Developments in Federal and State Law

Michael B. Gerrard Editor

ENVIRONMENTAL LAW IN NEW YORK

Volume 21, No. 6 June 2010

THE LACEY ACT AND THE WORLD OF ILLEGAL PLANT PRODUCTS

Marcus A. Asner and Grace Pickering

IN THIS ISSUE

I. Introduction

A revolution is underway in the way that companies throughout the world buy and use wood, paper, and other plant products, thanks to recent changes to the century old Lacey Act. Originally designed to protect native bird species, the Lacey Act most commonly is associated with wildlife protection—making it a crime, for example, to import into the United States wildlife knowing that it was harvested illegally in a foreign country. The Act was expanded in 2008, however, when Congress, reacting to the global problem of illegal logging, dramatically extended the reach of the Act so that it now also covers a wide range of "plants" and "plant products," ranging all of the way from paper produced in the United States to wooded furniture made from trees harvested in Indonesia.[1]

We are just beginning to see the impact of the recent amendments. The changes bring to the practice of environmental law some of the features and challenges that U.S. companies long have faced under other laws that govern behavior overseas, such as antitrust regulations or CFIUS regulations, or the Foreign Corrupt Practices Act.[2] Recently, in the first high-profile law enforcement action under the amended Act, officials raided a Gibson guitar factory in Tennessee because some of the factory's rosewood, an endangered and highly protected species, allegedly was imported illegally from Madagascar.[3] And environmental protection groups, as part of their ongoing efforts to reduce illegal logging, are using the Lacey Act's expanded reach to exert pressure on international companies who may trade in unlawfully obtained plant products.[4]

---

[1] *See* 16 U.S.C. § 3371(f); Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415, 45,417 (Sept. 2, 2009) (listing categories of plant products covered by the Lacey Act declaration requirement, such as frames, furniture, tools, musical instruments, paper, wood pulp, magazines, and books).

[2] *See* Ronald J. Tenpas & Matthew Forman, *A Revised Lacey Act: Criminal Exposure from Trading in Illegal Wood Products*, 29 BNA Daily Environment Report B-1, B-2 (Feb. 16, 2010).

[3] Sean Michaels, *Gibson Guitars Raided for Alleged Use of Smuggled Wood*, Guardian (U.K.), Nov. 20, 2009, *available at* http://www.guardian.co.uk/music/2009/nov/20/gibson-guitars-raided. Madagascar has banned the export of rosewood.

[4] *See* Press Release, Environmental Investigation Agency (EIA), Environmental Groups Call on French Shipping Company Delmas to Cancel Shipment of Precious Wood from Madagascar (Mar. 15, 2010) (EIA Director of Forest Campaigns, Andrea Johnson, stating that " '[r]ecent U.S. enforcement actions show that companies involved in the trafficking of illegal timber can no longer act with impunity' " and urging " '[French shipping company] Delmas to adopt and implement policies to avoid shipping illegal products' ").

For certain plant-based products, new Lacey Act import declarations now are required to accompany each shipment into the United States. Publishers and paper manufacturers in particular breathed a sigh of relief when the U.S. Department of Agriculture (USDA) recently announced that it would delay until September 1, 2010, enforcement of the new Lacey Act import declaration requirement for paper and wood pulp. Nonetheless, the import declaration requirement presently is being enforced for other products, as are the substantive changes to the Act.

Companies are trying to understand the impact the 2008 amendments will have on their business. This article describes the major differences to the law that companies should consider going forward.

II. Background

The Lacey Act[5] is the nation's oldest wildlife protection statute. Enacted in 1900, it originally was designed to combat interstate trafficking in poached birds and game, and to protect against the introduction of exotic species. Early prosecutions reflected the statute's emphasis on wildlife poaching. In 1910, for example, the United States Court of Appeals for the Eighth Circuit upheld the conviction of a man for exporting quail in violation of Oklahoma law.[6]

The scope of the statute gradually expanded over the next hundred years. In 1935, the Act was amended to prohibit trafficking in wildlife taken in violation of foreign law.[7] In 1981, Congress expanded the Lacey Act to cover certain plants and plant parts taken in violation of U.S. domestic law.[8] However, until recently, the Lacey Act's coverage of illegal plant products was limited to plants that were both indigenous to the United States and protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora[9] or state conservation laws.

A. The 2008 Amendments

The Lacey Act was expanded dramatically in 2008 when Congress, responding to increased concern over illegal logging and global deforestation, passed the Food, Conservation, and Energy Act of 2008.[10] The 2008 revisions have far-reaching implications for many companies doing business in the United States. As detailed in the following sections, companies now have an obligation to exercise "due care" to ensure that many of the plants and plant products they handle derive from only "legal" sources.

First, Congress expanded the definition of a "plant."[11] Under the new definition, a *plant* is "any wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands."[12] Paper, wooden furniture, hammers with wooden handles, musical instruments containing wood, and even books and magazines are now covered by the Lacey Act. Exceptions to the definition of "plant" include:

(1) Common cultivars. The USDA has not yet defined "cultivars," but publicly has stated that they will be plants such as cotton and tobacco.[13] The Lacey Act specifies that trees do *not* qualify for the common cultivar exception;
(2) Common food crops (including roots, seeds, parts, or products thereof). The USDA has not yet defined "crops," but has advised that it will adopt a broad definition;[14]
(3) Live plants; and
(4) Scientific specimens.[15]

Second, the Lacey Act now covers plants taken in violation of foreign as well as of domestic law. Foreign laws that can trigger a Lacey Act violation include: (1) laws that prevent the theft of plants; (2) laws that regulate the taking of plants from designated areas; (3) laws that call for the payment of taxes, royalties, or stumpage fees in order to take, possess, transport, or sell plants; and (4) laws that regulate the export or transshipment of plants.[16]

The Lacey Act applies regardless whether the underlying foreign law violation is criminal or civil in nature. For example, a defendant who harvests a plant in violation of a foreign civil regulation nonetheless can be convicted of a felony violation of the Lacey Act if he or she knowingly transports the illegally harvested plant into the United States. Not all foreign law violations can support a Lacey Act violation, however. Rather, the underlying law must be one aimed at protecting plants and their products. For example, violation of speeding regulations or labor laws while transporting plant

[5] 16 U.S.C. §§ 3371–3378.
[6] Rupert v. United States, 181 F. 87 (8th Cir. 1910).
[7] Act of June 15, 1935, ch. 261, § 242, 49 Stat. 378, 380.
[8] Pub. L. No. 97-79, § 2(f), 95 Stat. 1073 (Nov. 16, 1981).
[9] *Id.*
[10] Pub. L. No. 110-246 (May 22, 2008). The United States Department of Agriculture (USDA) website sets out the amended Lacey Act and the implementing regulations. The amended Act and these regulations are available at http://www.aphis.usda.gov/newsroom/hot_issues/lacey_act/index.shtml.
[11] 16 U.S.C. § 3371(f)(1).
[12] *Id.*
[13] USDA, *Implementation of Revised Lacey Act Provisions*, Transcript of Public Meeting, Oct. 14, 2008, at 27:13–15. This transcript previously was available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/TranscriptPublicMeeting.pdf, but is no longer on the APHIS website, having been taken down on or before November 20, 2009.
[14] *Id.* at 27:7–20.
[15] 16 U.S.C. § 3371(f)(2).
[16] *Id.* § 3372(a).

products, while perhaps troublesome in other ways, may not form a proper basis of a Lacey Act prosecution.[17]

Third, the Lacey Act now imposes a requirement that all importers of plant products submit a declaration with each import.[18] That declaration must contain, among other things, the scientific name of the plant, the country of origin, and the quantity and value of the plant products imported. Without such a declaration, the goods may not enter the United States. The Act imposes penalties for false declarations, which are more severe if the person submits the declaration knowing that it is false.[19]

B. Elements of a Lacey Act Prosecution

In a Lacey Act plant prosecution, the government must prove the following elements: (1) the plant was taken, possessed, transported, or sold in violation of a federal, state, or foreign law or regulation; (2) the defendant knowingly imported, exported, transported, received, acquired, or purchased the illegal plant or attempted to do so; and (3) the defendant knew or, with due care, should have known, of that violation.

The first element is known as the "predicate offense." The person who commits the predicate offense is not the only person who can be held criminally liable under the Lacey Act, however. Rather, any person who engages in the prohibited activities knowing of the underlying illegality of the plant products could be guilty of a felony Lacey Act offense.[20] For example, an importer may not have personally logged a shipment of illegal rosewood, but if the importer imported the rosewood knowing of its illegality, he or she will have violated the Lacey Act. Moreover, a conviction under the Lacey Act does not require the government to prove that the defendant knew the specific law or regulation that was violated. Rather, the government need only prove that the defendant knew of the plant's unlawfulness.[21]

III. New York Law and the Lacey Act

As noted, the Lacey Act makes it a federal offense to take wildlife and fauna in contravention of a federal, state, or foreign law. New York's Environmental Conservation Law includes a number of provisions designed to protect the state's wildlife and flora. A violation of any of these laws could form the basis of a Lacey Act prosecution.

Two provisions of New York law warrant special attention. First, New York law makes it illegal to purposefully injure, destroy, or remove trees from another person's land without the owner's consent.[22] The stated legislative purpose of this provision was to preserve the forest-based economy in New York, the New York State Legislature having found that 40% of that industry's jobs are tied to wood product manufacturing.[23]

Second, New York law also protects endangered plants, providing that no person shall "knowingly pick, pluck, sever, remove, damage by the application of herbicides or defoliants or carry away, without the consent of the owner thereof, any protected plant."[24] The same statute also grants the New York State Department of Environmental Conservation the power to designate certain plants as "protected" upon a finding that the plants are "endangered, rare, threatened or exploitably vulnerable" and, as such, should not be picked from their "natural habitat."[25] The statutory definition of "plant" includes trees.[26]

Accordingly, the New York statutory scheme makes it illegal to harvest certain species of protected trees (such as willow oaks[27]) in New York. And, if the illegally harvested wood is then moved across state lines, a wood company could then find itself as the defendant in a federal Lacey Act prosecution.

IV. Enforcement

The Lacey Act declaration provision technically is already in force. It is only being enforced, however, for certain types of goods: wood chips, tools, charcoal, tableware, caskets, and statuettes are just some of the goods for which enforcement is in place. Beginning on April 1, 2010, the declaration requirement will be enforced for musical instruments, arms and ammunition, and sculptures. The declaration requirement for wood pulp, paper, and fiberboard will start being enforced on September 1, 2010. Enforcement of the declaration requirement for books has been postponed until a later (and as yet, unspecified) date.[28]

---

[17] *See* Tenpas & Forman, *supra* n. 2, at B-3.

[18] 16 U.S.C. § 3373(f).

[19] *Id.* § 3373(a).

[20] United States v. Lee, 937 F.2d 1388, 1393–1394 (9th Cir. 1991) (upholding conviction of five fishermen who could not themselves have been penalized under the Chinese salmon fishing regulation).

[21] *See* United States v. Santillan, 243 F.3d 1125, 1129 (9th Cir. 2001) (upholding conviction of man who argued he could not be convicted for illegally importing parrots because while he knew the activity was illegal, he did not know which law had been violated).

[22] N.Y. Envtl. Conserv. Law § 9-1501.

[23] L. 2003, ch. 602, § 1 (N.Y.). This section continues: "The practice of forestry, including the manufacture of wood and paper products . . . is an important way of life that has been sustained for generations in many areas of the state." *Id.*

[24] N.Y. Envtl. Conserv. Law § 9-1503(3). New York has a similar law that protects "endangered wildlife," as defined by the New York State Department of Environmental Conservation. *Id.* § 11-0535(2); 6 N.Y.C.R.R. § 182.1 *et seq*.

[25] N.Y. Envtl. Conserv. Law § 9-1503(2). This provision does not cover planted forest stands.

[26] *Id.* § 9-1503(1).

[27] 6 N.Y.C.R.R. § 193.3.

[28] Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415, 45,417 (Sept. 2, 2009).

That said, the substantive provisions of the Act—including its requirements that companies deal only in legal plants and plant products—are already in force. The following section discusses how violations of the Lacey Act can lead to severe penalties, ranging from forfeiture and fines to prison time. While we so far have seen no plant-related prosecutions under the amended Act, one high-profile investigation resulted in law enforcement agents raiding the guitar manufacturer Gibson's Tennessee factory in November 2009, allegedly in connection with illegally-harvested rosewood from Madagascar.[29]

V. Penalties Under the Lacey Act

The Act provides for criminal and civil penalties. The gravity of the penalty generally depends on the state of knowledge of the person committing the offense.[30]

A. Knowing Violations

The Lacey Act makes it a felony to import, export, possess, purchase, acquire, or sell a plant or plant product knowing that it was taken in violation of U.S., state, or foreign law.[31] A person found guilty of a Lacey Act felony faces up to five years in prison, significant fines, and forfeiture. A person found guilty of conspiracy to violate the Lacey Act (under Title 18 of the United States Code) may be required to pay restitution to his or her victims. A knowing violation of the declaration requirement also may be a felony if the offense involves importing or exporting plants, or the sale or purchase of, or offer or intent to sell or purchase plants with a value over $350.

The Lacey Act makes it a misdemeanor knowingly to engage in the same conduct but with a plant product whose value is under $350.[32] A person convicted of a Lacey Act misdemeanor faces up to a year in jail, significant fines, and forfeiture.

B. Failure to Exercise "Due Care"

The Lacey Act requires the exercise of "due care" in the trade of plant products.[33] If a person or a company should have been aware of the illegality of the plant product after exercising "due care," that person or company may be found guilty of a misdemeanor. Alternatively, a failure to exercise due care can expose an organization or an individual to civil penalties of up to $10,000 per violation of the Act.

What constitutes "due care" will vary depending on the knowledge and experience of the purchaser, and the context of each purchase. For example, wood pulp that comes from an area with a well-known history of illegal logging likely would require a purchaser to exercise a higher level of care to make sure that the pulp is legal. A company importing a plant product from a country with significant corruption issues should be aware of the risk that local regulators may fail to ensure properly that plants are being harvested legally. The U.S. Department of Justice, Environmental and Natural Resources Division, has discussed a number of other common sense red flags that may suggest illegally taken plants. Such red flags include: (1) offers to sell plant products at prices considerably below going market rate; (2) offers to sell plant products for cash or offers of a discount for products lacking required paperwork; (3) facially invalid paperwork; and (4) evasive answers to questions regarding products' origins.[34]

Forestry chain-of-custody programs will continue to be popular because they are seen as a good way to exercise due care.[35] Moreover, U.S. businesses may exert commercial pressure on their suppliers to certify the legality of their plant

[29] Tenpas & Forman, *supra* n. 2, at B-1 to B-2; Michaels, *supra* n. 3. Madagascar bans the logging of rosewood, but political unrest in 2009 led to loggers invading protected areas and harvesting large quantities of both rosewood and ebony, the trade in which was estimated to be up to $460,000 per day. EIA, *supra* n. 4.

[30] 16 U.S.C. § 3373.

[31] *Id.* § 3373(a).

[32] *Id.*

[33] *Id.* §§ 3733(a)(1), (d)(2).

[34] The Department of Justice has indicated that existing precedent for non-plant Lacey Act offenses will be applied to the plant-based violations. *See* Elinor Colbourn, Environmental Crimes Section, Environmental & Natural Resources Division, U.S. Department of Justice, *Lacey Act Amendments of 2008* 15, Potomac Forum (March 29, 2009), *available at* http://www.forest-trends.org/~foresttr/documents/files/doc_696.pdf (citing *United States v. Virginia Star*, Case 2:07-cr-00449-PSG, a fish fillet case, as an example of application of due care standard to be applied to plant cases).

[35] European legislation attempting to tackle this problem has taken a somewhat more prescriptive approach to what constitutes "due diligence." *See* Tenpas & Forman, *supra* n. 2 (citing European Parliament Legislative Resolution A6-0115/2009). Article 4 of the European Regulation states that the required due diligence systems must: "employ[] a traceability system and third party verification by the monitoring organisation" and "comprise measures to ascertain: (i) country of origin, forest of origin and, where feasible, concession of harvest; (ii) name of the species, including scientific name; (iii) value; (iv) volume and/or weight; (v) that the timber or the timber embedded in the timber products has been legally harvested; (vi) the name and address of the operator who has supplied the timber and timber products; (vii) the natural or legal person responsible for harvesting; (viii) the operator to whom the timber and timber products have been supplied. These measures shall be supported by appropriate documentation maintained in a database by the operator or by the monitoring organisation." They must also "include a risk management procedure which shall consist of the following: (i) systematic identification of risks, inter alia through collecting data and information and making use of international, Community or national sources; (ii) implementation of all measures necessary for limiting exposure to risks; (iii) establishing procedures which shall be carried out regularly to verify that the measures set out in points (i) and (ii) are working effectively and to review them where necessary; (iv) establishing records to demonstrate the effective application of the measures set out in" the Regulation. Moreover, there must be "audits to ensure effective application of the due diligence system."

Article 4 also provides that timber products or producers deemed "high risk" require "extra due diligence obligation from the operators," which include "requiring additional documents, data or information; requiring third party audits."

products. Nonetheless, companies should know that obtaining a chain-of-custody certification, by itself, is not necessarily the same as exercising "due care" under the statute.[36] Traffickers of illegal plant products may well seek ways to modify their own methods so as to circumvent the various controls that companies and certification organizations erect. Accordingly, companies would be wise to examine regularly and update their chain-of-custody and purchasing processes so they can better identify potential problems in the supply chain as those problems arise.

Similarly, companies would do well to keep track of the reported levels of corruption in a country in which they do business. Although the link between the Lacey Act and corruption in a country may not seem obvious, in fact, these may be directly linked. For example, wide spread corruption in a country may lead to a greater likelihood that relevant documents or permits will be forged. Indeed, some have linked the illegal logging of rosewood in Madagascar to the purported willingness of local and national officials to accept bribes to grant loggers illegitimate permits.[37] Therefore, companies exercising due care should pay particular attention to reports of corruption and bribery in the countries that supply the plants or plant products they purchase.

Transparency International publishes an annual report that focuses on a global issue affected by corruption. Its Global Corruption Report for 2010 will focus on corruption affecting climate change. One of the Global Corruption Report's four "key areas" is "Forestry governance: responding to the corruption challenges plaguing the forestry sector."[38] This publication will provide further guidance for companies on the ways in which they can exercise greater care, including which countries pose greater risks, and in what ways the issue of corruption may be affecting the forestry business.[39]

C. Strict Liability

The Lacey Act provides that plant products that contain illegally taken plant material are subject to forfeiture even if the owner had no reason to know that the products are illegal. Although the illegal plant content may be hard to prove, if the government manages to do so, each person or entity along the supply chain may be required to forfeit their goods, regardless whether the person or entity exercised due care or knew of the illegality. Strong chain-of-custody regimes will help control the risk of forfeiture by helping companies avoid illegal plant products in their supply chain. That said, U.S. businesses also should consider ways to apportion this risk when negotiating contracts with suppliers or purchasers of their products.

VI. Conclusion

The recent amendments to the Lacey Act provide a powerful tool in the fight against illegal harvesting of trees and other plants around the world. The Act now imposes criminal penalties for intentional violations of laws protecting plants, whether in the United States or abroad. Companies also may face civil and criminal penalties for failure to exercise due care in the purchasing, transport, import, or export of plant products. And U.S. law enforcement has been quick to respond to the recent amendments: officials appear to be busy investigating reports of illegally-obtained wood and, in at least one recent high-profile case, have demonstrated their willingness to enforce the amendments.

Companies trying to comply with the Act are likely to rely increasingly on certification programs as part of their efforts to comply with the Act's "due care" standard. Nonetheless, companies also will need to be vigilant and aware of issues that may affect plant products' legality, such as levels of corruption in wood-producing countries.

Marcus A. Asner is a partner in the White Collar Criminal Defense practice group of Arnold & Porter LLP. Prior to joining Arnold & Porter, Mr. Asner served for nine years as an Assistant United States Attorney for the Southern District of New York, where he was the Chief of the Major Crimes and Computer Hacking/Intellectual Property unit for two years. As an Assistant United States Attorney, Mr. Asner handled, among other matters, the case of United States v. Bengis et al., one of the more significant prosecutions brought in the history of the Lacey Act. Grace Pickering is a litigation associate in the New York office of Arnold & Porter LLP.

[36] One of the current limitations of relying on a forestry chain of custody program is the still relatively small, albeit growing, percentage of forests that are covered by such programs. As of 2009, less than one percent of forests in Asia were covered by certification programs. In contrast, nearly two-fifths of North American forests enjoy chain-of-custody certification. Rupert Oliver & Florian Kraxner, *UNECE/FAO Forest Products Annual Market Review, 2008–2009: Forest Certification Challenged by Climate Change and Illegal Logging Concerns: Certified Forest Products Markets* 114 Table 10.2.1.

[37] EIA, *supra* n. 4. Madagascar was rated 99th on Transparency International's Corruption Perception Index for 2009, with a score of 3.0—the maximum possible being 10. Transparency International, *Corruption Perception Index 2009*, *available at* http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table.

[38] Transparency International, Flyer, *Global Corruption Report 2010: Climate Change, available at* http://www.transparency.org/content/download/48895/780558/GCR-Flyer-web+(2).pdf.

[39] Likewise, a company's learning concerning and efforts to comply with the Foreign Corrupt Practices Act may prove instructional and, indeed, intertwine with efforts to exercise due care over the supply chain for plant products.

LEGAL DEVELOPMENTS

ENERGY

Legislation

On March 24, 2010, Governor David Paterson vetoed a bill that would have established a program that would have provided grants for research into technologies that reduce greenhouse gases. The legislation (S. 4917) would have set up the New York State Greenhouse Gases Management Research and Development Program which would have provided grants for research that promotes new technologies and processes to avoid, abate, mitigate, capture, or sequester carbon dioxide and other greenhouse gases. Paterson said that he opposed the bill because it did not provide a source of funding and because it would duplicate existing state efforts by New York State's Climate Action Council, which is developing a climate action plan for the state. The veto message is available at http://public.leginfo.state.ny.us/menuf.cgi.

On March 24, 2010, the legislature enacted a law that amends the Public Services Law with respect to net energy metering for certain solar and wind electric generating systems. The amendment changes the definition of ''solar electric generating equipment'' and ''wind electric generating equipment.'' (L. 2010, ch. 7).

HAZARDOUS SUBSTANCES

Second Circuit Held That EPA Settlement Approval Is Unnecessary to Trigger Contribution Right Under CERCLA

The Second Circuit held that a superfund consent decree between a state and a private party does not require EPA approval for the settling party to pursue a contribution action based on the settlement. The Second Circuit reinstated a company's Section 113 contribution claims against several other alleged polluters over the cleanup of a contaminated industrial site in Troy, New York. The district court had dismissed Niagara Mohawk Power's contribution claims on the grounds the company had no contribution rights under Section 113(f)(3)(B) of CERCLA because EPA had never given DEC the express authority to approve a 2003 superfund-related settlement agreement with the company. In reinstating Niagara Mohawk's Section 113 claims, the Second Circuit first held the 2003 consent decree between the company and DEC qualified as an administrative settlement of liability for purposes of CERCLA. In its lawsuit, Niagara Mohawk Power is seeking reimbursement of some of the money it has spent over many years cleaning up coal tar and other hazardous substances from a contaminated industrial site in Troy, New York, known as the "Water Street Site." As part of its superfund lawsuit, Niagara Mohawk Power argued that four other private parties—Chevron U.S.A. Inc., the United States Steel Corp. (U.S. Steel), Portec Inc., and Edwin D. King—should share in its investigation and cleanup of at least one portion of the Troy site because those parties also once owned, operated, or allegedly discharged hazardous substances at the site. The Second Circuit held that the statute does not require that the federal government acquiesce in the administrative settlement . *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010).

District Court Denied Motion to Reassign Case Arising out of Union Carbide Disaster

Residents and property owners in Bhopal, India, filed a lawsuit in 2004 seeking injunctive relief and monetary damages under New York law as a result of water and soil pollution that occurred as a result of the 1984 Union Carbide industrial disaster. The plaintiffs alleged that they were injured as a result of an inadequate cleanup. In their lawsuit, the plaintiffs attempted to pierce the corporate veil and establish personal liability against the chief executive of the company for the alleged acts. The defendants initially moved to dismiss the action. The district court converted the motion to dismiss into a summary judgment motion and granted it. It also denied the plaintiffs' request for more time to conduct discovery. On appeal, the Second Circuit reversed, holding that the district court erred in converting the motion to dismiss into a summary judgment motion given the difficult procedural history of the case. On remand, the plaintiffs moved for a stay of summary judgment to conduct discovery on certain issues relevant to piercing the corporate veil and holding Union Carbide and its chief executive directly responsible rather than one of its subsidiaries. The district court granted the motion but limited the areas of discovery. Plaintiffs subsequently moved to have the case reassigned to another judge. The court denied the motion, holding that the plaintiffs did not show that the court has such "firmly held views" of the evidence or the merits of plaintiffs' claims that it could not fairly decide the summary judgment motion. *Janki Bai Sahu v. Union Carbide Corp.*, 2010 U.S. Dist. LEXIS 11984 (S.D.N.Y. Feb. 11, 2010).

LAND USE

Case Alleging Violation of Fourteenth Amendment Rights in Connection with Denial of Permit to Construct Driveway Dismissed on Ripeness Grounds

A landowner in the Town of Chili who owned a 77-acre parcel of land sought to construct a driveway on his property. After obtaining a fill permit and a development permit from the Town, he hired a company to haul approximately 1,500 truckloads of fill to construct the driveway. A Town official removed the fill permit from the property and ordered the landowner to cease construction until he obtained a site plan for the proposed driveway. The landowner then tried to obtain another fill permit, which was denied by the Town. The landowner subsequently commenced an action in federal court alleging that his 14th amendment rights were violated. The Town moved to dismiss on ripeness grounds. The district court granted the motion, holding that there had been no final determination by the Town

since the landowner failed to appeal the permit denial to the Town zoning board of appeals. *Hunter v. Town of Chili*, 2010 U.S. Dist. LEXIS 14141 (W.D.N.Y. Feb. 18, 2010).

Challenge to Property Upzoning Dismissed

Landowners in the Town of East Hampton commenced an action in federal court against the Town and the Town board in connection with the Town's enactment of a local law which upzoned a 15.1-acre property they owned from a minimum two-acre lot size to a five-acre lot size, alleging that doing so violated their equal protection rights. The landowners alleged that they were treated differently than an adjacent property which was upzoned to a three-acre lot size. The Town moved to dismiss. The district court granted the motion, holding that the Town had a rational basis for its decision, namely that the adjacent property was part of a larger subdivision development that had an agricultural easement and a voluntary reduction in the potential residential build-out. In addition, the court found that there was no evidence that this decision was motivated by malice or ill will. *Toussie v. Town Board of East Hampton*, 2010 U.S. Dist. LEXIS 13435 (E.D.N.Y. Feb. 17, 2010).

Decision Finding Recreational Facility Exempt from Pine Barrens Commission Jurisdiction Reversed on Ripeness Grounds

The Town of Riverhead and the Town of Riverhead Community Development Agency (CDA) commenced a joint Article 78 proceeding and declaratory judgment action challenging the assertion of jurisdiction by the Central Pine Barrens Joint Planning and Policy Commission over properties located within Enterprise Park at Calverton, which is owned by the CDA, and a related recreational facility. The Commission, which was created in 1993, is responsible for planning, managing, and overseeing land use within the Central Pine Barrens area of the Long Island Pine Barrens Maritime Reserve. Pursuant to the Environmental Conservation Law (ECL), the Commission has jurisdiction to review and approve all proposed development within the Central Pine Barrens area which has a significant adverse impact on the goals of a land use plan adopted by the Commission in 1995. In 2003, the Town, in conjunction with the CDA, began planning for the construction of a public park within Enterprise Park, including the construction of a recreational facility. The public park is within the Central Pine Barrens area. In 2007, the Town commenced construction of the recreational facility. After completing the first phase of the construction, the Commission adopted a resolution purporting to exercise jurisdiction over the Town's development of the facility and requested that the Town submit suitable materials to allow the Commission to determine whether the project had a significant impact on the land use plan. When the Town refused, the Commission served a notice of violation and the Town commenced the Article 78 proceeding, asserting that the project was exempt from the Commission's jurisdiction because it is a "public improvement" as defined by the ECL. This statutory section states that public improvements undertaken for the public welfare do not constitute development within the meaning of the law. The trial court agreed and granted the petition. On appeal, the Appellate Division reversed, holding that the matter was not ripe for judicial review given that the Commission had not rendered a definitive decision with respect to the proposed development. In addition, the court held that the Town had suffered no injury given that no fines had been imposed nor had any enforcement proceedings been initiated. *Matter of Town of Riverhead v. Central Pine Barrens Joint Planning & Policy Commission*, 2010 N.Y. App. Div. LEXIS 1778 (2d Dep't March 2, 2010).

Decision That City Landmarks Commission's Delay in Deciding Landmark Applications Was Arbitrary and Capricious Reversed on Appeal on Standing Grounds

An organization dedicated to preserving landmarks in New York City commenced an Article 78 proceeding regarding the review and designation of landmarked buildings and districts by the New York City Landmarks Preservation Commission (LPC). In its petition, it alleged that the Chairman of the LPC has usurped the power of the full LPC and acts as the sole advancer of potential landmarked properties, that the LPC unreasonably delays submission of designation proposals, and the LPC has failed to establish and consistently apply landmark designation standards. The petition sought to make LPC's procedures more transparent by ensuring that every disposition is made on the record, publishing clear standards for designation, presenting all properties for which a request for landmark status is received by the full LPC, and presenting negative as well as positive recommendations to the LPC. The petition requested that six specific properties be presented for consideration, all of which had applications that had been filed and where a decision regarding landmark status had been pending for many months. The LPC sought to dismiss the proceeding, alleging that the organization lacked standing to maintain the action. The trial court granted the petition, holding that the organization had standing because its members were professionals employed in the field of preservation and that an injury to the organization was not the same as that suffered by the public at large. In addition, the court held that the LPC's decision not to grant landmark status in a timely matter was arbitrary and capricious. The court therefore ordered that all requests for landmark status be submitted to the requisite committee within 120 days of receipt and that all of the committee's recommendations, whether positive or negative, be reported to the full LPC. On appeal, the Appellate Division reversed, holding that the organization failed to demonstrate standing to sue. Specifically, the court held that although the organization had an interest in the subject matter, it could not demonstrate how its members were injured in a way different from the public at large. In addition, the court held that even if standing existed, the LPC was under no statutory requirement to adhere to a particular procedure in determining whether to consider a property for designation. *Matter of Citizens Emergency Committee to Preserve Preservation v. Tierney*, 896 N.Y.S.2d 41 (1st Dep't 2010).

County Legislature's Decision Denying Farm's Petition to Be Included in Local Agricultural District Upheld

A farm located in Orange County, New York commenced an Article 78 proceeding seeking a review of a determination of the Orange County Legislature which adopted a resolution denying the farm's application to have certain property that it owned in the Town of Deerpark included in Agricultural District No. 2. The trial court denied the petition and dismissed the proceeding. On appeal, the Appellate Division affirmed, holding that the decision had a rational basis given that the Legislature was concerned that the number of hogs on the property would contravene the local zoning law and create a potential health hazard. *Matter of Deerpark Farms, LLC v. Agricultural & Farmland Protection Board of Orange County*, 896 N.Y.S.2d 126 (2d Dep't 2010).

Denial of Area Variance to Create Two Substandard Lots on Parcel of Land Upheld on Appeal

Owners of residential property in the Town of Hempstead sought area variances that would enable them to subdivide the property into two separate lots. After a hearing, the Town zoning board of appeals found that the two substandard lots would have an adverse effect on the character and physical or environmental conditions of the neighborhood and denied the variances. The owners then commenced an Article 78 proceeding. The trial court denied the petition and dismissed the proceeding. On appeal, the Appellate Division affirmed, holding that the board engaged in the required balancing test and considered the relevant statutory factors and that the decision had a rational basis and was not arbitrary or capricious. *Matter of Roberts v. Wright*, 896 N.Y.S.2d 124 (2d Dep't 2010).

Denial of Area Variance Upheld on Appeal

A landowner in the Town of Islip sought an area variance in connection with a proposed renovation to his property. The Town zoning board of appeals denied his application. The landowner subsequently commenced an Article 78 proceeding challenging the denial. The trial court denied the petition and dismissed the proceeding. On appeal, the Appellate Division affirmed, holding that there was no merit to the landowner's contention that the board granted prior applications on essentially the same facts but did not explain its reasons for not following its precedents, nor that it violated the Open Meetings Law in doing so. *Matter of Moore v. Town of Islip Zoning Board of Appeals*, 895 N.Y.S.2d 188 (2d Dep't 2010).

Trial Court Rejected Challenge to Proceeding Seeking to File Acquisition Maps Concerning Condemnation of Properties in Atlantic Yards Project

The New York State Urban Development Corporation (UDC) commenced a proceeding which sought to file acquisition maps for the condemnation of certain properties in downtown Brooklyn in connection with the Atlantic Yards Project. The owners of several properties sought to dismiss the proceeding on numerous grounds, including that the general project plan upon which the condemnation proceeding was commenced had been altered and superseded by a new general project plan and because the property owners' challenge to the condemnation proceeding was still ongoing. The Atlantic Yards Project, when constructed, will cover 22 acres in and around the Metropolitan Transportation Authority's Vanderbilt Yards in downtown Brooklyn. The project includes, among other things, the construction of a sports arena for the National Basketball Association's New Jersey Nets, at least 16 high-rise apartment towers, and several office towers. Approximately half of the project's footprint lies within land owned by the MTA. The other half is owned by private parties. The UDC issued a determination and findings in 2006 pursuant to the Eminent Domain Proceeding Law (EDPL) that, in effect, approved the condemnation of land owned by private parties. This determination was challenged on multiple fronts, including in federal court. In a June 2007 decision, the district court, employing rational basis review traditionally applied to legislative judgments in land use decisions, rejected these arguments and dismissed the complaint, holding that by the plaintiffs' own admission, the project would serve several well-established public uses such as the redress of blight, the construction of a sporting arena, and the creation of new housing. This decision was upheld by the Second Circuit. This determination was also challenged via multiple lawsuits in state court, which were dismissed, and affirmed on appeal. In the instant matter, the trial court held that the petition was properly filed pursuant to the EDPL and rejected the property owners' challenges to the proceeding. *In re New York State Urban Development Corp*., Index No. 32741/09 (Sup. Ct. Kings Co. March 1, 2010), NYLJ 1 (March 3, 2010).

MINING

Court of Appeals Held That Company Established Lawful Nonconforming Use Concerning Mining Sand and Gravel Aggregate on Its Property

A company that owned 216 acres of land in the Town of Yorkshire commenced an action seeking a declaration that its mining of sand and gravel aggregate on its property was a lawful nonconforming use and that it had acquired a vested right to mine the property. Following a jury trial, judgment was entered in favor of the company declaring that the mining was a lawful nonconforming use and that, because the Town had deprived the company of its constitutionally vested right to mine sand and aggregate on its property, it was entitled to damages in the amount of $190,000. On appeal, the Appellate Division reversed, holding that none of the evidence presented by the company established that it had actually begun mining its property before passage of a 2001 Town zoning law that prohibited mining within the Town absent a special use permit. Thus, there was no nonconforming use in existence at the time the

zoning law went into effect. In addition, the Court held that the company had no vested right given that the $800,000 that it spent on a project to mine on a portion of its property was incurred prior to when it obtained a DEC mining permit. Thus, the court held that the trial court should have directed the Town's motion for a directed verdict. On further appeal to the Court of Appeals, the Court reversed, noting that the Town had no zoning laws when the company acquired the property in 1996 or when DEC issued the company a mining permit in 1999. In addition, the court found that the company spent $500,000 in reliance on the Town's initial unqualified permission to mine on its property and that the property was used as a nonconforming use, as opposed to a contemplated use, at the time the zoning ordinance became effective. Thus, the company had established a nonconforming use and could move forward with mining on its property. *Glacial Aggregates LLC v. Town of Yorkshire*, 2010 N.Y. LEXIS 29 (Feb. 18, 2010).

OIL SPILLS & STORAGE

Denial of Summary Judgment Concerning Spill of Oil Storage Tank Reversed on Appeal

A property owner made arrangements with an oil delivery company to install a new fuel oil storage tank in her home. In turn, the company contracted with an individual to perform the installation. While attempting to install the storage tank, the individual performing the installation realized that it contained ice and water and told the property owner's children to contact him once this ice and water was removed. Before the tank could be removed and put in its proper location, the oil delivery company arrived at the property and put hundreds of gallons of oil into the tank. Nonetheless, the individual hooked up the tank to the property owner's home. It subsequently tipped over and spilled its contents. The owner then filed a nuisance against the company and the individual. The owner moved for summary judgment. The trial court denied the motion. On appeal, the Appellate Division reversed, holding that the owner set for a valid prima facie case and that the defendants submitted no proof how the owner's or her children's actions contributed to the spill. *Tifft v. Bigelow's Oil Service, Inc.*, 894 N.Y.S.2d 594 (3d Dep't 2010).

Construction Company Found Liable for Violating State Regulations Concerning Bulk Storage Facility and Fined $86,400

In October 2008, DEC staff commenced an administrative enforcement action against a construction company alleging that it failed to comply with petroleum bulk storage, air pollution, and solid waste regulations that apply to a petroleum bulk storage facility owned by the company. Specifically, DEC alleged that the company illegally discharged petroleum at the facility, failed to contain and report the discharge, and illegally disposed of discarded petroleum bulk storage tanks at the facility. The company failed to answer or otherwise appear in the proceeding. The administrative law judge assigned to the case found that the company violated the regulations at issue and recommended a penalty of $87,000. The DEC Commissioner adopted the administrative law judge's findings, but adjusted the penalty to $86,400, and suspended $42,815 of that amount subject to the company satisfying certain conditions, including completing the corrective measures, submitting a work plan to DEC, and paying the remainder of the penalty. *In re Pacos Construction Company, Inc.*, File No. R9-20080609-39 (DEC Feb. 23, 2010).

Owner/Operator of Petroleum Bulk Storage Facility Found Liable for Violating State Regulations and Fined $75,000

In May 2009, DEC staff commenced an administrative enforcement action against the owner and operator of a petroleum bulk storage facility in the Town of Maspeth concerning alleged violations of state regulations concerning petroleum bulk storage tanks and vapor recovery equipment. The owner/operator failed to answer or otherwise appear in the proceeding. DEC subsequently moved for a default judgment. The administrative law judge assigned to the case found that the owner/operator violated the regulations at issue and recommended a penalty of $75,000. The DEC Commissioner adopted the administrative law judge's recommendation in its entirety and ordered the owner/operator to undertake any testing and inspections that may be necessary as a result of the violations immediately. *In re Parmar Brothers, Inc.*, Case No. R2-20060307-102 (DEC Feb. 12, 2010).

PESTICIDES

Motion to Stay Cancellation of Illegally Approved Insecticide Denied

In December 2009, a federal district court overturned the conditional registration of a Bayer CropScience insecticide by EPA that environmental groups said could harm honeybees and ordered the registration vacated as of February 2010. The court remanded the issue to EPA for further proceedings in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Administrative Procedure Act. In its decision, the court upheld claims that EPA did not publish Federal Register notices or provide for public comment before conditionally approving the pesticide in 2008. Although a fact sheet issued by the agency in 2008 explained that the pesticide spirotetramat had been conditionally registered and summarized the rationale behind that decision, EPA conceded that it did not publish a notice of registration in the Federal Register for any of these decisions until August 6, 2009, three months after plaintiffs filed a lawsuit. EPA argued that plaintiffs were not deprived of their ability to participate in the agency's decision-making process because EPA solicited comments in response to the August 2009 notice. The court disagreed, holding that giving notice and inviting comments before an agency takes action ensures that affected parties have an opportunity to participate in and influence agency decision-making at an early stage, when

the agency is more likely to give real consideration to alternative ideas. Bayer subsequently sought a stay of the cancellation pending an appeal of the decision to the Second Circuit so it could continue selling the insecticide. The district court denied the motion, holding that EPA did not deny that it violated FIFRA and that the company had reaped a windfall by being able to sell the insecticide for a year pursuant to the unlawful registration. *Natural Resources Defense Council v. United States EPA*, 2010 U.S. Dist. LEXIS 10631 (S.D.N.Y. Feb. 8, 2010).

SEQRA/NEPA

Dismissal of Challenge to Antennae to Be Placed on Village Water Tower Upheld on Appeal

Residents of the Village of Bayville commenced an Article 78 proceeding challenging two resolutions passed by the Village Board which authorized the Board to enter into a license agreement with Nassau County to permit the installation of two microwave dish antennae and six omni-directional antennae on the Village water tower for use by the Nassau County police department. The antennae were to be installed on a water tower situated on a parcel of land previously gifted to the Village by a deed containing a restrictive covenant. The residents specifically challenged the Board's issuance of a negative declaration under SEQRA, finding that the proposed installation would have no significant adverse effect on the environment. They alleged that the antennae emitted radio-frequency radiation, which they alleged was a threat to human health. The Village moved to dismiss on the grounds that the proceeding was preempted by federal law. The trial court agreed, holding that the Telecommunications Act of 1996 preempted local regulation concerning the placement, construction, and modification of wireless service facilities. On appeal, the Appellate Division converted the action into one for a declaratory judgment and held that the restrictive covenant did not prohibit the installation of the antennae on the land. In addition, the court held that the trial court correctly dismissed the SEQRA challenge, holding that the Board identified the relevant issues of environmental concern and took a hard look at them before issuing a negative declaration. *Matter of Perrin v. Bayville Village Board*, 894 N.Y.S.2d 131 (2d Dep't 2010).

Proceeding Challenging Proposed Demolition of Historic Buildings Found Not Ripe

The Historic Albany Foundation and related individuals commenced an Article 78 proceeding challenging the decision of the Albany Planning Board to grant a permit to the Fort Orange Club to demolish a historic premises located in the City. The petitioners alleged that the Planning Board violated SEQRA by failing to prepare an EIS. In 2008, the Fort Orange Club sought to expand its main structure to add athletic facilities and expand available parking, as well as demolish two buildings. The Planning Board designated itself as lead agency pursuant to SEQRA and, after reviewing the potential environmental impacts of the proposed project, issued a negative declaration. The Foundation subsequently altered its application and the Board issued a negative declaration with respect to that application in January 2010. The club subsequently applied for a demolition permit from the City Department of Buildings. During the pendency of this application, the City passed an ordinance establishing new procedures for obtaining such a permit, which included a provision stating that the Planning Board shall not authorize the demolition of a building found to have significant architectural, archeological, or historic importance unless certain conditions were met, such as an immediate threat to public safety or economic hardship that was not self-created. The parties disagreed as to whether the new ordinance applied to the demolition in question. The petitioner subsequently moved for a preliminary injunction and the Planning Board moved to dismiss. The trial court held that the proceeding was not ripe because no demolition permit had been issued given that two other City agencies needed to grant approval for the project and an additional site plan approval was required. With respect to SEQRA, the court held that the petitioners could challenge the January 2010 negative declaration once a demolition permit was issued. *Historic Albany Foundation, Inc. v. Raymond Joyce*, 26 Misc. 3d 1221A (Sup. Ct. Albany County 2010).

Permits and License Issued by DEC to Expand Landfill Upheld

Save the Pine Bush, an environmental nonprofit organization, commenced an Article 78 proceeding seeking the review of several permits and a license issued by DEC to the City of Albany which authorized the expansion and continued use of a landfill within the environmentally sensitive Albany Pine Bush for a period of several more years. The petition alleged that DEC failed to conduct an adjudicatory hearing and that it failed to comply with SEQRA by failing to take a hard look at alternatives, failing to consider the odor problems associated with past operation of the landfill, and failing to consider the impact of taking 15 acres of Pine Bush habitat. DEC issued permits for solid waste management, air pollution control, freshwater wetlands, and water quality, and a license for endangered/threatened species in June 2009. These permits allowed the City to expand the footprint of the existing landfill by 15 acres and to overfill a portion of the existing landfill giving it approximately six more years of operating capacity. The permits contained a number of special conditions intended to mitigate the impacts of operating the landfill in this sensitive area, including requiring the City to purchase 13 acres of equivalent quality pine bush land and grant it to the State for preservation purposes and requiring the City to restore or enhance 250 acres of pine bush land. With respect to the organization's allegation that DEC did not conduct a required adjudicatory hearing, the trial court held that this was proper given that the organization did not submit any evidence sufficient to raise a triable issue of fact. With respect to the SEQRA allegations, the court held that the City complied with SEQRA by looking at a number of alternatives including a "no action" alternative and that DEC sufficiently mitigated the adverse environmental impact of the expansion. *Save the Pine Bush v.*

New York Dept. of Envtl. Conservation, Index No. 897–09 (Sup. Ct. Albany County Feb. 5, 2010).

SOLID WASTE

Owner of Vehicle Dismantling Facility Found Liable for Violating Various Provisions of the Environmental Conservation Law

DEC commenced an administrative enforcement action against the owner of a vehicle dismantling facility in the Town of Weedsport. DEC alleged that the owner violated various provisions of Title 23 of Article 27 of the Environmental Conservation Law (ECL) concerning vehicle dismantling facilities as well as those provisions of the ECL related to stormwater management. The owner did not answer or otherwise appear in the proceeding. The administrative law judge assigned to the proceeding found that the owner violated these provisions of the ECL and recommended a penalty of $10,000, together with a schedule to bring the facility into compliance. The DEC Commissioner agreed with the judge's recommendation except for one of the charges for which he stated that no *prima facie* case had been demonstrated. *In re Lester J. Wing*, Case No. R7-20081202-127 (DEC Feb. 8, 2010).

TOXIC TORTS

Burn Victim's Lawsuit Alleging Faulty Labels on Cement Bags Allowed to Go to Trial

An individual commenced a personal injury lawsuit in 2006 against Home Depot and a cement maker, alleging that he had to undergo skin grafting and other medical procedures after he suffered third-degree burns caused by his use of Portland cement bought at a Home Depot store in the Town of Freeport in 2004. The defendants' moved for summary judgment, arguing that the plaintiff's claims should be dismissed because the cement undisputedly complied with the labeling requirements of the Federal Hazardous Substances Act (FHSA). The court denied the motion, holding that the plaintiff raised triable issues of fact concerning whether the bags containing the cement were misbranded or mislabeled under the FHSA. The court further held that triable issues of fact were raised as to whether the plaintiff would have purchased the cement if not for the alleged warning deficiencies. *Leibstein v. Lafarge North America, Inc.*, 2010 U.S. Dist. LEXIS 12280 (E.D.N.Y. Feb. 12, 2010).

Summary Judgment Granted in Case Alleging Injuries from Underground Storage Tanks

Between August 1996 and October 1997, an individual was employed as a legal assistant in a law firm. During her employment, she allegedly began experiencing certain physical symptoms she associated with environmental contamination in her workplace. She thereafter commenced a lawsuit against a nearby gas station and the owner of the building in which she worked to recover damages for personal injuries on the grounds that the defendants allowed discharges from underground storage tanks to leak and release hazardous particles into the building where she worked. Both defendants moved for summary judgment. The trial court denied the motions. On appeal, the Appellate Division reversed, holding that the gas station's expert demonstrated that underground contamination did not reach the premises where the plaintiff worked and could not have caused the alleged injuries. *Rosato v. 2550 Corporation*, 894 N.Y.S.2d 513 (2d Dep't 2010).

Allegations That X-ray Cleaning Fluid Caused Technician's Lung Cancer Dismissed

A state trial court dismissed a former medical service technician's suit charging that his workplace exposure to a chemical in a product used to clean x-ray machines caused his lung cancer. The court held that the technician failed to offer any reliable expert evidence that his cancer could have been caused by his extremely small but long-term exposure to the chemical sodium dichromate in a cleaner manufactured by Kodak. The court held that while the plaintiff tied his cancer to his inhalation of mist or fumes from the chemical, Kodak presented credible expert testimony and test results showing that when the concentrated cleaner was used as instructed, no possibility existed of any cancer risk. The technician, who was diagnosed with lung cancer in 2006, said that for 30 years he had worked closely with Kodak's cleaning product as he maintained and repaired x-ray machines in hospitals and medical centers. He offered as support for his argument that it was his exposure to the product, and not his long-term smoking habit, the testimony of two experts. The court rejected their testimony as unreliable and also faulted them for not adequately addressing Kodak's contention that it was the technician's tobacco smoking that caused his cancer. Thus, the court granted summary judgment in favor of the company. *Barbaro v. Eastman Kodak Co.*, 26 Misc. 3d 1224A (Sup. Ct. Nassau County 2010).

WATERS

Summary Judgment in Case Alleging Violations of Clean Water Act in Connection with Fertilizer Plant's Activities Granted

The owners of a dairy farm located in the Town of North Java commenced a lawsuit in federal court against a fertilizer, chemical, and feed distribution plant located on an adjacent parcel of land. In 2007, the plant applied to the Town of Sheldon zoning board of appeals for a variance allowing it to construct a silo, which the dairy owners opposed. The dairy farm owners alleged in their complaint that the plant promised them that they would have clean water in exchange for them dropping their opposition to the variance. Instead, the owners alleged that the plant's operations caused numerous deposits and discharges of fertilizer, feed, and other contaminants into Tonawanda Creek and a tributary of the Creek and in the process polluted their well. The owners alleged violations of the Clean Water Act (CWA)

and the Resource Conservation and Recovery Act (RCRA). Following discovery, both sides moved for summary judgment. With respect to the owners' motion, the court found that they had standing to maintain the suit, that the waters at issue met the definition of "waters of the United States," but that they had failed to raise a triable issue of fact as to whether the plant had discharged pollutants into the Creek or its tributary. In addition, the court held that the owners failed to raise a triable issue of fact regarding the plant violated RCRA. *George v. Reisdorf Bros.*, 2010 U.S. Dist. LEXIS 11710 (W.D.N.Y. Feb. 10, 2010).

Motion for Preliminary Injunction Concerning Alleged Violations of the Clean Water Act Concerning Stormwater Discharges Denied

The City of Newburgh commenced a lawsuit pursuant to the Clean Water Act (CWA) against the owners of a residential development and related parties, alleging that it violated the CWA and State Pollutant Discharge Elimination System (SPDES) permits issued by DEC by discharging unfiltered stormwater into reservoir adjacent to the development known as Brown's Pond. The City also brought a claim for trespass, claiming that the development installed two drainage basins on City-owned land as well as a sediment barrier and filter next to Brown's Pond. In September 2009, the City moved for a preliminary injunction seeking to require the development to achieve compliance with the applicable SPDES permit, to implement weekly testing to evaluate the adequacy of the development's stormwater management system, and prohibiting expansion of the development. Defendants cross-moved to dismiss on various grounds. The district court denied the cross-motion with respect to the development, but held that because DEC had commenced an administrative enforcement proceeding against the development, civil penalties were not allowed under the CWA. However, the court held that this did not preclude the City's claims for injunctive relief. Nonetheless, the court denied the motion for a preliminary injunction, holding that the City failed to establish the threat of irreparable harm and that it had delayed in bringing suit given that it alleged that the development had failed to effectively control its stormwater discharges since 1999. *City of Newburgh v. Sarna*, 2010 U.S. Dist. LEXIS 12269 (S.D.N.Y. Feb. 5, 2010).

Court of Appeals Held That DEC Had Jurisdiction to Regulate Dam's Activities Related to Water Quality

A company that operated a hydro-electric dam commenced an Article 78 proceeding seeking a stay of a DEC administrative proceeding against it and a writ of prohibition that DEC did not have permitting or regulatory authority over it. The dam, which is federally regulated, has been in operation since 1981. In 1980, DEC granted the company's application for Water Quality Certification (WQC) pursuant to the CWA, certifying that if the Federal Energy Regulatory Commission (FERC) issued a license, the project was not likely to violate water quality standards. The dam was ultimately approved in 1981 as a project exempt from the Federal Power Act licensing requirement, but it was nonetheless regulated by FERC. According to the company, the WQC allowed the company to dewater and refill the pond area for dam repairs and/or maintenance. Periodically the pond was drained and the dam was repaired without permit or involvement by DEC. In 2005, a representative of FERC made a regularly scheduled visit to the dam, where he was notified that the dam would drain the pond to make certain repairs. In 2006, the FERC representative sent a letter to the dam that he would make another visit to discuss the repairs. This letter was copied to a number of agencies, including DEC. Subsequently, a representative of DEC notified the company that it would be necessary to obtain certain permits before making the repairs. The company applied for a stream disturbance and WQC permit from DEC, and the agency issued such permits in June 2006, although it did not issue a dam repair permit. In September 2006, the company began to make the repairs. In November 2006, DEC served the company with a notice of violation concerning its failure to obtain the necessary dam repair permit. The company argued that FERC had exclusive jurisdiction over licensing and permitting of the dam and that such permit was not necessary. The trial court dismissed the proceeding without prejudice, holding that the issue was not ripe for review and that, in any event, it could not issue a generic finding that DEC did not have regulatory or permitting authority over the dam (*see* April 2008 edition of *Environmental Law in New York*). On appeal, the Appellate Division affirmed, holding that although FERC's authority to regulate hydroelectric power projects largely preempts the field, there is an exception regarding state authority to determine whether a particular project violates the state's water quality standards. Thus, DEC had authority to regulate the dam's activities to protect water quality. On further appeal, the Court of Appeals affirmed, holding that DEC acted within its legal authority in filing an administrative complaint and was not preempted by federal law given that the CWA grants states authority to certify that dam activities do not violate water quality standards. *Matter of Chasm Hydro, Inc. v. New York State Dept. of Envtl. Conservation*, 2010 N.Y. LEXIS 21 (Feb. 16, 2010).

WETLANDS

Freshwater Wetlands Not Listed on DEC's Freshwater Wetlands Map Still Covered Under Town Law

A property owner in the Town of Brookhaven sought to build a residence on an 8,000-square-foot parcel of property. The owner applied to local authorities for a wetlands permit, which was denied. The owner subsequently commenced an Article 78 proceeding, alleging that the Town board erred in determining that the property was freshwater wetlands in light of a letter from DEC stating that the property was more than 100 feet from a regulated freshwater wetlands as shown on its Freshwater Wetlands Map and therefore not subject to regulation. The trial court granted the petition and reversed the decision. On appeal,

the Appellate Division reversed, holding that the Town Code prohibited the erection of any building or structure within freshwater wetlands without a permit and that the definition of "freshwater wetlands" applied to lands and waters including but not limited to those areas indicated on DEC's Freshwater Wetlands Map. Thus, it was unnecessary to establish that the subject property was designated as freshwater wetlands by DEC since it was covered by the Town Code. *Matter of Pletenik v. Town of Brookhaven*, 895 N.Y.S.2d 186 (2d Dep't 2010).

Application for Freshwater and Tidal Wetlands Permits Denied

An individual filed an application for a freshwater wetlands permit and a tidal wetlands permit in connection with the construction of a two-story single-family dwelling in the Town of Southampton. DEC denied the permits and the individual requested a hearing. After the hearing, the administrative law judge assigned to the case recommended that the permit be denied. The DEC Commissioner agreed, finding that the proposed construction was incompatible with a wetland and that the individual did not demonstrate a pressing economic or social need to build the house. *In re William Haley*, DEC No. 1-4736-06627/0001 (Feb. 22, 2010).

WILDLIFE AND NATURAL RESOURCES

Motion Seeking to Suppress Evidence Collected in Home of Individual Accused of Smuggling Ivory into U.S. Denied

An individual was arrested in December 2008 and charged with one count of smuggling African elephant ivory into the United States. In April 2009, the individual moved to suppress the physical evidence seized from his home at the time of his arrest, alleging that it should be suppressed because he signed the government's consent to search form after the search was conducted and that the warrantless search was therefore conducted without his consent. The district court held a suppression hearing in January 2010, at which time two agents from the U.S. Department of the Interior testified, along with the individual's wife. Following the hearing, the court denied the motion, holding that the evidence supported a finding that the individual signed the consent form before a search was conducted and that the consent was voluntary. *United States v. Sylla*, 2010 U.S. Dist. LEXIS 13056 (E.D.N.Y. Feb. 16, 2010).

NATIONAL DEVELOPMENTS

EPA Settled Environmental Justice Lawsuit Alleging a Failure to Investigate Discrimination in Washington State

On March 19, 2010, a federal court in Washington State entered a stipulated judgment in favor of the Rosemere Neighborhood Association. Rosemere is a non-profit community organization based in Clark County, Washington dedicated to environmental protection and improving the status of environmental justice communities. In entering the judgment, the court approved the final settlement agreement between Rosemere and EPA that concludes a seven-year stretch of administrative Title VI complaints and litigation. In February 2003, Rosemere first filed a Title VI administrative complaint with EPA's Office of Civil Rights alleging that the City of Vancouver, Washington had discriminated in the provision of municipal services in violation of the Civil Rights Act of 1964. Rosemere alleged that Vancouver failed to use EPA funds to address fairly long-standing problems in low-income and minority neighborhoods in West Vancouver. Soon after, the City of Vancouver began an investigation into the internal operations of Rosemere and then revoked Rosemere's status as a "recognized" neighborhood association. The City also stripped the neighborhood of its historical name, actions later deemed "suspicious" by EPA in an investigative report. Rosemere filed a second Title VI complaint with the EPA in December 2003 alleging retaliation by the City of Vancouver. Rosemere subsequently filed suit against EPA on two separate occasions, citing EPA's failure to accept, investigate, and issue findings on Rosemere's complaints. Each time, EPA responded to Rosemere only after the litigation was filed and EPA sought to dismiss the cases as "moot." In September 2009, the Ninth Circuit reversed the district court's ruling to dismiss Rosemere, citing EPA's "consistent pattern of delay." The appellate court substantiated the claim that Rosemere is in "realistic danger of sustaining a direct injury as a result of the agency's disregard of its own regulations."

In the settlement agreement, EPA's Office of Civil Rights admits that its actions were unlawful when it failed to process Rosemere's complaint of retaliation against the City of Vancouver. The settlement agreement requires EPA to take action on any additional Title VI complaints submitted by Rosemere over the next five years in accordance with regulatory timelines. The settlement agreement also requires EPA to report quarterly to the Rosemere Neighborhood Association for the next five years and specifically track the status of all Title VI administrative complaints submitted to and investigated by EPA. *Rosemere Neighborhood Association v. EPA* (W.D. Wash., settlement entered March 19, 2010).

NEW YORK NEWSNOTES

New York State Invasive Species Council Issued Draft Report to Protect Forests, Farmlands, and Waterways from Invasive Species

On April 1, 2010, the New York State Invasive Species Council released a draft report, "A Regulatory System for Non-Native Species," that calls for a multi-pronged approach to tackling invasive species. Among other recommendations, the Council proposed a new assessment system for invasive species—such as zebra mussels, Sirex wood wasps, and Eurasion milfoil—that would allow the state to categorize them as "prohibited," "regulated" or "unregulated." Such a classification system would help restrict movement of potentially harmful plants and animals. The Council, created by state statute, comprises nine state agencies and is co-led by DEC and the Department of Agriculture and Markets (DAM). Following finalization, the report will be sent to Governor David A. Paterson and the state legislature for possible action. In producing the report, DEC and DAM assembled a multi-stakeholder team from other state and federal agencies, academia and conservation, and business fields such as agriculture, pets, nursery, and landscape. Other highlights of the report include the following: (1) landowners would have no obligation to remove invasive species that spread on to their lands through no fault of their own; (2) the proposed regulatory system recognizes the business needs of nurseries and pet businesses to be able to plan and to manage existing stocks, some of which represent years of investment. This would include "grace periods" to avoid needlessly penalizing such industries; and (3) it encourages the nursery industry to develop varieties—"cultivars" in the plant world—that are sterile so that market demands could be satisfied without posing ecological and economic threats. The draft report is available at http://www.dec.ny.gov/animals/63402.html.

DEC Issued Proposed Program Policy Regarding "Green Remediation"

On March 31, 2010, DEC issued a notice that it has prepared a proposed program policy which establishes a preference for remediating sites in the most sustainable manner while still meeting all legal, regulatory, and program requirements. The policy expresses a preference for remedies which, for example, use less energy, create less emissions and waste, increase reuse and recycling, and maximize habitat value without compromising the fundamental requirement to protect human health and the environment. According to DEC, the approach also recognizes the potential for positive economic and social benefits of site reuse and supports coordination of site reuse and remediation to effect the most beneficial and sustainable reuse of the site. This guidance applies to all phases of site investigation and remediation for new sites and relevant phases for existing remedies in the Spill Response Program, Inactive Hazardous Waste Disposal Site Remedial Program (State Superfund Program), Environmental Restoration Program, Brownfield Cleanup Program, and Voluntary Cleanup Program. The purpose of this guidance is to describe how green remediation will be applied within the DEC Division of Environmental Remediation's remedial programs and to provide examples of green remediation techniques. It does not specify methods or criteria to be used to quantify the effectiveness of the various green remediation concepts or remedial alternatives. The concepts and principles will be considered, implemented to the extent feasible, and documented. The proposed policy is available at http://www.dec.ny.gov/regulations/2393.html.

DEC Issued Proposed Program Policy Concerning Guidance on Application Process for Brownfield Site Cleanup Agreements Under Brownfield Cleanup Program

On March 31, 2010, DEC issued a proposed program policy that provides guidance on the application process and general terms and conditions for Brownfield Site Cleanup Agreements (BCAs) under the New York State Brownfield Cleanup Program (BCP), as well as the process to amend and terminate a BCA. According to the notice, the terms and conditions in this guidance are in addition to the regulatory terms and conditions at 6 NYCRR sections 375-1.5, 375-3.4, and 375-3.5 and such other terms and conditions that may be in the BCA. The application for inclusion into the BCP will require the party to acknowledge and agree to the general terms and conditions in this guidance. Legislation establishing the BCP sets forth application provisions and requires DEC to execute a BCA prepared in accordance with ECL § 27-1409 for the purpose of completing a brownfield site remedial program. The statute does not prescribe the detailed steps in the application process or the time for execution of the BCA. In recognition of the benefit of guidance on the application process, benefit of timely execution of the BCA and the overall legislative intent of timely advancement of the remedial program, DEC will establish an application and BCA process that is more predictable and expeditious. The proposed program policy is available at http://www.dec.ny.gov/regulations/2393.html.

Public Service Commission Expanded Renewable Portfolio Standard Program

On March 25, 2010, the Public Service Commission (PSC) approved more than $279 million over a five-year period for customer-sited renewable energy projects as part of the state's Renewable Portfolio Standard (RPS) program. This funding will enable homeowners and businesses to install solar panels, fuel cells, wind turbines and other renewable energy devices. In addition, the PSC approved $150 million for large-scale solar photovoltaic, anaerobic digester, and fuel cell projects in and around the lower Hudson Valley and the New York City metropolitan area. The ratepayer-funded RPS initiative employs two programs to encourage the development of renewable energy, both of which are administered by the New York State Energy Research and Development Authority (NYSERDA). The bulk

of the electricity is obtained through competitive procurements for large-scale renewable resources, known as the main tier. The customer-sited tier promotes smaller, self-generation facilities located at residences and businesses. Technologies eligible for participation in the customer-sited tier include solar photovoltaic, anaerobic digesters, fuel cells, and small wind. The March 25 approval added solar thermal hot water to the list of eligible technologies. Funding amounts are as follows: solar photovoltaic ($144 million); anaerobic digesters ($70.5 million); fuel cells ($21.6 million); small wind ($18.1 million); and solar thermal ($24.7 million). In 2009, the PSC expanded the RPS goal to increase the proportion of renewable generation in New York to 30% of projected electricity consumption by 2015. As part of that 2009 decision, the PSC authorized $200 million in main tier spending. According to the PSC, its decision to increase funding for renewable energy projects will spur significant private sector renewable energy investments, including an estimated $626 million spent on customer-sited solar photovoltaic projects alone. In total, these new customer-sited projects will produce an estimated 466,000 MWhs of electricity over the five-year period, or enough electricity to supply 72,000 average-sized homes. In addition to customer-sited tier, the funds for large-scale downstate projects will be directed at projects greater than 50 kW. These projects will be more cost-effective and located where distributed generation can do the most good. The size complements the solar photovoltaic installations that are already supported under the customer-sited tier, which must be 50 kW or less, and provides economies of scale. (Public Service Commission Press Release March 25, 2010).

EPA Region 2 Gave Preliminary Approval to Establishment of No-Discharge Zone in New York State Canal System

On March 16, 2010, EPA Region 2 gave preliminary approval to an application by New York State to establish a no-discharge zone throughout the 524-mile New York State Canal System. Final approval of the designation would mean that boats would be prohibited from releasing treated or untreated sewage into the water. Boat sewage discharge can contain harmful levels of bacteria and chemicals such as formaldehyde, phenols, and chlorine, which negatively impact water quality and impair marine life. Currently, vessels are not restricted from discharging treated sewage from approved marine sanitation devices into the canal system, which includes the Erie, Cayuga-Seneca, Champlain, and Oswego canals, and Onondaga, Oneida, and Cross lakes. The EPA decision is subject to a 30-day public comment period. Information about the preliminary approval is available at http://www.epa.gov/region02/water/ndz/index.html.

New York City Mayor Signed Laws Raising Fines for Illegally Dumping Waste Materials into New York Harbor and Establishing "Green Team"

On March 15, 2010, New York City Mayor Michael Bloomberg signed two laws prohibiting the dumping of waste materials into New York Harbor and establishing an interagency "green team." The first bill (Intro. No. 54-A) on illegal dumping sets fines ranging from $1,500 to $10,000 for the first violation and $5,000 to $20,000 for each subsequent violation. It also expands the definition of illegal dumping to include objects discharged in or upon wharves, piers, docks, bulkheads, slips, and navigable waterways. The second bill (Intro. No. 77) establishes an Interagency Green Team and an Innovation Review Board to streamline approvals for environmentally beneficial technologies, design and construction techniques, materials, and products. It is the first bill to implement a set of city task force recommendations for a "Green Codes" project to integrate environmental sustainability considerations into code requirements.

DEC Issued Proposed Policy Regarding Closed-Cycle Cooling Technology for Power Plants and Other Industrial Facilities

On March 10, 2010, DEC issued a proposed policy to require the use of closed—cycle cooling technology by power plants and other industrial facilities that use large amounts of water for cooling purposes. The proposed policy, which was subject to a 45-day public comment period, is designed to protect fish and other aquatic organisms that are injured or killed through impingement at the water intake system or entrainment through the cooling system. Pursuant to the policy, the state will consider a closed—cycle cooling system or its equivalent as the best technology available as required by the Clean Water Act. The policy would apply to facilities that use 20 million gallons or more of water per day and require a permit under the State Pollutant Discharge Elimination System. Closed—cycle cooling technology recirculates water instead of discharging it after one use. According to DEC, a number of facilities in New York use a so-called once-through cooling process that withdraws water to condense the steam they use to spin turbines. The heated water is then returned to the waterway. The proposed policy is available at http://www.dec.ny.gov/docs/fish_marine_pdf/drbtapolicy1.pdf.

EPA Region 2 Announced Clean Air Plan for Ports of New York and New Jersey

On March 10, 2010, EPA Region 2 announced a broad clean air plan for the ports of New York and New Jersey. As part of the plan, officials also announced a $28 million truck replacement program being launched by the Port Authority of New York and New Jersey. EPA stated that funding under the American Recovery and Reinvestment Act will provide $7 million for the program, which will help with the costs of replacing some 600 old trucks with models made in 2004 or later that meet stricter limits on diesel emissions. The joint sustainability agreement pledges efforts to achieve steps laid out in an October 2009 Clean Air Strategy developed by the Port Authority with its federal, state, local, and private partners. The strategy addresses pollution emissions associated with maritime operations, including ships,

harbor craft, cargo handling equipment, locomotives, and trucks. The sustainability document was signed by EPA, the Port Authority, DEC, the New Jersey Department of Environmental Protection, New York City's Office of Long Term Planning and Sustainability and Economic Development Corp., the New York Shipping Association, and the New Jersey cities of Bayonne, Elizabeth, Jersey City, and Newark. The Port Authority stated that it plans to ban old trucks from its facilities in two phases: on January 1, 2011, pre-1994 trucks would be barred; and on January 1, 2017, all trucks that fail to meet 2007 federal emissions standards would be barred. According to EPA, each year trucks make three million trips to and from the port's marine terminals, resulting in the release of nearly 2,000 tons of nitrogen oxides and 55 tons of fine particle pollution. The text of the port sustainability agreement is available at http://www. epa .gov/ region02/ air /SOI_portcleanair.pdf. (EPA Region 2 Press Release March 10, 2010).

UPCOMING EVENTS

May 12, 2010, 6–8 p.m.

New York City Bar Association, "Climate Change: What Is to Be Done?" Location: 42 West 44th Street, New York, New York.

May 19, 2010, 9:00 a.m.

New York State Bar Association, Environmental Law Section, "Annual Legislative Forum." Location: One Elk Street, Albany, New York. Information: sections@nysba.org.

May 21, 2010, 8:30 a.m.–5:15 p.m.

"EPA Region II Conference," co-sponsored by EPA Region II and American, New York State, New Jersey State, and New York City Bar Associations. Location: Columbia Law School, 435 West 116th St., New York, New York. Information: http://www.ColumbiaClimateLaw.com.

WORTH READING

John-Patrick Curran & Kenneth M. Block, "Brownfield Program Should Benefit a Range of Projects," NYLJ 5 (March 10, 2010).

Gregory D. Eriksen, Note, *Breaking Wind, Fixing Wind: Facilitating Wind Energy Development in New York State*, 60 Syracuse L. Rev. 189 (2009).

William M. Flynn & John T. McManus, "Inside the World of Residential Electricity Submetering," NYLJ 11 (March 15, 2010).

Jeffrey D. Friedlander, "Protecting the Water Supply: Progress and Caution," NYLJ 3 (March 22, 2010).

Michael B. Gerrard, "Greenhouse Gas Disclosure Requirements Are Proliferating," NYLJ 3 (April 1, 2010).

M. Robert Goldstein & Michael Rikon, "Atlantic Yards Case: Blueprint for Delaying Condemnation," NYLJ 4 (March 24, 2010).

Anthony S. Guardino, "New Law Provides Tools to Prune Local Government," NYLJ 5 (March 24, 2010).

Roger R. Martella, Jr., *Climate Change Along the Northeast Corridor: How Washington and New York Are Approaching and Preparing for Greenhouse Gas Controls*, 18 N.Y.U. Envtl. L.J. 14 (2010).

New York City Bar, "The Role of Community Benefit Agreements in New York City's Land Use Process" (March 8, 2010).

New York League of Conservation Voters & Pace Law School Center for Environmental Studies, "Climate Adaptation and Mitigation: Westchester Responds to the Changing Future" (March 2010), *available at* http://www.nylcvef.org/sites/nylcvef.civicactions.net/files/Final_Report_Web_Version.pdf.

New York State Comptroller, "Economic Benefits of Open Space Preservation" (March 2010), *available at* http://www.osc.state.ny.us/reports/environmental/openspacepreserv10.pdf.

Charles S. Warren, "New York City Goes 'Greener' and 'Greater,' " NYLJ 11 (March 15, 2010).

(PUB 004)

Mathew Bender & Co., Inc.

Patrick E. Cannon — Director, Content Development
Linda J. Folkman — Legal Editor

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

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

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

Arnold & Porter LLP

Environmental Practice Group

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

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

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

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

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

Partners and Counsel
Timothy G. Atkeson
Blake A. Biles
Daniel A. Cantor
Lawrence Culleen
Michael Daneker
Kerry Dziubek
Michael B. Gerrard
Joel Gross
Matthew T. Heartney
Brian D. Israel
Nelson Johnson
Jonathan Martel
Thomas H. Milch
Karen J. Nardi
Thomas Stoever
Lester Sotsky

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