe it assumed defining what exactly constitute "waters of the United States" would be straightforward and EPA and the Army Corps could quickly settle on the details. Then again, perhaps Congress foresaw the challenges with things like interment streams, wetlands, ditches, and the like, and chose to punt the issue (while choosing to define other terms in the Clean Water Act). An ordinary person could look at, say, the Hudson River and think, yes, that is a water of the United States. However, as most well know, the issue gets "murky" quickly.

The Clean Water Act does not define the term "waters of the United States" even though it is a threshold term establishing the geographic scope of federal jurisdiction under the act. EPA and the Army Corps have defined the term in regulations since the 1970s. The definition has significant reach and effect under the Clean Water Act, including: (1) water quality standards and TMDLs under CWA § 303; (2) oil spill programs under CWA § 311; (3) water quality certifications under CWA § 401; (4) NPDES permits under CWA § 402; and (5) dredge and fill permits under CWA § 404. Many more regulations implementing these programs, and others, also rely upon the WOTUS definition.

Those with even a cursory understanding of the Clean Water Act know the definition of waters of the United States (known colloquially as WOTUS) is no stranger to the Supreme Court—several key decisions have ruled on prior definitions and EPA decisions under them. The WOTUS definition has also fallen victim to political winds, whiplashing its reach and effect among the Obama, Trump, and now Biden administrations.

In January 2021, President Biden's Executive Order 13990 identified the Trump era 2020 Navigable Waters Protection Rule specifically for review.[44] This order directed federal agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted by the Trump administration.[45] Upon review of the 2020 Navigable Waters Protection Rule, EPA and the Army Corps determined that the Trump rule significantly reduced clean water protections, with the lack of protections particularly significant in arid states.[46]

So, on Dec. 30, 2022 EPA and the Army Corps announced a final rule establishing a durable definition of "waters of the United States" (WOTUS).[47] EPA published the final rule in the federal register on Jan. 18, 2023.[48] According to EPA, the "rule returns to a reasonable and familiar framework founded on the pre-2015 definition with updates to reflect existing Supreme Court decisions, the latest science," and technical expertise of both EPA and the Army Corps.

Accompanying the issuance of the final rule, EPA and the Army Corps released several resources and supporting documentation to assist with implementation across the country.[49] These include a summary of 10 regional roundtables with input from communities regarding implementation.[50]

Nearly $84 Million Available To Help New York Communities Address Emerging Contaminants (PFAS) in Drinking Water

On Feb. 13, 2023, EPA announced more than $83.7 million from the Infrastructure Law to address emerging contaminants, like per- and polyfluoroalkyl substances (PFAS), in drinking water in New York.[51] These funds will be made available to communities as grants through EPA's Emerging Contaminants in Small or Disadvantaged Communities (EC-SDC) Grant Program and will promote access to safe and clean water in small, rural, and disadvantaged communities.

The Infrastructure Law invests $5 billion over five years to help communities reduce PFAS in drinking water. EPA announced the funds for New York as part of an allotment of $2 billion to states to prioritize infrastructure and source water treatment for pollutants, like PFAS and other emerging contaminants, and to conduct water quality testing.[52]

EPA Announces Plans for Wastewater Regulations and Studies, Including Limits for PFAS

On Jan. 20, 2023, EPA released Effluent Guidelines Program Plan 15 (Plan 15).[53] This plan explains how EPA will develop technology-based pollution limits and studies on wastewater discharges from industrial sources. A focus of Plan 15 is evaluating the extent and nature of PFAS discharges.[54]

In Plan 15 EPA announced that revised effluent limitations guidelines and pretreatment standards (ELGs) are needed for reducing PFAS in leachate discharges from landfills.[55] In addition to landfill leachate, EPA announced (1) new studies of PFAS discharges from textile manufacturers; (2) a new

study of publicly owned treatment works (POTW) influents to characterize the PFAS concentrations from industrial dischargers to POTWs; and (3) a new study on concentrated animal feeding operations (CAFOs) to decide whether to undertake rulemaking to revise the ELGs for CAFOs.

EPA's ELGs are national, technology-based regulations developed to control industrial wastewater discharges to surface waters and into POTWs. ELGs represent the greatest economically achievable pollutant reductions through technology for a specific industry (e.g., landfills, textile manufactures, and CAFOs).[56] EPA prepares ELG Program Plans after public review and comment on a preliminary plan, pursuant to Clean Water Act (CWA) § 304(m).

Clean Air Act Issues

EPA Proposes To Strengthen Fine Particle Standards

On Jan. 27, 2023, EPA published a proposal to strengthen fine particle pollution, also known as $PM_{2.5}$.[57] EPA's proposal will "take comment on strengthening the primary (health-based) annual $PM_{2.5}$ standard from a level of 12 micrograms per cubic meter to a level between 9 and 10 micrograms per cubic meter, reflecting the latest health data and scientific evidence; the Agency is also taking comment on the full range (between 8 and 11 micrograms per cubic meter) included in the Clean Air Scientific Advisory Committee's (CASAC) latest report."[58] EPA estimates that, if finalized at the lower end of the proposed range, a strengthened primary annual $PM_{2.5}$ standard at a level of 9 micrograms per cubic meter would prevent up to 4,200 premature deaths per year and 270,000 lost workdays per year and result in as much as $43 billion in net health benefits in 2032.[59]

EPA is proposing to retain the $PM_{2.5}$ 24-hour standard, the current primary 24-hour standard for PM_{10}, which provides protection against coarse particles, and the secondary standards for both $PM_{2.5}$ and PM_{10}.[60]

EPA Enforcement Against "Defeat Devices"

EPA announced, on Oct. 18, 2022, that two companies, PARTSiD, Inc. and PARTSiD, LLC (PARTSiD), based in Cranbury, New Jersey, will pay a $491,474 penalty in response to EPA claims that the companies illegally sold "defeat devices," aftermarket products that disable vehicles' emissions control systems.[61] EPA "found that PARTSiD sold hardware and software specifically designed to defeat required emissions controls on vehicles and engines, including aftermarket exhaust pipes; exhaust-related removal kits; and aftermarket computer software that can alter fuel delivery, power parameters, and emissions."[62] In addition to paying a penalty, under the agreement the company "has stopped selling the illegal devices."[63]

EPA requires emission controls on vehicles to reduce the harmful pollutants they emit and their harmful effects; aftermarket devices negate those controls.[64] Emission control systems, installed in most automobiles to meet federal emission standards, "typically control more than 90% of the regulated pollutants passing through them."[65]

Heavy Duty Engine and Vehicle Standards

On Dec. 20, 2022, EPA adopted a final rule, Control of Air Pollution from New Motor Vehicles: Heavy Duty Engine and Vehicle Standards.[66] The rule establishes "the strongest-ever national clean air standards to cut smog- and soot-forming emissions from heavy-duty trucks beginning with model year 2027."[67] EPA estimates that by 2045 the rule will yield the following annual public health benefits: up to 2,900 fewer premature deaths; 6,700 fewer hospital admissions and emergency department visits; 18,000 fewer cases of childhood asthma; 3.1 million fewer cases of asthma symptoms and allergic rhinitis symptoms; 78,000 fewer lost days of work; 1.1 million fewer lost school days for children; and $29 billion in annual net benefits.[68]

The new standards, which constitute the first update to clean air standards for heavy duty trucks in more than 20 years, are more than 80% stronger than the prior standards, increase useful life of governed vehicles by 1.5 to 2.5 times, and will yield emissions warranties that are 2.8 to 4.5 times longer.[69] This final rule includes provisions for longer useful life and warranty periods, which "guarantee that as target vehicles age, they will continue to meet EPA's more stringent emissions standards for a longer period of time."[70] The rule "requires manufacturers to better ensure that vehicle engines and emission control systems work properly on the road."[71] One example is the requirement that "manufacturers must demonstrate that engines are designed to prevent vehicle drivers from tampering with emission controls by limiting tamper-prone access to electronic pollution controls."[72]

Superfun(sic) Update

EPA Announces Additional $1 billion in Bipartisan Infrastructure Law Funds for Superfund Work, Including at the General Motors Site in Massena, N.Y.

On Feb. 10, 2023, EPA announced the second wave of approximately $1 billion in funding from the Bipartisan Infrastructure Law to start new cleanup projects at 22 Superfund sites and expedite over 100 other ongoing cleanups across the country.[73] Out of the 22 sites to receive funding for new Superfund projects, 60% are in communities with the potential for environmental justice concerns.[74]

The Bipartisan Infrastructure Law reinstates chemical excise taxes and allocates a total of $3.5 billion toward environmental remediation at Superfund sites. The first tranche of

infrastructure funding was announced by EPA in December 2021. The agency deployed more than $1 billion for cleanup activities at over 100 Superfund National Priorities List sites across the country.[75] EPA was able to start 81 new cleanup projects in 2022, four times as many construction projects as the year before.[76] The agency also more than doubled its spending for pre-construction activities such as remedial investigations, feasibility studies, remedial designs, and community involvement efforts.[77]

Among the sites that will receive funding from the second tranche of Bipartisan Infrastructure Law funds is the General Motors (Central Foundry Division) Superfund site in Massena, New York.[78] This site includes a former aluminum die-casting plant that operated from 1959 to 2009. The plant disposed of its industrial waste on-site, contaminating groundwater, soil, and river sediment with PCBs, volatile organic compounds, and phenols. The site is of particular concern to the Saint Regis Mohawk Tribe (SRMT) as its territory, called Akwesasne, is located downstream of the former plant, and fish and wildlife are a traditional source of food.[79]

In 1990 and 1992, EPA issued plans to clean up the Massena site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These plans have since been implemented by General Motors or the Revitalizing Auto Communities Environmental Response (RACER) Trust. The RACER Trust is responsible for certain cleanups following General Motors' bankruptcy and has spent over $153 million cleaning up the former Massena plant property and nearby waterbody sediments. [80]

Although the trust has funds for the design of the Tribal soil and sediment cleanup at the site, it does not have funds to conduct further cleanup activities. The infrastructure funding will be used to remove approximately 4,200 cubic yards of PCB-contaminated soil and 2,000 cubic yards of contaminated sediments from the site.[81]

EPA Orders Norfolk Southern to Conduct Superfund Response Activities Associated with the East Palestine Train Derailment

On Feb. 21, 2023, EPA issued a unilateral administrative order to Norfolk Southern Railway Company (Norfolk Southern) under CERCLA in connection with the derailment of Norfolk Southern rail cars on Feb. 3, 2023, in East Palestine, Columbiana County, Ohio.[82]

The order defines the Norfolk Southern train derailment site as the areal extent of hazardous substances that were released from the Feb. 3 train derailment and subsequent emergency response activities.[83] According to the order, releases to the environment include the migration of liquid product from the rail cars, runoff from firefighting efforts, and the migration of smoke and ash from the burning cars. Hazardous substances found at the site include vinyl chloride, benzene, and butyl acrylate.[84]

Pursuant to the terms of the order, Norfolk Southern will be required to perform certain response activities under CERCLA, including identifying and cleaning up contaminated soil and water resources, reimbursing EPA for cleaning services to be offered to nearby residents and businesses, attending and participating in public meetings, and reimbursing EPA's costs for work performed under the order.[85] If the company fails to complete any actions required by the order, EPA will conduct the necessary work and then seek to compel Norfolk Southern to pay triple the cost.[86]

The order was issued under § 106(a) of CERCLA. This provision authorizes EPA to issue unilateral orders upon a determination that there may be an imminent and substantial endangerment to the public health or welfare of the environment because of an actual or threatened release of hazardous substances.

EPA's order marks the transition of the multi-agency response from an emergency phase to a longer-term remediation phase. To help implement the order, EPA will establish a "unified command structure" to coordinate the cleanup efforts with federal, state, and local agencies.[87]

EPA Completes Demolition and Asbestos Removal at the Charlestown Mall Site in Utica and Frankfort, N.Y.

On Dec. 14, 2022, EPA announced that it had completed cleanup work to address asbestos contamination at the Charlestown Mall site in Utica and Frankfort, New York.[88] EPA removed a total of approximately 30,000 tons of debris from the site, and it will now engage with local elected officials and regional economic development leaders to discuss potential future uses of the site.[89]

The site was initially a weapons manufacturing factory and then a retail shopping outlet and commercial business

complex. By 2005, the site was mostly vacant.[90] In August 2020, a massive fire destroyed more than 500,000 square feet of the former manufacturing and retail space at the site. EPA boarded up remaining structures to limit access and further secured the property with a fence. EPA began the site cleanup in June 2022 by tearing down then-existing structures to their foundations and removing the asbestos-containing waste.[91]

The site is privately owned by Charlestown Mall of Utica, LLC, which acquired the three properties comprising the site in 2007. The owner signed a settlement agreement with EPA to partially cover cleanup costs.[92]

Now that site cleanup activities have been completed, EPA's Superfund Redevelopment Program will be available to provide ongoing reuse support services to the local community. As part of this program, EPA provides site owners and prospective buyers with direct support, such as technical assistance and redevelopment planning services, as well as tools and resources to help communities explore reuse choices.[93]

EPA Finalizes Cleanup Plan to Address Additional Contaminated Groundwater at the Olean Well Field Superfund Site in Cattaraugus County, N.Y.

On Oct. 4, 2022, EPA announced the issuance of a record of decision for a portion of the Olean Well Field Superfund site in Olean, New York.[94] The decision document finalized the agency's plan to inject non-toxic materials into wells to break down hazardous contamination in the groundwater across several areas of the site located south of the former AVX Corporation property.[95]

The Olean Well Field Superfund site contains various wells, homes, and manufacturing facilities. Earlier industrial operations at the AVX property, as well as three other facilities that EPA considers to be sources of site contamination, resulted in the contamination of soil and groundwater with trichloroethylene, 1,4-dioxane, and other volatile organic compounds.[96]

The newly selected in-situ treatment will speed up groundwater remediation by chemically reducing or oxidizing site contaminants. The technique supplements the natural breakdown of these contaminants over time. The selected cleanup will also involve long-term monitoring to ensure the remedial approach is working as intended.[97]

EPA added the site to the Superfund list in 1983. Since that time, several investigations led to cleanup remedies for the four source facilities and nearby impacted groundwater, most of which are being implemented by potentially responsible parties for the site.[98]

Margo Ludmer is an assistant regional counsel with the United States Environmental Protection Agency, Region 2, New York / Caribbean Superfund Branch. She received a J.D. from the University of Virginia School of Law and a B.A. from the University of Michigan. The author is not doing this work in any governmental capacity. The views expressed are her own and do not necessarily represent those of the United States or EPA.

Mary McHale is an assistant regional counsel with the United States Environmental Protection Agency, Region 2, Air Branch. She received a J.D. from the State University of New York at Buffalo Law School and a B.A. from the University of Virginia. The author is not doing this work in any governmental capacity. The views expressed are her own and do not necessarily represent those of the United States or EPA.

Joseph A. Siegel teaches climate change law at Haub School of Law at Pace University, environmental dispute resolution at Hofstra Law School, is an attorney at the U.S. Environmental Protection Agency, Region 2 office in New York, and chairs the Education/Outreach Subcommittee for Mediators Beyond Borders International's Climate Change Project. This work is not a product of the United States government or the U.S. Environmental Protection Agency. The author is not doing this work in any governmental capacity. The views expressed are his own and do not necessarily represent those of the United States or EPA.

James (Jay) L. Simpson is an assistant counsel with the New York State Department of Environmental Conservation, and previously was an assistant regional counsel at U.S. EPA Region 2. Any opinions expressed herein are the author's own, and do not necessarily reflect the views of the NYSDEC or EPA. This column is based upon select EPA press releases and other public information.

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DEC Dispatch

DEC Implementation of Legislation Requiring Environmental Justice Considerations in SEQR and DEC Permitting

By Antonia Pereira and Lawrence H. Weintraub

At the close of 2022 and beginning of 2023,[1] Gov. Kathy Hochul signed into law two sets of important amendments to the State Environmental Quality Review Act (SEQR)[2] and the Uniform Procedures Act (UPA).[3] Together these amendments will require state and local agencies to incorporate consideration of environmental justice into their approval processes through SEQR, and for DEC through both its permitting process under UPA and SEQR. For certain projects and facilities located in or that may affect "disadvantaged communities,"[4] the amendments change some long-held paradigms under which agencies have conducted environmental impact review and mark a significant shift toward equity in environmental decision-making. This article provides a basic introduction to the amendments.

1. Meaning of Environmental Justice

As defined by DEC and others, environmental justice means "the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[5] At the heart of environmental justice is the principle of equal treatment under the law as applied to environmental concerns, the idea of which originates in the Equal Protection Clause of the U.S. Constitution[6] and Title VI of the Civil Rights Act of 1964.[7] Environmental justice also speaks to the importance for considering previous and cumulative environmental harms placed upon disadvantaged communities. At the state level, the notion of equal protection has over time and to a certain extent made its way into SEQR. SEQR created opportunity for decision-makers to formally consider environmental impacts to communities in making decisions about siting of facilities in New York state.[8] SEQR has included, and since the 1980s been interpreted to include, a range of community impacts based on the definition of "environment" in ECL Art. 8.[9] UPA, DEC's permitting process, requires DEC to take community concerns into account and provides the opportunity for community feedback to be considered in permit decisions for "major projects" by requiring public notice. Equal protection, UPA, and SEQR intersect more closely than ever in the new environmental justice legislation.[10]

2. Environmental Justice Legislation

On Dec. 30, 2022, Gov. Hochul signed Senate Bill 8830 into law as Chapter 840 of the Laws of 2022 (Chapter 840) with the objective of addressing historic environmental inequities that resulted from prior siting of certain types of facilities in designated disadvantaged communities. "Disadvantaged communities" is a term defined by the Climate Justice Working Group, a group created by the Climate Leadership Community Protection Act (CLCPA), responsible for establishing criteria that will identify disadvantaged communities. According to the Working Group, Disadvantaged Communities are "communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate-income households."[11] The Climate Justice Working Group's statewide draft map of disadvantaged communities is available on the Climate.gov website.[12]

Chapter amendments to S.B. 8830 (Laws of 2022, Chapter 840) sought to ensure that decisions to site facilities in disadvantaged communities are not only environmentally equitable but are also balanced with the need for "critical infrastructure, such as housing, hospitals, and renewable facilities."[13] S.B. 1317—introduced in January 2023 as a chapter amendment to Chapter 840 of the Laws of 2022—made negotiated changes to Chapter 840 and subsequently passed both houses of the Legislature and was signed into law on March 3, 2023, becoming Chapter 49 of the Laws of 2023 (Chapter 49) (collectively referred to herein as the Environmental Justice Legislation (EJL)).

Implementation of EJL will be challenging,[14] as DEC must write implementing regulations for both SEQR and UPA as well as make changes to the SEQR Handbook, the SEQR workbooks,[15] and write UPA guidance. Accordingly, the effective date of the amendments was pushed back to January 2025.[16] DEC also expects to conduct training and

outreach for both DEC staff and municipal bodies on implementing the new law. State and local governments will need to familiarize themselves with the legislation and ensuing rulemaking.

a. SEQR Amendments

Environmental Justice Legislation requires changes to the existing SEQR regulations that will mostly occur through the rulemaking process. To begin with, the EJL directs DEC to promulgate SEQR regulations creating criteria for determining whether actions that will cause or increase a disproportionate pollution burden to disadvantaged communities warrant preparation of an environmental impact statement.[17] An environmental impact statement is what agencies, including DEC, use to assess the impact of a discretionary action once the action has been determined to result in potentially significant adverse impacts to the environment.

The criteria for determining significance are commonly referred to as "significance indicators." They are set out in 6 N.Y.C.R.R. 617.7 and reflected in the environmental assessment forms codified into 6 N.Y.C.R.R. 617.20, appendices A and B. Thus, pursuant to EJL, SEQR will recognize cumulative pollution burdens on disadvantaged communities as a separate "significance indicator" and will include thresholds or criteria to determine when the preparation of an environmental impact statement will be required. DEC expects these changes to SEQR to be implemented through DEC's rulemaking processes. Accordingly, the EJL amends ECL Art. 8, which sets forth the standards for the preparation of an environmental impact statement, to include in the existing subjects that may be covered by an environmental impact statement the "effects of any proposed action on disadvantaged communities, including whether the action may cause or increase a disproportionate pollution burden on a disadvantaged community."[18] The addition of this significance criteria, and the concomitant regulations, will ensure that impacts to disadvantaged communities are considered in the SEQR process and could to lead to the preparation of more environmental impact studies for projects that affect disadvantaged communities.

b. UPA Amendments

The EJL changes to UPA are more complex than the changes it makes to SEQR. As an initial matter, the EJL applies to a subset of UPA permits enumerated in the EJL; those that are most likely to affect disadvantaged communities including air, water withdrawal, solid waste and SPDES permits. They are referred to in the EJL as "applicable permits."

i. Existing Burdens Report

One of the most consequential changes in the permit process that will come about from implementation of the new

requirements is the obligation on project sponsors and DEC to prepare an existing burden report—a new tool that is to be used by applicants and DEC to assess the existing pollution burden in a disadvantaged community and any increase that may result from the proposed project.

Under the EJL, DEC will be obligated to require a burden report for a new "applicable permit" that may cause or contribute more than a *de minimis* amount of pollution to a disadvantaged community. The burden report requirement will most likely be required as part of a complete application[19]—a potential challenge given the existing UPA time frames that DEC must meet in determining whether an application is complete, 15 days for non-delegated or authorized permits and 60 days for federally delegated or authorized permits.[20] There are two possible exceptions to the obligation to create an existing burden report.

First, in the case of an application for renewal of an existing permit, no existing burden report will be required for permit renewals of existing facilities that have prepared a burden report in the past 10 years. Even with this exception, permit renewals will still face greater scrutiny than before when they were treated as purely ministerial actions no matter how many times the permits were renewed.[21]

Second, for renewals and modifications to an existing permit, DEC can elect not to require an existing burden report for a facility if "the permit [project] would serve an essential environmental, health, or safety need of the disadvantaged community for which there is no reasonable alternative." The legislation does not specify uses that may constitute "an essential environmental, health, or safety need." However, given the history of the legislation it is reasonable to conclude that hospitals, housing, and renewable facilities could be considered essential. In defining the uses that serve an "essential environmental, health or safety need," DEC can also look to analogous laws from other jurisdictions.[22]

The EJL requires that DEC, in consultation with the state Department of Health, develop a template for the existing burden report—akin to the manner in which DEC prepared model environmental assessment forms for SEQR. Once the template is developed, EJL provides a 30-day public comment period.[23] Notably, in developing the template, DEC was given discretion to develop separate models for the burden report depending on whether the report relates to a new or modified project or a renewal. In so doing, the EJL tacitly acknowledges the fact that there is a wide regulatory difference in the way new projects are treated from modification and renewals founded on practical and due process concerns.[24]

These contents of the report are outlined in the legislation. The EJL provides that the report should include the following: [1] ". . .relevant baseline data on existing burdens, including from relevant criteria used to designate the particular disadvantaged communities . . .; [2] the environmental or public health stressors already borne by the disadvantaged community as a result of existing conditions located in or affecting the disadvantaged community; [3] the potential or projected contribution of the proposed action to existing pollution burdens in the community; and [4] existing and potential benefits of the project to the community including increased housing supply or alleviation of existing pollution burdens that may be provided by the project, including operational changes to the project that would reduce the pollution burden on the disadvantaged community."[25]

In the future, applicants, agencies, and the public may obtain data for items "1" and "2" from DEC's Info Locator maps[26] that DEC expects to incorporate information data on disadvantaged communities including population characteristics and vulnerabilities, environmental burdens, and climate change risk. In the interim, the data appears in draft, interactive maps—prepared by the Climate Justice Working Group—that are on the Climate.gov website.[27]

Item "3" is the heart of the analysis—the calculation of the additional pollution burden that would result to the disadvantaged community. Item "4" is an acknowledgment that projects that may increase a burden in terms of pollution may also have benefits or even alleviate burdens on a community, such as affordable housing and other projects that provide essential needs.

ii. Permitting Standards

Based on the burden report, the administrative record including comments received from persons in the disadvantaged community, the EJL provides that if a new project will cause or contribute to a more than *de minimis* disproportionate pollution burden on a disadvantaged community, the permit must be denied.

Under the EJL, the permitting standard for renewals and modifications is more lenient than for a new project. A permit renewal or modification must only be denied if it causes a "significant" increase to the existing disproportionate pollution burden on a disadvantaged community. Many renew-

Antonia Pereira was appointed as DEC Region 2 regional attorney in 2022. Before that time, Ms. Pereira served as an assistant corporation counsel in the New York City Law Department. **Lawrence H. Weintraub** has served as DEC counsel for the Division of Environmental Permits since 2007. Any opinions expressed herein are the authors' own, and do not reflect the views of the New York State Department of Environmental Conservation.

als and modifications, however, involve little or no change in pollution burden but could still be impacted by the legislation. The EJL allows DEC to require applicants for renewals and modifications that do not result in "significant" increase to the existing disproportionate pollution burden on a disadvantaged community to explore strategies to reduce the existing burden their operations have on the disadvantaged community.

Conclusion

The EJL is a step forward in embedding environmental justice considerations into both SEQR and DEC permitting. Like SEQR when it was enacted into law by the Legislature in 1975, the EJL will take time to develop through regulation and guidance and application along the way. It will have to coexist and be harmonized with existing laws that affect the siting of facilities in disadvantaged communities and other policy goals. The EJL, however, holds the promise that disadvantaged communities will become less burdened by pollution by requiring agencies to take account of existing burdens in making siting decisions. This new consideration, if implemented properly, will help to ensure that going forward no community in New York state will bear a disproportionate pollution burden.

Endnotes

1. L. 2023, Ch. 49.
2. ECL Article 8.
3. ECL Article 70.
4. *See* ECL 75-0101(5).
5. *See* DEC Commissioner's Policy 29, Definitions, https://www.dec.ny.gov/public/36929.html; *see also* NYC Admin. Code Title 3, Chapter 10, Section 3-1001.
6. United States Constitution, Fifth Amendment as made applicable to state and local governments through the 14th Amendment of the United States Constitution.
7. For a scholarly overview of the subject *see* Gerrard, Ruzow and Weinberg, Environmental Impact Review in New York, §8.20 (Matthew Bender).
8. SEQRA was modelled on the National Environmental Policy Act of 1969 (NEPA). The following website has useful information on consideration of environmental justice under NEPA: https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act.
9. ECL 8-0105(6) "'Environment' means the physical conditions which will be affected by a proposed action, including. . .existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." *See also, Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359 (1986). For an early application of SEQR to environmental justice concerns, *see* American Marine Rail, LLC (ALJ Rulings on Issues and Party Status and Environmental Significance, August 25, 2000), at 71.
10. Though beyond the scope of this article, in 2019, the Legislature enacted, and Governor Andrew Cuomo signed into law, another piece of legislation known as the Community Leadership and Climate Protection Act (L. 2019, Ch. 106) — referred to as CLCPA. CLCPA §7(3) provides as follows: In considering and issuing permits, licenses, and other administrative approvals and decisions. . .all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision."
11. ECL 75-0101.
12. *See* https://climate.ny.gov/resources/climate-justice-working-group/.
13. Approval no. 115, chapter. 840, Dec. 30, 2022.
14. DOB's Mem, Bill Jacket, Laws of 2023, Ch. 49.
15. *See* DEC website for the SEQR Handbook and EAF workbooks, https://www.dec.ny.gov/permits/357.html.
16. *See* DEC website for the SEQR Handbook and EAF workbooks, https://www.dec.ny.gov/permits/357.html.
17. S.B. 1317, § 6.
18. S.B. 1317, § 3.
19. *See* proposed regulatory amendments to 6 NYCRR 621.3, available on DEC's website at https://www.dec.ny.gov/permits/357.html.
20. ECL 70-0109(1) and 70-0117(3).
21. *See* ECL 8-0105(5)(ii) and 6 NYCRR 617.5(c)(25); *see also, Village of Hudson Falls v. DEC*, 158 AD2d 24 (3d. Dept. 1990), *aff'd*., 77 N.Y.2d 983 (1991).
22. *See, e.g*, New Jersey Environmental Justice Law (codified at N.J.S.A. 13:1D-157 *et seq*.) adopted in 2022, an analogue of the New York's law.
23. Laws of 2023, Ch. 49, §7.
24. *See. Village of Hudson Falls v. DEC, supra*.
25. S.B. 1317, §7.
26. https://gisservices.dec.ny.gov/gis/dil/.
27. *See*, Climate Justice Working Group website, https://climate.ny.gov/resources/climate-justice-working-group/ (last accessed on 3/14/2023).

NYSERDA Update

By Janice Dean

It has been a busy few months here at the New York State Energy Research and Development Authority (NYSERDA) and we are pleased to provide the section with this update. In October 2022, NYSERDA was proud to welcome six new real estate partnerships to the state's $50 million Empire Building Challenge to help advance a climate-friendly building stock in New York State. We also made $18.1 million available through the Natural Carbon Solutions Innovation Challenge for the development of innovative nature-based solutions that lower emissions and sequester carbon through novel products and services.

In November, we ramped up our efforts with three major announcements. At the TWA Hotel at John F. Kennedy International Airport, Lt. Gov. Antonio Delgado and NYSERDA President and CEO Doreen Harris unveiled 10 grand prize awards as part of the $85 million New York Clean Transportation Prizes program to enhance clean transportation, improve mobility options, and reduce harmful emissions through innovative transportation solutions. These efforts don't just protect the environment and improve the air we breathe, they also create jobs. The 2022 Clean Energy Industry Report released right after Thanksgiving showed that the number of individuals with clean energy jobs in New York State reached a record level of 165,000 workers at the end of 2021, helping to lead New York's COVID-19 economic recovery by recouping the clean energy jobs lost in 2020 and significantly exceeding pre-COVID-19 clean energy employment levels.

Speaking of jobs, it was quite a scene in Whitehall, New York where Gov. Kathy Hochul was joined by the Premier of Quebec and Grand Chief Sky Deer of the Mohawks of Kahnawà:ke to celebrate the start of construction of the 339-mile Champlain Hudson Power Express transmission line, being developed by Transmission Developers Inc., to deliver reliable clean energy from Hydro-Québec in Canada directly to New York City. The construction of this green infrastructure project, which begins following the execution of a major union labor agreement between the developer and New York State Building and Construction Trades, is expected to bring $3.5 billion in economic benefits to New Yorkers while creating nearly 1,400 family-sustaining union jobs during construction.

The momentum continued as we moved into December. The governor kicked off the month with $52 million in awards to establish 12 Regional Clean Energy Hubs to serve as centers of outreach, awareness, and education in regions across New York State and help foster residents' participation, especially those in underserved or otherwise disadvantaged communities, in New York's clean energy transition. Then right before Christmas, a robust public comment period that included 11 public hearings across the state and more than 35,000 written comments, New York State's Climate Action Council, co-chaired by NYSERDA President and CEO Doreen M. Harris and Department of Environmental Conservation Commissioner Basil Seggos, approved and adopted the New York State Climate Action Council Scoping Plan, which outlines recommended policies and actions to help meet the goals and requirements of the nation-leading Climate Act. One would think we were done. But right before the end of last year, NYSERDA and DPS submitted Energy Storage Roadmap 2.0 to the Public Service Commission proposing a comprehensive set of recommendations to expand New York's energy storage programs to achieve six gigawatts of energy storage by 2030, cost-effectively unlocking the rapid growth of renewable energy across the state to bolster grid reliability and customer resilience. If approved, the Roadmap will support a buildout of storage deployments estimated to reduce projected future statewide electric system costs by nearly $2 billion, in addition to further benefits in the form of improved public health because of reduced exposure to harmful fossil fuel pollutants.

To kick off 2023, Gov. Hochul unveiled a bold climate agenda as part of her 2023 State of the State, proposing two key initiatives: first, the governor directed NYSERDA and DEC to advance an economy-wide Cap-and-Invest Program that establishes a declining cap on greenhouse gas emissions, invests in programs that drive emissions reductions in an equitable manner prioritizing disadvantaged communities, limits costs to economically vulnerable households, and maintains the competitiveness of New York industries. In addition, Gov. Hochul will propose legislation to create a universal Climate Action Rebate that is expected to drive more than $1 billion in future cap-and-invest proceeds to New Yorkers every year. Second, she announced investments in energy affordability and clean and efficient buildings, the proposal for which will create the Energy Affordability Guarantee to ensure participating New Yorkers never pay more than 6% of their incomes on electricity and will provide $200 million in relief for utility bills for up to 800,000 New York households earning under $75,000 a year that are not eligible for the state's current utility discount program. And

to tackle the state's largest source of greenhouse gas emissions, Gov. Hochul announced an ambitious package of building decarbonization initiatives, including for zero-emission new construction and the phaseout of the sale of new fossil fuel heating equipment. NYSERDA recognizes the scale and pace of work is growing rapidly. With that in mind, we were proud when NYSERDA's board of directors appointed Anthony Fiore as the new chief program officer in charge of overseeing the programs to help us advance our mission.

Just last month, NYSERDA welcomed Vermont as a signon to a multi-state agreement, joining with New York, Connecticut, Maine, Massachusetts, New Jersey and Rhode Island, to develop a proposal to become one of up to 10 regional clean hydrogen hubs designated through the federal Regional Clean Hydrogen Hubs program included in the bipartisan Infrastructure Investment and Jobs Act. The Northeast Clean Hydrogen Hub of seven states and more than 100 clean hydrogen ecosystem partners is moving forward to develop and submit a full proposal to the U.S. Department of Energy to compete for funding through the $8 billion program. In the coming months, you will see many more success stories hit the headlines as we continue to make progress toward the achievement of our climate and clean energy goals.

We hope section members will be on the lookout for the results of New York's third offshore wind solicitation which closed earlier this year. NYSERDA received a robust response to this solicitation, with more than 100 total proposals for eight new projects from six offshore wind energy developers, representing a record-setting level of competition among East Coast states. The high volume of quality proposals from leading global energy developers is a testament to the state's ability to attract strong competition and significant investments in New York's clean energy economy, ports, and the development of long-term domestic supply chains. These awards will be bolstered by the sixth round of large-scale renewable energy awards expected to come this summer following the close of the active solicitation this spring.

It is, as section members know well, a once in a lifetime opportunity to change the world we live in for the better, and NYSERDA will continue to be a leader in driving change for all New Yorkers.

Janice Dean is Deputy General Counsel at NYSERDA, where she advises on clean energy programs and nuclear waste cleanup. She is a graduate of the University of California, Berkeley, and the Elisabeth Haub School of Law at Pace University.

EELS Task Force on Implementation of the Green Amendment

Case Summaries

In November 2021, New Yorkers voted overwhelmingly to enshrine fundamental environmental rights in the Bill of Rights of the New York Constitution. Article I, § 19 (the environmental right), effective Jan. 1, 2022, states that "Each person shall have a right to clean air and water, and a healthful environment." Shortly thereafter, the Environmental and Energy Law Section of the New York State Bar Association convened a task force to focus on implementation of New York's newly recognized Environmental Right. Recognizing that the succinct and aspirational text of the Environmental Right would develop through judicial interpretation, the task force is focusing its early efforts on monitoring and reporting on significant judicial developments.

A review of select decisions and cases implicating the Environmental Right follows below. Key questions being explored in early controversies include whether the Environmental Right is self-executing, its potential application to private parties, and how it relates to existing environmental laws. A more complete listing of cases and filings is available at the environmental right repository maintained by the Pace/Haub Environmental Law Program at https://nygreen.pace.edu/.

Fresh Air for the Eastside, Inc. v. Waste Management, LLC et al., Index No. 2022000699 (Sup. Ct., Monroe Co.)

In an important early decision interpreting the Environmental Right, a Supreme Court in Monroe County held that the Environmental Right is self-executing, imposes obligations on the state but not (directly) on private parties, and can demand more than the minimum required under existing statutes and regulations.

Fresh Air for the Eastside, Inc. (FAFE) is a not-for-profit corporation organized to represent the interests of the public in the vicinity of the High Acres landfill in central New York. In January 2022, FAFE brought a declaratory judgment action against the State of New York (NYS), the state Department of Environmental Conservation (DEC), the city of New York (NYC) and Waste Management of New York, LLC (Waste Management) based on what they alleged to be continuing adverse impacts from the landfill. The complaint sets out various alleged violations of state law and air permit conditions, but the sole cause of action is for violation of the Environmental Right. FAFE alleges that the continued operations of the landfill deprive the nearby community of its right to clean air and to a healthful environment.

Defendants NYC, Waste Management, NYS and DEC moved to dismiss the complaint on a variety of grounds. Defendants argued that the FAFE claim should be brought under Article 78 of the CPLR as a challenge to government action or inaction, and that such claim should fail because of the DEC's discretion regarding enforcement. They further argued that the Environmental Right was not intended to supplant the existing statutory and regulatory structure already governing landfills and that the plain language of the Environmental Right is too vague to be self-executing. As NYC put it, "The right to clean water and air and a healthful environment is simple to express, but difficult to define."

On Dec. 7, 2022, the Supreme Court, Monroe County, Hon. John J. Ark, J.S.C. issued a Decision and Order on the three motions to dismiss. The court granted the motions by the City of New York and the landfill operator Waste Management, finding that the complaint failed to state a cause of action against either of those defendants.

The court included an extensive quote from an Albany Law School Government Law Center publication[1] and adopted its reasoning: Because the Environmental Right lacks any reference to further legislative action, it is in fact self-executing. The court held that the Environmental Right is not ambiguous on its face and can be interpreted without reference to legislative history. However, because the Environmental Right lacks any reference to private entities, it is only enforceable against the government. On that basis the court granted the Waste Management motion to dismiss FAFE's claim. The court also granted NYC's motion to dismiss, holding that garbage is fungible—if it wasn't NYC's garbage coming to the landfill it would be someone else's—and NYC has no obligation to police Waste Management's operations of a legally permitted landfill.

The court, however, denied the motion to dismiss on behalf of NYS and DEC. It rejected the argument that the matter should have been brought under Article 78 because FAFE does not challenge the issuance of permits, but DEC's ongoing enforcement of permits and the Environmental Right. "Quite simply, an Article 78 proceeding is best to review past actions of an agency. A declaratory judgment action is best to determine prospective responsibilities." Similarly, it rejected

the argument that FAFE was required to exhaust administrative remedies; the Environmental Right is in the Bill of Rights and not the Environmental Conservation Law, and the judiciary is the most appropriate entity to consider claims of constitutional violations. The court agreed with FAFE's argument that the state cannot rely on enforcement discretion as a defense; the allegation is of a constitutional violation and neither the state nor its agencies have discretion to violate the constitution.

Of note, in a related action brought by FAFE against the town of Perinton and Waste Management relating to approval and operation of the landfill (*Fresh Air for the Eastside, Inc. v. Perinton*, Index No. (Sup. Ct., Monroe Co.)), the court likewise denied a motion to dismiss a claim alleging that local approvals for and operation of the landfill violated FAFE members' rights under Article I, § 19. The court observed that the Environmental Right was adopted after the town of Perinton's approval of the challenged Host Community Agreement and does not apply retroactively. However, because FAFE's amended petition was filed on March 10, 2022, the court declined to dismiss the claim with respect to "events occurring after January 1, 2022." The court cited approvingly to the idea that the Environmental Right does not "'grandfather[ ]. . .actions previously permitted by government'"[2] where they result in current violations of environmental rights, suggesting that the decision is best interpreted to mean that, while the Environmental Right cannot be retroactively applied to invalidate specific decisions predating its adoption, it can be invoked to require remedial orders to correct existing violations, even if previously approved.

Renew 81 For All, et al. v. NYS Department of Transportation, et al., Index No. 007925/2022 (Sup. Ct., Onondaga Co.)

In the third court decision interpreting the Environmental Right, the Supreme Court in Onondaga County recently dismissed without discussion an Environmental Right claim against the New York State Department of Transportation (DOT). While the court did not explain the basis for its dismissal, DOT had argued that Environmental Right does not have procedural requirements and that DOT's compliance with the State Environmental Quality Review Act (SEQRA) adequately protected petitioners' rights and satisfied the Environmental Right.

In a verified petition filed Sept. 30, 2022, Renew 81 for All, an unincorporated association of community members, and several towns sought to invalidate DOT's environmental review and record of decision in connection with a proposed major reconfiguration of I-81 near Syracuse. In short, DOT proposed to de-designate the segment of I-81 through Syracuse as an interstate highway, demolish the viaduct on which I-81 runs through downtown Syracuse and replace it with a surface road system, and designate and improve a connecting segment of I-481 as the new I-81. The majority of the petition alleges violations of SEQRA, and asserts that DOT failed to consider cumulative impacts, improperly segmented its review, failed to take a hard look at numerous environmental impacts, and failed to select the alternative that minimized or avoided impacts. The petition also asserts violations of the Smart Growth Act and the Climate Leadership and Community Protection Act. As a final cause of action, the petition alleges that DOT violated Environmental Right by failing to sufficiently analyze environmental impacts and by selecting an alternative with unmitigated adverse impacts. In a subsequent supplemental petition, the petitioners also sought to require DOT to prepare a supplemental Environmental Impact Statement (EIS) to consider the impacts of a major semiconductor manufacturing campus announced after the petition was filed.

In its opposition to the petition, the state proposed two grounds for denying the Environmental Right claim. First, it asserted that Environmental Right does not mandate any particular procedure to evaluate if a project might infringe on a protected right. Second, the state asserted that compliance with SEQRA protected the parties' and public's environmental rights.

Like the petition, the court's decision, issued on Feb. 14, 2023, focused largely on the SEQRA claims. While it dismissed most of those claims, it found three shortcomings in the FEIS and ordered DOT to prepare an SEIS. With respect to the Environmental Right claim, the court summarized the parties' arguments and then, without further discussion, dismissed the claim.

Marte, et al. v. City of New York, et al., Index No. 159068/2022 (Sup. Ct., N.Y. Co.)

This plenary action, filed in October 2022, seeks to stop the construction of a real estate development project known as Two Bridges in lower Manhattan. The environmental harms alleged in the complaint include structural damage to nearby buildings, the secondary displacement of existing residents, loss of light and air in a neighboring building with unprotected lot line windows, construction noise, construction equipment emissions, air pollution from additional vehicular traffic, and lack of community engagement. The plaintiffs allege that the Environmental Right and the SEQRA require that the construction of the project be enjoined pending the preparation of a supplemental environmental impact statement to study these issues. The state court system, in final decisions that are no longer subject to appeal, rejected two prior SEQRA challenges to the EIS that had been prepared for the project, but the new complaint alleges that the adoption of

the Environmental Right, the COVID-19 pandemic and various other matters constitute a change in circumstances and new information that require a supplemental EIS.

In December, the City of New York filed a motion to dismiss arguing that: (i) the Environmental Right does not create an independent cause of action that replaces the Environmental Conservation Law, including SEQRA; (ii) the city has no further discretionary actions to take in connection with the project (thereby potentially raising the issue whether nondiscretionary actions, such as issuance of a building permit, are subject to a challenge under the Environmental Right); (iii) the Environmental Right cannot be applied retroactively to re-open the SEQRA process that occurred prior to its enactment; (iv) the complaint is time barred because it was filed more than four months after the Environmental Right's enactment; and (v) the complaint fails to plead a cognizable claim under SEQRA.

On the same date, the private developer and another private party named as a defendant filed their own motions to dismiss. The motions argue that the Environmental Right is not self-executing (citing *Brown v. New York*, 89 N.Y.2d 172 (1996), which addresses whether a discrimination-related civil rights provision of the state constitution is self-executing) and raises several of the same arguments made by NYC summarized above.

In February 2023, the plaintiffs filed their memorandum of law opposing the motions to dismiss. In addition to addressing the SEQRA issues, the plaintiffs argued that NYC, having allegedly "contributed to" the violation of plaintiffs' constitutional rights by approving the project and issuing a building permit, now has a "nondiscretionary obligation to comply with the constitution" and an affirmative "duty to take necessary steps to eliminate the violation."

The court has not yet ruled on the motions to dismiss.

***Seneca Lake Guardian v. New York State Department of Environmental Conservation et al.*, Index No. EF2022-0533 (Sup. Ct., Tompkins Co.)**

Another early case may explore whether (and if so, how) the Environmental Right changes analysis of standing by environmental plaintiffs.

In October 2022, Seneca Lake Guardian filed an Article 78 petition challenging DEC's issuance of a Solid Waste Management Permit for the construction and operation of a waste transfer facility in Cayuta to County Line MRF, LLC (County Line). In its petition, Seneca Lake Guardian alleges that DEC's issuance of the permit was arbitrary and capricious because County Line's application did not satisfy several statutory and regulatory requirements as it did not include an adequate waste control plan or operations and maintenance plan. As an additional cause of action, Seneca Lake Guardian also alleges that issuance of the permit was unlawful because the waste transfer facility would allow pollutants to enter surface water, yet NYSDEC "failed to consider the impact of the permit on Petitioner's members' constitutional right to clean water and a healthful environment." Seneca Lake Guardian notes the potential for untreated leachate containing PFAS to be sent to the Ithaca Area Wastewater Treatment Facility, which does not treat for PFAS, thus potentially allowing PFAS to enter Cayuga Lake, a source of drinking water. In the Memorandum of Law accompanying its petition, Seneca Lake Guardian emphasizes that the adoption of Article I, § 19, was motivated by concerns about contamination of drinking water with emerging contaminants, including specifically PFAS.

DEC and County Line responded by filing motions to dismiss arguing that Seneca Lake Guardian does not have standing, largely because its members lack injury-in-fact. If, in response, Seneca Lake Guardian argues in part that Article I, § 19, supports standing, this case could become the first to consider whether (and if so, how) Article I, § 19, intersects with New York standing doctrine.

Case summaries prepared by members of the EELS Task Force on Implementation of the Green Amendment, Susan Amron, general counsel at the New York City Department of City Planning; John Schuyler Brooks, Abramson Brooks LLP; Philip E. Karmel, partner, Bryan Cave Leighton Paisner LLP; Colin M. Knoer, The Knoer Group PLLC; Robert Knoer, The Knoer Group PLLC; and Katrina Fischer Kuh, Haub Distinguished Professor of Environmental Law at the Elisabeth Haub School of Law.

Endnotes

1. New York's New Constitutional Environmental Bill of Rights: Impact and Implications by Scott Fein and Tyler Otterbein, https://www.albanylaw.edu/government-law-center/new-yorks-new-constitutional-environmental-bill-rights-impact-and (Feb. 27, 2023).
2. Decision and Order at 9 (quoting *The Impact of the Green Amendment A New Era of Environmental Jurisprudence* presented by Professor Nicholas Robinson at a meeting of the Environmental and Energy Law Section).

Long-Time Member Profile: Karen Mintzer

By Aaron Gershonowitz

For this issue we have focused our long-time member profile on Karen Mintzer, who is a partner at Mintzer Mauch PLLC, an environmental, land use, and real estate law firm that is certified by New York State, New York City and the Port Authority of New York and New Jersey as a Women-Owned Business Enterprise (WBE). Karen has been active in a number of the section's committees. She is currently the co-chair of the Enforcement and Compliance Subcommittee, which sponsored a panel on Civil and Criminal Investigations and Enforcement of Environmental Law in New York State in March 2023, and recently worked with others in EELS to develop the section's comments on the proposed revision to the brownfields program.

Karen's environmental law experience includes both private practice and public service. She began her career as a litigator at Stroock, Stroock and Lavan, then practiced environmental law at Sive, Paget and Riesel, P.C. and Kramer Levin Naftalis and Frankel LLP, where she litigated environmental cases and advised on regulatory matters and the environmental elements of real estate transactions, land use, and permitting. Her public service includes three years as regional attorney at DEC Region 2 (covering New York City) and as general counsel to the New York State Office of Parks, Recreation and Historic Preservation (OPRHP). This combination of public service and private practice experience gives Karen a unique perspective when advising clients on environmental matters.

In January 2020, Karen co-founded Mintzer Mauch PLLC. The firm currently represents real estate developers, businesses, not for profits, and New York City and New York State agency clients on the full range of environmental issues, including litigation, environmental review, permitting, defense of enforcement actions, brownfields, and transactional advising. Co-founding a law firm with her partner Helen Mauch was the realization of an idea hatched long ago, while Karen and Helen were associates in "big law." Karen is finding it very satisfying to see this idea of a women-owned environmental, land use, and real estate law firm become a successful reality. Karen noted that several lawyers were kind enough to share their law firm establishment experiences with her and Helen as they were deciding whether to start their own firm; she enjoys paying it forward by speaking to other lawyers who are thinking about following suit. Karen also hopes that the success of her women-owned law firm may inspire other women lawyers to go out on their own.

Karen Mintzer

Some of the more interesting projects Karen has worked on have required a combination of her experience representing private developers and her experience in state government. For example, her current work on the development of the Hudson Highlands Fjord Trail, a multi-use recreational trail extending from Cold Spring to Beacon that will be developed on land owned by the state, municipalities, and private property, has required her to combine her real estate development and environmental regulatory expertise with her understanding of how state government works. Karen is also working with New York State agency clients on projects related to the development of renewable energy. Karen is particularly proud of her involvement in the establishment of the new Shirley Chisholm State Park in southeast Brooklyn, New York, while she was general counsel at OPRHP, which involved complex negotiations among OPRHP, the United States Department of the Interior, and the New York City Department of Environmental Protection. The 400-acre park was developed on a former New York City landfill adjacent to Jamaica Bay and offers hiking and biking trails, a free bike library, and waterfront access to a neighborhood that was sorely lacking in open space.

Karen loves to travel, most recently to Botswana and Zimbabwe, and ski with her husband and two teenaged sons. Having been exposed to the vast New York State park system while at OPRHP, she is also (slowly) trying to visit the many parks she has not yet seen.

Karen received her B.A., with honors, from Lafayette College and her J.D. from Georgetown University Law Center.

New Member Profile: Adam Herron

By Keith Hirokawa

Adam Herron

It is my extreme pleasure to provide the section with biographical background for this issue's new member, Adam Herron. Adam is a 2022 summa cum laude graduate of Albany Law School and a 2019 magna cum laude graduate of the Oregon State University College of Forestry. He was a dynamic, brilliant, and unrivaled student, and NYSBA is fortunate to have him as an attorney.

Adam reports that law school was challenging and enlightening. He describes an important moment in law school at the end of his first semester: "I was on a boat on a vacation with my dad and brother, trying to distract myself from my belief that I had probably flunked out of law school despite working as hard as I could. My grades trickled in during a brief liaison with some wi-fi and I couldn't believe that the opposite had happened and I had done pretty well. After that, I knew that if I could keep up the same effort, my hard work would pay off in ways I wouldn't have believed in my past life."

Despite his humility, Adam was an accomplished law student. He was consistently at the top of his class, modeling his hard work and leadership for those around him. One of his publications, entitled *Climate Change and the Water Trap: Considering Western Water Policy Through Socio-Ecological Trap Theory*, is an impressive interdisciplinary look at how the allocation of scarce water resources can create a complicated dependency that does not allow for policy reversal or reallocation: in some areas, such as agriculture in Arizona or domestic water needs in Los Angeles, we find that some water allocations have created a dependency on the continuing delivery of water, resulting in difficulties allocating the water to other pressing needs. Adam's work is pathbreaking, and I have cited his scholarship on several occasions.

Adam currently serves as an associate attorney at Phillips Lytle, LLP in Albany, where he focuses his practice on the energy sector, assisting clients with matters related to the development of renewable energy projects, including regulatory matters before the New York State Public Service Commission and Federal Energy Regulatory Commissions. He assists clients with matters related to the development of renewable energy projects. He truly enjoys the work: "I like being a part of and working with the legal system because it permeates our society at a foundational, and even atomic, level. Every action and consequence that we take, small or large, flows through and is informed by law. To be a part of the practice of this system is simultaneously humbling and empowering."

Adam grew up in southern New Jersey and attended college in coastal North Carolina. Then he moved to Hawaii "to live my dream as an ocean lifeguard and to test myself in the large surf." Adam and his wife have since started a family and settled in scenic southern Vermont near the Green Mountain National Forest. "My family and I live in a very rural part of southern Vermont on an old farm made up of fields, heirloom apple trees and sugar bushes of old sugar maples. My wife is a lifelong New Englander who had previous success in real estate in Hawaii which she carried on when returning to Vermont to settle down. I have two young boys who are wild, barefooted adventurers and who relish at the chance to play music, jump in a canoe, or play in the snow." In addition to being a devoted father and husband, Adam spends the majority of his time fly fishing, canoeing, and snowboarding, while occasionally getting to the coast to keep his love of surfing alive.

Law School CORNER

Curators Brianna Grimes and Gabriella Mickel

This fourth edition of the Law Student Corner highlights students and their work at six law schools. If you know any schools or students who would like to participate, please email gmickel@law.pace.edu.

Student Highlight

In February, Pace-Haub Law hosted the 35th annual Jeffrey G. Miller National Environmental Law Moot Court Competition (NELMCC). Over 50 teams competed in this year's competition. In the final round, the team from Columbia Law School prevailed. The winning team members—Anne Li, Max Cornell, and Kai Saleem—are featured below.

Meet **Anne Li (Columbia, 1L)**, **Max Cornell (Columbia, 1L)**, and **Kai Saleem (Columbia, 1L)**, the winning team of the 35th annual NELMCC, all of whom are first-year law students. Max, Anne, and Kai shared their experience in the competition and their future plans.

The trio highlighted different motivations when asked why they decided to compete in NELMCC. Max shared that he came to law school wanting to learn to protect non-human life, noting that environmental law was a key tool. He selected NELMCC because he wanted to build creative arguments muscle in a relevant field. For Kai, competing in NELMCC was a chance to bond with other students interested in environmental law. Anne, on the other hand, was not particularly interested in environmental law, but more in overlapping social issues, including housing and health.

All three students found their NELMCC experience to be rewarding, even though the brief was extremely challenging as first-year law students. Kai loved the competition and hanging out with her team, while Anne appreciated the opportunity to develop her oral advocacy skills with coaches, **William Donaldson '24, Jack Jones '24,** and **Abby Pelton '24**, leading up to the competition. Anne also liked that despite having significant errors in their brief, due to them having less than one semester of law school under their belts, they were able to substantively progress before the competition. Max found it rewarding to work with both his teammates and his coaches.

All three are Public Interest/Public Service (PI/PS) Fellows and hope to work in public interest at some point after graduation. Max, a former electrical engineer, hopes to do impact litigation at a Big Green. Kai, a former state-level environmental lobbyist, aims to work on energy regulations and policy. Anne, a former employee of the National League of Cities, wants to do legislative advocacy for policies related to mental health, homelessness, and crisis response. In addition to Anne, Max, and Kai, many New York law students are doing impressive work related to environmental law.

Work and Advocacy

After living in an environmental justice community in New York City, **Lindsay Matheos (CUNY, 2L)** became passionate about environmental law. During law school, Lindsay co-founded Indigenous Americans and Law Student Advocates (IALSA) and wrote a paper titled *Superfunded: Rethinking Responsible Remediation and Redevelopment of Brownfield and Superfund-Adjacent Sites in New York City* for a Land Use and Community Lawyer course. Specifically, she explored "green gentrification" and argued that the phenomenon is the byproduct of a confluence of urban planning mechanisms and tax incentives that work together to incentivize

irresponsibly large and costly developments in vulnerable communities on toxic and neglected land. Lindsay focused on the effects of Opportunity Zones, the Brownfield Cleanup Program, and Brownfield Opportunity Areas to support her argument. Currently, she is also interning with Public Employees for Environmental Responsibility to support government whistleblowers with their environmental claims. This summer she will be interning with EPA Region 2.

Jaclyn Spencer (CUNY, 2L) was a high school history teacher in New York City prior to law school. Many of her students were living in EJ communities. She saw the impact that had on students and their families, so she decided to pursue environmental law in hopes of helping address these environmental issues in her community. Last summer, Jaclyn interned with DEC Region 2 in Queens. She also spent time commenting on the $PM_{2.5}$ levels for the new NAAQS. This semester she is interning with the Wilderness Society on a project in Alaska. Additionally, Jaclyn co-authored an article with CUNY Professor Rebecca Bratspies on the Green Amendment that appears in this issue of the Journal.[1] Jaclyn is looking forward to working for the New York Lawyers for the Public Interest in their Environmental Justice Division this summer.

Student Publications and Writings

Mariah Bowman (2L, Pace-Haub Law), this year's student chair of NELMCC, wrote an article titled *Nonhuman Rights: The Case of Happy the Elephant*. Her article was accepted for GW University Law School's *Animals and the Anthropocene: A Legal Scholarship Symposium*. Mariah is not the only law student in New York making contributions to legal scholarship.

- **Brianna Grimes (2L, Pace-Haub Law),** *Why Releasable Marine Mammals Deserve To Be Released***,** Chicago-Kent J. of Env't & Energy L. (forthcoming 2023).
- **Mia Petrucci (3L, Pace-Haub Law),** *Animals Too Ugly to Protect? The PACT Act Needs an Update*, Ecology Law Quarterly: Currents.
- **Mauren Hartwell (1L, Pace-Haub Law),** *Local Climate Action Planning—The Land Use Perspective*, ZPLR (forthcoming 2023).
- **Haley Pedicano (2L, Pace-Haub Law), Gabriella Mickel (Pace-Haub Law and YSE), and John Nolon,** *Constructing a Sustainable Future: Net-Zero Cities*, 38 Nat. Res. & Env't (forthcoming Summer 2023).
- **Gabriella Mickel ('23, Joint Degree Pace-Haub Law and YSE),** *ESG and Regulated Disclosure, in* ESG for Legal Professionals (Am. Bar Ass'n.) (forthcoming 2023).
- **Jillian Houle's (2L, Pace-Haub Law)** op-ed, "Less is more when it comes to road salt," was published in the *New Hampshire Union Leader*.
- **Krystle Okafor (recent graduate, NYU)**, *Community Ownership in New York City: The Housing Development Fund Corporation*, 30.3 N.Y.U. Env't L.J. 413 (2022).
- **Samantha Daisy (3L, Columbia)**, *Choosing Words Wisely: Climate Agreements Viewed Through a Legal Contractual Framework*, 48.1 Colum. J. Env't L. 136 (2022).
- **Nicole Franki (3L, Columbia)**, *Regulation of the Voluntary Carbon Offset Market: Shifting the Burden of*

Climate Change Mitigation from Individual to Collective Action, 48.1 Colum. J. Env't L. 177 (2022).

Events

Recent

The annual New Directions in Environmental Law (NDEL), organized jointly between the Yale School of the Environment and Yale Law School, is back. This year, the conference was held in conjunction with the Food Law Student Network Conference with the help of Pace|Haub Environmental Law from March 31 to April 1, 2023.

From top, left to right: Hailey Pedicano (Pace Law '24); Gina Hervey (YSE/Pace Law '24); Colin Pohlman (Lewis & Clark Law '24); Brianna Grimes (Pace Law '24); Joshua Briggs (Pace Law '24); Professor Josh Galperin, joint degree coordinator, Pace-Haub Law Professor; Brooke Mercaldi (YSE/Pace Law '24); Allison King (Seton Hall Law '24); Samantha Capaldo (Drake Law '23); Stephanie Prufer (YSE '24); and Maddy Tran (YSE '24).

The NYU Environmental Law Journal hosted a symposium titled *Building Effective, Sustainable, and Equitable Infrastructure* on April 3. The symposium centered on the impact of recent legal and legislative developments such as the Bipartisan Infrastructure Law, Inflation Reduction Act, and FY 2023 Omnibus Bill on infrastructure projects. Additionally, the symposium explored the effects of infrastructure on aquatic animal life and the required mitigation strategies.

Earlier this year, Cornell's Environmental Law Society hosted a Q&A webinar titled *Justice for Victims of Water Pollution* featuring Rob Bilott. Bilott is best known for his legal battle against DuPont, which led to him being dubbed by The New York Times Magazine as "The Lawyer Who Became DuPont's Worst Nightmare." Since the DuPont case, he has continued representing clients who have been harmed by "forever chemicals," such as per- and polyfluoroalkyl (PFAS), as a member of Taft Law's Environmental, Litigation, and Product Liability and Personal Injury practices.

On Feb. 10, 2023, the Fordham Urban Law Journal hosted its 2023 symposium, titled *Building a Greener Future Through Urban Sustainability*. The symposium explored topics related to urban climate adaptation and resilience, including flood prevention, electrification of the transportation and buildings sectors, efforts to equitably transition to clean energy, and other important environmental justice considerations. Panelists included scholars, government and agency appointees, technical experts, and environmental advocates. Vicki Arroyo, EPA associate administrator for policy, also gave a keynote address at the event.

In December, Pace|Haub Law hosted its annual Environmental Law & Policy Hack. Schools competing in 2022 were challenged to propose innovative private environmental governance interventions to spur meaningful on-the-ground environmental progress. Four finalist teams from University of Vanderbilt School of Law, University of Maryland Francis King Carey School of Law, University of Miami School of Law, and a joint Yale School of the Environment and Yale School of Management team were judged by experts in the field, including Maria Jose Gutierrez Murray (senior director of international programs for Tradewater), Roger Martella (vice president, chief sustainability officer for General Electric), and Maram Salaheldin (attorney at law on Clark Hill's Environmental & Natural Resources and International Trade practice groups). Ultimately, the University of Miami School of Law won and received funds to implement their winning proposal.

Endnotes

1. *See* "Avoiding Mistakes When Implementing the Green Amendment."

The Dawn of Environmental Human Rights in New York

By Nicholas A. Robinson

On Election Day in 2021, New York's voters added Section 19 to the state's constitutional Bill of Rights. They reaffirmed a human birthright to clean air, clean water and a healthful environment. New York's constitutional Bill of Rights now guarantees the liberty that "Each person shall have a right to clean air and water, and a healthful environment."[1] New York's Legislature had previously concurred, recognizing that these rights are "elemental." At the NYSBA Environment and Energy Law Section's annual meeting on Jan. 25, 2022, I was privileged to lecture about *A New Era in Environmental Jurisprudence* that this Bill of Rights guarantee provides.[2] Little did I know then that Judge John J. Ark of the Supreme Court in Monroe County would later last year cite this lecture in the first judicial decisions applying New York's newly minted Bill of Rights assurance of a personal freedom.[3] This essay reflects on legal issues that are likely to emerge in ongoing adjudication about New York's environmental right.

There are now four lawsuits pending in New York courts. The Elisabeth Haub School of Law at Pace University maintains an online environmental right repository with the principal pleadings, decisions on motions, and eventually all judicial decisions as they arrive.[4] The repository also provides references to analogous rulings in other states that provide rights to the environment in their constitutions, as well as to decisions in other jurisdictions around the world. Although the right to the environment is new to New York jurisprudence, for many years other common-law countries are enforcing this right, as are other courts around the world. As EELS members study and apply the New York right to the environment, many issues arise. Not least is that the human right to the environment is now also in the domain of human rights commissions and legal counsels' offices for literally all state agencies. EELS may be a *primus inter pares*, given its environmental law expertise. However, just as due process of law is everyone's concern, so too the environmental rule of law, both embodied in the same New York constitutional Bill of Rights.

The Human Right

The United Nations General Assembly took note of the widespread acknowledgement of the right to the environment in July of 2022, when it recognized "the right to a clean, healthy, and sustainable environment as a human right."[5] An extensive analysis presented to the U.N. Human Rights Commission in Geneva, Switzerland, earlier demonstrated that the "vast majority" of nations have already recognized the right to a clean and healthy environment in their national constitutions and laws.[6] Legal scholars in the United States also have acknowledged or critiqued these rulings around the world.[7] Professors James May and Erin Daly have prepared a comparative law guide to judicial decisions applying environmental rights.[8]

It remains to be seen how New York courts will construe the constitutional guarantee to a clean and healthy environment. Because human health and ambient environmental situations are comparable around the world, and the du-

ties established by environmental statutes are comparable worldwide, it is likely that rulings by New York courts will be akin to judicial decisions elsewhere applying environmental rights.[9] Like other provisions in the Bill of Rights (such as freedom of speech or freedom of religion), the Constitution expressly prohibits government from trampling on the peoples' rights, now also for a clean and healthy environment. As the Pennsylvania Supreme Court ruled in 2013, these fundamental rights "are inherent in man's nature" and preserved rather than created by the Pennsylvania Constitution."[10] The Pennsylvania court held that government's ignorance about its actions harming a person's environmental rights "does not excuse the constitutional obligation because the obligation exists a *priori* to any statute purporting to create a cause of action."[11]

This right to a clean and healthful environment is a fundamental human right, upon which all other human rights depend. The state has a duty to uphold these rights.[12] Moreover, New York's right to the environment underscores, indeed elevates, all environmental justice claims in New York.[13] A government permit that allows environmental harm to persons in disadvantaged communities is legally suspect under New York's Bill of Rights. Beyond environmental agencies, the New York Human Rights Division, and local human rights commissions, have a new legal impetus to bring relief to communities enduring environmental discrimination because of race, color, national origin or income. Suits on behalf of each person denied clean air or clean water or a healthful environment may be directed at governmental human rights officials who fail to act to ensure observance of these human rights.[14] The reach of New York's Bill of Rights in Article I, § 19, will be surprising.[15]

Implications of the Initial Environmental Rights Rulings

New York's decisions of first impression interpreting Bill of Rights Article I, § 19, deserve thoughtful analysis. Judge John J. Ark (Supreme Court, Monroe Co.), independently arrived at a determination of law comparable to those of the Pennsylvania decision. The case involves longstanding complaints by persons claiming that their right to healthful environment has been infringed upon by the governmentally licensed High Acres landfill in the Town of Perinton. Denying the motions to dismiss by the New York state Department of Environmental Conservation, the judge ruled that the right to the environment in New York's Bill of Rights was self-executing, and constituted a nondiscretionary duty on the part of all government agencies to fulfill their obligations under the Bill of Rights. Accordingly, plaintiffs could seek the remedy of mandamus. Moreover, plaintiffs had no obligation to exhaust any administrative remedies before seeking judicial relief, and could do so within the six-year statute of limitations for constitutional claims (not the four-month limitation for CPLR Article 78 claims).[16] Judge Ark also ruled that the standards for judicial review of a constitutional claim are more rigorous than the "arbitrary and capricious" standards for administrative law claims. The burden of proof lies with the government to establish that it is not infringing a constitutionally guaranteed right. This shifts the burden of proof that environmental plaintiffs previously had to meet to the government defendant. As a corollary to this burden of proof, a number of courts abroad have adopted an evidentiary maxim known as *in dubio pro natura*, which means when the evidence or equities are equally balanced, the court to respect the right to the environment adopts the finding that is most protective of the environment.[17]

The freedoms enshrined in the Bill of Rights, like due process of law, have ancient roots in the Magna Carta of 1215.[18] The environmental rule of law has its origins in the Forest Charter of 1217, which Magna Carta produced.[19] The human right to the environment is today considered to be an element of due process of law.[20] Thus, claims to enforce the right to the environment in New York arise also as claims to secure due process of law (U.S. Constitution Bill of Rights, Articles V and XIV, and New York common law due process). When claims are asserted by persons in environmental justice settings, they also arise as claims under Article I, § 11 (equal protection of the law). Similarly, if a local government acts to prevent a person asserting the right to the environment, a claim involving freedom of speech arises Article I, § 8, and so too if freedom of assembly, to demonstrate for claims environmental right, is curtailed, claims could arise also under Article I, § 9.

Given that the Bill of Rights now includes the fundamental human right to clean air, water and healthful environment, it is frankly surprising that Gov. Kathy Hochul and state agencies such as the Department of Environmental Conservation, and also Attorney General Letitia James and the Department of Law, seem to resist making the changes in policy and procedure required by Article I, § 19. Judge John Ark raised this concern in his *Fresh Air for the East Side* decisions: "Whether the Green Amendment will be an important tool to allow communities to safeguard their environment and compel state and local governments to prevent environmental harms is uncertain. Indeed, the vigor of the State's opposition to this lawsuit does not bode well for its enforcement of the Green Amendment."[21]

Responding to the Paradigm Shift

Judge Ark observed that the "regulatory paradigm in existence on December 31, 2021, as of January 1, 2022, has become a matter of constitutional right."[22] One might expect that a local planning board, or bureau chief in the Depart-

ment of Environmental Conservation, both understaffed and lacking sufficient resources to handle their respective workloads, might resist the paradigm shift. Certainly, the private sector in New York, including real estate developers, did not welcome the likelihood of a paradigm shift, as they lobbied hard against adoption of the Green Amendment in 2021. But that was then. As Prof. Rebecca Bratspies put it: "This changes everything."[23] Nonetheless, state and local agencies appear to be ignoring the implications of the state's human right to the environment.

All in state government should take note of Judge Ark's thoughtful opinions delivered at the end of 2022. Judge Ark ruled, "Complying with the Constitution is not optional for a state agency, and is thus nondiscretionary and ministerial." It is incumbent on state and local government agencies to exercise their due diligence to plan to ensure that they respect each person's environmental human rights. To do otherwise is to reject democracy. As Judge Ark put it, "The voters of this State have empowered impacted citizens to bring a Green Amendment case when their right to breath clean air and live in a healthful environment has been violated."[24]

New York's environmental right effectively withholds from each government agency any authority to violate each person's right to clean air and water and healthful environment. When 70% of New York's voters adopted these words, they understood their plain meaning. Legislative sponsors made clear they wish the Green Amendment to be concise, akin to expressions of due process or free speech rights.[25] Environmental rights guarantee the right to life, which our era of climate change, biodiversity loss and chemical pollution places in some peril.[26] The birth rights to breathe clean air, have clean water, and live in a healthful environment are widely regarded as natural rights.[27] As is amply clear from applications of process of law, courts ascribe more precise meanings to the basic liberties in the Bill of Rights in context of the government's act of trespass.

Objective criteria exist for the bench and bar, and government officials, to provide concrete meaning to clean air and water and a healthful environment. First, it's fundamental to human rights law that the law can countenance no backsliding from levels of protection currently in place. This is the non-regression principle.[28] It has concrete meaning in the context of environmental law, for example the non-degradation of water quality norm that underpins the Clean Water Act and New York's water quality standards.[29] It is evident in the duty to identify and adopt substantive mitigation of adverse effects under the State Environmental Quality Review Act (SEQRA).[30] SEQRA also emphasizes the progressive nature of government's objective, to improve and sustain improved conditions: "The maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of statewide concern."[31]

Under Bill of Rights § 19, governments cannot degrade the level of a person's clean air and water and healthful environment. Agencies can take note of existing conditions, since they are the baseline below which degradation that impacts a person is proscribed. Without assessing the status of the local environment, agencies cannot know how their actions may cause degradation. SEQRA already requires this pre-action assessment, but many agencies have ignored this duty. Such avoidance of this legal duty is at the root of many affronts to environmental justice.

When applying the right to the environment in context, Judge Ark provided a framework for judicial decision-making: "In adjudicating and applying the Green Amendment, it may be necessary to have a two-prong test: First, did the government action comply with the applicable statute? Second, did the government action violate a person's constitutional 'rights to clean air and water and a healthful environment'?"[32] If failure to adhere to a statutory duty is found, then a court may not need to reach the constitutional claim. In assessing the claim under the Bill of Rights, with the strict scrutiny appropriate when called upon to preserve the persons' rights, Judge Ark's test involves three considerations: (a) any agency's infringement on an environmental right must be justified by a compelling state interest (not business as usual, or mere economic advantage); (b) the proposed agency conduct must demonstrate that it is the least intrusive (like the alternatives analysis required under SEQRA, or showing over-all the act is not regressive), and (c) the action claimed to be a compelling state interest must still be consistent with the non-degradation and hold harmless the person's environmental human rights (as in equal protection and environmental justice instances). Just plaintiffs will need to assemble substantial evidence that the government is degrading the air and water to their detriment, so defendants will face a daunting task to claim their act is compelling. There is not likely to be a large volume of environmental rights cases. If agencies reassessed how they respect each person's environmental rights, litigation could be avoided altogether.

The Duties of the Executive Branch

Article IV, § 3 of the New York Constitution obliges the governor to ensure that the "laws are faithfully executed." The Executive Chamber should take stock of how manufacturing enterprises have learned to comply with environmental laws over the past decades. They created their own environmental management systems, known as EMS.[33] EMS allow any organization to adjust their operations to conform with legal norms for environmental stewardship.[34] Successful manufacturing enterprises also follow the environmental audit pro-

cesses provided by the International Standards Organization (ISO).[35] The ISO 14,000 guidance series included provisions for independent audits of companies' environmental compliance procedures.[36] In the course of doing so, they were able to streamline operations, minimize waste streams, and modernize their operations.[37] It is time for government agencies to follow the best practices being used routinely by the private sector.

There are consultancies and training programs for EMS and ISO 14,000. Gov. Hochul, or the executive of any agency, can enlist these services to establish an EMS that aims to ensure that the governmental entity complies with New York's environmental rights. Rather than opposing the right, as Judge Ark experienced, the Department of Law should counsel state agencies to review their operations to ensure compliance with the human rights, including the right to the environment. Gov. Hochul should issue an Executive Order that each state agency adopt an appropriate EMS that ensures environmental rights are honored. There is a substantial practice for lawyers and environmental consultants in helping agencies learn to observe each person's environmental rights.

Arguably, New York voters are distressed that their state's ambient environmental quality continues to decline. They amended the Bill of Rights to secure their environmental liberty, a right to life. The incremental and cumulative impact of many pollutants or adverse land use changes add up. Governments are not preventing degradation. Many voters doubtless consider it a "crime" that their shared environment is being harmed by economic interests and temporizing, insufficient government regulation. The Bill of Rights, at least, now guarantees each person a right that she or he can bring to a court to vindicate.

Is it the dawn of a shift in how New York rebalances the equities toward affirming the right to life? Governmental agencies have tools to welcome the change, or, as Judge Ark experienced, to fight to preserve their prerogatives and discretion to affirm business as usual. Ultimately, the Bill of Rights is in the hands of judges. Meanwhile, Gov. Hochul and Attorney General James have every opportunity to chart the paths to enable all governmental agencies to accept their human rights obligations.

The Bill of Rights' paradigm shift in New York requires no less.

Nicholas A. Robinson is University Professor for the Environment at Elisabeth Haub School of Law at Pace University.

Endnotes

1. NY Constitution Bill of Rights, Article I, § 19. In force since Jan. 1, 2022. Colloquially known as the "Green Amendment," voters accepted the right to the environment by a 2-to-1 margin, with 2,129,051 votes in favor of the amendment.
2. Prof. Nicholas A. Robinson, Elisabeth Haub School of Law at Pace University, Presentation at the N.Y.S. Bar Association Annual Meeting before the Environment and Energy Law Section (Jan. 25, 2022), https://digitalcommons.pace.edu/lawfaculty/1205/.
3. *Fresh Air for the Eastside v. State*, 2022 N.Y. Misc. LEXIS 8394, 2022 NY Slip. Op 34429(U, (Sup. Ct., Monroe Co., Dec 20, 2022). and the companion case of *Fresh Air for the Eastside v. Town of Perinton*, No. E2021008617 (Sup. Ct., Monroe Co., Dec. 8, 2022).
4. *See* https://nygreen.blogs.pace.edu.
5. U.N. General Assembly Resolution A/76/300 (July 28, 2022), with 161 nations voting in favor including the USA, and 8 abstentions, and no votes in opposition. *See* https://news.un.org/en/story/2022/07/1123482.
6. This point was cited in the last preambular paragraph for the U.N. Resolution. *See* https://digitallibrary.un.org/record/3982508?ln=en.
7. *See* James May and Erin Daly, *Compendium of Global Environmental Constitutionalism: Selected Cases and Materials*, U.N. Environment Programme & Widener University, 2019 (Second Edition).
8. *See* James R. May and Erin Daly, *Judicial Handbook on Environmental Constitutionalism* (2017), http://works.bepress.com/james_may/100/.
9. *See*, for instance, rulings in Hawaii, Montana, Pennsylvania Constitution Article I, § 27.
10. *Robinson Township, Delaware Riverkeeper Network v. Commonwealth,* 83 A. 3d 901, at 948 and Note 36 (Pa. 2017). The same finding was cited in the leading decision recognizing and enforcing the right to the environment abroad in 1993, by the Supreme Court of the Philippines, *Oposa v. Factoran*, by Justice Hilario Davide, Jr., *see* https://lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html. In Pennsylvania, the ruling struck down a state law (applied to legislative action); in The Philippines the ruling invalidated all the nation's forestry permits (applied to executive action).
11. *Id.,* 83 A. 3d 901, at 952.
12. The Bill of Rights Article I, § 19, then is to be applied as part of New York's Human Rights Law, Chapter 18 of the Executive Law. *See* Article 15, Human Rights Law, § 290, Article 1, providing that the Human Rights Division is charged to uphold the human rights of New Yorkers: "The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such

equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." *See* https://www.nysenate.gov/legislation/laws/EXC/290.

13. Although the state Department of Environmental Conservation has policies and a modest program on environmental justice (*see* https://www.dec.ny.gov/lands/333.html), the Legislature has enacted the Environmental Justice Permitting Bill, S8830, which Gov. Hochul signed last Dec. 31, 2022, and which is due to come into force in June 2023. *See* https://www.nysenate.gov/legislation/bills/2021/s8830. The Law amends the State Environmental Quality Review Act (SEQRA, Article (*Environmental Conservation Law)) to require all state and local governmental agencies making an environmental assessment under SEQRA to consider whether the proposed action may cause or increase a disproportionate and/or inequitable impact on a disadvantaged community (DAC). When an agency prepares an environmental impact statement, it must include a detailed statement defining the disproportionate and/or inequitable effects that the proposed action may have on a DAC. Read together with the Bill of Rights, Article I, Section 19, "the agencies have no discretion except to require a full avoidance of any act that infringes each person's right to clean water and a healthful environment." The New York Climate Justice Working Group has prepared criteria to identify each DAC. Before the June effective date for the Environmental Justice Permitting Bill, at Gov. Hochul's request, the Legislature is expected to make as yet unknown amendments to the Environmental Justice Permitting Bill. Should any of these amendments infringe on the environmental rights of persons in an environmental justice community, a court could conceivably face the question of the Bill of Rights potentially nullifying legislative actions that infringe the environmental rights.
14. *See* the discussion of Senate Bill S8830, *supra* note 13.
15. For another example, consider how criminal law engages fundamental rights. *See* Rob White, *Ecocentrism and Criminal Proceedings for Offenses against Environmental Laws*, In E. Fisher and B. Preston, An Environmental Court in Action – Function, Doctrine and Process, Chapter 11, at 213 (2022, Hart Publishing).
16. *Fresh Air for the Eastside, supra* note 3.
17. Too often previously, an economic interest would prevail when the equities are equally balanced. *See* Oxford References: https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-912 ; *see* Sarena Baldin and Sara de Vido, "The In Dubio Pro Natura Principle: An Attempt of a Comprehensive Reconstruction," https://www.researchgate.net/publication/366634311_THE_IN_DUBIO_PRO_NATURA_PRINCIPLE_AN_ATTEMPT_OF_A_COMPREHENSIVE_LEGAL_RECONSTRUCTION.
18. Historical Society of the NY Courts: "Eight hundred years ago (June 19, 1215), England's most powerful feudal barons gathered at Runnymede, on the banks of the river Thames, to force King John to formally recognize their traditional legal rights by signing a charter known as Magna Carta. Divided into 63 chapters, Magna Carta established the crucial principle that the "law of the land" existed independently of the monarchy, and that the king was subject to it. The charter also recognized the rights of the barons to trial by jury, due process and habeas corpus." *See* https://history.nycourts.gov/about_period/magna-carta/.
19. *See* N.A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature,* in Daniel Barstow Magraw, et. al, (Eds), Magna Carta and the Rule of Law (American Bar Association, 2014), https://digitalcommons.pace.edu/lawfaculty/990/. Under the NYS Bill of Rights Article I, Section 14, the common law, as received from England and until repealed, continues as the law of New York, and this includes Magna Carta.
20. *See* the report prepared by the Environmental Law Institute (ELI) for the United Nations: https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report . *See* Chapter 4, § 4.2.
21. *Fresh Air for the East Side, supra* note 3.
22. *Ibidum.*
23. Rebecca Bratspies, *Thus Changes Everything: New York's Environmental Amendment,* Viewpoint, Environmental Law In New York, vol 33, No. 6 (Arnold & Porter, Lexis/Nexis, June 2022) at p. 1.
24. *Ibidum.*
25. Those who doubt the clarity of New York's Right to the Environment, and carp that it is too vague to apply, have not studied the jurisprudence of construing other rights in New York. *See*, e.g., *People v. P.J. Video*, 68 N.Y. 296, 301-2, 501 N.E. 2d 556, 559-60 (1985) recalling "New York's long tradition of interpreting our State Constitution to protect individual rights."
26. *See* the scientific synthesis report of the United Nations, "Making Peace with Nature," (2021), https://www.unep.org/resources/making-peace-nature.
27. The court so held in the landmark environmental rights case of *Oposa v. Factoran*, *supra* note 10. New York court decisions have given concrete meaning to the natural right of *due process of law* "6,000 times in the first ten years of the twenty-first century, and over 6,000 times in the decade after that (2010-2020), giving judges a more solid, Constitutionally grounded, and less amorphous platform than 'natural law.'" Albert M. Rosenblatt, *The Rise and Fall of Natural Law in New York*, Judicial Notice, issue 6, p. 18 at 23 (2022, Historical Society of the State of New York). New York courts cited natural law in less than 12 decisions.
28. *See* Markus Vordermayer-Reimer, *Progressivity And Non-Regression In International Human Rights Law: Going Up On The Escalator* (Published online by Cambridge University Press, February 11, 2021), https://www.cambridge.org/core/books/abs/nonregression-in-international-environmental-law/progressivity-and-nonregression-in-international-human-rights-law-going-up-on-the-escalator/2FBC6B7F7626E076E2EB16C171BB447C#.
29. Section 101, Clean Water Act, 33 USC 1251. The U.S. Environmental Protection Agency views anti-degradation expansively, beyond water quality issues. *See* https://www.epa.gov/wqs-tech/key-concepts-module-4-antidegradation.
30. Article 8 Environmental Conservation Law.
31. ELC 8-0103.
32. *Fresh Air for the East Side v, State*, *supra* note 3.
33. *See* https://www.epa.gov/ems.
34. https://www.fedcenter.gov/programs/ems/.
35. https://www.iso.org/home.html.
36. https://www.iso.org/iso-14001-environmental-management.html.
37. The World Environment Center has long led major corporations develop environmental compliance and stewardship tools and systems. *See* https://www.wec.org/, as has the World Business Council for Sustainable Development. *See* https://www.wbcsd.org/.

Avoiding Mistakes in Implementing New York's Green Amendment

By Jaclyn Spencer and Rebecca Bratspies

In November 2021, New Yorkers voted overwhelmingly to amend Article I of the State Constitution—the Bill of Rights.[1] The newly added Article I, § 19 is very short—just one sentence. In its entirety, the amendment reads: "Each person shall have a right to clean air and water, and a healthful environment."[2] This language, commonly called "the Green Amendment," is both sweeping and simple. It guarantees all New Yorkers the constitutional right to live, work, and play in communities that are safe, healthy, and free from harmful environmental conditions. Assemblymember Steve Englebright, the amendment's primary sponsor, described these basic environmental rights as "an elementary part of living in this great state."[3] Bold words indeed, reflecting the amendment's potential to generate sweeping legal change that delivers environmental justice to long-suffering, disadvantaged communities.[4] In adding this provision to the state constitution, New York joins a broader social consensus on environmental rights across the United States[5] and around the world.[6] Indeed, soon after New York amended its constitution, the United Nations General Assembly recognized the right to a clean, healthy and sustainable environment as a universal human right.[7]

Now that the New York Constitution has been amended, certain legal questions emerge immediately. Most pressingly, New Yorkers need to know whether Article I, § 19 is self-executing (meaning that it gives rise to a constitutional cause of action on its own) or whether it requires implementing legislation. A second pressing question is what this constitutional amendment means for how the Department of Environmental Conservation (DEC), as well as other state agencies and local government authorities, should incorporate constitutional environmental protections as they exercise their authority to implement the state's suite of existing environmental laws and regulations.[8]

Although there are other states with environmental provisions in their constitutions,[9] only the Pennsylvania and Montana, and now New York, constitutions contain "Green Amendments"—constitutional provisions that put environmental rights on par with other fundamental social and political rights like freedom of speech, freedom of religion, and property rights.[10] Thus, as New York begins the process of fleshing out the contours of its own Green Amendment, it makes sense to look for lessons and models in Pennsylvania and Montana.

Indeed, the language is strikingly similar in all three state constitutions. Where the New York Constitution affirms that everyone has "a right to clean air and water, and a healthful environment,"[11] Montana recognizes "the right to a clean and healthful environment" as an inalienable right.[12] Pennsylvania's constitutional right is arguably broader because it includes "scenic, historic, and esthetic values" but it begins with the same unadorned statement that "[t]he people have a right to clean air, pure water, and to the preservation" of the environment.[13] This Pennsylvania provision, like New York's Article I, § 19, is contained in the state's Bill of Rights.[14]

The analogy is not perfect. There are significant differences between New York's new constitutional environmental provision and the Pennsylvania and Montana constitutional provisions, both of which were adopted more than 50 years ago as part of the first wave of environmental legal protections following the first Earth Day.[15] Most notably, both Pennsylvania[16] and Montana[17] included public trust provisions in their constitutional environmental provisions. New York's Green Amendment does not, though the Adirondacks Forever Wild provision arguably serves some of the same functions, albeit in a more limited capacity.[18] Despite this difference, there is much to learn from how Pennsylvania and Montana have interpreted their Green Amendments.

1. Is New York Constitution's Article I, § 19 Self-Executing?

Constitutional provisions are said to be self-executing if they go into effect immediately after being created, without the need for implementing legislation.[19] By contrast, a non-self-executing provision would require legislative implementation before it could be enforced by a court. Because the Green Amendment is found in the Bill of Rights in the New York Constitution, answering the self-executing question should be relatively easy.

Pennsylvania's history with its Green Amendment seems quite helpful in showing why New York's Green Amendment is self-executing. Like Article I, § 19, the Pennsylvania Constitution contains a clear statement recognizing environmental rights as fundamental rights.

Given the similarities among these provisions, and their common location in the Bill of Rights, looking to Pennsylvania makes sense. In particular, looking to the tortuous his-

tory of Pennsylvania's Green Amendment can help New York avoid the errors of judicial interpretation that stymied full implementation of Pennsylvania's Green Amendment for its first few decades.

An early case interpreting Pennsylvania's Article I, § 27 clouded the issue of whether the Green Amendment was self-executing. In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,[20] decided soon after the Green Amendment's ratification, Pennsylvania sued under the Green Amendment to enjoin construction of an observation tower on private land overlooking Gettysburg Battlefield National Park. The trial court ruled that the amendment was self-executing, but declined to grant injunction.[21] Both rulings were upheld on appeal.[22] At the Pennsylvania Supreme Court, there was a majority for refusing the injunction, but no agreement on whether the Green Amendment was self-executing.[23] Three justices would have denied the injunction on the ground that the amendment was not self-executing.[24] Two other justices concurred that the injunction should be denied, but explicitly stated that they did not join the plurality's reason for denying the injunction.[25] Two other justices dissented on the ground that the Green Amendment was self-executing.[26] There was thus no majority on the question of whether the environmental rights amendment was self-executing.[27] While this should have left intact the lower court decision that the amendment was self-executing,[28] it instead laid the groundwork for the erroneous conclusion that the Green Amendment was not self-executing.[29] One scholar of Pennsylvania constitutional law mused that perhaps the case "led lawyers and judges to view section 27 as entirely a grant of governmental authority, and not as a limitation on that authority."[30] It took another 40 years, until *Pennsylvania Environmental Defense Foundation v. Commonwealth*, for the Pennsylvania court to unambiguously clarify that Article I, § 27 was self-executing.[31]

Given the looming climate crisis, we do not have 40 years to play with. New York should learn from Pennsylvania's errors and clarify immediately that the Green Amendment is self-executing. Corporate defendants are resistant to this idea and have suggested that environmental rights are not self-executing.[32] It will be up to New York courts to reject this erroneous interpretation and affirm that the right is in fact self-executing.[33] This seems to be happening. In *Fresh Air for the East Side*, the first case raising a claim under New York's Green Amendment, the court rejected the invitation from regulated industry to find that § 19 was not self-executing.[34] Instead the court noted that in New York constitutional provisions are presumptively self-executing, and specifically found § 19 to be self-executing.[35]

This ruling, which is in line with how New York courts treat other rights enshrined in Article I, seems likely to stand on appeal.[36] Environmental rights thus join other constitutionally protected fundamental rights that are by design self-executing and must be upheld and protected by the government.[37] This means that the right to clean air, water, and a healthy environment is guaranteed to everyone in New York, and the Green Amendment will apply in any case when the state, its agencies, or local governments do not respect these rights.

2. How Does the Green Amendment Affect Interpretation of Existing Law and Regulation in New York?

The question of how to interpret the intersection of New York's Green Amendment and pre-existing environmental laws can similarly benefit from the lessons learned in Pennsylvania and Montana. In answering this question, New York should be guided by the principle that "neither the legislature nor an executive agency can define a constitutional right. The constitutional right exists independent of the implementing legislation of regulation, not the other way around."[38]

An early case brought under Pennsylvania's Green Amendment, *Payne v. Kassab* (1973),[39] offers a cautionary lesson. In *Payne,* the Pennsylvania Commonwealth Court expressed concerns that interpreting Article I, § 27 to allow the public to broadly challenge agency environmental decision-making would open a floodgate of litigation. The court therefore articulated a three-part test for how courts should review agency decisions challenged under the Green Amendment. The *Payne* test had three components:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[40]

This test set an extremely low bar for constitutionality, anchoring the constitutional analysis in compliance with existing law. Under the *Payne* test, merely complying with existing law and regulation was enough to ensure that virtually every environmental decision would pass constitutional muster.[41]

It was not until the 2013 plurality decision in *Robinson Township v. Commonwealth* that the Pennsylvania Supreme Court revised this analysis, recognizing that the Green Amendment imposed a duty on both the Legislature and executive to refrain from actions that unduly infringed upon environmental rights protected in Article I, § 27.[42] Four years later, in *Pennsylvania Environmental Defense Foundation v.*

Commonwealth,[43] the Pennsylvania Supreme Court explicitly rejected the *Payne* test, finding that "it strips the constitutional provision of its meaning."[44]

In *Pennsylvania Environmental Defense Foundation,* the Pennsylvania Supreme Court made it clear that compliance with existing law did not answer the question of constitutionality under the Green Amendment. Rather, the court specifically stated that the constitutional right "places a limitation on the state's power to act contrary to this right, and . . . any laws that unreasonably impair the right are unconstitutional."[45] Thus the constitutional right exists independent of the implementing legislation or regulation.[46] In other words, the court rejected the proposition that because "an environmental law was created by the legislature, then by extension the law met the constitutional standard."[47]

Montana grappled with similar questions about the effect of its Green Amendment on existing law. Like Pennsylvania, the state spent decades digging itself out from some early legal decisions that greatly weakened their Green Amendment. In 1976, the Montana Supreme Court decided *Montana Wilderness Association v. Board of Health & Environmental Sciences*, in which the court seemed to hold that compliance with pre-existing law was enough to satisfy the requirements of the Green Amendment.[48] The dissenting opinion rightly objected that this decision took the teeth out of the Green Amendment, bemoaning that under the majority reasoning "the inalienable right of all persons to a clean and healthful environment guaranteed by Montana's Constitution confers a right without a remedy. . ."[49]

Similarly, in 1979, in *Kadillak v. Anaconda Co.*, the court assessed the relationship between constitutional environmental rights and the Montana Environmental Policy Act (MEPA), which had been enacted the year before the constitutional amendment.[50] In this case, Butte residents sought to force the state to conduct an Environmental Impact Statement (EIS) before issuing a permit for disposal of mining waste.[51] In rejecting the claim that an EIS was constitutionally required, the Montana Supreme Court relied wholly on case law that pre-dated the Green Amendment. Asserting that "there is no evidence that MEPA was enacted to implement the new constitutional guarantee of a 'clean and healthful environment,'"[52] the court therefore refused to re-interpret the state's obligations under MEPA in light of the Green Amendment.

In the wake of *Kadillak* and *Montana Wilderness Association,* little happened under Montana's eviscerated Green Amendment for the next two decades. In 1999, however, the Montana Supreme Court breathed new life into the Green Amendment in a case called *Montana Environmental Information Center v. Department of Environmental Quality*.[53] This

case involved a challenge to Montana's Department of Environmental Quality (DEQ) policy of allowing mine waste discharge into streams and rivers with no environmental review.[54] The petitioners argued the Montana Constitution's Article II, § 3 guarantee of a "fundamental right to a clean and healthful environment" required that such decisions be subject to strict scrutiny, and that this constitutional guarantee, read in conjunction with the state duty to maintain the environment contained in Article IX, § 1, allowed Montana to act prospectively to prevent pollution before it occurred.[55] The Supreme Court agreed, concluding that these two parts of Montana's Constitution "were intended by the constitution's framers to be interrelated and interdependent and that state or private action which implicates either, must be scrutinized consistently" using strict scrutiny.[56] The court further determined that the "intention was to provide language and protections which are both anticipatory and preventative."[57]

Recently, the Montana Supreme Court further underscored the state's obligation to protect the environment under the Green Amendment. In *Park County Environmental Council v. Montana Department of Environmental Quality,*[58] the court ruled that state environmental permitting processes

failed to fulfill Montana's constitutional right to a "clean and healthful environment" because they did not include anticipatory and preventative mechanisms in their legal frameworks.[59] The court invalidated a 2011 amendment to the Montana Environmental Policy Act that purported to bar courts from issuing injunctions or otherwise suspending permits found to have been issued in violation of environmental laws.[60] The unanimous court found that this legislative provision violated the state's constitutional obligation to provide environmental review and protection before approving activities with the potential to degrade Montana's environment.[61] This decision made it clear that Montana's constitutional mandate includes a duty to prevent environmental harms.

Perhaps the most interesting case under the Montana constitution is *Held v. Montana*, a case brought by Our Children's Trust on behalf of a group of 16 young people.[62] This case alleges that Montana's fossil fuel energy system is violating their right under the Montana constitution to a stable climate as part of a clean and healthful environment.[63] Aside from alleging that the specific environmental harms associated with climate change violate their constitutional rights, these plaintiffs also argue that the provision in the Montana Environmental Policy Act that prevents environmental review from considering "actual or potential impacts that are regional, national, or global in nature"[64] (the so-called Climate Change Exception) violates Articles II and IX of Montana's Constitution.

This lawsuit not only invokes the constitutional right to clean and healthful environment, but also relies on language in the Montana Constitution explicitly recognizing the rights of future generations. In August 2021, a Montana district court ruled that the youth plaintiffs had standing under the state constitution.[65] The case is currently scheduled for trial beginning in June of 2023.[66] There is no direct climate corollary in New York; indeed the Climate Leadership and Community Protection Act requires that every state agency, including DEC, assess whether their actions to issue permits are consistent with the state's goal of reducing greenhouse gas emissions.[67] However, this case may be instructive for how New York should reconsider categories of decisions that are currently categorically exempted from environmental review, particularly land use decisions.

3. Lessons to Learn

New York can learn from both the Pennsylvania and Montana examples and avoid their mistakes by recognizing that the Green Amendment disrupts the status quo and requires more stringent environmental decision-making under the National Environmental Policy Act (NEPA) and the New York State Environmental Quality Review Act (SEQRA).[68] And, so far, New York courts seem to be doing just that. In the first case brought under New York's Green Amendment, a Monroe County court faced and rejected claims that the constitutional right enshrined in Article I, § 19 was coterminous with existing law.

In *Fresh Air for the Eastside*, defendants claimed "that compliance with a permit issued by the Department of Environmental Conservation constitutes compliance with the constitutional environmental right."[69] In refusing to dismiss the claim, the court noted that "[c]omplying with the constitution is not optional for a state agency."[70] Indeed, the Constitution is the blueprint for governance in the state,[71] and the executive branch of government has a constitutional obligation to ensure that the "laws are faithfully executed."[72] A new constitutional amendment has vastly different consequences for this duty than those that would flow from the more ordinary enactment of new legislation.[73] As such, the court ruled that environmental plaintiffs had properly stated a cause of action against the state of New York under the Green Amendment vis-à-vis the state's failure to adequately regulate a landfill alleged to be creating a nuisance.[74]

While some have raised concerns that the Green Amendment could be used to upend the state's environmental decision-making entirely,[75] the second New York court to entertain a claim under New York's Green Amendment set some of those concerns to rest.[76] Despite an invitation from plaintiffs to use the new constitutional provision to rewrite review of agency decision-making, the *Renew 81 for All v. New York* court used an ordinary "hard look" analysis to assess the adequacy of the Department of Transportation's EIS for a proposed bypass reconstruction near Syracuse.[77] The court denied the constitutional claim without further comment.[78]

Indeed, it seems most likely that the Green Amendment's impact will be felt most in the context of assessing cumulative impacts, ensuring environmental justice, and regulating emerging contaminants. However, the amendment will also have a role in ratcheting up pollution standards overall and will likely give new impetus to nuisance-based claims of environmental harms. DEC will need to reconsider how to implement its existing mandates under New York's Environmental Conservation Law[79] in light of its obligation to comply with the Green Amendment. Where SEQRA balances environmental considerations with economic factors, there is now a constitutional imperative for ensuring a healthful environment. Indeed, the *Fresh Air for the Environment* court particularly noted that all state agencies and local governments "are obliged to respect [the Green Amendment] and to interpret their duties in a way that ensures a person's environmental rights will be respected. . . . The fundamental right serves as a guide to agencies in interpreting their duties."[80]

Practically, this means that as DEC, or any agency, implements its obligation to "consider the significant adverse en-

vironmental impacts of any discretionary actions [and] mitigate such impacts to the maximum extent practicable,"[81] the balance of what kinds of impacts are deemed "adverse" and "significant" may change, as well as what kinds of mitigation are considered "practicable." While this new balance is unlikely to result in "environmental protection at all costs," [82] implementing the Green Amendment will require significant changes to business as usual. One area likely to see immediate change is the range of projects that are currently treated as exempt from environmental review under SEQRA. The Green Amendment now provides an independent mandate for assessing and mitigating environmental impacts, regardless of statutory or regulatory exemption.

There are currently two cases asking courts to assess precisely this question. The first, brought on behalf of residents in New York City's Chinatown and the Lower East Side, challenges the Two Bridges Large Scale Residential Development on the ground that the SEQRA EIS process did not adequately protect residents' constitutional environmental rights.[83] Because the EIS was concluded before enactment of the Green Amendment, this case may be an important test of the amendment's reach. In the second case, community members are suing the State of New York and Norlite LLC alleging that regulators have allowed the company to operate a hazardous waste incinerator in a manner that, *inter alia,* violates their constitutional rights to clean air and a healthful environment.[84] This case may be an important test case for how much additional heft the Green Amendment gives to environmental justice communities complaining of lax state enforcement that puts their health and welfare in jeopardy.

Conclusion

The next few years will see New York defining the contours of its Green Amendment. There will undoubtedly be many other cases brought, and the courts' decisions will flesh out who can bring actions, how their claims will be analyzed, how these rights will be enforced, and what sort of penalties may be used. In the interim, state agencies and local governments have an independent duty to reconsider their existing practices in light of the environmental rights that the amendment guarantees to each person. They should embrace this responsibility, rather than seek to avoid it.

Ensuring each person's constitutional right to clean air, clean water, and a healthful environment will require changes in governmental operations. Learning from early mistakes in Pennsylvania and Montana can help New York get a jump start on successful implementation. Together with the new Cumulative Impacts law, and the CLCPA's focus on disadvantaged communities, the Green Amendment requires proactive consideration of how to build positive environmental change.

Jaclyn Spencer is a 2L at the CUNY School of Law. As a long-time NYC resident and former public school teacher in the city, she is committed to helping ensure that all New Yorkers enjoy clean air and water, and a healthful environment.

Rebecca Bratspies is Professor of Law, CUNY School of Law, and director, Center for Urban Environmental Reform.

Endnotes

1. Rebecca Bratspies, *This Changes Everything: New York's Environmental Amendment*, 33 Envt'l L. in N.Y 95 (Jun. 2022).
2. NY const. art. I, § 19. The Elisabeth Haub School of Law at Pace University has compiled a useful internet repository of resources pertaining to the Green Amendment, including pleadings and other legal documents for cases asserting rights under Art. I, § 19. *See* New York's Environmental Rights Repository, https://nygreen.pace.edu.
3. Assemblymember Steve Engelbright on the Passage of a NYS Green Amendment (Apr. 30, 2019), https://nyassembly.gov/mem/Steve-Englebright/video/13189/#videos.
4. Before being added to the ballot, the proposed amendment first had to twice pass both houses of the state Legislature—something it also did by with overwhelming margins. This amendment clearly and unambiguously reflects the political will of the people of New York. New York Proposal 2: Environmental Rights Amendment (2021) Ballotpedia, https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_(2021).
5. Since New York's historic vote to adopt Section 19, the New Mexico Legislature has taken up a similar environmental constitutional proposal. Scott Wyland, L*awmakers Consider Green Amendment to New Mexico Constitution, Santa Fe New Mexican* (Jan. 16, 2022). Multiple other states are also considering Green Amendments. Maya van Rossum, *How Green Amendments Protect Key Environmental Rights, Law360* (Nov. 23, 2021); *Breaking Down State Green Amendments, NCEL Blog* (Nov. 6, 2020). For more information on green amendments, *see* generally, Maya K. van Rossum, *The Green Amendment: Securing Our Right to a Healthy Environment* (2017). Moreover, surveys show that the American people overwhelmingly support the proposition that everyone has the right to breathe clean air. Rebecca Bratspies, S*truggling to Breathe: Asthma, Pollution, and the Fight of Environmental Justice Data For Progress* (2020).
6. *Access to a Healthy Environment Declared a Human Right by U.N. Rights Council, U.N. News* 0028Oct. 8, 2021) (describing the U.N. Human Rights Council vote on resolution 48/13 which recognized to a clean, healthy, and sustainable environment.).
7. G.A. Res. 76/300 (Jul. 28, 2022). This resolution built on the October 2021 Human Rights Council Human declaration recognizing "the right to a clean, healthy, and sustainable environment as a human right that is essential for the full enjoyment of all human rights." Human Rights Council Res 48/13, U.N. Doc. A/HRC/Res/48/13 (Oct. 8, 2021).
8. The New York Environmental Conservation Law charges the New York State Department of Environmental Conservation with the obligation and duty to "conserve, improve, and protect" the state's

natural resources and environment, and to "prevent, abate, and control" pollution. ECL 1-0101, 3-0101;

9. *See* e.g., Haw. Const. art. XI, § 1; Mass. Const. art. 97; Ill. Const. art. XI, §§ 1, 2.

10. *See* generally, Maya von Rossum, The Green Amendment: The People's Fight For a Clean, Safe, and Healthy Environment (2022); Genevieve Bombard et al., The Precedents and Potential of State Green Amendments, Rockefeller Institute Of Government (July 2021) at 5, https://rockinst.org/wp-content/uploads/2021/07/CLPS-green-amendments-report.pdf.

11. N.Y. Const art. I § 19.

12. The Montana Constitution includes environmental rights as inalienable rights in the Declaration of Rights section.

> Inalienable rights. All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.
>
> Mont. Const. art. II §3(emphasis added).

13. Pa. Const. art. I, § 27. Another section of this article makes it clear that rights enumerated in Article I of the Pennsylvania constitution are "excepted out of the general powers of government and shall forever remain inviolate." Pa. Const. art. I, § 25.

14. At least some commenters suggest that this makes Pennsylvania's experience particularly useful to New York as it builds out the contours of its own Green Amendment. *New York's Green Amendment: How Guidance from Other States Can Shape the Development of New York's Newest Constitutional Right*, Dechert LLP, Nov. 11, 2021, https://www.dechert.com/knowledge/onpoint/2021/11/new-york-s-green-amendment--how-guidance-from-other-states-can-s.html).

15. For example, the EPA was founded in 1970, soon after the first Earth Day. *See e.g.* U.S. EPA, *The Origins of the EPA*, (last updated June 24, 2022), https://www.epa.gov/history/origins-epa.

16. The Pennsylvania provision, adopted in 1971 provides in full:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.
>
> Pa. Const. art. I, § 27

17. The Montana Constitution provides, in relevant part:

> Protection and improvement.
>
> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The Legislature shall provide for the administration and enforcement of this duty.
>
> (3) The Legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.
>
> Mont. Const. Art IX. §1.

18. N.Y. Const. art. 14, § 1.

19. Definition of self-executing, Merriam Webster Dictionary of Law (1996).

20. *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc*., 454 Pa. 193 (1973)

21. *Id.* at 196.

22. *Id.* at 196-97.

23. *Id.* at 205.

24. These justices were O'Brian, Pomeroy and Nix.

25. These justices were Roberts and Mandarino. Their concurrence indicated a belief that even without the Green Amendment, the state had inherent authority to sue to protect the environment.

26. Chief Justice Jones and Justice Eagan dissented. *Id.* at 208.

27. *Id.* at 205.

28. John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions,* 30 Widener Commw. L. Rev. 147 (2021).

29. *See* Pa *Env;t Defense Found. V. Commonwealth*, 161 A.3d 911, 937, n. 28 (explaining this error of law).

30. John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust* 45 Envt'l. L. 463, 474-475 (2015).

31. *Pa. Env't Defense Found. v. Commonwealth*, 161 A.3d 911, 937 (Pa. 2017), (reiterating that "no implementing legislation is needed" to create a cause of action under the Green Amendment because "the amendment does so on its own *ipse dixit.*" *Citing Payne v. Kassab (Payne II),* 361 A.2d 227, 272 (1976)).

32. Waste Management's Memorandum of Law in Support of Its Motion to Dismiss at 3-6, *Fresh Air for the Eastside, Inc. v. State of New York*, Sup. Ct, Monroe County, Ark, J. index no. E2022000699. It is worth noting that Waste Management's non-self-executory argument relied almost exclusively on *Dorsey v. Stuyvesant Town Corp*., 299 N.Y. 512, 531 (1949) in which the Court of Appeals dismissed a challenge to Stuyvesant Town's racially restrictive covenants on the ground that the constitution's civil rights clause was not self-executing. Talk about being on the wrong side of history!

33. Rebecca Bratspies & Katrina Fischer Kuh, *New Yorkers' Environmental Rights Are Under Attack*, Bloomberg Law (Jul. 24, 2021).

34. *Fresh Air for the Eastside, Inc. v. State of New York*, Sup. Ct, Monroe County, Ark, J. index no. E2022000699, slip op. at 11 (Monroe County, Dec. 7, 2022), *citing* Scott Fein and Tyler Otterbein, *Is the Green Amendment Self-Executing*, Albany Law School Government Center Explainer (undated), https://www.albanylaw.edu/government-law-center/new-yorks-new-constitutional-environmental-bill-rights-impact-and.

35. *People v. Carroll*, 3 N.Y.2d 686, 691 (1958). The Fresh Air court did, however, find that the Green Amendment did not authorize suits by private actors against other private actors, and thus dismissed the claims against the private company.

36. *See, e.g., Brown v. State of New York*, 89 N.Y.2d 192 (1996) (explicitly finding the New York Constitution's Arts. I § 11 search and seizure provision, and §12 equal protection provision to be self-executing).

37. Bratspies, *supra* note 1, at 4.

38. *The New York Environmental Rights Amendment to the New York Constitution*, 12 National Law Review (Nov. 8, 2021).

39. *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14 (1973).
40. *Id.* at 29-30.
41. Bombard et al., *supra* note 10, at 10.
42. *Robinson Township v. Commonwealth*, 623 Pa. 564 (2013); Indeed, the court found that the Green Amendment "places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional. *Pa. Environmental Defense Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017) (citing *Robinson Twp.,* 83 A.3d at 951).
43. *Pa. Environmental Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).
44. *Id.* at 930.
45. *Id.* at 931.
46. *The New York Environmental Rights Amendment to the New York Constitution*, Nat'l L. Rev. (Nov. 8, 2021), https://www.natlawreview.com/article/new-environmental-rights-amendment-to-new-york-constitution.
47. Lanessa Owens Chaplain, *New York's Green Amendment: Curbing Environmental Racism*, NYCLU (July 21, 2022), https://www.nyclu.org/en/publications/new-yorks-green-amendment-curbing-environmental-racism.
48. *Montana Wilderness Ass'n v. Bd of Health & Envt'l Sci.*, 171 Mont. 477, 479, 481-82 (Mont. 1976).
49. *Id. a*t 486.
50. *Kadillak v. Anaconda Co.,* 602 P. 2d 147, 150 (Mont. 1979).
51. *Id.* at 151-54.
52. *Id.* at 154.
53. *Mont. Envt'l Infor. Cntr v. Dept. of Envt'lt Quality*, 296 Mont. 207 (Mont. 1999).
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Extreme Heat Meets Environmental Injustice: Policy Solutions To Help Disadvantaged Communities Battle the Urban Heat Island Effect

By Ivonne Norman and Jose Almanzar

Those blistering summer days just seem to feel extra hot in New York City. That suffocating feeling is indeed a harsh reality. In fact, some parts of urban environments may be 15°F to 20°F hotter than other areas during the mid-afternoon in the summertime.[1] This phenomenon is known as the "urban heat island effect" and it disproportionately and negatively impacts disadvantaged communities.[2]

On one hand, the urban heat island effect can be attributed to climate change. Others might attribute the phenomenon to man-made issues, the most egregious being poor urban planning. However, it is the authors' opinion that extreme heat's disproportionate impact on environmental justice communities is, in large part, a byproduct of the racist "redlining" housing lending practices of the 1930s. A 2020 peer-reviewed study concluded that formerly redlined neighborhoods of nearly every city studied were significantly hotter than the non-redlined neighborhoods.[3] Other research has supported this revelation.[4]

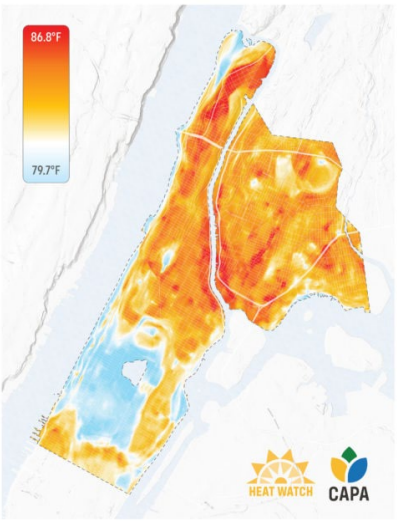
For overburdened communities, the prolonged exposure to extreme heat can have serious consequences. In severe cases, heat islands can be fatal to vulnerable populations such as infants and the elderly. Indeed, extreme heat is responsible for more American deaths each year than any other weather-related hazard.[5] Recognizing the public health and other negative impacts of urban heat islands, policymakers are proposing measures to help mitigate this issue.

This article will provide a brief overview of the urban heat island effect and its severe consequences on environmental justice (EJ) communities. It will also explore how existing federal and New York state policies are helping to address the issue.

The Urban Heat Island Phenomenon

Built environments experience higher temperatures than their surrounding rural counterparts. As a result of the "albedo effect," the use of concrete and asphalt, as well as the prevalence of paved roadways, serve to absorb and retain—rather than reflect—the sun's heat.[6] While heat islands are heavily influenced by albedo, other factors such as lack of greenery and trees and building height contribute to higher surface temperatures.[7]

This effect is magnified in urban environments, which characteristically contain numerous tall buildings and experience higher population density. Furthermore, green space and concrete also are not distributed evenly across cities, which results in the creation of "micro heat islands" within a city. These are the low-income and diverse neighborhoods lacking vegetation or tree canopy that are suffering the most from extreme heat.



Source: CAPA Strategies

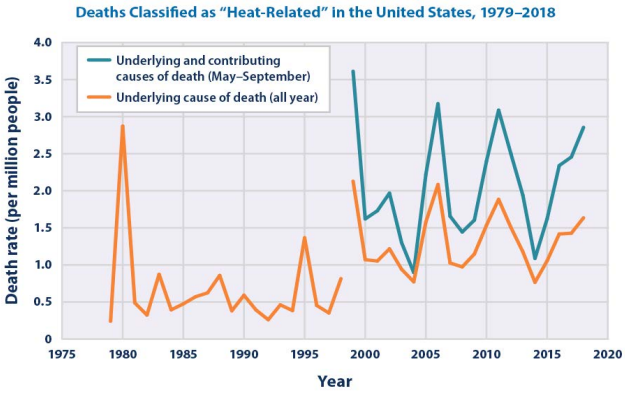
A study conducted by Columbia University's Climate School in the summer of 2021 revealed that Inwood, Washington Heights and the South Bronx (neighborhoods populated predominantly by low-income or diverse populations) had higher temperatures than other surrounding (wealthier) neighborhoods. For example, a data collection from 3 to 4 p.m. near Central Park West measured between 80 and 82 °F while parts of the South Bronx and Northern Manhattan were between 88 and 89 °F. In the evening hours, temperatures were about four degrees higher in those hotter neighborhoods.[8]

Public Health Concerns and Other Ramifications

Residents trapped in heat islands have suffered cumulative impacts for decades and the ripple effects are endless. Chronic

health problems and exacerbation of mental illness are most common. Preventable heat-related illnesses also include heat strokes, respiratory issues, dehydration, and death.[9] Other issues include a higher demand for electricity, which leads to excessive electricity consumption resulting in rolling blackouts and power outages. Power outages may also cause food poisoning from spoilage, carbon monoxide poisoning from generators, and death due to failure of medical equipment.[10]

When the outdoor temperatures are unbearable, urban residents impacted by extreme heat communities seek refuge indoors. Unfortunately, disadvantaged communities generally have less access to temperature-regulated spaces. Residents with air conditioning units may be unable to afford the added utility costs and often choose to brave the heat thereby worsening pre-existing asthma or epileptic seizures. Others may choose to leave their doors and windows open in futile efforts to alleviate the heat making them susceptible to crime.[11]



Between 1998 and 1999, the World Health Organization revised the international codes used to classify causes of death. As a result, data from earlier than 1999 cannot easily be compared with data from 1999 and later.

Data sources:
- CDC (U.S. Centers for Disease Control and Prevention). 2020. CDC WONDER database: Compressed mortality file and detailed mortality file, underlying cause of death. Accessed June 2020. https://wonder.cdc.gov.
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For more information, visit U.S. EPA's "Climate Change Indicators in the United States" at www.epa.gov/climate-indicators.

The Centers for Disease Control and Prevention (CDC) found that extreme heat causes over 700 deaths per year in the United States. In most cases, comorbidities such as diabetes and heart disease are aggravated when exposed to intense heat and as a result, the direct cause of death is misdiagnosed and seldom recognized as heat-related.[12]

Policies To Mitigate the Urban Heat Island Effect

Recent legal developments and governmental initiatives should provide many opportunities for environmental justice communities to mitigate the harms caused by extreme heat.

Federal Initiatives

On Aug. 7, 2022, the Inflation Reduction Act (IRA) was passed with approximately $370 billion in available funds. Some of this funding will make its way to EJ communities via President Biden's Justice40 Initiative, which directs that 40% of climate funding be allocated to disadvantaged communities.[13] The EPA is already actively seeking ways to distribute these funds to overburdened communities. One initiative is the EPA's Environmental Justice Collaborative Problem-Solving Program (EJCPS) with an estimated $30 million in grants for community-based nonprofits working to address local environmental and public health issues. Funds from this program will hopefully include efforts focused on addressing extreme heat.[14]

The EPA also recently announced the availability of $550 million from IRA funding to expedite investments through the EPA's new Environmental Justice Thriving Communities Grantmaking (EJ TCGM) program. This program will award up to $50 million to 11 entities to serve as grantmakers "for projects and capacity building efforts addressing local environmental and public health issues." While at first blush the EJ TCGM program appears focused on reducing pollution, we envision that many qualifying projects could focus on extreme heat, which is undoubtedly a "local environmental and public health issue." The deadline for nonprofits—or partnerships between nonprofits, Tribal Nations, and academic institutions—to apply for these grants was May 31, 2023.[15]

Other programs include $2.3 billion in FEMA funding for its Building Resilient Infrastructure and Communities (BRIC) program to help disadvantaged communities increase resilience to environmental hazards including extreme heat. FEMA is also providing $385 million through the Low-Income Home Energy Assistance Program (LIHEAP) to facilitate efficient air conditioning equipment, community cooling centers, and assistance with household energy costs. The Extreme Heat Interagency Working Group under the National Climate Task Force is advancing other efforts, including National Oceanic and Atmospheric Administration's (NOAA) community-led urban heat island mapping campaign. The Occupational Safety and Health Administration (OSHA) is also setting federal standards to protect workers from heat-related illness caused by occupational heat exposure.[16] On Feb. 9, 2023, a coalition of seven Attorneys General, including New York state, urged OSHA to promulgate emergency temporary standards by May 1, 2023.[17]

New York State Laws

Green Amendment

The state's new Environmental Rights Amendment (a/k/a the Green Amendment) appears to be the most prominent law that could be used to hold the government accountable for extreme heat issues. Ratified by majority vote on Nov. 2, 2021, the constitutional amendment took effect on Jan. 1, 2022. The Green Amendment guarantees New Yorkers "a right to clean air and water, and a healthful environment."[18]

Theoretically, residents from EJ communities could bring legal challenges to government decisions that exacerbate extreme heat conditions. In practice, however, the implications and enforcement of the state's Green Amendment are being tested in the courts.

FAFE v. State (Index No. E2022000699, Monroe County) is the first post-Green Amendment action alleging constitutional violations by the state for failing to abate a years-long nuisance of putrid odors and gas emissions from a large landfill. In denying the state's motions to dismiss, the Supreme Court held, among other findings, that the state has a nondiscretionary duty to comply with the Green Amendment. This decision could set a precedent for future litigation that may require state and local agencies to remedy the harms caused by extreme heat.[19]

Cumulative Impacts Legislation

New York's Cumulative Impacts Law (S.8830/A.2103D), signed by Gov. Kathy Hochul on Dec. 30, 2022, stands out as one of the most robust environmental justice policies in the country. It has been lauded by EJ advocates as a "landmark" piece of legislation, rivaling New Jersey's progressive EJ law.

The Cumulative Impacts Law protects disadvantaged communities by seeking to prevent a disproportionate pollution burden when the state is issuing or renewing permits for regulated facilities. By requiring that regulated entities consider cumulative air impacts prior to permitting, this law is likely to become an important tool to prevent exacerbating the effects of urban heat islands to overburdened communities.[20]

Environmental Bond Act

Another remarkable law that should help address impacts of extreme heat to EJ communities is the Clean Water, Clean Air and Green Jobs Environmental Bond Act or Environmental Bond Act, which passed by an overwhelming margin on Nov. 9, 2022. The act reserves $4.2 billion to support environmental improvements that preserve, enhance, and restore natural resources. Initiatives to increase local greenspace with parks, urban trees and green roofs, as well as creating cooling corridors or air-conditioned centers, are examples of improvements that may allow disadvantaged communities to benefit from these funds.[21] The act also mandates that at least 35% of bond funds be directed toward disadvantaged communities.

Pending New York Legislative and Administrative Acts

Gov. Hochul signed legislation in September 2022 requiring a comprehensive study of extreme heat in New York's urban neighborhoods. The legislation (S.8431-A/A.10001-B) requires the Department of Environmental Conservation (DEC), in consultation with the Environmental Justice Interagency Coordinating Council and the Climate Justice Working Group, to publish a report on the disproportionate impact of extreme heat in urban EJ communities. These government findings should inform further policy-making and provide support for vulnerable communities to advocate for greenspace equity and conscious urban landscaping.[22] The law requires DEC to prepare the extreme heat report by the spring of 2024.

The Environmental Conservation Committee, under the leadership of former Senator Todd Kaminsky, sponsored Senate bill S. 1164A to "regulat[e] employers to keep their employees safe from exposure to extreme heat." This bill would require delivery companies to develop a heat-related illness prevention plan, provide annual training to heat-exposed employees, maintain records related to high heat exposure and would prohibit the companies from retaliating against employees for reporting heat-related concerns.[23] The bill and its Assembly counterpart (A. 5361) remain in committee.

Conclusion

Extreme heat is impacting the lives of many New Yorkers, but especially those living in urban EJ communities. Research has confirmed that previously "redlined" neighborhoods are bearing a disproportionate brunt of the urban heat island phenomenon. In New York City, extreme heat causes the death of Black/African American people twice as often as other racial and ethnic groups. The time has come for this epidemic to be met with progressive government action. We need to intentionally work on alleviating the impacts of this public health issue on already overburdened communities.

Policies fostering equitable access to greenspace, addition of tree canopy in urban spaces, the availability of cooling areas, occupational hazard protections, and energy costs assistance to low-income persons, among others, are good steps to lessening the devastating effects of extreme heat. These collective actions will save lives. However, the legal community and more policymakers should be aware of this issue that is devastating our most vulnerable populations. More can and should be done.

Ivonne Norman is a civil litigator, environmental justice advocate and non-profit board leader. She is a member of the Environmental Justice Committee at NYSBA, the Environmental Law Committee at NYCBA and WE ACT For Environmental Justice. Ivonne is a native Spanish speaker and a graduate from New York Law School.

Jose Almanzar is an environmental attorney in New York and a former environmental scientist. His practice includes representing businesses, municipalities and non-profits in a number of matters. Jose is Co-Chair of the Environmental Justice Committee for the New York State Bar Association's Environmental & Energy Law Section. He writes and speaks about Environmental Justice issues and represents pro bono clients.

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PFAS and Superfund

By Walter Mugdan

In recent years, a number of chemicals that have been largely unregulated have generated considerable concern, including at existing or prospective Superfund sites. Of intense and growing concern is a group of compounds known as per- and polyfluoroalkyl substances (PFAS). Perhaps most common among these is perfluoroctanoic acid (PFOA), which was used to make non-stick materials like Teflon, and was also used widely in firefighting foam;[1] and perfluorooctane-sulfonic acid (PFOS), used in stain-resistant fabrics and food packaging, among other uses.

On Aug. 26, 2022, the Environmental Protection Agency (EPA) issued a proposed rule designating PFOA and PFOS as CERCLA "hazardous substances."

Basis of the Proposal

> [The proposed designation] is based on significant evidence that PFOA and PFOS may present a substantial danger to human health or welfare or the environment. PFOA and PFOS can accumulate and persist in the human body for long periods of time and evidence from laboratory animal and human epidemiology studies indicates that exposure to PFOA and/or PFOS may lead to cancer, reproductive, developmental, cardiovascular, liver, and immunological effects.[2]

Some PFAS compounds have adverse health effects at extremely low concentrations. On June 15, 2022, EPA issued an Interim Updated Drinking Water Health Advisory for several PFAS compounds including PFOA and PFOS. (Such an advisory is non-regulatory, but it represents EPA's assessment of the level at which vulnerable people are protected from adverse health effects resulting from exposure throughout their lives to these individual PFAS in drinking water.) For PFOA, the interim drinking water advisory level is four parts per quadrillion.[3] This is remarkable for many reasons, not least of which is that it is about 500 times lower than the usual laboratory detection level of two parts per trillion.[4] In other words, as a practical matter, it is virtually impossible to measure. The drinking water advisory level for PFOS is 20 parts per quadrillion, also functionally unmeasurable.

Why Is It Important for PFAS To Be CERCLA "Hazardous Substances"?

PFAS are not currently regulated under federal environmental laws.[5] In particular, there are as yet no federal "maximum contaminant levels" for drinking water; they are not

"hazardous wastes" under RCRA, and they are not yet "hazardous substances" under CERCLA. However, if disposed of they are "solid wastes" under RCRA, and if released into the environment they are "pollutants or contaminants" under CERCLA. But they do not trigger corrective action obligations under RCRA, and the government's enforcement authorities under CERCLA are significantly circumscribed, though some action can be taken under each statute.

Under § 104(a) of CERCLA,[6] EPA can take a Superfund response action whenever (a) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (b) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health. Thus, there is a significantly higher burden for EPA to take a response action with respect to a "pollutant or contaminant" than for a "hazardous substance." Moreover, under §§ 106 and 107 of CERCLA,[7] EPA can take enforcement actions for cost recovery and/or injunctive relief (i.e., cleanup work) only for a release or threatened release of a hazardous substance.

PFOA and other PFAS are being found in groundwater across the United States, including at some current Superfund sites. If the proposed rule is finalized, it is possible—indeed, likely—that sites where PFAS contamination is found will be added to the NPL so that the full range of CERCLA authorities can be brought to bear.

Cleanup of PFAS Contamination

Fortunately, PFOA and some other PFAS can be removed from water relatively easily, with common treatment technologies such as air stripping or activated carbon. Unfortunately, some PFAS (including compounds intended as a replacement for PFOA and given the trade name "GenX" by manufacturer DuPont) are somewhat less easily removed from water.[8]

In 2017, at the request of the New York state Department of Environmental Conservation, EPA added to the Superfund National Priorities List (NPL) the St. Gobain Performance Plastics McCaffrey St. facility in the village of Hoosick Falls, New York because of PFOA discharges that contaminated the municipality's public drinking water supplies.[9] This was only the second time EPA proposed to add a site to the NPL based on discharges of a "pollutant or contaminant" (rather than a hazardous substance), and the first time involving PFOA or any PFAS. Air deposition of PFAS in the Hoosick Falls community is also a concern, and similar concerns arise near other sources of air emissions. For example, New Jersey is investigating the impact of air deposition from the Chemours/DuPont and Solvay facilities in the southern part of the state;[10] several hundred homes were found to have private well water contaminated with PFAS above state standards (see below), and have been provided with Point of Extraction Treatment Systems (POETs) or connected to municipal drinking water supplies.

PFAS Litigation

DuPont, the maker of Teflon, faced some 3,500 toxic tort suits in Ohio, alleging injuries from PFOA-contaminated drinking water.[11] In December 2016, a jury in the first of these to go to trial awarded $2 million to the plaintiff in compensatory damages, and in January 2017 it awarded a further $10.5 million in punitive damages.[12] A few weeks later, in February 2017, DuPont and Chemours (its former subsidiary, which it spun off in 2015[13]) settled these cases for a cash payment of $671 million.[14]

And anyone who has watched television during the past several months will have seen frequent advertisements by lawyers encouraging service members who were stationed at Marine Base Camp Lejeune to join toxic tort suits over alleged exposure to PFAS while serving there.[15]

State Regulation of PFAS

The legislatures in at least 31 states are currently considering bills concerning chemicals, many of them addressing PFAS.[16] A significant number of states have already established their own standards or guidelines for PFAS. At least eight states[17] have proposed or issued Maximum Contaminant Levels (MCLs) for two or more PFAS compounds, most commonly PFOA and PFOS. New Jersey was the first state to adopt a drinking water Maximum Contaminant Level (MCL) for any PFAS; it has adopted MCLs of 14 parts per trillion (ppt) for PFOA and 13 ppt for PFNA, and added PFNA to its List of Hazardous Substances under the New Jersey Spill Act (the New Jersey analog to CERCLA).[18] New Jersey has also set Interim Specific Groundwater Quality Criteria for PFOA and PFOS.[19]

New York has set MCLs of 10 ppt for PFOA and PFOS,[20] and has also promulgated Soil Cleanup Objectives for these compounds.[21] New York also established PFOA, PFOS, and their salts as "hazardous substances" under its cleanup law.[22] The State of Washington concluded that PFAS, as a class, fall under its Toxics Control Act "and will need to be cleaned up."[23]

Vermont has established an MCL of 20 ppt for PFOA;[24] New Hampshire set MCLs for four PFAS including PFOA (12 ppt) and PFOS (15 ppt);[25] and Pennsylvania recently finalized MCLs for PFOA (14 ppt) and PFOS (18 ppt).[26] North Carolina set a "health goal" of 140 ppt for GenX,[27] Dupont's Teflon replacement compound (actually, a group of compounds). Some states have issued PFAS health advisories for drinking water, rather than regulatory standards, and some states have issued groundwater, soil and air standards.[28]

And in 2019 New York enacted legislation phasing out the use of PFAS-containing firefighting foam.[29] Several states require monitoring for PFAS in public drinking water systems, including California, New Jersey and New York.[30]

As can be seen from the above, no state has set a regulatory standard below the low parts-per-trillion level. Thus, these state standards are orders of magnitude higher (less restrictive) than the EPA interim health advisory for PFOA and PFOS. At this writing, EPA itself is preparing to propose a federal MCL for at least those two compounds;[31] it is unlikely the standard will be below the usual detection limit of 2 to 4 ppt.

And by the Way

On Dec. 5, 2022, EPA proposed a rule to improve Toxic Release Inventory (TRI) reporting on PFAS.[32] The rule would eliminate an existing exemption that allows facilities to avoid reporting when PFAS are used in *de minimis* concentrations. Because PFAS are used at low concentrations in many products, removing the *de minimis* exemption ensures that covered facilities that make or use listed PFAS will no longer be able to avoid disclosing releases and waste management quantities for these chemicals.

In 2020, Congress added certain PFAS to the list of chemicals for which TRI reporting is required, and provided a framework to automatically add other PFAS in future years. Currently, some 180 PFAS compounds are on the list. Congress established TRI reporting thresholds of 100 pounds for each of the listed PFAS. The previous administration codified the provisions in a manner that allows facilities to disregard certain *de minimis* concentrations of chemicals in mixtures or trade name products (below 1% concentration for each of the TRI-listed PFAS, except for PFOA for which the concentration is set at 0.1%). The 2022 proposed rule would eliminate the availability of that exemption and require facilities to report on PFAS regardless of their concentration in products. This reporting might reveal manufacturing sites where PFAS are being used that might be sources of contamination.

Walter Mugdan is the deputy regional administrator of the U.S. Environmental Protection Agency's Region 2. Any opinions expressed herein are those of the author, and do not necessarily reflect the position of the U.S. Environmental Protection Agency.

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4. The Minimum Reporting Level (MRL) for these PFAS, as established in EPA's fifth Unregulated Contaminant Monitoring Rule applicable to certain drinking water systems, is 4 parts per trillion. "The MRL is the minimum quantitation level that, with 95 percent confidence, can be achieved by capable analysts at 75 percent or more of the laboratories using a specified analytical method (recognizing that individual laboratories may be able to measure at lower levels)." *See id.* at https://www.epa.gov/sdwa/questions-and-answers-drinking-water-health-advisories-pfoa-pfos-genx-chemicals-and-pfbs.
5. A number of federal regulatory actions are underway, in addition to the proposed designation of certain compounds as CERCLA hazardous substances. *See* Key EPA Actions to Address PFAS, EPA, https://www.epa.gov/pfas/epa-actions-address-pfas#:~:text=In%20May%202022%2C%20EPA%20took,or%20remediation%20activities%20are%20needed (last visited Mar 26, 2023).
6. 42 U.S.C. 9604(a).
7. 42 U.S.C. 9606 and 9607.
8. Information about GenX can be found in Wikipedia at: Genx, Wikipedia (2023), https://en.wikipedia.org/wiki/GenX (last visited Mar 26, 2023). During 2017 the discovery of GenX in the Cape Fear River and associated drinking water supplies in North Carolina brought. . .well, considerable fear to local communities. *See, e.g.:* Genx – Cape Fear River Watch, Cape Fear River Watch – Keeping an Eye on the River. (2023), https://capefearriverwatch.org/genx/ (last visited Mar 26, 2023). The state established a "health goal" of 140 ppt for drinking water; *see:* Genx frequently asked questions – NC, https://files.nc.gov/ncdeq/GenX/FAQ_updated_100417-5.pdf (last visited Mar 26, 2023). EPA has not established any advisory or regulatory limits.

9. *See*: GPO strategic plan FY2023-2027, U.S. Government Publishing Office, https://www.gpo.gov/ (last visited Mar 26, 2023). By agreement between the two agencies, NYSDEC has the lead responsibility for managing the St. Gobain McCaffrey Street Superfund NPL site.

10. *See, e.g.,* Frank Kummer & Dylan Purcell, *Previously unidentified chemicals discovered across S. Jersey, linked to plant that used pfas*, https://www.inquirer.com (2020), https://www.inquirer.com/science/climate/new-jersey-pfas-chemicals-solvay-plant-dep-20200604.html (last visited Mar 26, 2023).

11. The 2019 film *Dark Waters* is based on the lawyer who first brought these suits, and the clients he represented. Dark waters (2019 film), Wikipedia (2023), https://en.wikipedia.org/wiki/Dark_Waters_(2019_film) (last visited Mar 26, 2023)).

12. *See:* Brandon Lowrey, Dupont owes $2m in teflon testicular cancer trial, jury says, Law360 (2016), https://www.law360.com/articles/875696/dupont-owes-2m-in-teflon-testicular-cancer-trial-jury-says?article_related_content=1 (last visited Mar 26, 2023) *and* Cara Salvatore, Dupont hit with $10.5m punitive verdict in cancer trial Law360 (2017), https://www.law360.com/environmental/articles/877780 (last visited Mar 26, 2023).

13. *See* further discussion of Dupont's spin-off of Chemours below, Section V.

14. *See:* Arathy S Nair, Dupont settles lawsuits over leak of chemical used to make teflon, Reuters (2017), https://www.reuters.com/article/us-du-pont-lawsuit-west-virginia/dupont-settles-lawsuits-over-leak-of-chemical-used-to-make-teflon-idUSKBN15S18U (last visited Mar 26, 2023).

15. An internet search for "Camp Lejeune + PFAS" will bring up many websites providing similar encouragement.

16. E. A. Crunden, E&E News: States target 'forever chemicals,' plastics subscriber.politicopro.com, https://subscriber.politicopro.com/article/eenews/2023/02/06/states-target-forever-chemicals-plastics-00081322 (last visited Mar 26, 2023).

17. MA, MI, NH, NJ, NY, RI, VT and WA.

18. *See*: Official site of the State of New Jersey, NJDEP | News Release 20/P025 | Affirming National Leadership Role, New Jersey Publishes Formal Stringent Drinking Water Standards for PFOA and PFOS (2020), https://www.nj.gov/dep/newsrel/2020/20_0025.htm (last visited Mar 26, 2023).

19. Ground Water Quality Standards (GWQS), NJDEP-Division of Water Monitoring and Standards, https://nj.gov/dep/wms/bears/gwqs.htm (last visited Mar 26, 2023). These Interim criteria became effective 3/13/2019.

20. https://www.health.ny.gov/environmental/water/drinking/docs/water_supplier_ fact_sheet_new_mcls.pdf.

21. New York State Brownfield Cleanup Program Development of Soil Cleanup Objectives – Technical Support Document 2020 Addendum (ny.gov).

22. Adoption of final rule: 6 N.Y.C.R.R. Part 597, Adoption of Final Rule: 6 N.Y.C.R.R. Part 597 – NYS Dept. of Environmental Conservation, https://www.dec.ny.gov/regulations/104968.html (last visited Mar 26, 2023).

23. PFAS at cleanup sites, Cleanup sites – Washington State Department of Ecology, https://ecology.wa.gov/Waste-Toxics/Reducing-toxic-chemicals/Addressing-priority-toxic-chemicals/PFAS/Cleanup-sites (last visited Mar 26, 2023).

24. *See:* Peak Johnson, Vermont sets new drinking water standard for PFOA Vermont Sets New Drinking Water Standard for PFOA (2016), http://www.wateronline.com/doc/vermont-sets-new-drinking-water-standard-for-pfoa-0001 (last visited Mar 26, 2023).

25. https://www.des.nh.gov/media/pr/2019/20190628-pfas-standards.htm, The NH standards were finalized in June, 2019, but they were stayed by court action in November, 2019, *see:* PFAS – per- and polyfluoroalkyl substances, PFAS Per and Polyfluoroalkyl Substances, https://pfas-1.itrcweb.org/fact-sheets/ (last visited Mar 26, 2023).

26. DEP Involvement, Department of Environmental Protection, https://www.dep.pa.gov/Citizens/My-Water/drinking_water/PFAS/Pages/DEP-Involvement.aspx (last visited Mar 26, 2023).

27. NC established a "health goal" of 140 ppt for drinking water; *see* https://files.nc.gov/ncdeq/GenX/FAQ_updated_100417-5.pdf. Although this value seemed conservative at the time, the new EPA research cited above suggests the number should be much lower – in the single digit parts per trillion.

28. As of early 2022, at least nine states (AK, CA, CO, CT, DE, ME, MN, NM, OH) that have not issued MCLs have issued drinking water health advisories for two or more PFAS compounds, including PFOA and PFOS; of these, seven (not CA and MN) use EPA's previous 70 ppt health advisory for combined PFOA and PFOS. At least twelve states (AK, CO, FL, MA, MI, MN, NC, NH, NJ, TX, VT, WI) issued groundwater advisory levels for two or more PFAS compounds, most commonly PFOA and PFOS; these criteria vary significantly, e.g., PFOA levels ranging from 12 ppt to 2000 ppt. At least nine states (AK, FL, IN, MA, MI, MN, TX, VT, WI) have also issued soil advisory levels; like the groundwater levels, these vary significantly from state to state. At least three states (MI, NH, TX) have issued air advisory levels. The author thanks his colleagues Kevin Kubik and John Bourbon for assistance in compiling this information.

29. Lana Bellamy, NY, U.S. phasing out pfas in firefighting foam, Poughkeepsie Journal (2019), https://www.poughkeepsiejournal.com/story/news/local/2019/12/27/ny-phasing-out-pfas-firefighting-foam/2760409001/ (last visited Mar 26, 2023).

30. *See*, e.g., News Release 20/P025; Report Per- and Polyfluoroalkyl Substances (PFAS): State legislation and Federal Action, National Conference of State Legislatures, https://www.ncsl.org/research/environment-and-natural-resources/per-and-polyfluoroalkyl-substances-pfas-state-laws.aspx#:~:text=In%202019%2C%20state%20legislatures%20considered,firefighting% 20foam%20and%20other%20products (last visited Mar 26, 2023) and https://www.health.ny.gov/environmental/water/ drinking/docs/water_supplier_fact_sheet_new_mcls.pdf.

31. On February 2, 2020, EPA published its proposed "regulatory determination" for PFOS and PFOA in drinking water. A positive regulatory determination is a required step in the process that would lead to establishment of MCLs under the Safe Drinking Water Act. EPA, https://www.epa.gov/ccl/regulatory-determination-4 (last visited Mar 26, 2023). The positive determination was finalized on February 22, 2021.

32. EPA Proposes Rule to Enhance Reporting of PFAS Data to the Toxics Release Inventory, EPA, https://www.epa.gov/newsreleases/epa-proposes-rule-enhance-reporting-pfas-data-toxics-release-inventory (last visited Mar 26, 2023).

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I am starting this Blog with a summary of the recent meeting of more than 90 heads of state and 35,000 delegates from 190 countries in Sharm El Sheik, Egypt, at the 27th Convention of the Parties (COP27) to address climate change. For the first time, the parties were able to agree on language establishing "the right to a clean, healthy and sustainable environment" which had been dropped from an earlier version and which references a U.N. resolution approved in July. The agreement also establishes a fund for "loss and damage" to assist poor countries in recovering from extreme weather events caused largely by the greenhouse gas emissions from wealthy nations. But, for the 27th time, the countries failed to agree on concrete measures that will limit global warming to 1.5C, the limit agreed to in the 2015 Paris climate agreement. Given what the countries have committed to, the planet likely will continue heating beyond the 1.1C it has already warmed above pre-industrial levels, to a projected 2.1C to 2.9C which likely will have catastrophic impacts affecting billions of people this century.

The loss and damage fund had long been blocked by the U.S. and other wealthy countries for fear that they could face unlimited liability for the GHG emissions that are driving climate change. The agreement makes clear that payments are not an admission of liability and calls for a committee with representatives from 24 countries to work over the next year to determine what form the fund should take, which countries and financial institutions should contribute, and where the money should go.

"The announcement offers hope to vulnerable communities all over the world who are fighting for their survival from climate stress," said Sherry Rehman, the climate minister of Pakistan, which suffered catastrophic flooding this summer that left one-third of the country underwater and caused $30 billion in damages. Scientists determined that global warming had intensified the deluges.

"The loss and damage deal agreed is a positive step, but it risks becoming a 'fund for the end of the world' if countries don't move faster to slash emissions," said Manuel Pulgar-Vidal, who presided over the U.N. summit in 2014 and is now the climate lead for the World Wide Fund for Nature. "We cannot afford to have another climate summit like this one."

The European Union supports the L&D fund which might include a wide variety of options such as new insurance programs in addition to direct payments. The U.S., which emitted far more GHG than any nation in history, was the last big holdout.

But there is no guarantee that wealthy countries will pay. A decade ago, the U.S., the EU and other wealthy emitters pledged $100 billion per year by 2020 to help poorer countries shift to clean energy and pay for adaptation measures. The realization of this pledge is falling short by tens of billions of dollars annually. Last year, the Biden administration requested $2.5 billion in climate finance but secured just $1 billion, and that was with Democrats controlling both chambers. With Republicans in the majority in the House in January, the chances of Congress approving more funds for L&D are remote.

Senator John Barrasso (R-WY) said, "sending U.S. taxpayer dollars to a U.N. sponsored green slush fund is completely misguided." "The Biden administration should focus on lowering spending at home, not shipping money to the U.N. for new climate deals. Innovation, not reparations, is key to fighting climate change."

The L&D fund would be in addition to a 2015 agreement forged by the U.N. in which wealthy nations agreed to provide $100 billion a year from public and private sources to developing countries to help them mitigate climate change and shift away from fossil fuels.

Many of the European countries agreeing to the fund have colonial ties to developing nations seeking funds, a relationship that bolsters the argument for reparations. "The practice of colonialism transferred the rich resources of Asia and Africa to Europe to industrialize their countries, which is also the root cause of climate change—the consequences of which we, the poor countries, are forced to suffer," President Ranil Wickremesinghe of Sri Lanka said. "Adding insult to injury, damages caused by extreme weather conditions are increasing and their impact is exceedingly costly."

Paul Bledsoe, a climate adviser under President Bill Clinton and now a lecturer at American University, said the idea of paying climate reparations to distant nations would be "an absolute political domestic disaster." He said it would "cripple" Biden's 2024 re-election chances. "America is culturally incapable of meaningful reparations," Mr. Bledsoe

said. "Having not made them to Native Americans or African Americans, there is little to no chance they will be seriously considered regarding climate impacts to foreign nations. It's a complete non-starter in our domestic politics."

Developing nations have been calling for industrialized countries to provide compensation for the costs of devastating storms and droughts caused by climate change for 30 years. Such efforts have been resisted, until last year. At the UN climate summit in Glasgow, a tiny trickle began. Scotland, the host country, committed $2.2 million for L&D. Ireland pledged $10 million; Austria pledged 50 million euros (around $50 million); Belgium promised $2.5 million in L&D to Mozambique; Denmark pledged at least $13 million; Germany pledged $170 million to a new program offering vulnerable nations a form of insurance for climate emergencies.

"I support governments paying money for loss and damage and adaptation, but let's be very clear that that's a matter of billions or tens of billions," former VP Al Gore said.

President Nicolás Maduro of Venezuela gave an impassioned speech denouncing capitalism and the extraction of natural resources as the causes of climate change, but omitted mention of his own country's history as an oil producer.

Prime Minister Shehbaz Sharif of Pakistan, detailed the continuing recovery following extraordinary floods this summer that killed an estimated 1,700 people. "This all happened despite our very low carbon footprint," he said. "Loss and damage needs to be part of the core agenda of COP27."

The U.S. and the EU secured language in the deal that could sweep in additional donors including major emerging economies like China and Saudi Arabia. The U.N. currently classifies China as a developing country which exempts it from having to provide climate aid, even though it is currently the world's biggest emitter of GHG as well as the second-largest economy. The new deal may lead to future conflict since China fiercely resists being treated as a developed nation in global climate talks.

According to a U.N. report, titled "Too Little, Too Slow," developing nations need approximately $200 billion a year, on average, during this decade. The cost of climate adaptation in developing nations will reach $160 billion to $340 billion by 2030 and rise to $315 billion to $565 billion by 2050. For wealthy countries, failing to spend more money on climate adaptation around the world will only make the problem worse.

Rising global temperatures intensified recent deadly floods in Pakistan and Nigeria and produced record heat across Europe and Asia. In the Horn of Africa, a third year of severe drought threatens millions of people with famine. With global CO2 emissions reaching a record high this year, some negotiators fear that regardless of what is agreed to on paper, the 1.5C goal could soon be out of reach.

Leaders of low-lying island nations say vast swaths of their territories could wash away if global average temperatures were to surpass 1.5 degrees. "This is indeed a matter of survival for all vulnerable countries," Kwaku Afriyie, Ghana's environment minister, said.

Russia's invasion of Ukraine in February disrupted global energy markets and complicated efforts to reduce the use of fossil fuels. As natural gas prices soared, countries in Europe and elsewhere switched to burning coal and invested in new natural gas pipelines and terminals that could operate for decades. Despite western sanctions, Russian fuel exports have continued to alternate trading partners.

The International Energy Agency predicted that the energy crisis incited by Russia's invasion of Ukraine will spur more nations to invest in lower-emissions technologies this decade to improve energy security. Global investment in clean energy may rise from $1.3 trillion this year to more than $2 trillion annually by 2030, which is half of what is needed to hold warming to 1.5C.

In the U.S., Republicans continue work to expand oil and gas production and exploration. Fossil fuel companies even made gas deals with nations at COP27. Thus, limiting global warming to 1.5C degrees may now be impossible, Al Gore, said in a speech on the opening day of the summit. "The world's leading scientists and energy experts have told us that any new fossil fuel development is incompatible with 1.5 degrees as the limit to the temperature increase," he said.

Every fraction of a degree of additional warming could mean tens of millions more people worldwide exposed to life-threatening heat waves, water shortages and coastal flooding, scientists have found. A 1.5-degree warmer world might still have coral reefs and Arctic sea ice, while a world 2-degrees warmer probably won't.

Limiting warming to 1.5C requires immediate, costly, drastic steps that are politically difficult and disruptive, and requires leaders of nearly all countries to act in concert. All countries need to reduce their collective fossil fuel emissions roughly in half by 2030, and then stop CO_2 emissions by 2050, scientists have calculated. This necessitates a complete overhaul of all electricity and transportation systems at an unprecedented pace. And with every year of inaction, the task gets harder.

"There is this skepticism about the U.S.' ability to fulfill its promise," Li Shuo, a policy adviser for Greenpeace based in Beijing, said. "The U.S. could just walk away, citing congressional resistance, and on the other side, the Chinese will

be held more accountable." The U.S. withdrew from the Paris agreement under Trump.

India, the world's third-largest emitter, has been wary of the 1.5-degree target. To meet that goal, Indian officials have said, richer countries have to cut their emissions much more rapidly than they are doing and provide more financial aid to poor nations, potentially on the order of trillions of dollars, to help them shift to clean energy. But wealthy governments are not doing any of this.

Prime Minister Mia Mottley of Barbados is working to reform the World Bank and the International Monetary Fund to unlock more money to help developing economies switch from fossil fuels. She said that it wasn't enough to chant "1.5 to Stay Alive" in hopes that it would bring about change.

Biden's Inflation Reduction Act, America's first major climate legislation, which could direct $370 billion into low-carbon technologies like wind turbines, solar panels, nuclear power plants, hydrogen fuels, electric vehicles and electric heat pumps, is projected to help the U.S. reduce its emissions by 40% below 2005 levels by 2030. At the climate summit, Biden said, "If we're going to win this fight, every major emitter nation needs align with the 1.5 degrees." "We can no longer plead ignorance to the consequences of our actions or continue to repeat our mistakes."

Biden was the only leader of a major polluting country to attend COP27. President Xi Jinping of China, President Vladimir Putin of Russia and Prime Minister Narendra Modi of India were no-shows.

Two of the Republican delegates—Representative John Curtis (UT) and Representative Gregory Murphy (NC)—recognized the urgency of climate change but oppose efforts by Democrats to abandon fossil fuels, imperiling American growth and disadvantaging the U.S. vis-a-vis China. "Fossil fuels built the world. And we'll bankrupt the world and starve the world if we make a transition that is too fast," Mr. Murphy said. "China was given an out in the Paris accord allowing it to increase polluting till 2035, which honestly baffles me. Why is our biggest competitor given an out to compete against us—how does that make any sense whatsoever?"

They both also rejected the notion that the U.S. owed any compensation to developing countries that have contributed a relatively tiny proportion to the crisis. "As human beings if we tried to compensate every wrong that happened in the world, we're lost," Mr. Curtis said. "I think about American Indians, the slave issues in the United States. There is no path to right every wrong, financially."

If 1.5 is still attainable, preservation of the world's largest forests is essential. Fortunately, in Brazil, President Jail Bolsonara was defeated by Luiz Inácio Lula da Silva, a committed environmentalist. Mr. Lula, has pledged to protect the Amazon rainforest. Mr. Bolsonaro cut environmental programs and encouraged development and deforestation. "There is an opportunity to protect the Amazon rainforest, which is critical for protecting our global climate," said Leila Salazar-Lopez, the executive director of Amazon Watch, a nonprofit organization. "If the Brazilian election would have gone the other way, then I think we would definitely be beyond a tipping point and we would not have a chance for 1.5."

In fact, the three countries that are home to more than half of the world's tropical rainforests—Brazil, Indonesia and the Democratic Republic of Congo—have pledged to work together to establish a "funding mechanism" that could help preserve the forests, which help regulate the Earth's climate. The plan has no financial backing of its own and was more of a call to action than a strategy for how to achieve its goals.

While reducing fossil fuel emissions (mitigation) is the most important part of addressing climate change, forests are a critical part of a sustainable biosphere upon which all life depends. Trees absorb planet-warming CO2 through photosynthesis, storing it in their trunks, branches and roots. When trees burn or rot, they release the CO2. Thus, standing trees temper climate change, while deforestation worsens it.

The Amazon rainforest alone lost over 13,000 square miles of tree cover between 2019 and 2021, according to the National Institute of Space Research in Brazil.

In Indonesia, forest loss declined by a quarter last year from 2020, according to the World Resources Institute. It was the fifth year in a row of falling totals. But deforestation continued to rise in the Democratic Republic of Congo, which lost 1.2 million acres last year, largely due to land clearings for small-scale agriculture and charcoal production.

Tasso Azevedo, who helped create the Amazon Fund, one of the most successful financial mechanisms to preserve the rainforest, was unimpressed with the text of the agreement announced in Egypt. "There is not one paragraph about action," he said. "And it's signed only by ministers, very little impact."

Facts on the Ground

A historic lake-effect snowstorm buried western New York, including the Buffalo metro area, with over 80 inches of snow in four days before Thanksgiving, killing four. Gov. Kathy Hochul declared a state of emergency for the Buffalo and Watertown areas and Erie County. Southern portions of Buffalo were placed under a travel ban. President Biden and FEMA approved Hochul's request for a federal Emergency Declaration for 11 counties in western and northern New York. Hochul said the Emergency Declaration would provide immediate federal funding to the impacted counties to sup-

port ongoing response and rescue operations. All commercial traffic was banned along a 132-mile stretch of the New York State Thruway (Interstate 90) from Rochester, New York, to the Pennsylvania border. The Niagara Thruway (Interstate 190) was also closed as were several school districts.

Contributing to the unusually heavy snowfall, was the fact that Lake Ontario's temperature was at its warmest value for mid-November in at least 27 years of recordkeeping, according to NOAA's Great Lakes Environmental Research Laboratory. Lake Erie's temperature was at its second-warmest value for mid-November over the same period. Lake-effect snow develops when cold, dry air, often originating from Canada, flows across the relatively warm waters of the Great Lakes. As that cold air passes over the lakes, warmth and moisture from the water are picked up and transferred into the lowest portion of the Earth's atmosphere. This rising air condenses into clouds, which can form narrow bands capable of producing snowfall rates as high as 2 to 3 inches per hour or more, according to the NWS.

Hurricane Ian was a large and destructive Category 4 Atlantic hurricane that was the deadliest hurricane to strike the state of Florida since 1935. Ian caused widespread damage across western Cuba and the southeast U.S., especially Florida, South Carolina, North Carolina and Virginia. It was the ninth named storm, fourth hurricane, and second major hurricane of the 2022 Atlantic hurricane season.

On Sept. 25, Ian became a high-end Category 3 hurricane making landfall in western Cuba with winds of about 125 mph. Heavy rainfall caused widespread flooding across Cuba and heavy wind caused a nationwide power outage. It became a high-end Category 4 hurricane on Sept. 28, 2022, as it approached the west coast of Florida, making landfall on Cayo Costa Island. Ian caused immense damage before moving back offshore into the Atlantic. It again made landfall as a hurricane in South Carolina. Ian caused 5 deaths in Cuba, 146 in Florida, 5 in North Carolina, and 1 in Virginia. It dissipated over southern Virginia on Oct. 2 but produced rain over much of the eastern U.S.

Ian caused U.S. losses estimated at over $50 billion. Much of the damage was from flooding brought about by a storm surge of 10 to 15 feet. The cities of Fort Myers Beach and Naples were largely destroyed along with Sanibel Island and Pine Island. Millions were left without power including more than 2.5 million in FL, 143,000 in PR, 33,000 in NC and 10,000 in VA and many communities in Florida lacked potable water.

President Biden and the first lady, Jill Biden, traveled to Puerto Rico to survey the damage left by a previous Hurricane, Fiona, and then they visited Florida to assess recovery efforts from Hurricane Ian. Several island communities were completely cut off, complicating rescue efforts. President Biden declared Hurricane Ian a major disaster in Florida, ordering federal aid to help with recovery.

Ian dumped as much as a foot of rain on some cities as it swept across the Florida Peninsula. Governor DeSantis said that the storm's impacts were "historic." Restoring power to Lee and Charlotte counties would require rebuilding infrastructure, not just "connecting a power line back to a pole." "Lee and Charlotte are basically off the grid at this point," he said. Deanne Criswell, the FEMA administrator, said that the water supply to nine hospitals in Lee County had been disrupted. A portion of the Sanibel Causeway, the only road that connects Sanibel Island to mainland Florida, was destroyed by Hurricane Ian.

Excess water from Hurricane Ian had caused at least a dozen wastewater treatment facilities in Florida to release either raw or partially treated waste, which can contain bacteria or other disease-causing organisms as well as high levels of nitrogen and phosphates, according to the state's Department of Environmental Protection. Scientists have stated that storms like Ian are being made more powerful and more unpredictable by climate change.

Hurricane Fiona, however, was the most damaging for Puerto Rico, shutting down its energy grid with the prospect of an extended blackout. Fiona had a maximum sustained wind of 130 mph. Fiona pummeled the Turks and Caicos causing power outages and displacing at least 163 people, officials said.

The authorities in Puerto Rico said 1.4 million people had lost power and that two-thirds of the island's water and sewer customers, more than 760,000, were without service due to a lack of power to pumps or turbid water at filtration plants.

Hurricane Fiona battered the Dominican Republic's popular eastern provinces, causing at least two deaths and displacing nearly 13,000 people. The eastern provinces, home to one of the largest tourism industries in the Caribbean, took the brunt of the storm. Fiona brought 90 mph winds and heavy rain that set off mudslides, shuttered resorts and damaged highways, officials said.

Gov. Pedro R. Pierluisi of Puerto Rico said the rain in parts of central, southern and southeastern Puerto Rico had been "catastrophic." Most of the island was inaccessible to rescuers, and more than 2,000 people were in shelters. Puerto Rico will have a difficult recovery process after as much as 30 inches of rain fell in some places.

A rare November hurricane, Nicole, made landfall south of Vero Beach, FL, and caused widespread power outages, destructive flooding and coastal erosion. Over 30 million people received storm warnings and around 300,000 people

lost electricity, mostly in Brevard, Indian River and Volusia Counties.

More than 500 homes in Port Orange, Fla., were at risk of flooding after a critical dam was swept away in the storm. Mayor Don Burnette said the seawall protecting the Cambridge Canal system, which drains water out of the neighboring community, had been breached. Water levels are 8 feet higher than normal in the area, he said.

For climate scientists, the most alarming weather event of the summer may have been the simultaneous heat and drought across most of China. The country experienced extreme heat for almost three months, affecting more than 900 million people. As many as 66 rivers in a single municipal area, around Chongqing, have "dried up," according to the state broadcaster CCTV. Weather historian Maximiliano Herrera said, "there is nothing in world climatic history which is even minimally comparable."

The heatwave worsened a drought that has harmed food and factory production, reduced hydropower and river transport over an expansive area. The Yangtze River Basin, which runs from coastal Shanghai to Sichuan province in China's southwest and includes Asia's longest river, was considered the worst-affected area, affecting hundreds of millions of people.

The heatwave ravaged much of China for over 70 consecutive days with temperatures consistently over 40C (104F) in at least 17 provinces, from southwestern Sichuan to coastal Jiangsu and Zhejiang provinces in the east. In Sichuan province, temperatures reached 43C and in Beibei, 45C.

The record heat waves and droughts threaten China's food, energy and economic security, experts said. Due to water shortages, the Chinese Communist Party had to choose between supplying water for agriculture or power-generation, according to Gopal Reddy, founder of the group Ready for Climate.

Some 267 weather stations across China reported record temperatures in August, and the long dry spell across the Yangtze River basin has reduced hydropower output and crop growth ahead of this season's harvest in Jiangxi. Ten reservoirs in neighboring Anhui province have fallen below the "dead pool" level, meaning they are unable to discharge water downstream, the local water bureau said.

Across Pakistan, a deluge of floodwater swept away mountainsides, pushed buildings off their foundations and turned whole districts into inland seas. Over a million homes were damaged or destroyed. After nearly three months of incessant rain, much of Pakistan's farmland is now underwater, raising the specter of food shortages in what is likely to be the most damaging monsoon season in the country's recent history.

Sherry Rehman, Pakistan's climate change minister, called the flooding a "climate-induced humanitarian disaster" of "epic proportions" and appealed for international aid. Pakistan's National Disaster Management Authority said 162 bridges had so far been damaged by the floods and that more than 2,000 miles of roads were destroyed.

Scientists expect more of these seasonal rains to come down in dangerous, unpredictable bursts as the planet continues to heat up because warmer air holds more moisture. When the right atmospheric factors come together to generate heavy precipitation, there is more water available to fall from the clouds than there had been before GHG emissions began warming the planet, said Noah S. Diffenbaugh, a climate scientist at Stanford University who has studied the South Asian monsoon.

Due to Pakistan's record floods, villages are now desperate, isolated, islands. More than 33 million people have been displaced, vast areas have been submerged and homes and crops decimated. The flooding is the worst to hit the country in recent history, according to Pakistani officials. The floods were caused by heavier-than-usual monsoon rains and glacial melt.

In Dadu District, one of the worst hit areas in Sindh Province in southern Pakistan, the floodwater completely submerged roughly 300 villages and about 40,000 square miles of land, roughly the size of the state of Virginia.

Tens of thousands of people are now homeless and displaced to nearby towns and cities where they seek refuge in schools, public buildings, and along the roadside and canal embankments. Malaria, dengue fever and waterborne diseases are rampant and the government shut down electricity

to prevent electrocutions. "We are abandoned, we have to survive on our own," said Ali Nawaz, 59, a cotton farmer.

Previously, U.S. wildfire season was mostly over by October, but in mid-October at least 50 notable fires burned across the Western U.S. The bulk of the large outbreaks were in Idaho, Montana and the Pacific Northwest. At least six fires had grown larger than 25,000 acres. Across the country, fires to date have burned a half million more acres compared with this time last year, federal statistics show.

A wildfire in Washington State grew to 2,000 acres from 150 acres within hours, forcing thousands of people to evacuate. The Nakia Creek fire burned in the Yacolt Burn State Forest near Camas, Wash., about 20 miles northeast of Portland, Ore. The fire, which began on Oct. 9, was about 20% contained earlier but escalated, driven by a combination of strong winds, high temperatures and low humidity. About 3,000 homes were subject to mandatory evacuation orders in Clark County. Another 33,780 were under a voluntary evacuation notice.

The wind, with gusts up to 30 mph, grounded air response crews for their safety, the Clark Regional Emergency Services Agency said. County officials said this season "has been a long one for fire crews." "They have been putting in long days for several months now."

The region has experienced unseasonably high temperatures. In Seattle, temperatures peaked at 88F, the second warmest day in October in almost 130 years, the Weather Service said.

The Mosquito fire in the Sierra Nevada foothills, became California's largest blaze of the year. The fire has been advancing east through dry, hilly terrain northeast of Sacramento, the state capital. It had grown to more than 63,000 acres.

Smoke from wildfires has worsened over the past decade, potentially reversing decades of improvements in Western air quality made under the Clean Air Act, according to research from Stanford University. Researchers noted a 27-fold increase over the past decade in the number of people experiencing an "extreme smoke day," which is air quality deemed unhealthy for all age groups. In 2020 alone, nearly 25 million people across the contiguous U.S. were affected by dangerous smoke.

"People may be less likely to notice days with a modest increase in fine particulate matter from smoke, but those days can still have an impact on people's health," said Marissa Childs, who led the research. She noted that extreme smoke days were rare between 2006 to 2010, but from 2016 to 2020 more than 1.5 million people, particularly in the Western U.S., were routinely exposed to levels posing immediate risks.

"We have been remarkably successful in cleaning up other sources of air pollution across the country, mainly due to regulation like the Clean Air Act," said Marshall Burke, a co-author of the research and professor of earth system science at Stanford. "That success, especially in the West, has really stagnated. And in recent years this started to reverse" largely due to wildfires. Climate change intensifies fire risk across the country and smoke plumes travel thousands of miles from their source affecting millions of Americans coast to coast.

Particulate pollution causes both short-term irritation and has been linked to chronic heart and lung conditions as well other negative health effects like cognitive decline, depression and premature birth.

"There is no safe concentration," said Tarik Benmarhnia, an environmental epidemiologist at the University of California, San Diego, who worked on an earlier study showing that smoke from wildfires can be 10 times more harmful than other sources of air pollution. The new research indicates that the health risk is increasing as the hot and dry conditions for wildfires worsen with climate change.

In late August, severe thunderstorms swept through southern Michigan and northwest Ohio, leaving more than 650,000 customers without power in the region and killing three people, including an 11-year-old boy who was swept into a drain as the storm system stretched into Arkansas. A line of storms, produced wind gusts of between 60 to 80 mph in parts of Illinois, Indiana, Michigan and Ohio, prompting severe thunderstorm warnings.

Also in Michigan, a mid-October storm brought heavy snow, powerful winds and extremely high waves to the region. More than 13 inches of snow accumulated in the north-central part of the Upper Peninsula. Waves of 13 to 15 feet were recorded along eastern Lake Superior and may have reached 20 feet in the early afternoon and wind gusts of up to 60 mph swept the area around Grand Marais, Mich., on the southern shore of Lake Superior. For the Upper Midwest, the heaviness of the snowfall was "uncommon."

The remnants of Typhoon Merbok caused widespread flooding in coastal areas of western Alaska, in mid-September. Alaska Governor Mike Dunleavy issued a disaster declaration in response to what he called an "unprecedented storm." The governor said extreme winds crashing waves and coastal sea surge had impacted several communities along 1,000 miles of the Alaska coastline.

The State Emergency Operation Center received multiple reports of flooded homes, roads and airports, along with power outages and infrastructure damage. Strong winds with gusts close to 70 mph caused a storm surge that flooded coastal communities, including Golovin where around 170

people evacuated their homes, and in Hooper Bay where 250 people evacuated.

"It's a historic-level storm," Rick Thoman, a climate specialist at the University of Alaska Fairbanks, said of the system steaming toward Alaska. "In 10 years, people will be referring to the September 2022 storm as a benchmark storm."

More than 800,000 people were evacuated in central Vietnam ahead of Typhoon Noru's expected landfall after it hit the Philippines in late September. Noru, known in the Philippines as Typhoon Karding, made landfall in the Philippines, causing flooding and killing at least eight people, officials said. Noru produced maximum sustained winds of 92 mph in Vietnam making it the equivalent of a Category 1 storm on the wind scale that is used to describe tropical cyclones in the Atlantic. It blew roofs off houses and caused widespread blackouts. An additional 4,000 people were evacuated from north-eastern Thailand due to a risk of flash floods stemming from a combination of heavy rainfall and saturated soils following the persistent monsoon season.

Nigeria is suffering its worst flooding in a decade, with vast areas of farmland, infrastructure and 200,000 homes partly or wholly destroyed. At least 603 people have died, with more than 2,400 others injured and over 1.4 million displaced by the flooding. In some areas, water levels almost reached the roofs. Matthias Schmale, the U.N. humanitarian coordinator for the country, said "Climate change is real, as we are yet again discovering in Nigeria." In 2012, when the country last experienced flooding on this scale, the damage was estimated at $17 billion.

The European drought combined with extreme heat this summer have dried rivers and reservoirs worrying experts. The two phenomena lead scientists to conclude the conditions are made more likely and more severe by anthropogenic climate change. "It's hugely concerning," said Yadvinder Malhi, a professor of ecosystem science at the University of Oxford. "It's a sign that there are big shifts going on in the stability of the global climate and the regional weather that's going to cause more and more stress on human systems and natural ecosystems." Because humans have heated the planet about 1.1C (2F), there is much more variability in the climate than expected, Dr. Malhi said. He added that if warming reaches 2C degrees or more, humans can expect to see far greater impacts than initially feared. "As there is more energy in the atmosphere, we're getting more and more extremes, whether it's flooding extremes," like in Pakistan, "or drought extremes like we're seeing in Europe, China and part of North America." These sorts of events were predicted for 2040, and to see them now strongly indicates that climate variability is occurring more rapidly than predicted.

At the start of the year, Spain was experiencing its driest January in 20 years, and by February, the Alto Lindoso reservoir had fallen to 15% of its capacity. "The degree of this drought is on the once-in-a-century or several-centuries-time-scale intensity," Dr. Malhi said, adding that while extreme droughts do occur normally, it may be that now such droughts will occur more frequently.

"We have an awful lot still to learn," Friederike Otto, a senior lecturer at the Grantham Institute at Imperial College London, said. "I think it [Europe's drying rivers and reservoirs] says that climate change, particularly in Europe, is always discussed as something happening in the future. It's not in the future. It's happening now."

Nine people died and at least four others were missing after an overnight rainstorm in mid-September dumped more than a foot of rain on the coast of central Italy, turning streets into rivers, blocking bridges and highways, and leaving thousands without electricity or gas. The downpour occurred in the central Marche region, devastating several small towns. In a post on social media, firefighters said that they had rescued dozens of people from their roofs or in trees. A civil protection official, Luigi d'Angelo, said that about 16 inches of rain had fallen in two to three hours. "It was an extremely intense event," he told the news agency ANSA.

Antonello Pasini, a scientist with the National Research Council of Italy, said that climate change was affecting the Mediterranean with drastic alternations between hot air intrusions from the south and cold fronts from the north. That, in turn, "is creating disasters that we unfortunately see increasingly frequently," he said. He added that Italy's particular geological configuration, with narrow valleys channeling torrential rivers, made it prone to landslides. In July, 11 people were killed by an avalanche while climbing a glacier in northern Italy, after record high temperatures in the area.

In Lytton, British Columbia, nothing has been rebuilt since flames devoured the tiny village of Lytton last year, turning it into a national symbol of climate change. It was in Lytton, about 90 miles northeast of Vancouver, that temperatures set a national record of 49.6C (121.3 F) in Canada!—before the deadly fire erupted. The inferno killed 619 people in the province last year and caused tens of millions of dollars in damage.

Vancouver's City Council has taken initial steps toward suing major oil companies seeking damages for the local costs of climate change. This would be the first lawsuit of its kind in the country against the fossil fuel industry.

Apart from the fire, a weather event known as an atmospheric river caused huge floods that isolated entire towns and thousands of people in a region east of Vancouver. A tornado, called a waterspout, brought winds of 68 mph to Vancouver.

High winds and storm surge damaged Vancouver's scenic sea walls in Stanley Park, which have become increasingly vulnerable to rising sea levels.

"We cannot make the types of dramatic shifts that society needs to deal with climate change while the global fossil fuel industry makes hundreds of billions, trillions of dollars, of profit from selling the same products that are causing the problem," said Andrew Gage, a staff lawyer at West Coast Environmental Law, one of the environmental groups leading the campaign "Sue Big Oil" and urging local governments to file a class-action lawsuit against global oil companies.

The day after Lytton broke the national heat record, strong winds pushed flames through Lytton consuming it in less than two hours. The Mayor, Jan Polderman said, before the fire he believed that climate change was "the next generation's problem." "I don't think that anymore."

Failure to limit global warming to 1.5C will likely set off several climate "tipping points," a team of scientists said, with irreversible effects including the collapse of the Greenland and West Antarctic ice sheets, abrupt thawing of Arctic permafrost and the death of coral reefs.

The researchers said that even at the current level of warming, some of these self-sustaining changes might have already begun. But if warming exceeded 1.5C, the changes become much more likely. And at the higher Paris target, 2Cs, even more tipping points would likely be set off, including the loss of mountain glaciers and the collapse of a system of deep mixing of water in the North Atlantic.

The changes would have significant, long-term effects on life on Earth and likely would trigger unstoppable positive feedback loops. The collapse of the Greenland and West Antarctic ice sheets could produce unrelenting sea level rise, measured in feet, not inches, over centuries. The thawing of permafrost could release more heat-trapping gases into the atmosphere, accelerating global warming beyond habitability. A shutdown of ocean mixing in the North Atlantic could affect global weather patterns and cause more extreme weather events beyond anything humans have evolved to endure.

Johan Rockström, the director of the Potsdam Institute for Climate Impact Research in Germany and one of the researchers, said the team had "come to the very dire conclusion that 1.5C is a threshold" beyond which some of these effects would start, if they haven't already. It is therefore imperative, he and others said, for nations to immediately slash CO2 emissions and other heat-trapping gases to curb global warming.

The research is consistent with recent assessments by the Intergovernmental Panel on Climate Change, a group of experts convened by the United Nations, that beyond 1.5C, the threats of climate change grow considerably.

David Armstrong McKay, a climate scientist at the University of Exeter in Britain, said limiting warming to 1.5C "doesn't guarantee we don't see tipping points," "but it reduces the likelihood."

And as with the UN panel's assessments, exceeding 1.5C does not mean all is lost. "Every 10th of a degree counts," Dr. Rockström said. "So, 1.6 is better than 1.7 and so on" in reducing the tipping-point risks.

Countries have not pledged to cut GHG emissions enough to meet either Paris target. Current policies put the world on pace for up to 2.9C of warming by the end of the century. At that level of warming, even more tipping points would be set off, the researchers said.

The new research specified 16 tipping points, including nine that would have global effects. The study "puts temperature thresholds on all the tipping elements," Dr. Rockström said. "That has never been done before."

One worrisome example of a tipping point is the rapid warming of the Arctic which has led to the extreme wildfire seasons experienced in Siberia in recent years which is expected to continue.

The researchers said that the Siberian Arctic, with its vast expanses of forest, tundra, peatlands and permafrost, was nearing a threshold beyond which even small temperature increases could produce sudden increases in the extent of fires. "Global warming is changing the fire regime above the Arctic Circle in Siberia," said David L.A. Gaveau, one of the researchers. His company, TheTreeMap, monitors deforestation around the world.

Arctic wildfires can consume decayed organic matter in peat and thawed permafrost thereby releasing CO2. This GHG adds to global warming which makes the goal of reining in climate change more difficult if not impossible. Over the past four decades, the Arctic has been warming about four times faster than the global average. Recent summers in eastern Siberia have been marked by particularly extreme temperatures reaching 38C (100F).

The warmth has been accompanied by severe and extensive wildfires. "Observations indicated that the fire seasons were exceptional," Dr. Gaveau said.

He and his colleagues analyzed satellite data to map the burned area each summer from 1982 to 2020. Over that time, a total of nearly 23 million acres burned. The researchers found that together, 2019 and 2020 accounted for nearly half of the total. "The burning was much, much higher than in the last 40 years," Dr. Gaveau said. The study was published in the journal Science.

They then looked at factors that affect wildfire risk, including the length of the growing season (which results in more vegetation available to burn) and air and surface temperatures (warm conditions dry out the vegetation, making it easier to burn) and found that these have increased over the decades. Those and other factors "are causing what we're seeing — an increase in areas of burning," he said.

In 2019 and 2020, average summer temperatures in the Siberian Arctic had increased to above 10C (50F). Dr. Gaveau said that 10C could be a tipping point, or threshold, beyond which wildfire activity greatly increases with just a small increase in temperature. "It's worrying because predictions essentially indicate that the fires of 2019, 2020 will become the norm by the end of the century," he said.

They estimated that the fires of 2019 and 2020, which burned large areas of peatland, resulted in the release of more than 400 million metric tons of CO_2, which is greater than the total annual emissions of Australia. With more extreme fire years, Dr. Gaveau said, "there's going to be much more carbon released into the atmosphere every year because of global warming in a region that would not normally burn as much."

The fires are also thawing the permafrost, previously permanently frozen ground underlying much of the Siberian Arctic. The organic matter in the thawed ground decomposes and releases CO_2 and methane, and it can also dry out and burn, resulting in even more emissions and warming, etc.

The study adds to the urgency of reducing emissions. These emissions from thawed permafrost and Arctic wildfires are not fully accounted for in global carbon budgets but should be so countries can adjust their emissions goals to limit global warming.

A separate study published in Science looked at factors that drove the extreme fire season of 2021. Rebecca C. Scholten of Vrije Universiteit Amsterdam and colleagues found that over the past half-century spring snowmelt in northeastern Siberia has started an average of 1.7 days earlier per decade. The earlier the snowmelt the longer soil and vegetation dry out, increasing the risk of burning.

The researchers also found that changes in the polar jet stream that circles the planet likely contributed to greater fire activity. During many weeks when extreme fires occurred, the jet stream was temporarily split in two, with northerly and southerly branches. Referred to as an Arctic front jet, it typically has a region of stationary lower-level air which allows heat to build up, increasing fire risk.

This split jet stream is the same phenomenon that scientists say likely contributes to increasing heat waves in Europe. Dr. Scholten said the research showed that the two factors worked together. "It's a compound effect," she said. "It's only if we have early snowmelt, which we have more with climate warming, and then if we have an Arctic front jet, which we also have more frequently with climate warming, then we have like really extreme fire risk."

To avert worsening climate disasters, all sectors of the economy must be transformed by midcentury. The most urgent task is the rapid phase-down of planet-warming emissions from coal-fired power plants in emerging economies. Burning coal for electricity is the single largest source of global GHG emissions. It accounts for about 10 billion tons of CO_2 annually, more than 70% of global fossil fuel emissions from electricity generation.

The world's leaders are failing badly in this regard. Since 1990, the world has doubled its emissions from coal-fired power. There are now more than 6,500 such plants with at least an additional 941 planned. According to the Rockefeller Foundation, combined, they could emit 273 billion tons of CO_2 over their normal 40-year operational lifetime. Such emissions could cause humanitarian crises that can scarcely be imagined for the world's most vulnerable peoples.

To keep global warming to below 2C (3.6F) above preindustrial levels, the global community must stop building coal plants immediately and cut coal emissions in roughly half by 2030. Coal plants must be replaced by carbon-free power, transportation must be decarbonized, as must buildings and industry. Innovative political and financial solutions are emerging, but will they be in place in time?

Emissions from coal plants in the 38 countries in the Organization for Economic Cooperation and Development have declined by an average of 6% annually since 2014. But emissions growth from emerging nations has far exceeded these reductions. Such growth accounts for 79% of the global total. China, India, Vietnam, Indonesia and South Africa are among the countries that have relied heavily on coal for economic development.

Coal is favored as political and business elites are often highly personally invested in it (including in the U.S., notably Senator Manchin (R-WV)). Coal also supports tens of millions of lives directly and indirectly.

Following the climate negotiations in Glasgow last year, France, Germany, Britain, the U.S. and the EU agreed to mobilize $8.5 billion over the next 3-5 years to help South Africa and coal workers transition from coal. South Africa is the world's 15th-largest emitter of GHG, and it generates 87% of its electricity by burning coal.

The Group of 7 backs such an approach. India, the Philippines, Bangladesh, Pakistan and others may follow if the countries underwriting South Africa's transition follow through on their financial commitments. It has been a prob-

lem to actually mobilize billions in new capital financed at below-market rates to underwrite these deals.

Pursuant to a 2019 New York City (NYC) law, most large buildings must drastically reduce their emissions starting in 2024. That will entail replacing boilers with heat pumps. It's not going to be easy. Nationally, the Biden administration is trying to hasten such a shift with billions of dollars in tax rebates to electrify buildings and make them more energy efficient. In 2021, sales of heat pumps grew significantly in the U.S. and several other major markets, according to research published in Nature.

Emissions from buildings, primarily for heat and hot water, account for more than a quarter of the nation's emissions. In NYC it's roughly 70%. "New York City, I would argue, is the most aggressive city in the country on energy efficiency and green buildings," Mr. Donnel Baird, founder of Bloc Power, said. "We are so far behind, and we are underperforming."

In NYC, many apartment building owners, including co-operatives, can't readily afford to go all-electric. There aren't enough workers trained to retrofit them. And often, even in new buildings, to say nothing of old buildings that were built decades before heat pumps existed, there isn't enough space to accommodate all the equipment.

Ithaca, N.Y., and Berkeley, CA, have passed laws requiring all buildings, new and old, to stop using oil and gas in the coming years, whether for heating or cooking. Dozens of cities across the U.S. have also passed laws that prohibit new gas hookups. A counteroffensive, funded by gas companies and local utilities, is fighting local laws to ban gas.

The Inflation Reduction Act offers up to $8,000 in tax rebates for property owners to purchase electric heat pumps and make energy efficiency improvements (e.g., insulation and better windows). Many buildings will need to upgrade their electric panels to fully electrify. There are rebates for that, too. The bill also allocates $200 million to train workers to install new electric appliances and insulation.

But as buildings electrify, along with cars and buses, utilities will need to produce much more electricity as demand grows. The city needs to install new transmission lines to meet the new demand.

NYC's 24 power plants run mostly on methane gas and fuel oil, spewing GHG emissions into the atmosphere and polluting the air nearby. The city aspires to have what it calls a fully "clean energy" electricity grid by 2040.

The switch is cumbersome. NYC has been slow in issuing the necessary permits. Plumbing lines and wires must be removed. The required machinery is enormous. Most high-rise buildings don't have enough space for the equipment. Developers of new buildings, if they want to go all-electric, need to set aside expensive real estate to accommodate the equipment.

If home/building owners decide to switch out the old oil boilers for gas ones, it will prolong the building's reliance on fossil fuels for another 40 years or so. But doing so involves less work, less up-front cost, and less of an education for shareholders/apartment owners. Many hurdles to clear.

Washington

By a bipartisan Senate vote of 69 to 27 the United States joined the 2016 Kigali Amendment, along with 137 other nations that have agreed to sharply reduce the production and use of hydrofluorocarbons (HFCs), industrial chemicals commonly found in refrigerators and air-conditioners. The chemicals are potent GHGs, warming the planet with 1,000 times the heat-trapping strength of CO2.

Sen. Chuck Schumer of New York, the majority leader, called the ratification "a historic step forward to combating global warming in a huge way." He predicted that the vote may count as one of the most important bipartisan accomplishments during this Congress. Twenty-one Republicans joined all present members of the Democratic caucus to approve the treaty, including Senator McConnell (KY), the minority leader.

If the Kigali pact is successfully implemented, scientists estimate it would prevent up to 0.5C, (about 1F), of warming by the end of this century. At this stage in the planet's rapid warming, every fraction of a degree makes a difference.

The vote was largely symbolic as the Congress and the Biden administration had enacted policies to reduce the production and importation of HFCs in the U.S. by 85% over the next 15 years, and industry has turned to alternative chemicals.

About 15% of HFCs would still be permitted because they have critical uses for which alternatives do not yet exist. Under the Kigali Amendment, industrialized nations like the U.S. and those in the EU will reduce production and consumption of HFCs to about 15% of 2012 levels by 2036. Much of the rest of the world, including China, Brazil and all of Africa, will freeze HFC use by 2024, reducing it to 20% of 2021 levels by 2045.

Americans for Prosperity, a political action committee founded by the billionaire Koch brothers, sent a letter to lawmakers saying that ratifying the Kigali Amendment would be an "abdication of U.S. sovereignty over environmental regulation" to the UN. The group also argued it would raise the price of air-conditioning, refrigeration and industrial cooling for American consumers.

But Francis Dietz, a spokesman for the Air-Conditioning, Heating and Refrigeration Institute, an industry trade group, said the phase-down of HFCs was happening, no matter what the Senate did. "We've been preparing for this for more than a decade," he said, adding, "If you're a consumer, this isn't going to make any difference to you whatsoever."

The Biden administration intends to regulate methane, a potent GHG that spews from oil and natural gas operations (methane is the primary component of natural gas). Methane regularly leaks from wells, pipelines and other infrastructure, and is also deliberately released for maintenance or other reasons. It warms the atmosphere 80 times as fast as CO2 in the short term. The regulations will be enforced by the Environmental Protection Agency which will limit the methane coming from roughly one million existing oil and gas rigs across the U.S. Prior rules aimed at preventing methane leaks from oil and gas wells built since 2015 were rescinded by the Trump administration. The new regulations will restore and strengthen the prior regulations.

More than 100 nations attending COP27 promised to curb global emissions of methane 30% by 2030. That is the equivalent of eliminating emissions from every car, truck, airplane and ship, said Fatih Birol, executive director of the International Energy Agency.

Biden called the agreement a "game-changing commitment" and said the new efforts will create jobs to manufacture technologies for methane detection and employ pipefitters and welders to cap abandoned wells and plug leaking pipelines.

The U.S. Department of Transportation also proposed a regulation to reduce methane leaks from natural gas pipelines, and the U.S. Department of Agriculture announced it will work with farmers and ranchers on ways to reduce methane from livestock.

Methane is the second most abundant GHG after CO_2 and it's responsible for more than a quarter of the warming the planet is currently experiencing. It dissipates from the atmosphere faster than CO_2 but is more powerful at heating the atmosphere in the short run. Methane is an odorless, colorless, flammable gas, produced by landfills, agriculture, livestock and oil and gas drilling. It is sometimes intentionally burned or vented into the atmosphere during gas production.

Based on EPA studies in the 1980s, it was believed that if the combustion was efficient, 98% of the methane would be destroyed and/or converted into CO_2 which is less immediately harmful. But the new research found that flaring is far less effective, perhaps only 91% destructive.

Riley Duren, chief executive of Carbon Mapper, a nonprofit group that is launching satellites next year that will detect and monitor sources of GHG emissions, said the findings were expected by those who are familiar with emissions from oil and gas basins and know how much flaring that is done. Al Gore's ClimateTrace initiative is also up and running and measuring and tracing methane emissions.

The International Energy Agency estimated that worldwide in 2021, more than 140 million cubic meters of methane was burned in this way, equal to the amount imported that year by Germany, France and the Netherlands.

In addition to reducing GHGs, regulating methane will protect public health, EPA officials said. When methane is released into the atmosphere, it is frequently accompanied by hazardous chemicals like benzene and hydrogen sulfide. Exposure to those pollutants has been linked to serious health problems including asthma and cancer.

Gas burners in the kitchen, even when off, emit methane and benzene which are GHGs (methane) and cancer causing (benzene). Recent research estimated that each year California gas appliances and infrastructure leak the same amount of benzene as is emitted by nearly 60,000 cars, but these leaks are unaccounted for in the state's records. Benzene is a highly flammable chemical that can be colorless and odorless, and which increases the risk of blood disorders and certain cancers like leukemia with long-term exposure.

Homes and buildings are directly responsible for about 13% of the country's GHG emissions, mostly from gas burned in stoves, ovens, hot water heaters and furnaces. The growing body of evidence of harmful levels of indoor air pollution is a "good reason to encourage electrification not just for the climate, but for health, too," said Rob Jackson, an earth scientist at Stanford University.

Carl R. Howard is co-chair of the Global Climate Change Committee for the Environmental and Energy Law Section. The views expressed above are his own. Thanks to **Teraine Okpoko** who assisted with Facts on the Ground. Follow Carl Howard on Twitter @Howard.Carl.

Recent Decisions and Legislation in Environmental Law

Rancho Vista Del Mar v. United States, 2022 U.S. Dist. LEXIS 206277 (D.D.C. Nov. 14, 2022)

Facts

In 2019, former President Donald Trump declared a national emergency that allowed the United States to construct a wall along the southern border of the United States. This emergency centered on the "influx" of "illegal immigrants" coming into the United States. Statutory authority was given to the armed forces to "undertake military construction projects" to address the emergency.[1]

While retaining almost 500 acres of land, Rancho Vista deeded about 17 acres to the United States government so that a continuous border fence could be constructed adjacent to the remainder of their property.[2] The construction upon Rancho Vista's property was part of San Diego Project 4 (the Project).[3] The DHS secretary approved construction on the sites as part of the project.[4] The secretary did not account for NEPA or ESA procedures.[5] President Biden then terminated the national emergency at the southern border once he took office.[6] DOD and DHS were ordered to halt construction projects along the border, and Rancho Vista's property was next to the unfinished construction project.[7] The site was left "uncleaned, partially excavated, and with both installed and uninstalled materials left behind."[8] Rancho Vista claimed that those actions (or inaction) caused it injury by causing erosion and desedimentation, destroying the habitat, and threatening the endangered species connected to Rancho Vista's property.[9] Rancho Vista also claimed that the 700-foot gap left by the construction "channel[ed] illegal immigrants crossing the border. . ." onto its property, further contributing to impairment of enjoyment and environmental destruction.[10]

Procedural History

This case arose when the corporation of Rancho Vista del Mar (Rancho Vista) brought suit against the United States, the Department of Homeland Security (DHS) and its secretary, and the Chief Patrol Agent for the San Diego Sector of Customs and Border Protection (CBP). Rancho Vista alleged that the government's decision to halt unfinished construction of a border wall on Rancho Vista's property violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).[11] The defendants then filed a motion to dismiss.[12]

Issue

Can government agencies be held responsible under the ESA, NEPA, and/or the APA for injurious, but nondiscretionary, agency action?

Rationale

Article III Standing

In order to establish Article III Standing, the plaintiff in any case must have suffered a (1) "concrete and particularized," actual or imminent (not hypothetical or conjectural) injury-in-fact (2) with a "causal connection" between the injury and the conduct in question; and (3) it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[13] The plaintiff also has the burden of alleging facts to fit the elements.[14]

A. Injury-In-Fact

Here, the court found that Rancho Vista had established a cognizable injury-in-fact, because the injuries in the complaint were concrete and imminent or actual. The injuries in question were the desedimentation, destruction of habitat, and continued threat to the endangered species on Rancho Vista's property.[15] This left Rancho Vista's property and the surrounding area "open to environmental destruction." Rancho Vista also alleged that the unfinished gap on the wall left the property open to "undocumented immigrants" passing through and destroying the environment.[16] These injuries were concrete and particular to Rancho Vista, so the first requirement was met. The court also denied the government's assertion that the environment being injured was not enough to show standing because plaintiffs must show injury.[17] This was unpersuasive because Rancho Vista had shown that there was an injury to itself since Rancho Vista owns the critical habitat in question.[18] Rancho Vista also stated that the government's actions "impaired its enjoyment" of the property and "harmed [plaintiff's] ranch and the surrounding environment."[19]

B. Causal Connection

The causal connection here was not in dispute, because the injuries complained of were immediately traceable to the actions of the DOD.[20] If the DOD did not abandon the project, then Rancho Vista would not have construction materials littering the property, there would not be a gap in the wall, and the resulting destruction of the environment would

not exist. The injury also continued because the construction was not cleaned up and the environment continued to suffer.[21]

C. Redressability

Redressability was challenged here. To meet this third requirement for standing, the injury-in-fact must be able to be redressed if the court was to grant relief. Rancho Vista must be able to have its particularized injury corrected if it were to prevail.[22]

Rancho Vista sought two forms of relief: "(1) 'an order holding unlawful and setting aside [the government's] decision to cease all work on the border fence segment adjacent to Rancho Vista's property,' and (2) 'an order requiring [the government] to secure and finish the site in a workmanlike manner.'"[23] The court found that these requests for relief would have been able to adequately address Rancho Vista's injuries if they were to be granted.[24] The government attempted to argue that redressability was not met, but only because the defendants do not have the authority to grant these two forms of relief. However, the court found that this argument assumed a decision on the merits of the case, whereas redressability is not decided on an analysis of the merits.[25] Initially, there must always be an assumption that the plaintiff would win on the merits of the case.[26]

Administrative Procedure Act Claim

After the analysis on constitutional standing, the court turned to the merits of the claims. The APA requires that agencies decide actions based on a "consideration of relevant factors" and without a "clear error of judgement."[27] Rancho Vista alleged that the government action was "arbitrary and capricious." Agency actions are arbitrary and capricious when it has relied on "factors which Congress has not intended it to consider" and has "entirely failed to consider an important aspect of the problem," explained its decision "that runs counter to the evidence" or the explanation "is so implausible" that a difference in opinion or agency expertise could not be responsible.[28]

The agency responsible for the pause in construction could not be blamed here, because it could not be held responsible for merely obeying an "unambiguous statutory and executive command."[29] Thus, the actions were not arbitrary or capricious. The order to end construction was given by executive command via President Biden, and that did not leave any room for agency discretion.[30] The DOD did not have the authority to continue the project, and the secretary did not need to consider any factors when ending construction on the border wall.[31]

Rancho Vista proposed that the DOD or DHS should have raised a different statutory authority to finish the project, but the court did not find this persuasive because the APA only requires agency action that is "legally required."[32] The court found for the government on the APA claim because the DOD was legally required to stop construction and Rancho Vista's cited statutory authority did not have a basis for the court to order the government to act in Rancho Vista's interests.[33]

National Environmental Policy Act and Endangered Species Act Claims

The court found the NEPA and ESA claims unavailing because the procedural requirements within both acts do not apply to "nondiscretionary" agency decisions.[34] The command to halt construction was not an option for the DOD or DHS because it came from President Biden's order to end the national emergency that was originally declared by the Trump administration.[35] NEPA only applies to "actions" where there is discretionary federal authority.[36] ESA does not apply to "mandatory duties imposed on agencies by statute."[37] Thus, Rancho Vista failed to state a claim under these acts.[38]

Conclusion

The court granted the defendants' motion to dismiss with prejudice because Rancho Vista failed to state a claim upon which relief could be granted. While Rancho Vista has constitutional standing to bring the claims, they could not prevail on the merits because they did not have colorable claims under the APA, NEPA, or the ESA.

Priscila Galambos
Albany Law School, Class of 2024

Endnotes

1. *Rancho Vista Del Mar v. United States*, 2022 U.S. Dist. LEXIS 206277, at *3-*4, (D.D.C. Nov. 14, 2022).
2. *Id.* at *4.
3. *Id.*
4. *Id.* at *5.
5. *Id.*
6. *Id.*
7. *Id.* at *6.
8. *Id.*
9. *Id.* at *7.
10. *Id.*
11. *Id.* at *2.
12. *Id.* at *1.
13. *Id.* at *9-*10 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).
14. *Id.* at *10.

15. *Id.*
16. *Id.*
17. *Id.* at *11 (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).
18. *Id.* at *11.
19. *Id.*
20. *Id.*
21. *Id.* at *12.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at *13-*14.
26. *Id.* at *14 (*citing City of Waukesha v. EPA*, 320 F.3d 228, 235, 355 U.S. App. D.C. 100 (D.C. Cir. 2003)).
27. *Id.* at *15.
28. *Id.*
29. *Id.* at *15-*16.
30. *Id.* at *16.
31. *Id.* at *17.
32. *Id.* at *19.
33. *Id.* at *20-*21.
34. *Id.*, at *21.
35. *Id.*
36. *Id.* (*See Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151, 347 U.S. App. D.C. 382 (D.C. Cir. 2001)).
37. *Id.* (*citing Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)).
38. *Id.* at *22.

Yurok Tribe v. U.S. Bureau of Reclamation, 2023 WL 1785278 (N.D. Cal. Feb. 6, 2023)

Facts

This case concerns the rules and regulations surrounding the Klamath river water supply.[1] The cause of action centers on an order issued by the Oregon Water Resources Department (OWRD) (hereinafter, the order).[2] The Upper Klamath Lake (UKL) is home to two endangered fish, the shortnose sucker and the Lost River sucker, and allows water to flow downstream to a species of salmon that is the main food source for another endangered species, the Southern Resident killer whale.[3] Since endangered species inhabit the UKL, the Endangered Species Act (the ESA) is triggered.

The Bureau of Reclamation (the Bureau) oversees the operations surrounding the Klamath Project (the project).[4] Part of the Bureau's job is "managing the water levels in UKL and distributing water from it."[5] As mentioned, there are endangered species living within the water source, hence, "the Bureau must ensure that any action that it takes is not likely to jeopardize the continued existence of. . .[the] listed species or destroy or adversely modify its habitat."[6] Therefore, in regard to the UKL, the "Bureau must. . .strike a balance between ensuring that sufficient water remains in the UKL for the sucker fish, while providing sufficient downstream flows in the Klamath River for the salmon (and by proxy, the [regional] killer whale [population])."[7] The genesis of the instant case was an OWRD order:

> On April 23, 2020, OWRD issued an interim order prohibiting the Bureau from releasing stored water from UKL 'except in accordance with the relative and respective state law rights calling upon the stored water unless and until' it provided OWRD certain information about the timing and release of that water.[8]

As a result of the order, some parties to this case were concerned about whether the lack of water flow would violate the ESA by stopping the downstream water flow—which, in turn, affects the listed-killer whale's food source.

Here, the plaintiffs are the Yurok Tribe, the Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources (collectively, plaintiffs). The defendants are the Bureau and the Klamath Water Users Association (KWUA) (collectively, defendants).[9]

Procedural History

Before the 2020 OWRD order, this case dealt with plaintiffs' lawsuit against the Bureau and NMFS over a 2019 biological opinion written as part of a required consultation process.[10] In March of 2020, the Bureau developed an interim plan that the parties agreed to; as a result, the parties "stipulated to stay the litigation until September 30, 2022, so long as the Bureau operated the project in accordance with the Interim Plan."[11] However, upon the issuance of the OWRD order, the parties requested the stay be lifted to allow the parties to challenge the order.[12] The stay was lifted and the federal defendants—including the United States and the Klamath Tribes—commenced a crossclaim, and the plaintiffs filed a supplemental complaint.[13]

The United States and plaintiffs both moved for summary judgment; KWUA and OWRD then counterclaimed seeking summary judgment.[14]

Issue

Whether the order issued by the OWRD is preempted by the ESA.[15]

Rationale[16]

The court began its analysis with the reminder that the "Supremacy Clause grants Congress 'the power to preempt state law.'"[17] To allow a state law to preempt federal law there must be a clear indication that it was the intent of the statute or Congress to allow preemption.[18] Therefore, the court's analysis was split into two sections: (1) what Congress's purpose was when enacting the ESA in regard to preemption; and (2) "whether the Bureau's compliance with the ESA and OWRD order is physically impossible or whether the order stands as an obstacle to accomplish the Congress's goals."[19]

The KWUA asserted the argument that the Bureau's job and duty is not subject to the ESA and, instead, the Bureau is only authorized to operate the project for reclamation purposes without "discretion to take action on behalf of endangered species."[20] The court, as outlined below, was unpersuaded by this argument and stated it lacked any sound support or backing.

First, the court examined the plain meaning of the ESA and what Congress's intent had been when implementing the ESA. Examining past case law, the court included a quote from a Supreme Court case which stated, "[t]he plain intent of Congress in enacting. . .[the ESA] was to halt and reverse the trend towards species extinction, whatever the cost."[21] The court went on to add that the "text and structure of the ESA make clear that Congress's purpose in enacting the ESA was to prioritize the preservation and recovery of endangered and threatened species."[22] Based on the caselaw and statutory interpretation, the court decided that it was Congress's intent to preempt state law with the ESA.[23]

The Klamath Irrigation District (KID), an *amicus curiae,* presented an argument against federal preemption, reasoning that since there was not an "express preemptive provision in the ESA" the court should not imply preemption.[24] Furthermore, the KWUA argued that summary judgment should not be granted in favor of the United States since the government had not demonstrated it was "'physically impossible' for the Bureau to comply with both the ESA and the OWRD order."[25] The court, again, was unpersuaded by these arguments.

Since the court determined that "the Bureau must comply with the ESA in operating the Klamath Project—including when it releases stored water from UKL,"[26] it now had to determine whether the Bureau could comply with the ESA if it followed the order. In its analysis the court stated this portion was "easy to answer."[27] If the Bureau were to follow the order it would pose "an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting the ESA."[28] Stated simply, the court determined if the Bureau followed the order it would adversely impact the Southern Resident killer whale by impacting the whale's food supply (the salmon).[29] The court went on to determine if the Bureau followed the order it would violate the ESA; and if the Bureau released water in accordance with the ESA, it would violate the order.[30] As the court has determined the Congress's intention was for the ESA to be Supreme law, the ESA must preempt the order.[31]

Conclusion

The court granted summary judgment in favor of the United States and plaintiffs. The OWRD was enjoined from enforcement of the order.[32]

Taylor Bacon
Albany Law School, Class of 2023

Endnotes

1. *Yurok Tribe v. U.S. Bureau of Reclamation*, 2023 WL 1785278, at *1 (N.D. Cal. Feb. 6, 2023).
2. *Id.* at *1.
3. *Id.* at *3.
4. *Id.* at *2.
5. *Id.*
6. *Id.*
7. *Id.* at *4.
8. *Id.* at *6 (*quoting* Stip. Docs. At 708).
9. *Id.* at *1.
10. *Id.*
11. *Id.* (*quoting* Dkt. No. 908.).
12. *Id.*
13. *Id.*
14. *Id.* at *8 (The first cause of action is as follows: "(1) The OWRD order is 'invalid because OWRD lacks jurisdiction to issue orders impinging upon. . .the Bureau's satisfaction of its obligations under the federal ESA.'" *Id.* at *7).
15. There was a second issue, whether the order "violated the doctrine of intergovernmental immunity"; however, the court decided not to examine it. *Id.* at *12.
16. Arguments by the Klamath Irrigation District (KID) were excluded as the court ruled against KID's procedural motions and it was not relevant to the outcome of the case.
17. *Id.* at *12 (*quoting Arizona v. United States*, 567 U.S. 387, 399 (2012)).
18. *Yurok Tribe*, 2023 WL 1785278, at *12 (N.D. Cal. Feb. 6, 2023).
19. *Id.*
20. *Id.* at *16.
21. *Id.* at *14 (*quoting Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978)).
22. *Yurok Tribe*, 2023 WL 1785278, at *14 (N.D. Cal. Feb. 6, 2023).
23. *Id.*
24. *Id.* at *18.

25. *Id.*
26. *Id.* at *17.
27. *Id.*
28. *Id.*
29. *Id.* at *18.
30. *Id.*
31. *Id.* ("[T]he Congressional purpose behind the ESA is clear and the OWRD order stands in the way of the accomplishment and execution of that purpose, meaning it is preempted").
32. *Id.* at *21.

Defenders of Wildlife v. U.S. Army Corps of Eng'rs, No. 1:20CV142-LG-RPM, 2022 U.S. Dist. LEXIS 236583 (S.D. Miss. 2022)

Facts

In 2019 and 2020, the United States Army Corps of Engineers (Corps), the United States Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) classified the openings of the Bonnet Carré Spillway (spillway) as emergencies, which allowed the Corps to bypass a formal consultation with the NMFS and FWS (collectively, the services).[1] Without an adequate evaluation of the potential adverse impacts, the Corps was allowed to discharge polluted river water from the spillway. Consequently, the polluted river water lowered "the salinity levels of the receiving waters."[2] Moreover, the "changes caus[ed] an array of impacts that adversely affect[ed] wildlife and destroy[ed] their habitat."[3] For instance, in 2019, "when the [s]pillway was opened twice for a total of four months, oyster beds were destroyed, commercial fishery operations were devasted, and hundreds of dolphins died and washed ashore[.]"[4]

While the Corps did not engage in formal consultations with the services, they "issued a series of after-the-fact findings on individual spillway openings."[5] The plaintiffs, two environmental non-profit organizations, allege that these findings "arbitrarily ignore[d] or minimize[d] the impacts to [the] imperiled species and their designated critical habitat."[6]

Procedural History

Plaintiffs Defenders of Wildlife and Healthy Gulf (collectively, the plaintiffs) filed a lawsuit against NMFS, FWS, and the Corps (collectively, the defendants) and moved for summary judgment.[7] The defendants also moved for summary judgment and motion for partial remand.[8]

Issues

The issues were (1) whether the Corps acted arbitrarily and capriciously when making the initial decision that emergency consultation was appropriate for spillway openings, and (2) whether the services acted arbitrarily and capriciously when approving emergency consultation.

Rationale

The district court looked at the definition of 'emergency' in the Black's Law Dictionary and the Oxford English Dictionary (OED). Black's Law defined 'emergency' as "'[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm, 2. [a]n urgent need for relief or help.'"[9] OED defined the word as "'[t]he arising, sudden or unexpected occurrence (of a state of things, an event, etc.).'"[10]

After defining the term, the district court held that the spillway openings were not in fact emergencies. The spillway was "specifically designed and constructed to release freshwater from the Mississippi River into other waterways."[11] Thus, the court held that spillway "openings are expected, and the Corps is capable of, and has in fact planned for, these openings to occur."[12]

Conclusion

The court found that the defendants acted arbitrarily and capriciously.[13] The court dismissed plaintiffs' remaining claims regarding defendants' prior actions and remanded the entire case for prospective consultation. In doing so, the defendants were ordered "to anticipate the general effects that future spillway openings will have on endangered and threatened species and their critical habitats."[14]

Gabriel Jimenez Negron
Albany Law School, Class of 2025

Endnotes

1. *Defenders of Wildlife v. U.S. Army Corps of Eng'rs*, No. 1:20CV142-LG-RPM, 2022 U.S. Dist. LEXIS 236583 (S.D. Miss. 2022).
2. *Id.* at 6.
3. *Id.*
4. *Id.*
5. *Id.* at 7.
6. *Id.*
7. *Id.* at 2.
8. *Id.*
9. *Id.* at 18.
10. *Id.*
11. *Id.*
12. *Id.* at 18-19.
13. *Id.*
14. *Id.* at 20.

Matter of CREDA, LLC v. City of Kingston Planning Bd., No. 00355 (N.Y. 3rd Dep't Jan. 26, 2023)

Facts

The Kingstonian Project (the project) was a plan to redevelop parts of the City of Kingston in Ulster County, New York.[1] The project would demolish an outdoor parking lot and a parking garage that was no longer in use in the Kingston Stockade Historic District (KSHD) as well as a redevelopment of 2.5 acres of land into an apartment building, a hotel, retail space, a pedestrian plaza and a parking garage.[2] The respondent City of Kingston Planning Board (the planning board) was established as the lead agency and the respondent Kingstonian Development, LLC was established as the project sponsor.[3]

Pursuant to the State environmental Quality Review Act (SEQRA), Kingstonian Development submitted part 1 of the full environmental assessment form (FEAF).[4] The planning board then inventoried resources that could potentially be affected by the project.[5] The planning board also completed parts two and three of the FEAF.[6] The project's developers, respondents JM Development Group, LLC, Herzog Supply Co., Inc., Kingstonian Development, LLC, and Patrick Page Holdings, L.P. (the developers) met with the City's Historic Landmarks Preservation Commission and appeared before the planning board to present their proposal for the project.[7] The developers appeared at a public planning board meeting to where members of the public were able to voice their opinions on the project and the developers discussed various changes to the plan including the removal of a breezeway and an upcoming traffic study.[8] Per the planning board's direction, the developers conducted various studies and reports, which were made available for public review.[9]

The planning board issued a negative declaration in December of 2019 and concluded that there were not any significant adverse effects associated with the project.[10] Petitioner Creda, LLC commenced a CPLR Article 78 proceeding in January of 2020.[11] Petitioners 61 Crown Street, LLC, 311 Wall Street, LLC, 317 Wall Street, LLC, 323 Wall Street Owners, LLC, 63 North Front Street, LLC, 314 Wall Street, LLC and 328 Wall Street, LLC (collectively, petitioners) filed a motion to intervene as party petitioners.[12] This motion was granted by the Supreme Court.[13]

Procedural History

This is an appeal following the Supreme Court's 2021 dismissal of the petitioners' application. The petitioners filed an amended petition alleging that the planning board did not follow substantive and procedural requirements of SEQRA and sought for the annulment of the negative declaration and an annulment of a subdivision approval that the planning board had granted.[14]

Issue

Whether the petitioners had standing to challenge the negative declaration under the SEQRA, and whether SEQRA has been satisfied both procedurally and substantively.[15]

Rationale

"To establish standing in the SEQRA context, petitioners were obliged to establish both an injury-in-fact and that the asserted injury was within the zone of interests sought to be protected by SEQRA."[16] "Petitioners must have more than generalized environmental concerns to satisfy that burden and, unlike in cases involving zoning issues, there is no presumption of standing to raise a SEQRA or other environmental challenge based on a party's close proximity alone."[17] Here, the court made note that SEQRA's intended purposes are

> to declare a state policy which will encourage productive and enjoyable harmony between [humans] and [their] environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.[18]

KSHD was considered a unique and historic district "listed on the National Register of Historic Places, tracing back more than 300 years to the nation's colonial period and Revolutionary era."[19] While proximity to a project on its own is not sufficient to grant standing to challenge a negative declaration, in this case, petitioners owned property within KSHD and believed that the project would drastically reduce the historical significance of KSHD, cause the loss of archeological resources that only exist within KSHD, and alter the quaint character of the community.[20] The petitioners' allegations aimed to protect KSHD's unique nature along with their properties' distinct connection to KSHD's historical resources and sufficiently articulated an injury that would be different than that of the public at large, so the court found that the petitioners did have standing to challenge the negative declaration.[21] The petitioners believed that the planning board was required to complete an environmental impact statement, but SEQRA requires completion of an environmental impact statement only when the lead agency has issued a positive declaration of a significant adverse environmental impact.[22] Since the planning board engaged properly in an "open and

deliberative process" with developers, members of the public, and all agencies that were identified at the time, the procedural requirements of SEQRA were fulfilled.[23] SEQRA was limited to whether the agency identified and seriously considered the relevant areas of environmental concern, and "[a] court may only annul an agency's determination to issue a negative declaration where it is arbitrary, capricious or unsupported by the evidence."[24] The planning board received input from the public as well as several agencies involved with the public including the Preservation Commission, the Heritage Area Commission, and the State Office of Parks, Recreation, and Historic Preservation.[25] The developers modified plans as needed based on this input and provided reasoned explanations for its determinations.[26]

Conclusion

The planning board executed due diligence in addressing the public's concerns and the concerns of the agencies involved with the project; while the petitioners did have standing to challenge the negative declaration, the court affirmed the planning board's negative declaration and found that the determinations that were detailed in the negative declaration were neither arbitrary or capricious, and satisfied the requirements of SEQRA.[27]

Jillian Gentile
Class of 2024

Endnotes

1. *CREDA, LLC v. City of Kingston Planning Bd.*, No. 00355, slip op. at 1 (N.Y. 3rd Dep't Jan. 26, 2023).
2. *Id*. at 2.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*. at 3.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*. at 4.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id.* at 5 (*quoting Matter of Peachin v. City of Oneonta*, 194 A.D.3d 1172, 1174, 149 N.Y.S.3d 258 (3d Dep't 2021)).
17. *Id.* at 5 (*quoting Matter of Village of Woodbury v. Seggos*, 154 A.D.3d 1256, 1258, 65 N.Y.S.3d 76 (3d Dep't 2017)).
18. *Id.* at 6 (*quoting* N.Y. Env't Conserv. Law § 8-0101 (Consol. 2023)).
19. *Id.* at 6 (*quoting 61 Crown St., LLC v. New York State Off. of Parks, Rec. & Hist. Preserv.*, 207 A.D.3d at 837-38 (3d Dep't. 2022).
20. *CREDA, LLC v. City of Kingston Planning Bd.*, No. 00355 (N.Y. 3d Dep't Jan. 26, 2023).
21. *Id*.
22. *Id*.
23. *Id.* at 11.
24. *Id*. at 9 (*quoting Gabrielli v. Town of New Paltz,* 93 AD3d 923, 924, 939 N.Y.S.2d 641 (N.Y. 3d Dep't 2012)).
25. *Id.*
26. *Id.*
27. *Id.*

Fresh Air for the Eastside, Inc. v. State, 2022 N.Y. Slip Op 34429(U) (Sup. Ct., Monroe Co. 2022)

Facts

New York voters approved the Green Amendment ballot initiative in 2021, enshrining in the state constitution new rights: "[e]ach person shall have a right to clean air and water, and a healthful environment."[1] This case—in which more than 200 residents living near a 300-acre landfill claim that the state government, City of New York municipal government, and a waste management company jointly violated their newly established constitutional right to clean air—is a matter of first impression for the Supreme Court of New York, Monroe County (the court).[2]

The plaintiffs (plaintiffs), members of Fresh Air for the Eastside, Inc., are residents of the Town of Perinton, New York. The defendants are High Acres Landfill owner and operator Waste Management of New York, L.L.C. (WMNY), the state of New York and the New York State Department of Environmental Conservation (collectively, the state), and the City of New York (NYC) (collectively, the defendants).

Established in 1971, the High Acres Landfill (the landfill) is a privately owned landfill, located in the Central New York towns of Perinton and Macedon, that houses garbage from the NYC boroughs of Brooklyn, Queens, and the Bronx.[3] In 2015, NYC received a permit from the state and began delivering waste to the landfill via rail transportation, causing a 250% increase of total disposed municipal solid waste. Now, NYC garbage constitutes 90% of the municipal solid waste in the landfill.[4]

The waste in the landfill produces fugitive emissions of landfill gas, a mix of greenhouse gases (e.g., methane and car-

bon dioxide), volatile organic chemicals, hazardous air pollutants, and hydrogen sulfide.[5] The fugitive emissions containing sulfur compounds, of which even small amounts emit a potently noxious "smell of rotten eggs," led to the formation of the plaintiffs as Fresh Air for the Eastside, Inc.[6] The plaintiffs recorded nearly 24,000 complaints about the fugitive emissions and associated odors in public spaces and private residences from 2017 to 2022.[7] In addition to their concern about violations to their right to clean air, the plaintiffs also expressed concern of the fugitive emissions effect on climate change because weather conditions affect operation of the landfill and control of fugitive emissions.[8]

Procedural History

Plaintiffs claim that defendants' cumulative and aggregate conduct (1) failed to reduce the amount of waste discarded in the landfill and (2) failed to mitigate the odors and fugitive emissions produced by that waste.[9] Further, they argue, the state's issuance of the landfill's permit and failure to respond to regulatory violations constitutes a breach of basic duty of care; NYC's failure to abate environmental conditions caused by the Emissions is an abdication of its charter-established duty to properly dispose of NYC garbage; and expansion and operation of the landfill is contrary to state Environmental Conservation Law and New York Climate Leadership Community Protection Act.[10]

In their complaint, the plaintiffs request three forms of relief: (1) a declaration that the defendants violated the Plaintiff's constitutional rights to clean air and a healthful environment; (2) issuance of an injunction to either direct "the immediate proper closure of the [l]andfill" or immediate abatement of the odors and fugitive emissions; and (3) Plaintiff's costs, attorney's fees, and other disbursements pursuant to the New York State Equal Access to Justice Act.[11]

Each of the defendants filed their own motion to dismiss on various bases.

Issue

Should the court grant NYC's motion to dismiss the plaintiffs' complaint on the basis of documentary evidence, lack of subject matter jurisdiction, or failure to state a cause of action?

Should the court grant WMNY's motion to dismiss the plaintiff's complaint on the basis of documentary evidence, lack of subject matter jurisdiction, or failure to state a cause of action?

Should the court grant the state's motion to dismiss the plaintiffs' complaint on the basis that the claim is "time barred" and "fails to state a claim for the relief of mandamus to compel"?

Rationale

In considering NYC's motion, the court reasons that "[g]arbage is fungible" and—if NYC ceased to be a WMNY customer—the disposal of garbage to the landfill would not change.[12] Further, the Green Amendment bestows no duty upon NYC to monitor "WMNY's compliance with its permits or to abate operational problems at WMNY's regulated and licensed landfill."[13]

Acknowledging that WMNY is a private entity, the court considers the scope of the Green Amendment to rule on WMNY's motion to dismiss. The court, in evaluating if the amendment is "self-executing and enforceable by a private cause of action," adopts an analysis from Albany Law School Government Law Center: the Green Amendment is "enforceable without additional legislation" against the government, but not private entities outside limited circumstances.[14]

In assessing the state's motion, the court assesses if the Plaintiff's lawsuit is "procedurally proper, timely and it was unnecessary to first petition the [New York State Department of Environmental Conservation (DEC)]."[15]

First, the court states, "Defendants have not properly remedied the on-going [emissions and odors] problem," and "more needs to be done to protect [the Plaintiff's] constitutional rights to clean air and a healthful environment."[16] Further, "numerous and continuous acts and omissions" by the state constituted a violation of the state constitution.[17] The court reasons that the Green Amendment clearly requires the state to protect constitutional rights to clean air and the state cannot decide whether or not to comply with the constitution. Thus, the court "is fully entitled to compel the state to comply with the Constitution."[18]

The state also failed to cite binding authority that would require the plaintiffs to first pursue their action through an administrative Article 78 proceeding, which is "used to appeal the decision of a New York State or local agency to the New York courts."[19] The court finds the plaintiffs' plea for "redress for actions, inactions and/or results. . .which. . .cause unclean air or an unhealthful environment, and thereby violate the Constitution" to be within the purview of state courts and best served by granting of declaratory judgment because such relief cannot be granted by an Article 78 proceeding through DEC.[20]

To assess the complaint's timeliness, the court points to the clear facts that the plaintiffs filed their complaint 27 days after the Green Amendment became effective and "constitutional violations are subject to a six-year statute of limitations."[21]

Conclusion

The court ruled on all three motions to dismiss. The court found in favor of both the City of New York and WMNY, granting the two defendants' motions to dismiss for failure to state a cause of action.[22] However, the court found that the state failed to meet its burden and denied its motion to dismiss for properly stating a cause of action.[23] Lastly, in light of the state's vigorous opposition to the instant case, the court ruminated on what future enforcement of the Green Amendment will look like.[24]

Zachary R. Evans
Albany Law School, Class of 2024

Endnotes

1. N.Y. Const., art. 1, § 19; *See* Scott Fein and Tyler Otterbein, *New York's New Constitutional Environmental Bill of Rights: Impact and Implications*, Albany Law Sch. Gov't Law Ctr., https://www.albanylaw.edu/government-law-center/new-yorks-new-constitutional-environmental-bill-rights-impact-and (last visited: Feb. 10, 2023).
2. *Fresh Air for the Eastside, Inc. v. State*, 2022 N.Y. Slip Op 34429(U), 3, 14 (Sup. Ct., Monroe Co. 2022); *See* Justin Davidson, *Voyage of the Gross*, New York Magazine (Aug. 12, 2022), https://www.curbed.com/2022/08/nyc-trash-landfill-incineration-recycling-compost-voyage-gross.html.
3. *High Acres Landfill*, NY Dep't. of Envtl. Conservation, https://www.dec.ny.gov/chemical/113037.html (last visited: Feb. 21, 2023); Liz Donovan, *Outsourced NYC Trash is Causing a 'Never-Ending Odor Event' Upstate, Lawsuit Alleges*, CityLimits (Sept. 19, 2022), https://citylimits.org/2022/09/19/outsourced-nyc-trash-is-causing-a-never-ending-odor-event-upstate-lawsuit-alleges/.
4. *Fresh Air for the Eastside, Inc.*, at 12-13.
5. *Id.* at 9, 13.
6. *Id.* at 13.
7. *Id.* at 13-14.
8. *Id.* at 15.
9. *Id.* at 5-8.
10. *Id.*
11. *Fresh Air for the Eastside, Inc.*, at 7-8; *See* N.Y. Civil Practice Laws & Rules 7801 (CPLR).
12. *Fresh Air for the Eastside, Inc.*, at 21.
13. *Id.* at 22.
14. *Id.* at 21.
15. *Id.* at 22.
16. *Id.* at 23-24.
17. *Id.* at 23.
18. *Id.* at 29.
19. *Article 78 Proceedings – How to Appeal an Agency Decision*, Legal Assistance of W. New York, Inc., https://www.lawny.org/node/62/article-78-proceedings (last visited: Feb. 21, 2023); *See* N.Y. Civil Practice Laws & Rules 7801 (CPLR).
20. *Fresh Air for the Eastside, Inc.*, at 24-25, 27.
21. *Id.* at 26.
22. *Id.* at 32-33.
23. *Id.* at 33.
24. *Id.* at 32.

Sierra Club v. Town of Torrey, 75 Misc. 3d 523, 167 N.Y.S.3d 727 (4th Dep't 2022)

Facts

In 2014, respondent Greenidge Generation LLC (Greenidge) purchased an electric generating facility in the respondent Town of Torrey.[1] The plant, which uses water from Seneca Lake to cool turbines and discharges heated water back into Seneca Lake, began operating in March 2017.[2] In June 2020, Greenidge sought approval from respondent Town of Torrey Planning Board to construct a bitcoin mining facility using the electricity generated from the Greenidge plant.[3]

In September 2020, the planning board declared itself the lead agency and the project to be an unlisted action under the State Environmental Quality Review Act (SEQRA).[4] In April 2021, the planning board reviewed Greenidge's application, which included a full Environmental Assessment Form (EAF) and a community noise assessment conducted by a third-party environmental noise consulting company.[5] The planning board issued a negative declaration under SEQRA and approved Greenidge's site plan.[6] In July 2021, the Town of Torrey issued a building permit, and construction of the project began in August 2021.[7]

Procedural History

On May 21, 2021, petitioners filed their First Amended Petition, which challenged the issuance of a negative declaration and alleged that the planning board violated SEQRA by not preparing a full environmental impact statement (EIS) and by not taking the requisite "hard look" at the potential for negative environmental impacts.[8] Petitioners consisted of Sierra Club, Seneca Lake Guardian, Inc., The Committee to Preserve the Finger Lakes, and thirty individuals who owned property either on or near Seneca Lake, or near the Greenidge facilities.[9]

The individual petitioners alleged that due to the Greenidge plant operation, there existed an increased risk of harm to their health due to "harmful algae blooms" caused by the discharge of the heated water from the Greenidge plant into Seneca Lake.[10] Some petitioners further alleged that they would suffer increased noise levels from the bitcoin mining operation.[11]

Respondents Town of Torrey, Town of Torrey Planning Board, and Greenidge raised several affirmative defenses and objections, including that the project was properly considered an unlisted action, no EIS was required, the petitioners lacked standing, the respondents took the requisite "hard look" at environmental impacts, and the decision to issue a negative declaration was supported by substantial evidence.[12]

On December 3, 2021, petitioners filed a notice of motion seeking a preliminary injunction to enjoin Greenidge from continuing to develop the project.[13] Respondent Greenidge cross-moved to dismiss the amended petition.[14]

Issues

(1) Whether respondent Torrey Planning Board properly characterized the project as an unlisted action; (2) Whether the petitioners had standing; (3) Whether the planning board took the requisite "hard look" before issuing the negative declaration; (4) and whether a preliminary injunction was warranted. [15]

Rationale

First, the court ruled that respondent Torrey Planning Board properly characterized the project as an unlisted action under SEQRA, despite petitioners' argument that the project was a Type I Action.[16] The court held the petitioners' argument was "predicated on a misrepresentation of what the project entail[ed]," which consisted of four building structures, installing computer and networking equipment, and connecting the buildings and equipment to the power grid to use the electricity generated by the plant.[17] Notably, the project did not involve any use of water from Seneca Lake.[18]

Second, the court ruled that none of the individual petitioners had standing, and, thus, the Petitioner-organizations did not have standing.[19] The court held petitioners' concerns regarding the discharge of heated water from the Greenidge plant were "irrelevant," since the project would not impact the air or water of Seneca Lake.[20] Further, while some of the petitioners alleged the operation of the computer equipment and the fans necessary to remove heat would result in excessive noise, the court noted that none of the petitioners lived closer than 2,000 feet to the project.[21] Thus, the petitioners "failed to establish that they would suffer an environmental injury different from that suffered by the general public."[22]

Third, even assuming the petitioners had alleged sufficient allegations to establish standing, the court ruled that respondent Torrey Planning Board took the requisite "hard look" before issuing the negative declaration for the project.[23] Despite the proper classification as an unlisted action, the planning board used the full EAF in assessing the environmental impacts.[24] Its members assessed each of the sixteen areas of potential environmental concerns and identified two areas of concern: "impact on energy" and "impact on noise, odor, and light."[25] Regarding the impact on energy, the court held the planning board properly concluded that there would not be a significant environmental impact since the project would not result in an increase in generating capacity at the plant.[26] Further, the noise concern led to submission of a revised acoustical study to the planning board, which concluded the predicted noise levels would be below the limits set by the zoning law of the Town of Torrey.[27]

Fourth, the court ruled the petitioners' preliminary injunction was moot, and, even if not moot, was unwarranted.[28] The court noted that there was unnecessary delay by petitioners in seeking the preliminary injunction, that Greenidge acted in good faith, and that construction—which had proceeded for four months at the time the injunction was sought—had substantially completed.[29] Further, even if petitioners had standing, they failed to establish both that the planning board's determination was contrary to SEQRA and that they would suffer irreparable harm should the project be completed.[30] The court again noted the allegation of harm to Seneca Lake due to water discharge was "irrelevant," and the noise (i.e., only other possible environmental harm) would fall below accepted levels, or else the project would need to cease operations until remedied.[31] Lastly, "the balance of equities" favored Greenidge, as a delay in their multi-million dollar investment would have significant financial consequences.[32]

Conclusion

The court denied petitioners' motion for a preliminary injunction, granted respondent Greenidge's motion to dismiss the amended petition, and dismissed the amended petition.[33]

Diana Waligora
Albany Law School, Class of 2025

Endnotes

1. *Sierra Club v. Town of Torrey*, 75 Misc. 3d 523, 525, 167 N.Y.S.3d 727 (4th Dep't 2022).
2. *Id.* at 525-26.
3. *Id.* at 527.
4. *Id.* at 528.
5. *Id.* at 527-29.
6. *Id.* at 529 (defining a negative declaration as a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts).
7. *Id.*
8. *Id.*
9. *Id.*

10. *Id.* at 529-30.
11. *Id.* at 530.
12. *Id.* at 530-31.
13. *Id.* at 531.
14. *Id.*
15. *Id.* at 531-40.
16. *Id.* at 531-32.
17. *Id.* at 532.
18. *Id.*
19. *Id.* at 535.
20. *Id.* at 533 (granting respondent Greenidge's motion to strike the affidavit of Dr. Gregory Boyer, noting it was "irrelevant as to the issues of standing as it addresses the impact of heated water discharge into Seneca Lake").
21. *Id.* at 534.
22. *Id.*
23. *Id.* at 535.
24. *Id.* at 536.
25. *Id.*
26. *Id.* at 536-37.
27. *Id.* at 536.
28. *Id.* at 540.
29. *Id.* at 539.
30. *Id.* at 540.
31. *Id.*
32. *Id.*
33. *Id.*

Rosenblum v. Trinity Hudson Holdings, LLC, 211 A.D.3d 494, 180 N.Y.S.3d 123 (1st Dep't 2022)

Facts

This appeal before the Supreme Court of New York, Appellate Division, First Department (appellate court) involves litigation between two neighboring New York City property owners over allegedly negligent and illegal use of water-removal pumps during major flooding events.[1] Kenneth Rosenblum and fellow owners of a Manhattan apartment building (plaintiff-appellants) brought an action against the owners of a nearby commercial building: the leadership of Trinity Church and one of its real estate entities, Trinity Hudson Holdings, LLC (defendant-respondents). Plaintiff-appellants claim the defendant-respondents' water pumping caused fine silts and soils to disappear from under the foundation of Plaintiffs-appellants' building. Plaintiff-appellants additionally claim that the defendants put groundwater into the New York City sewer system in violation of New York City Department of Environmental Protection (DEP) rules and regulations.[2]

Procedural History

Plaintiff-appellants appealed a 2021 decision of the Supreme Court, New York County, which granted defendant-respondents' motion for summary judgment dismissing the complaint.[3] The Supreme Court also denied plaintiff-appellants' motion to amend the complaint.[4]

Issues

Whether the Supreme Court, New York County erred in (1) granting the defendant-respondents' motion for summary judgment, dismissing plaintiff-appellants' complaint, and (2) denying plaintiffs-appellants' motion to amend the complaint. Further, the appellate court inquired into whether defendant's water pumping was in violation of DEP's rules and regulations.

Rationale

The appellate court rejected plaintiff-appellants' contention that the lower court erred in granting defendants' motion for summary judgment.[5] The affidavit of plaintiff-appellants' expert failed to raise an issue of fact in opposition to defendant-respondents' experts' affidavit, as the expert's opinion was "devoid of any reference to a foundational scientific basis for its conclusions."[6] Plaintiff-appellants' engineer stated that "defendants' pumping zone of influence extends…under the entire foundation footprint" of plaintiffs' building without addressing defendant-respondents' engineers' specific explanations as to why defendants' pumping was not causing fine silts and soils to disappear from under the foundation of plaintiffs' building.[7]

The appellate court also rejected plaintiff-appellants' motion to amend the complaint as the claim that the defendants were in violation of DEP rules and regulations lacked merit.[8] The appellate court states, "[m]ere evidence of safety regulations violation is insufficient to warrant the imposition of punitive damages."[9] DEP was concerned only about (1) pollution and (2) whether the sewer system/wastewater treatment plants would be overwhelmed, not about harm to the neighbor of the person that was discharging groundwater into the sewer.[10] The court held that since the plaintiff would not have a private right of action for defendant-respondents' violation of 15 RCNY 19–02, they would not be entitled to punitive damages for such violation.[11] Plaintiff-appellants were not "one of the class for whose particular benefit the [rule] was enacted."[12]

Conclusion

The Appellate Division of the Supreme Court, First Department, affirmed the trial court's ruling, affirming grant of motion for summary judgment to dismiss plaintiff-appel-

lants' complaint and denying the plaintiff-appellants' motion to amend the complaint for punitive damages.

Julia Tucker
Albany Law School, Class of 2025

Endnotes

1. *Rosenblum v. Trinity Hudson Holdings, LLC*, 211 A.D.3d 494, 180 N.Y.S.3d 123 (App. Div. 1st Dep't); *see Rosenblum v. Trinity Hudson Holdings, LLC*, 2021 N.Y. Misc. LEXIS 2714 (Sup. Ct., N.Y. Co. 2021).
2. *Rosenblum v. Trinity Hudson Holdings, LLC*, 211 A.D.3d 494, 180 N.Y.S.3d 123 (1st Dep't 2022).
3. *Id.* at 495, 124.
4. *Id.* at 124.
5. *Id.* at 124. (*quoting Romano v. Stanley*, 90 N.Y.2d 444, 452, 661 N.Y.S.2d 589, 684 N.E.2d 19 (1997)).
6. *Id.* at 124.
7. *Id.* at 124. (*quoting Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 22–24, 756 N.Y.S.2d 26 (1st Dep't. 2003)).
8. *Id.* at 124. (*quoting Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 22–24, 756 N.Y.S.2d 26 (1st Dep't. 2003) (internal quotation marks omitted)).
9. *Id.* at 124.
10. *Id.*
11. *Id.* at 124. (*quoting Hammer v. American Kennel Club*, 1 N.Y.3d 294, 299, 771 N.Y.S.2d 493, 803 N.E.2d 766 (2003)).
12. *Id.* at 124.

Parrino v. People, 210 A.D.3d 898, 179 N.Y.S.3d 116 (2022)

Facts

Plaintiff property owner brought action against County of Suffolk (the county), State of New York (the state), and Department of Environmental Conservation (DEC) claiming he owned underwater lots in fee simple and was not required to obtain a permit from the county or DEC to cultivate and harvest any type of shellfish by any method.[1]

Procedural History

Pursuant to RPAPL Article 15 for judgment declaring property owner has fee simple title to all subject properties, the plaintiff appealed to Suffolk County Supreme Court from an order issued on April 22, 2019.[2]

Issue

Did the property owner acquire title to underwater lots in fee simple?

Rationale

Before 1884, the state owned underwater lands in both Peconic and Gardiner's bays except for lands already granted or reserved.[3] In 1884, New York State granted title to underwater lands in Peconic and Gardiner's bays to the county subject to condition subsequent that if the land ceased to be used for "oyster culture," the lots would revert back to the state.[4] In 2004, Paradise Point Oyster Farms, Inc., owned by the plaintiff, purchased two underwater lots in Gardiner's bay and subsequently conveyed the lots to the plaintiff by deed on December 12, 2008.[5] In 2014, the plaintiff commenced this action seeking a judgment declaring his fee simple title to subject underwater lots and that he was not required to obtain a permit from DEC or the county and that he could cultivate and harvest shellfish by any method.[6]

The state may convey fee interest in underwater lands to an individual or corporation.[7] However, grants should be construed strictly and "nothing is granted thereby unless expressly."[8] In this case, a provision was made by the state for reverter if the land ceased to be used for "oyster culture," and thus the plaintiff did not acquire title to the subject lots in fee simple.[9] Contrary to the plaintiff's contention, the defendants have the right to regulate both the planting and taking of shellfish with respect to the lots in question.[10]

Conclusion

Order affirmed. As this action is in part for a declaratory judgment, the matter was remitted to the Suffolk County Supreme Court for entry of judgment, *inter alia*, making appropriate declarations in accordance herewith.[11]

Jocelynn Joy Buti
Albany Law School, Class of 2024

Endnotes

1. *Parrino v. People*, 210 A.D.3d 898, 898 (2022).
2. *Id.* at 898-99.
3. *Id.* at 899; *see generally Dicanio v. Incorporated Vil. of Nissequogue,* 189 A.D.2d 223, 227 (1993).
4. *Parrino*, *supra* note 1 at 899; *see* L 1884, ch 385, § 1.
5. *Parrino*, *supra* note 1 at 899.
6. *Id.* at 899.
7. *Id.* at 899; *see Long Sault Dev. Co. v. Kennedy*, 105 N.E. 849 (1914); *see also Turiano v. State of New York*, 519 N.Y.S.2d 180 (1987).
8. *Parrino*, *supra* note 1 at 899; *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 129 App.Div. 574, 577, affd 91 N.E. 846, affd 229 U.S. 82.
9. *Parrino*, *supra* note 1 at 899; *see Trustees of Calvary Presbyt. Church of Buffalo v. Putnam*, 221 App.Div. 502, 504, *affd,* 162 N.E. 601.
10. *Parrino*, *supra* note 1 at 899; *see* ECL § 13-0302.
11. *Parrino*, *supra* note 1 at 899-900; *Lanza v. Wagner*, 229 N.Y.S.2d 380 (1962).

Section Committees and Chairs

The Environmental and Energy Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

Adirondacks, Catskills, Forest Preserve and Natural Resource Management
Claudia K. Braymer
Braymer Law PLLC
Glens Falls, NY
claudia@braymerlaw.com

Jan S. Kublick
McMahon Kublick P.C.
Syracuse, NY
jsk@mkms.com

Agriculture and Rural Issues
Scott H. Wyner
NYS Dept. of Agriculture and Markets
Albany, NY
scott.wyner@agriculture.ny.gov

Brownfields Task Force
David J. Freeman
Gibbons, P.C.
New York, NY
dfreeman@gibbonslaw.com

Lawrence P. Schnapf
Schnapf, LLC
New York, NY
larry@schnapflaw.com

Coastal and Wetland Resources
Terresa M. Bakner
Whiteman Osterman & Hanna LLP
Albany, NY
tbakner@woh.com

Amy K. Kendall
Knauf Shaw, LLP
Rochester, NY
akendall@nyenvlaw.com

Continuing Legal Education & Ethics
Lawrence Schnapf
Schnapf LLC
New York, NY
larry@schnapflaw.com

Marla E. Wieder
U.S. EPA Region II
New York, NY
wieder.marla@epa.gov

Corporate Counsel
Howard Tollin
SterlingRisk
Woodbury, NY
htollin@sterlingrisk.com

Nicholas Ward-Willis
Keane & Beane, PC
White Plains, NY
nward-willis@kblaw.com

Diversity & Inclusion
Christine M. Leas
Sive Paget & Riesel PC
New York, NY
cleas@sprlaw.com

Sarah M. Lobe
Nixon Peabody LLP
Rochester, NY
sarah.lobe@avangrid.com

Virginia C. Robbins
Bond, Schoeneck & King, PLLC
Syracuse, NY
robbinv@bsk.com

Energy
Hayley Carlock
Scenic Hudson, Inc.
Poughkeepsie, NY
hcarlock@scenichudson.org

Yvonne E. Hennessey
Barclay Damon LLP
Albany, NY
yhennessey@barclaydamon.com

Enforcement and Compliance
Susan E. Amron
NYC Department of City Planning
New York, NY
samron@planning.nyc.gov

Karen Mintzer
Mintzer Mauch PLLC
New York, NY
karen@mintzermauch.com

Matthew J. Sinkman
Gibbons P.C.
New York, NY
msinkman@gibbonslaw.com

Environmental Business Transactions
Jon Schuyler Brooks
Freeborn & Peters LLP
New York, NY
jbrooks@freeborn.com

Helen Collier Mauch
Mintzer Mauch PLLC
New York, NY
helen@mintzermauch.com

Donna Mussio
Fried, Frank, Harris Shriver & Jacobson
New York, NY
donna.mussio@friedfrank.com

Environmental Impact Assessment
Richard G. Leland
Akerman LLP
New York, NY
richard.leland@akerman.com

Adam J. Schultz
Couch White LLP
Albany, NY
aschultz@couchwhite.com

Adam Michael Stolorow
Sive Paget & Riesel PC
New York, NY
astolorow@sprlaw.com

Environmental Insurance
Gerard P. Cavaluzzi
Kennedy/Jenks Consultants, Inc.
Croton on Hudson, NY
jerrycavaluzzi@kennedyjenks.com

Michele Schroeder
Environmental Risk Inc.
Rockville Centre, NY
mschroeder@environrisk.com

Environmental Justice
Jose A. Almanzar
Jose Almanzar, Esq.
Port Washington, NY
jalmanzar@gmail.com

Ivonne Norman
Harris Law
New York, NY
ivonnecnorman@gmail.com

Future of Federal Environmental Policy Task Force
David J. Freeman
Gibbons, P.C.
New York, NY
dfreeman@gibbonslaw.com

J. Kevin Healy
Bryan Cave Leighton Paisner LLP
New York, NY
jkhealy@bryancave.com

Gail S. Port
Proskauer Rose LLP
New York, NY
gport18@gmail.com

Continued on next page

Global Climate Change
Prof. Michael B. Gerrard
Columbia Law School
New York, NY
mgerra@law.columbia.edu

J. Kevin Healy
Bryan Cave Leighton Paisner LLP
New York, NY
jkhealy@bryancave.com

Carl R. Howard
US Environmental Protection Agency
Office of Regional Counsel
New York, NY
howard.carl@epa.gov

Virginia C. Robbins
Bond, Schoeneck & King, PLLC
Syracuse, NY
robbinv@bsk.com

Hazardous Waste/Site Remediation
David J. Freeman
Gibbons, P.C.
New York, NY
dfreeman@gibbonslaw.com

Amy Lynn Reichhart
Nixon Peabody LLP
Rochester, NY
areichhart@nixonpeabody.com

Lawrence Schnapf
Schnapf LLC
New York, NY
larry@schnapflaw.com

Land Use
John B. Kirkpatrick
Kirkpatrick Law LLC
White Plains, NY
jkirk@kirklawllc.com

Frank Piccininni
Sterling Environmental Services
Woodbury, NY
fpiccininni@sterlingrisk.com

Daniel M. Richmond
Zarin & Steinmetz
White Plains, NY
dmrichmond@zarin-steinmetz.com

Legislation
John L. Parker
Sahn Ward
Uniondale, NY
jparker@sahnward.com

Membership
Amy K. Kendall
Knauf Shaw, LLP
Rochester, NY
akendall@nyenvlaw.com

Mining
Kevin M. Bernstein
Bond, Schoeneck & King, PLLC
Syracuse, NY
kbernstein@bsk.com

Alita J. Giuda
Couch White, LLP
Albany, NY
agiuda@couchwhite.com

Pesticides
Telisport W. Putsavage
Putsavage PLLC
Albany, NY
putsavage@environmentallaw.us

Mackenzie Spring Schoomaker
Beveridge & Diamond PC
New York, NY
mschoomaker@bdlaw.com

Petroleum Spills
Jeffrey C. Stravino
Hodgson Russ LLP
Buffalo, NY
jstravino@hodgsonruss.com

Melissa M. Valle
Knauf Shaw LLP
Rochester, NY
mvalle@nyenvlaw.com

Siting & Utility Regulation
Jeffrey Greenblatt
PSEG Long Island
Uniondale, NY
jeffrey.greenblatt@pseg.com

Ekin Senlet
Barclay Damon LLP
Albany, NY
esenlet@barclaydamon.com

Social Media and Electronic Communications
Drew Victoria Gamils
Keane & Beane
Westchester, NY
dgamils@kblaw.com

Solid Waste
Michael S. Bogin
Sive Paget & Riesel PC
New York, NY
mbogin@sprlaw.com

Steven C. Russo
Greenberg Traurig LLP
New York, NY
russos@gtlaw.com

Toxic Torts
Daniel Mark Krainin
Beveridge & Diamond PC
New York, NY
dkrainin@bdlaw.com

Cheryl P. Vollweiler
Skarzynski Marick & Black, LLP
New York, NY
cvollweiler@skarzynski.com

Water Quality
Philip H. Dixon
Law Office of Philip H. Dixon
Albany, NY
philiphdixon@gmail.com

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