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On the Waterfront: New York City's Climate Change Adaptation And Mitigation Challenge (Part 1 of 2)

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ON THE WATERFRONT: NEW YORK CITY'S CLIMATE CHANGE ADAPTATION AND MITIGATION CHALLENGE

(Part 1 of 2)

Sarah Adams-Schoen

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a wondrous place. Archipelagos of small islands dotted near-shore waters. Wetlands and oyster beds stretched for miles. Sloping beaches lay dazzling under the sun. The harbor coastline provided abundant food sources and natural protection from storms. It would prove essential to the survival and growth of the early settlement of New Amsterdam. . . .

"This coastline is just as essential to New York City's survival and growth today."²

Introduction

New York City is a city on the waterfront. With 520 miles of coastline, New York City's coastline is longer than the coastlines of Miami, Boston, Los Angeles and San Francisco combined. Nearly nine million New Yorkers live in areas vulnerable to flooding, storm surges and other natural disaster-related risks that are increasing as a result of climate change.

Father Barry: "You want to know what's wrong with our waterfront? It's the love of a lousy buck."¹

"When Henry Hudson sailed into what is now known as New York Harbor in 1609, the coastline he encountered was

¹ ON THE WATERFRONT (1954).

² CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 40 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

New York City didn't wait for a devastating storm to begin comprehensively addressing the effects of climate change.³ The City's extensive climate change mitigation⁴ and resiliency⁵ efforts and communications strategy have put the City in a league of its own. But, notwithstanding New York City's proactive commitment to climate change mitigation, on October 29, 2012, Super Storm Sandy's massive blow to the Big Apple—including the deaths of 43 New Yorkers—highlighted the need to weigh climate change and disaster resiliency more heavily on the policy scales as the City balances between conflicting policies.⁶

Part 1 of this article looks at the current climate-change related predictions for New York City and summarizes the numerous climate-change mitigation and adaptation initiatives the City is taking. Part 2, which will be published in the May 2014 issue, explores some of the key challenges facing the City, ultimately asking whether—even with the massive efforts triggered in part by Super Storm Sandy—the City is doing enough to prevent global warming and protect its residents from the increasingly intense and frequent weather extremes our future holds.

Part 1—NYC: Climate Change Predictions and Initiatives

Super Storm Sandy

New York City is experiencing the impacts of climate variability and change in the form of increasing annual air temperature, more frequent and intense flooding events, and more frequent and intense coastal storms. In October 2012, Super Storm Sandy combined with a storm that was traveling west to east, striking the East Coast at high tide. The pressure in Sandy was one of the lowest ever recorded. The storm completely devastated the coastline from Cape May, New Jersey, to New York Harbor, Seagate and Staten Island, and the coastline from New York to Connecticut.

The impact on New York City itself was devastating. The tidal surge from Super Storm Sandy flooded the New York Port Authority Trans-Hudson subway tunnels, the New York subways, and the Brooklyn Battery Tunnel. The storm shut down access to New York City by highway, rail and air for almost a week; related power outages lasted for weeks in some areas. With 43 New Yorkers losing their lives,⁷ 6,500 patients evacuated from hospitals and nursing homes, nearly 90,000 buildings in the inundation zone,⁸ 1.1 million children unable to attend school for a week, nearly 2 million people without power, and \$19 billion in damage, Mayor Bloomberg characterized Sandy as “the worst natural disaster ever to hit New York City.”⁹

³ Some definitions of “climate change” focus on changes in climate caused by human activities only, while others include all changes in climate, whether caused by human activity or natural variability in climate. *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 6 (Martin Parry et al. eds., 2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm (“IPCC usage refers to any change in climate over time, whether due to natural variability or as a result of human activity. This usage differs from that in the Framework Convention on Climate Change, where *climate change* refers to a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.” (emphasis in original)).

⁴ The IPCC defines “mitigation” as “anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases.” IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 750 (Martin Parry et al. eds., 2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm.

⁵ “Resilience” refers to “[t]he capacity of a system, community or society potentially exposed to hazards to adapt, by resisting or changing in order to reach and maintain an acceptable level of functioning and structure. This is determined by the degree to which the social system is capable of organizing itself to increase its capacity for learning from past disasters for better future protection and to improve risk reduction measures.” *Terminology*, U.N. OFFICE FOR DISASTER RISK REDUCTION, <http://www.unisdr.org/eng/library/lib-terminology-eng%20home.htm> (last visited Feb. 13, 2014). The IPCC defines the related term “adaptation” as “the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.” IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 6 (Martin Parry et al. eds., 2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm.

⁶ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 40 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml> (“In October 2012, with the arrival of Sandy, the case for increased climate resiliency—even beyond the initiatives [previously] set forth . . .—was forcefully made to all New Yorkers”).

⁷ The vast majority of the deaths were from drowning in areas where waters rose rapidly as a result of the storm surge. Of these deaths, 23 occurred in Staten Island, including 10 in the neighborhood of Midland Beach, and the remainder occurred in Queens, Brooklyn and Manhattan. Victims ranged in age from two years old to 90. CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 13–14 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁸ “More than 400 New York City Housing Authority buildings containing approximately 35,000 housing units lost power, heat, or hot water during Sandy.” CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 14 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁹ Foreword from the Mayor, in *City of New York, PlaNYC: A Stronger, More Resilient New York* (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

These and other climate-related impacts are expected to continue to manifest and increase in intensity as a result of the accumulation of greenhouse gases in the atmosphere.

New York City and Climate Change: The “New Normal”¹⁰

Columbia University Professor Cynthia Rosenzweig, the co-chairwoman of the New York City Panel on Climate Change (NPCC), identified “compelling areas of linkage between Superstorm Sandy and climate change, including rising sea levels that made storm surges higher.”¹¹ Moreover, although scientists debate about whether climate change *caused* Super Storm Sandy, scientists tend to agree that climate change contributed to the severity of the storm and will lead to more extreme storms in the future.¹²

The Fifth Assessment Report (AR5) of the Intergovernmental Panel on Climate Change (IPCC) concluded that there is “unequivocal” evidence of increased atmospheric concentrations of greenhouse gases including carbon dioxide (CO₂), methane (CH₄), and nitrous oxide (N₂O).¹³ AR5 also reported that it is “certain” global surface temperatures have increased since the late nineteenth century and are steadily increasing, with each successive decade being the warmest on record, and the evidence provides “very high confidence” that sea ice, ice sheets and glaciers are “persistently shrinking.”¹⁴ According

to the IPCC, “it is likely that future tropical cyclones (typhoons and hurricanes) will become more intense, with larger peak wind speeds and more heavy precipitation associated with ongoing increases of tropical sea surface temperatures.”¹⁵

Sea level in New York City has risen 1.1 feet since 1900, and we can predict that it will continue to rise, at an increasing pace. According to the most recent projections from the NPCC, higher sea levels are “extremely likely,” with projected sea level rises of as much as 2.5 feet by 2050.¹⁶ In addition to increasing the height of storm surges, sea level rise also causes dramatic losses in coastal wetlands, which buffer storm surges, thereby increasing exposure to flood damage as well as other harms such as saltwater intrusion into estuaries and drinking water supplies.¹⁷ Severe storms also result in further loss of coastal lands.¹⁸

One result: By the 2050s, the middle-range projections suggest that coastal flood levels which currently occur an average of once per decade may occur once every three to six years. And, with the high-range projections, today’s 1-in-100 year flood may occur approximately *five times* more often by the 2050s.¹⁹ We can also predict that New York City’s future will include increasing annual air temperatures, heavier rains and stronger winds, more major heat waves, more frequent and intense coastal storms and other more frequent and extreme weather conditions.²⁰

¹⁰ In the foreword to the PlaNYC 2013 Progress Report, Mayor Bloomberg lamented, “we are sobered by the ‘new normal’ that climate change is producing in our city, including more frequent and intense summer heat waves and more destructive coastal storms like Hurricane Sandy.” CITY OF NEW YORK, PLANYC PROGRESS REPORT 2013: A GREENER, GREATER NEW YORK (2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf.

¹¹ Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 GEO. MASON L. REV. 775, 781 (2013) (citing Colin Sullivan, *Columbia University Panel Urges Quick Action to Plan “Coastal City for the Future,”* CLIMATEWIRE, Nov. 20, 2012, <http://www.eenews.net/climatewire/2012/11/20/archive/5?terms=colin+sullivan>).

¹² See CITY OF NEW YORK, NEW YORK CITY PANEL ON CLIMATE CHANGE (NPCC), CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 7 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf (“While it is not possible to attribute any single extreme event such as Hurricane Sandy to climate change, sea level rise already occurring in the New York City area, in part related to climate change, increased the extent, and magnitude of coastal flooding during the storm.”).

¹³ IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 121 (T.F. Stocker et al. eds., 2013), http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf.

¹⁴ IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 37, 40-41 (T.F. Stocker et al. eds., 2013), http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf.

¹⁵ IPCC, *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 15 (Susan D. Solomon et al. eds., 2007), https://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.

¹⁶ CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 4 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

¹⁷ See Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 BYU L. REV. 1783, 1801 & nn.86-90. Professor Farber is Co-Director of Berkeley Law’s Center for Law, Energy & the Environment. See Daniel A. Farber, Faculty Profile, Berkeley Law, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=1141> (last visited Feb. 13, 2014); Cat Lazaroff, *Climate Change Could Devastate U.S. Wetlands*, ENV’T NEWS SERV., Jan. 29, 2002, <http://www.ens-newswire.com/ens/jan2002/2002-01-29-06.asp>.

¹⁸ Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 BYU L. REV. 1783, 1803. Hurricane Katrina, for example, resulted in the loss of over two hundred square miles of wetlands. *Id.*

¹⁹ CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 20 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

²⁰ CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 4-5, 18-21 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

With only a 1.5-foot sea level rise, another storm like Sandy could require New York City to evacuate as many as three million people. With a three-foot rise in sea level, major storms would inundate low-lying shore communities in Brooklyn, Queens, Staten Island and Long Island, shut down the City's transportation system, flood the highways and render the tunnels into the City impassable. An even greater sea level rise, which appears possible by mid- to late-century given the continued pace of greenhouse gas emissions, "would place much of the city underwater—and beyond the reach of any protective measures."²¹ These conditions will cost lives, cause property damage and business losses, harm the environment and threaten public health. In economic terms, then-Mayor Bloomberg recently predicted that "while Sandy caused about \$19 billion in losses for [New York City], rising sea levels and ocean temperatures mean that by the 2050s, a storm like Sandy could cause an estimated \$90 billion in losses (in current dollars)—almost five times as much."²²

Nor are storms and flooding the only, or even the worst, predictable effects of climate change on New York City. The most recent NPCC report also predicts that by 2050 the city could have as many days at or above 90 degrees annually as Birmingham, Alabama currently has. Heat waves are also predicted to more than triple in frequency and last on average one and a half times longer than they do today. Compounding this, "heat indices are very likely to increase, both directly due to higher temperatures and because warmer air can hold more moisture. The combination of high temperatures and high humidity can produce severe additive effects by restricting the human body's ability to cool itself and thereby induce heat stress."²³ Given that heat waves kill more Americans each year than all other natural disasters combined,²⁴ the need to address the causes of increasing temperatures and heat indices is great. The predictions certainly are sobering.

Climate Change: A Global Problem with a Local Solution

With global temperatures increasing—and resulting increases in sea levels, acidification of oceans and losses of flood-mitigating wetlands—intense storms and other extreme weather events are increasing in frequency and severity. Nor are environmental disasters simply uncontrollable acts of nature. Rather, they are at least in part attributable to failures of the legal system to effectively assess and mitigate risks. As Berkeley law professor Daniel Farber observes, "environmental disasters stem from gaps in environmental regulation: weak protection of wetlands, badly planned infrastructure, and, above all, climate change."²⁵

Clearly, climate-induced weather extremes have serious implications for the core responsibilities of municipalities like New York City. According to some researchers, Sandy revealed how poor land use decisions can exacerbate already destructive coastal storms.²⁶

As a result, state and local governments, including New York City, must continue to work toward a more resilient future by implementing climate change mitigation and adaptation measures. Decision makers, resource managers and local and regional planners need to prepare. Failure to do so will continue to be costly in terms of property and public health (including loss of lives) and, ultimately, will threaten the future of low-lying cities such as New York City.²⁷

Local land use planning and development controls offer one of the most powerful tools for achieving natural disaster-resilient communities as well as communities that contribute to a decreased incidence of natural disasters.²⁸ Local governments such as New York City have an array of tools in their toolbox that can mitigate against and adapt their communities to climate change-related conditions—including building codes; land use,

²¹ Bruce Stutz, *New York City Girds Itself for Heat and Rising Seas*, YALE ENV'T 360, Sept. 10, 2009, <http://e360.yale.edu/content/feature.msp?id=2187> (discussing the results of the first NPCC report). The second NPCC report's future flood maps illustrate how projected sea-level rises will expose additional areas of New York City to flooding during extreme storm events. See CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 27 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

²² Foreword from the Mayor, in *City of New York, PlaNYC: A Stronger, More Resilient New York* (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

²³ CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 22 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

²⁴ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 26 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml> (reporting that a 2006 heat wave caused 140 deaths in New York).

²⁵ Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 BYU L. REV. 1783, 1786.

²⁶ See, e.g., Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 GEO. MASON L. REV. 775, 780–81 (2013).

²⁷ The National Institute of Building Sciences Multihazard Mitigation Council reported in 2005 that, on average, each dollar spent on mitigation saves society an average of \$4 in avoided future losses in addition to saving lives and preventing injuries. See NATIONAL INSTITUTE OF BUILDING SCIENCES, MULTHAZARD MITIGATION COUNCIL, NATURAL HAZARD MITIGATION SAVES: AN INDEPENDENT STUDY TO ASSESS THE FUTURE SAVINGS FROM MITIGATION ACTIVITIES (2005), available at https://www.nibs.org/?page=mmc_projects#nhms.

²⁸ A national survey of public and private emergency managers, code specialists and engineers found that building codes and land use planning ranked as the most effective tool to achieve hazards vulnerability reduction. Patricia Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 ENVTL. L. REP. 10158, 10158 & n.3 (2008) (citing INSTITUTE FOR BUSINESS & HOME SAFETY, ARE WE PLANNING SAFER COMMUNITIES? RESULTS OF A NATIONAL SURVEY OF COMMUNITY PLANNERS AND NATURAL DISASTERS (2002)).

zoning, and subdivision regulations; comprehensive capital improvement, transportation, floodplain management, storm-water management and open space plans; facilities needs studies; population growth and future development studies; and economic development plans.²⁹ This means that New York City can—and must—contribute to a long-term reduction in vulnerability to natural hazards.

New York City Takes a Comprehensive, “Get Tough”³⁰ Approach to Climate Change

Heeding the sobering data and dire predictions for its massive coastal population, New York City is taking a comprehensive approach to climate change mitigation and adaptation.³¹ The City is analyzing climate change-related data and planning for more massive storm surges, heavy rains and winds, major heat waves and other extreme weather conditions. In addition to creating more natural disaster-resilient communities, the City is also taking numerous proactive steps to decrease greenhouse gas emissions and otherwise mitigate climate change, as discussed below.

Indeed, New York City is attacking climate change mitigation and resiliency from so many different angles that simply locating and navigating the different initiatives and challenges is a feat unto itself. What follows is a summary of some of the City’s key mitigation and resiliency initiatives.³²

a. Office of Long-Term Planning and Sustainability & PlaNYC

In 2007, Mayor Michael Bloomberg launched PlaNYC. A 2007 report entitled *A Greener, Greater New York* laid out PlaNYC’s goals, including reducing the city’s greenhouse gas emissions by more than 30 percent by 2030, and 126 initiatives to reach this and other goals, including the establishment of the Mayor’s Office of Long-Term Planning and Sustainability. In 2011, the City updated *A Greener, Greater New York*, with new initiatives that placed an even greater emphasis on climate

resiliency in response to changes in weather that were already taking place.³³

PlaNYC’s recently published 2013 progress report indicated that, in the last six years, the City launched a municipal brown-fields cleanup program and an innovative green infrastructure program; implemented its Greener Greater Buildings Plan, Clean Heat program, climate resilience initiatives, Million Trees program and Green Infrastructure Plan; launched the country’s most ambitious suite of policies to reduce energy use in large buildings; passed regulations to phase out highly polluting fuel oil; developed updated climate impact projections; and passed the city’s Zone Green Zoning Text amendment, among other things. The progress report also reports that, in the last six years, the city’s annual greenhouse gas emissions have dropped 16%, which brings the city more than halfway to its goal of a 30% reduction by 2030.³⁴

The progress report attributes this success in part to the integration of sustainability goals into all City agencies and their operations. According to the progress report, the City “now spend[s] 10% of [its] annual energy budget—approximately \$80 million—on funding energy efficiency measures in City government buildings.”³⁵

PlaNYC includes more than a dozen interconnected goals for creating “a greener, greater New York,”³⁶ including: (1) increasing the resilience of the city’s communities, natural systems and infrastructure to climate risks; (2) reducing greenhouse gas emissions by more than 30%; (3) reducing energy consumption and making energy systems cleaner and more reliable; (4) improving the quality of waterways to increase recreation opportunities and restore coastal ecosystems; (5) ensuring a high quality and reliable water supply; (6) diverting 75% of the City’s solid waste from landfills; (7) cleaning up all of the City’s contaminated land (otherwise known as “brown-fields”); (8) achieving the cleanest air quality of any big U.S. city; (9) expanding sustainable transportation choices and ensuring the reliability and quality of the transportation network; and (10) creating homes for almost one million New

²⁹ See Patricia Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 ENVTL. L. REP. 10158, 10162–69 (2008) (discussing sustainability tools in local government toolbox).

³⁰ The toughness and strength of New Yorkers is a theme running throughout the 2013 post-Sandy report, *A Stronger, More Resilient New York*. See CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

³¹ Although mitigation measures can limit the amount of greenhouse gas emissions, they are only part of the solution. “Much of the change in climate over the next 30 to 40 years is already determined by past and present emissions.” Adapting to the Impacts, in *Scottish Executive, Changing Our Ways: Scotland’s Climate Change Programme* (2006), available at <http://www.scotland.gov.uk/Publications/2006/03/30091039/0>.

³² Initiatives not addressed in this article include, among others, the City’s Brownfield Cleanup Program, air quality initiatives, Sustainable Stormwater Management Plan and the Mayor’s Carbon Challenge. Reports on these initiatives and many others are available at *Publications*, PLANYC, <http://www.nyc.gov/html/planyc2030/html/publications/publications.shtml> (last visited Feb. 13, 2014).

³³ Numerous related New York City publications, including the 2007 and 2011 *Greener, Greater New York* reports and annual progress reports are available at *Publications*, PLANYC, <http://www.nyc.gov/html/planyc2030/html/publications/publications.shtml> (last visited Feb. 13, 2014).

³⁴ CITY OF NEW YORK, PLANYC PROGRESS REPORT 2013: A GREENER, GREATER NEW YORK 6 (2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf.

³⁵ CITY OF NEW YORK, PLANYC PROGRESS REPORT 2013: A GREENER, GREATER NEW YORK 6 (2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf.

³⁶ CITY OF NEW YORK, PLANYC PROGRESS REPORT 2013: A GREENER, GREATER NEW YORK 11 (2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf (summarizing goals).

Yorkers and increasing the affordability and sustainability of housing and neighborhoods.³⁷

PlaNYC's recent progress report boasts that "PlaNYC is the world's standard for municipal sustainability plans and cities throughout the world are emulating our work."³⁸ Despite significant tensions and challenges presented by such things as conflicting policies, which will be discussed in Part 2 of this article, this boast nevertheless appears to hold water. PlaNYC is far from merely aspirational—it contains concrete goals such as the emissions reduction goal, implementation strategies, substantial data analysis projects, an aggressive timeline for making changes to relevant local laws and funding strategies.

b. New York City Panel on Climate Change

To help respond to climate change in New York City and accomplish the goals outlined in PlaNYC, the Mayor's Office convened the first New York City Panel on Climate Change (NPCC1) in 2008. In doing this, New York City became the first city to scale down the United Nation's IPCC global climate models to develop climate-related projections specific to a municipality.³⁹

In 2009, NPCC1 released a set of climate projections specific to New York City. Significantly, NPCC1 concluded that—despite efforts to implement reductions in greenhouse gas emissions—New York City must make substantial preparations for climate-related changes.⁴⁰

In September 2012, the City passed Local Law 42, which established the New York City Panel on Climate Change as an ongoing body.⁴¹ Local Law 42 requires the NPCC to meet at least twice a year to review scientific data on climate change; recommend projections for the 2020s, 2050s and 2080s within one year of the publication of the IPCC Assessment Reports, or, at a minimum once every three years; recommend a framework

for stakeholders to incorporate climate change projections into their planning processes; and advise the City's Office of Long-Term Planning and Sustainability on a communications strategy related to climate science.⁴²

Local Law 42 also established a New York City climate change adaptation task force, "consisting of city, state and federal agencies and private organizations and entities responsible for developing, maintaining, operating or overseeing the city's public health, natural systems, critical infrastructure, buildings and economy."⁴³ Like the NPCC, the task force is required to meet at least twice a year. Additionally, within one year of the NPCC's development of recommended climate change projections pursuant to Local Law 42, the task force must create an inventory of potential climate change-related risks to the City's communities, vulnerable populations, public health, natural systems, critical infrastructure, buildings and economy; develop adaptation strategies to address the risks; and identify issues for further study.⁴⁴

In January 2013, the Mayor's Office convened the second New York City Panel on Climate Change (NPCC2) to provide scientific information and analyses on climate risks for use in the Special Initiative for Rebuilding and Resiliency, discussed below. Specifically, the goal of NPCC2 was to "present climate uncertainties clearly in order to facilitate risk-based decision-making on the use of policy tools such as incentives, regulations, and insurance" in order to "make New York City more resilient to mean changes in climate and to future extreme events."⁴⁵ NPCC2 published a report in June 2013, which provided new climate change projections and future coastal flood risk maps for New York City.⁴⁶

c. Special Initiative for Rebuilding and Resiliency

As part of PlaNYC, in December 2012, the City convened the Special Initiative for Rebuilding and Resiliency (SIRR) to

³⁷ For more detailed information about the housing and neighborhood goals, see CITY OF NEW YORK, PLANYC PROGRESS REPORT 2013: A GREENER, GREATER NEW YORK 12–15 (2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf.

³⁸ CITY OF NEW YORK, PLANYC PROGRESS REPORT 2013: A GREENER, GREATER NEW YORK 6 (2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf.

³⁹ IPCC, the international advisory body on climate change, was formed in 1988 by the World Meteorological Organization and the United Nations Environment Programme. See CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 34 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf (glossary of terms).

⁴⁰ NPCC, CLIMATE RISK INFORMATION 5 (2009), http://www.nyc.gov/html/om/pdf/2009/NPCC_CRI.pdf.

⁴¹ N.Y.C., Local Law 42 of 2012 (codified at N.Y.C. ADMIN. CODE §§ 3-122 to 3-123).

⁴² N.Y.C., Local Law 42 of 2012 (codified at N.Y.C. ADMIN. CODE §§ 3-122 to 3-123).

⁴³ N.Y.C., Local Law 42 of 2012 (codified at N.Y.C. ADMIN. CODE §§ 3-122 to 3-123).

⁴⁴ *Id.* The task force is also responsible for reviewing the NPCC's climate change projections, evaluating potential impacts of climate change on public health, including delivery of public health services to the city's vulnerable populations; evaluating the potential impacts of climate change on the city's natural systems, critical infrastructure and buildings; identifying rules, policies and regulations governing public health, natural systems, critical infrastructure, buildings and economy that may be affected by climate change; and, formulating and updating coordinated strategies to address the potential impact of climate change on the city's communities, vulnerable populations, public health, natural systems, critical infrastructure, buildings and economy. *Id.*

⁴⁵ CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 9 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

⁴⁶ CITY OF NEW YORK, NPCC, CLIMATE RISK INFORMATION 2013: OBSERVATIONS, CLIMATE CHANGE PROJECTIONS, AND MAPS 4 (Cynthia Rosenzweig & William Solecki eds., June 2013), http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

address long-term climate change resiliency specifically in the wake of Super Storm Sandy. In June 2013, SIRR released a 438-page, 22 chapter report entitled *A Stronger, More Resilient New York*, presenting recommendations for rebuilding the communities affected by Sandy and increasing the resilience of infrastructure and buildings citywide. Gathering and reporting on data from numerous sources, including the NPCC2 report and an economic analysis by the reinsurance company Swiss Re, the 2013 report projected that, absent implementation of the SIRR recommendations, by 2050, a storm similar to Sandy would cost New York City approximately five times as much as Sandy.⁴⁷

The coastal protection chapter of *A Stronger, More Resilient New York* sets forth the City's most recent comprehensive coastal protection plan. The plan reviews and rejects the "silver bullet" of a massive, harbor-wide storm-surge barrier, and instead proposes a broad, diverse range of discrete coastal protection measures.⁴⁸ The chapter stated:

Some of the proposed measures mimic existing coastal features that performed well during Sandy. Others have been proven to be successful elsewhere. Where possible, the City has derived inspiration from the historic natural features that once protected the coastline throughout the city. Elsewhere, both traditional and newly developed technologies have been considered.⁴⁹

For example, the plan proposes the use of augmented wetlands, reefs and living shorelines in Jamaica Bay, Tottenville in Staten Island, Bay Ridge Flats, along the Arthur Kill and Kill van Kull, and along Long Island Sound. The City's storm surge modeling for the report showed that, "when placed appropriately," wetlands, reefs and living shorelines possess wave attenuation properties, and those properties can be enhanced by altering the

wave attenuation features by, for instance, changing the depth at which they are placed.⁵⁰

The plan also recommends the use of numerous protective infrastructures, including local storm surge barriers in Newtown Creek, Rockaway Inlet and the Gowanus Canal in Brooklyn. These barriers would consist of large, movable in-water gates connected to levees or floodwalls on adjacent shores.⁵¹

The proposed coastal measures are intended to be both complementary and capable of independent implementation over time, "based on available funding and relative priority."⁵² Although the report notes that "ultimately the City will be best served by implementing the entire suite of options," the report claims that implementation of the 37 "Phase I" measures could reduce expected losses in a Sandy-like storm in the 2050s by up to 25 percent, or more than \$22 billion.⁵³

The SIRR report also contains 6 initiatives designed to strengthen the city's ability to understand the impacts of climate change,⁵⁴ 14 initiatives to increase the resilience of the City's buildings,⁵⁵ 6 economic recovery initiatives,⁵⁶ 10 initiatives for addressing the needs of the insurance system,⁵⁷ and 23 initiatives for increasing the resiliency of utilities,⁵⁸ among others.

d. NYC Green Codes Task Force

The design and construction of buildings play a larger role in resiliency in New York City than in many other cities, at least in part because New York City already has an extensive and widely utilized public transit system. According to the 2013 *New York City Local Law 84 Benchmarking Report*, New York City's buildings accounted for nearly 75% of the City's total

⁴⁷ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 34 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁴⁸ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 50–65 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁴⁹ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 50 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵⁰ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 53 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵¹ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 56 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵² CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 40 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵³ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 40 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵⁴ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 32 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵⁵ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 79–86 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵⁶ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 89–90 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵⁷ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 101–03 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

⁵⁸ CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 122–29 (June 2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>.

greenhouse gas emissions, 94% of the City's electrical consumption and 85% of its water usage.⁵⁹

In July 2008, Mayor Bloomberg and City Council Speaker Christine Quinn asked the New York Chapter of the U.S. Green Building Council to convene the NYC Green Codes Task Force to review the current building and construction codes and make recommendations on how they could be amended to promote more sustainable practices, including specifically: (1) examining construction, fire, water and sewer, and zoning codes; (2) identifying impediments to incorporation of green technologies; (3) identifying opportunities to promote energy efficiency and other sustainable practices; and (4) recommending ways to incorporate climate adaptation measures into the codes.⁶⁰

Rather than mandating LEED standards, the City chose to "green" the building and other related codes. The task force's report asserted:

Greening the codes has significant advantages over mandating LEED for the private sector. Codes create economies of scale in both expertise and materials, thereby lowering costs. Codes are also enforceable, and they build on existing institutions and industry practices. They can be tuned to the priorities and conditions of a particular jurisdiction. In addition, codes allow the city to correct market failures, such as split incentives; these include landlords who do not want to pay for improvements because the benefits would go to their tenants. Finally,

codes help the City achieve social equity and environmental justice. By modifying codes and driving down costs, green buildings can be available to all.⁶¹

The task force's more than 200 volunteers responded with 111 proposed code additions or revisions. Each proposal includes statutory language, a detailed explanation of the issues, an analysis of costs and savings, precedents from other jurisdictions, a comparison of the proposal to any related LEED credits and information on implementation. The proposals primarily affect new buildings under construction and existing buildings that are being renovated, but, in some cases, the task force also proposed targeting upgrades to existing buildings to correct widespread problems.⁶²

Currently, 43 of the 111 proposals have been enacted and another four have been partially enacted.⁶³ The enacted codes include new laws or amendments to existing law that:

Add environmental protection as a fundamental principle of construction codes,⁶⁴ streamline approvals for green technologies and projects,⁶⁵ increase resiliency of buildings to natural disasters,⁶⁶ increase energy efficiency⁶⁷ and decrease carbon emissions,⁶⁸ remove impediments to alternative energy,⁶⁹ increase indoor health and safety,⁷⁰ increase resource conservation,⁷¹ manage stormwater more sustainably,⁷² promote sustainable urban ecological practices,⁷³ and enhance water efficiency.⁷⁴

⁵⁹ CITY OF NEW YORK, PLANYC: NEW YORK CITY LOCAL LAW 84 BENCHMARKING REPORT 5 (Sept. 2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/1184_year_two_report.pdf.

⁶⁰ Letter from Michael Bloomberg, Mayor, and Christine Quinn, Speaker of the Council of the City of New York, to Russell Unger, Executive Director, USGBC New York (July 8, 2008), in *Executive Summary*, in URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: A REPORT TO MAYOR MICHAEL R. BLOOMBERG & SPEAKER CHRISTINE C. QUINN (Feb. 2010), available at http://www.nyc.gov/html/gbee/downloads/pdf/gctf_executive_summary.pdf.

⁶¹ *Executive Summary*, in URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: A REPORT TO MAYOR MICHAEL R. BLOOMBERG & SPEAKER CHRISTINE C. QUINN 1–2 (Feb. 2010), available at http://www.nyc.gov/html/gbee/downloads/pdf/gctf_executive_summary.pdf.

⁶² See, e.g., N.Y.C., Local Law 85 of 2009 (Don't Exempt Existing Buildings from Green Codes).

⁶³ Green Buildings & Energy Efficiency, GCTF Enacted Proposals, PlaNYC, <http://www.nyc.gov/html/gbee/html/codes/enacted.shtml> (last visited Feb. 13, 2014).

⁶⁴ N.Y.C., Local Law 49 of 2010.

⁶⁵ N.Y.C., Local Law 5 of 2010.

⁶⁶ See, e.g., N.Y.C. Building Code app. G and N.Y.C. Local Law 143 of 2013 (safeguard toxic materials stored in flood zones); N.Y.C., Local Law 81 of 2013 (forecast non-flood climatic hazards to 2080); N.Y.C., Local Law 79 of 2013 (ensure toilets and sinks can operate during blackouts).

⁶⁷ See, e.g., N.Y.C., Local Law 52 of 2010 (lighting efficiency in apartment buildings); N.Y.C., Local Law 48 of 2010 (manual on-automatic off lighting); N.Y.C., Local Law 47 of 2010 (reduction of artificial lighting in sunlit lobbies and hallways).

⁶⁸ See, e.g., N.Y.C., Local Law 21 of 2011 (reduce summer heat with cool roofs); N.Y.C., Local Law 141 of 2013 (reduce carbon dioxide emissions from specialized concrete); 2010 ECCCNY, ch. 5 and ASHRAE 90.1 2010 ch. 5 (minimize air leakage building exteriors); 1 R.C.N.Y. ch. 5000 (ensure lighting systems function properly).

⁶⁹ See, e.g., 63 R.C.N.Y. ch. 1 (remove landmarks impediments to alternative energy); N.Y.C., Local Law 20 of 2011 (allow large solar rooftop installations); N.Y.C., Local Law 28 of 2012 (increase allowable size of solar shades); N.Y.C., Local Law 43 of 2010 (allow use of biofuels).

⁷⁰ See, e.g., N.Y.C., Local Law 2 of 2012 (limit harmful emissions from carpets); N.Y.C., Local Law 72 of 2011 (filter soot from incoming air); 15 R.C.N.Y. ch. 2 (phase out dirty boiler fuels); N.Y.C., Local Law 43 of 2010 (phase out dirty boiler fuels); N.Y.C., Local Law 70 of 2011 (treat corrosive concrete wastewater); 15 R.C.N.Y. ch. 1 (reduce "red tape" for asbestos removal); N.Y.C., Local Law 55 of 2010 (increase availability of drinking fountains). In addition, the Federal Formaldehyde Standards for Composite Wood Products Act enacted in 2010 restricts cancer-causing formaldehyde in building materials. See 15 U.S.C. § 2697.

⁷¹ See, e.g., N.Y.C., Local Law 60 of 2012 (provide recycling areas in apartment buildings); N.Y.C., Local Law 71 of 2011 (use recycled asphalt).

⁷² See, e.g., 15 R.C.N.Y. ch. 31 (reduce stormwater runoff from new developments, send rainwater to waterways, encourage innovative stormwater practices, and maintain site-based stormwater detention systems).

⁷³ See, e.g., N.Y.C., Local Law 80 of 2013 (construct sustainable sidewalks).

⁷⁴ See, e.g., N.Y.C., Local Law 57 of 2010 (enhance water efficiency standards); N.Y.C., Local Law 56 of 2010 (catch leaks by measuring water use); N.Y.C., Local Law 54 of 2010 (stop wasting drinking water for cooling).

A list of enacted proposals, corresponding legal language and detailed proposals is available at <http://www.nyc.gov/html/gbee/html/codes/proposals.shtml>.

e. Department of City Planning Initiatives

New York City's Waterfront Revitalization Program (WRP) is the City's principal coastal zone management tool. In accordance with the State WRP program, New York City adopted the New York City WRP in 1982.⁷⁵ The WRP is administered by the New York City Department of City Planning and sets forth ten policies designed to maximize the benefits derived from economic development, environmental preservation and public use of the waterfront, while minimizing the conflicts among those objectives.⁷⁶ All City, State and federal discretionary actions in the coastal zone must be reviewed for consistency with these policies.⁷⁷

The current WRP policies were adopted by the City Council in 1999 in the "New Waterfront Revitalization Program," became effective upon state and federal approval in 2002, and have not been amended since 2002.⁷⁸ Despite being New York City's "principal coastal zone management tool" and despite the fact that the WRP "establishes the city's policies for development and use of the waterfront,"⁷⁹ nowhere in the 46-page "New Waterfront Revitalization Program" is climate change or sea level rise mentioned. Instead, the WRP appears to base its coastal ecosystem protection policy primarily on habitat protection and avoidance of species loss.⁸⁰

Because it appears the 2002 WRP policies were established without consideration of climate change, it may not be surprising

that the policies do not seek to increase coastal open spaces. Rather, "[t]he central goal of [Policy 4, th[e coastal ecosystems] policy[,] is to *avoid* any adverse primary or secondary impacts to the coastal ecosystem."⁸¹ Policy 6, which is to "minimize loss of life, structures and natural resources caused by flooding and erosion," recognizes that "[t]he inherent protective value of natural shorelines needs to be enhanced." This policy further recognizes that "[i]f feasible, locating non-water dependent development and structures away from flooding and erosion hazards is the most effective means of achieving this option."⁸²

On October 30, 2013, the City approved a series of revisions to the WRP in order to proactively advance the long-term goals laid out in *Vision 2020: the New York City Comprehensive Waterfront Plan*.⁸³ The revised WRP is now awaiting state and federal approval.⁸⁴ The 2013 update does not substantially alter the policies or structure of the WRP program; the ten policies and the structure of consistency review remain the same. Rather,

[The 2013 revision] seeks to incorporate considerations surrounding the waterfront that have evolved as a result of numerous waterfront planning efforts that have taken place since the WRP was last updated. Most importantly, [the 2013] revisions build on and are a direct outcome of *Vision 2020: the New York City Comprehensive Waterfront Plan*, which was released in March of 2011 by the Department of City Planning.⁸⁵

Vision 2020 was an update to the 1992 New York City Comprehensive Waterfront Plan (upon which the 2002 WRP was based). *Vision 2020* is organized around eight goals, one of which is climate resilience.⁸⁶ It proposes to use the waterways as part of a larger strategy to make the city more sustainable and

⁷⁵ New York City's local waterfront revitalization plan (WRP) is authorized by New York State's Waterfront Revitalization of Coastal Areas and Inland Waterways Act, N.Y. Exec. Law §§ 910–923, which stems from the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451–1464. The implementing regulations of the New York statute and coastal area policies can be found in the Department of State regulations, 19 N.Y.C.R.R. pt. 600.

⁷⁶ N.Y.C. DEP'T OF CITY PLANNING, THE NEW WATERFRONT REVITALIZATION PROGRAM 3 (Sept. 2002), http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf. The ten policies address: (1) residential and commercial redevelopment; (2) water-dependent and industrial uses; (3) commercial and recreational boating; (4) coastal ecological systems; (5) water quality; (6) flooding and erosion; (7) solid waste and hazardous substances; (8) public access; (9) scenic resources; and (10) historical and cultural resources. *Id.* at 8.

⁷⁷ N.Y.C. DEP'T OF CITY PLANNING, NEW WATERFRONT REVITALIZATION PROGRAM 3 (Sept. 2002), http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf.

⁷⁸ See N.Y.C. DEP'T OF CITY PLANNING, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM: NEW YORK CITY APPROVED REVISIONS PURSUANT TO SECTION 197-A OF THE CITY CHARTER 5 (Oct. 30, 2013), http://www.nyc.gov/html/dcp/pdf/wrp/revisions/nyc_wrp_city_approved.pdf (discussing history of New York City's WRP and New WRP).

⁷⁹ N.Y.C. DEP'T OF CITY PLANNING, NEW WATERFRONT REVITALIZATION PROGRAM 3 (Sept. 2002), http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf; see also *The Waterfront Revitalization Program*, NYC PLANNING, <http://www.nyc.gov/html/dcp/html/wrp/index.shtml> (last visited Feb. 13, 2014).

⁸⁰ N.Y.C. DEP'T OF CITY PLANNING, NEW WATERFRONT REVITALIZATION PROGRAM 16 (Sept. 2002), http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf.

⁸¹ N.Y.C. DEP'T OF CITY PLANNING, NEW WATERFRONT REVITALIZATION PROGRAM 16 (Sept. 2002), http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf.

⁸² N.Y.C. DEP'T OF CITY PLANNING, NEW WATERFRONT REVITALIZATION PROGRAM 20 (Sept. 2002), http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf.

⁸³ See N.Y.C. DEP'T OF CITY PLANNING, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM: NEW YORK CITY APPROVED REVISIONS PURSUANT TO SECTION 197-A OF THE CITY CHARTER 5 (Oct. 30, 2013), http://www.nyc.gov/html/dcp/pdf/wrp/revisions/nyc_wrp_city_approved.pdf.

⁸⁴ The City Council approved the revisions to the WRP on October 30, 2013. The revised WRP will go into effect upon approval by the New York State Department of State and the U.S. Department of Commerce.

⁸⁵ N.Y.C. DEP'T OF CITY PLANNING, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM: NEW YORK CITY APPROVED REVISIONS PURSUANT TO SECTION 197-A OF THE CITY CHARTER 5 (Oct. 30, 2013), http://www.nyc.gov/html/dcp/pdf/wrp/revisions/nyc_wrp_city_approved.pdf.

⁸⁶ The eight goals are: expand public access, enliven the waterfront, support the working waterfront, improve water quality, restore the natural waterfront, enhance the Blue Network (the waterways themselves), improve governmental oversight, and increase climate resilience. N.Y.C. DEP'T OF CITY PLANNING, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM: NEW YORK CITY APPROVED REVISIONS PURSUANT TO SECTION 197-A OF THE CITY CHARTER 6 (Oct. 30, 2013), http://www.nyc.gov/html/dcp/pdf/wrp/revisions/nyc_wrp_city_approved.pdf.

resilient. Specifically, the plan proposes to use stormwater management, and protection and restoration of wetlands, beaches and natural shorelines to improve the ecological health of its water bodies. The plan recognizes the connection between these measures and protection of coastal neighborhoods from flooding and storm surges.⁸⁷

According to the City, “the changes to the WRP will solidify New York City’s leadership in the area of sustainability and climate resilience planning as one of the first major cities in the U.S. to incorporate climate change considerations into its Coastal Zone Management Program.”⁸⁸ The revised WRP goals will also “promote a range of ecological objectives and strategies, facilitate interagency review of permitting to preserve and enhance maritime infrastructure, and support a thriving, sustainable working waterfront.”⁸⁹

In June 2013, the Department of City Planning produced two reports to help New York City and other urban waterfront communities improve their resilience to coastal flood risks, *Designing for Flood Risk* and *Urban Waterfront Adaptive Strategies*.⁹⁰ *Designing for Flood Risk* identifies design principles to guide flood-resistant construction, provides an overview of regulatory requirements for construction in flood zones under the National Flood Insurance Program, recommends changes to zoning to “enable more versatile and desirable design solutions for flood-resistant construction,” and “explores the impacts of flood-resistant construction standards on built form and the creation of a vibrant streetscape and public realm.”⁹¹ *Urban Waterfront Adaptive Strategies* identifies and analyzes potential adaptive strategies, including interventions inland, at the shoreline and in the water.⁹²

Both reports informed *A Stronger, More Resilient New York*. *Designing for Flood Risk* also shaped the Department’s proposed Flood Resilience Text Amendment, which would enable buildings to be constructed and retrofitted for flood resilience based on the latest flood maps issued by the Federal Emergency Management Agency (FEMA), while mitigating the potential negative effects of elevated buildings on ground-floor activity and quality of the streetscape. This proposal began the public land use review process on May 20, 2013.

f. Draft New York City Hazard Mitigation Plan

In January 2014, the New York City Office of Emergency Management (OEM), in partnership with the Department of City Planning, released the draft 2014 New York City Hazard Mitigation Plan (HMP). The HMP identifies the range of hazards facing the City and strategies to reduce the effects of these hazards. The 2014 draft HMP serves as an update to the 2009 New York City Natural Hazard Mitigation Plan. The public comment period for the draft HMP closed on January 15, 2014. The draft HMP is now awaiting review by New York State Division of Homeland Security and Emergency Services and approval by FEMA.⁹³

Part 2—NYC: Climate Change Tensions and Challenges

Part 2, which will appear in the May 2014 issue, will explore some of the key tensions and challenges facing the City as it implements the initiatives in *A Stronger, More Resilient New York*, continues to decrease its greenhouse gas emissions, and otherwise attempts to mitigate and adapt to the NPCC’s sobering climate change predictions.

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⁸⁷ N.Y.C. DEP’T OF CITY PLANNING, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM: NEW YORK CITY APPROVED REVISIONS PURSUANT TO SECTION 197-A OF THE CITY CHARTER 6 (Oct. 30, 2013), http://www.nyc.gov/html/dcp/pdf/wrp/revisions/nyc_wrp_city_approved.pdf.

⁸⁸ The Waterfront Revitalization Program: 2012 WRP Revisions, NYC Planning, http://www.nyc.gov/html/dcp/html/wrp/wrp_revisions.shtml (last visited Feb. 13, 2014).

⁸⁹ The Waterfront Revitalization Program: 2012 WRP Revisions, NYC Planning, http://www.nyc.gov/html/dcp/html/wrp/wrp_revisions.shtml (last visited Feb. 13, 2014).

⁹⁰ See N.Y.C. DEP’T OF CITY PLANNING, DESIGNING FOR FLOOD RISK (June 2013), http://www.nyc.gov/html/dcp/pdf/sustainable_communities/designing_flood_risk.pdf; N.Y.C. DEP’T OF CITY PLANNING, URBAN WATERFRONT ADAPTIVE STRATEGIES (June 2013), http://www.nyc.gov/html/dcp/pdf/sustainable_communities/urban_waterfront_print.pdf.

⁹¹ N.Y.C. Dep’t of City Planning, Sustainable Communities: Climate Resilience Studies—Designing for Flood Risk, http://www.nyc.gov/html/dcp/html/sustainable_communities/sustain_com6.shtml (last visited Feb. 13, 2014).

⁹² Sustainable Communities: Climate Resilience Studies, NYC Planning, http://www.nyc.gov/html/dcp/html/sustainable_communities/sustain_com4.shtml (last visited Feb. 13, 2014).

⁹³ Emergency Planning: Hazard Mitigation Plan, N.Y.C. Office of Emergency Mgmt., http://www.nyc.gov/html/oem/html/planning_response/planning_hazard_mitigation_2014.shtml (last visited Feb. 13, 2014).

LEGAL DEVELOPMENTS

ASBESTOS

Federal Court Ruled That It Had Jurisdiction Over Asbestos Action Under the Federal Officer Removal Statute

Husband and wife plaintiffs commenced an action in the Supreme Court, Broome County (which was continued by the executor of their estate after they died) alleging that over the course of a 46-year work career the husband was exposed to asbestos and asbestos-containing products, including products manufactured by defendant Crane Co. (Crane). The complaint did not contain specific allegations as to how, when and where the husband was exposed to Crane products, but plaintiff's response to discovery requests indicated that some exposures had occurred while the husband served in the U.S. Navy. Crane subsequently invoked the federal officer removal statute and removed the action to the federal district court for the Northern District of New York. The court denied plaintiff's motion to remand, concluding that Crane's assertions that it had acted under the Navy's direction in manufacturing its products and supplying them to the Navy were adequate to meet the prong of the federal officer removal test that Crane acted "under a federal officer"; that plaintiff's allegations indicated exposure on specific ships to specific types of products manufactured by specific manufacturers including Crane satisfied the second prong requiring that the products were supplied "under color of federal office"; and that Crane could assert a "colorable federal defense," thereby satisfying the third prong. With respect to the "colorable federal defense" prong, the court noted that plaintiff had submitted expert testimony to argue that the federal defense asserted by Crane—the government contractor defense—could not succeed on the merits (because the Navy did not limit or restrict the sort of precautions that should accompany products about hazards posed by the installation of the products). The court said, however, that Crane only needed to show that the defense was "colorable," not "clearly sustainable." Since Crane had identified facts that would, if viewed in the most favorable light, establish its entitlement to the government contractor defense at trial, the action could proceed in federal court. *Gates v. A.O. Smith Water Products Co.*, 2014 U.S. Dist. LEXIS 2543 (N.D.N.Y. Jan. 9, 2014).

ENERGY

Appellate Division Ruled That Town Was Bound by Settlement Agreement with Wind Energy Companies

Petitioners were companies who constructed and operated wind turbine energy facilities. In 2009, the Town of Prattsburgh code enforcement officer advised petitioners in writing that the

Town could not require a building permit for a proposed wind energy project because there were no Town laws preventing petitioners from proceeding with the project. Nonetheless, petitioners sought to work with the Town Board to obtain its approval of the project. When petitioners were unable to reach agreement regarding use of Town roads for access to the project site, they commenced an Article 78 proceeding in the Supreme Court, Monroe County. In December 2009, petitioners and the Town Board agreed to a settlement, which the Town Board approved just before a newly elected Town Board came into office. In January 2010, the new Town Board rescinded the resolution approving the settlement, and in March 2010 passed a moratorium on wind turbine development in the Town. Petitioners moved in the pending Article 78 proceeding to enforce the settlement agreement, and the Town cross-moved to vacate the agreement as "a gratuitous and invalid act" to grant vested rights and commenced a declaratory judgment action seeking to have the agreement declared invalid and/or void. The Supreme Court granted in part petitioners' motion to enforce the agreement but concluded that they had not obtained vested rights and therefore gave them 168 days (the time from the Town's approval of the settlement agreement to the date of the moratorium's enactment) to make improvements to obtain such rights. The Appellate Division, Fourth Department ruled that the court should have granted petitioners' entire motion and dismissed the Town's declaratory judgment action. The Fourth Department said that the Town was bound by the settlement agreement as a matter of contract law, and that the Supreme Court had erred by determining the merits of the issue of whether petitioners had acquired vested rights—an issue that was "fully and finally resolved by the settlement agreement." *Matter of Ecogen Wind LLC v. Town of Prattsburgh Town Board*, 112 A.D.3d 1282, 978 N.Y.S.2d 485 (4th Dept. 2013).

HAZARDOUS SUBSTANCES

Federal Court Ruled That 2002 Settlement Precluded State from Compelling Chemical Company to Pay for Additional Remediation

In 2002, defendant PVS Chemicals, Inc. (PVS) and the State of New York entered into a Stipulation and Order of Settlement (2002 Order of Settlement) to resolve the State's claims that PVS violated federal and state environmental laws and engaged in a public nuisance by maintaining illegal solid and hazardous waste activities and contaminated conditions at its Buffalo facility. In exchange for a release from all pending claims and liabilities that "occurred at the facility" prior to the settlement date, PVS performed all of its obligations under the 2002 Order of Settlement, including implementation of a site investigation plan. When DEC presented PVS with an order on consent in 2010 that would have required PVS to undertake an Inactive Hazardous Waste Disposal Site Remedial Program, PVS refused, citing the 2002 Order of Settlement. After DEC informed PVS in 2011 that the facility had been

added to the Registry of Inactive Hazardous Waste Disposal Sites, PVS moved for an order requiring the removal of the site from the registry and preventing the State from commencing litigation against PVS related to environmental conditions known at the time of the 2002 Order of Settlement. The federal district court for the Western District of New York granted PVS's motion to the extent of ruling that the 2002 Order of Settlement precluded the State from seeking to compel PVS to develop, implement or fund an inactive hazardous waste disposal remediation program at the site related to contamination known to exist at the time of the 2002 Order of Settlement. The court noted that it was undisputed that soil and groundwater conditions at the facility were "virtually unchanged" from conditions before the 2002 Order of Settlement, and further noted that the State had not required additional remediation measures as a result of the site investigation conducted by PVS pursuant to the 2002 Order of Settlement and that the State was not relying upon newly discovered information about site conditions to justify additional administrative action. The court concluded that while the State could list the facility on the hazardous waste site registry and undertake a remedial program, it could not force PVS to pay the costs of such a program. *New York v. PVS Chemicals, Inc.*, 2014 U.S. Dist. LEXIS 225 (W.D.N.Y. Jan. 2, 2014).

INSURANCE

State Court Barred Insurance Companies from Using Inadvertently Produced Documents

In a coverage dispute concerning claims related to an eight-month shutdown of a damaged turbine at Transcanada's Ravenswood power plant in Queens, Transcanada entities sought a protective order barring the insurance companies from using certain documents inadvertently produced by Transcanada during discovery, including e-mails between Transcanada in-house and outside counsel assessing potential claims against the insurers and analyzing a report on an investigation into the cause of the outage, an e-mail by a Transcanada representative to in-house counsel summarizing and describing legal analysis provided by outside counsel, and a chart prepared by Transcanada that summarized analysis and advice provided by law firms that Transcanada had interviewed. The Supreme Court, New York County issued the protective order, ruling that documents that contained attorneys' legal analysis of the merits of the Transcanada's claims against the insurers were privileged as attorney-client communications and/or attorney work product, and that the insurance companies had not met their burden of establishing that the crime-fraud exception should apply. Affirmations of the company's counsel established that the production had been inadvertent, and that the company had taken reasonable steps to prevent the disclosure and to rectify the disclosure once it was discovered. The company also established that a protective order would not unduly prejudice the insurance companies since the insurance companies had received a copy of the report on the

investigation into the cause of the outage and could not establish that Transcanada's impressions of the report and its litigation tactics in determining which law firm to hire were relevant to the claim. The court ordered the insurance companies to return the documents, struck deposition testimony related to the documents, and enjoined use of the documents, information in the documents or the related deposition testimony. *TC Ravenswood, LLC v. National Union Fire Insurance Co. of Pittsburgh*, 2014 N.Y. Misc. LEXIS 358 (Sup. Ct. N.Y. Co. Jan. 24, 2014).

LAND USE

Federal Court Granted Summary Judgment to Town of Riverhead in Dispute Over Handling of Golf Club Land Use Application

The owner of a 191-acre site in the Town of Riverhead brought a 42 U.S.C. § 1983 lawsuit against the Town, the Town's attorney and the Town planning board's attorney alleging violations of its First Amendment right to petition the government for redress of its grievances and its Fourteenth Amendment rights to procedural and substantive due process. The owner contended that in 2003 defendants arbitrarily and capriciously deprived it of the ability to construct a health spa on the property despite a 1982 special permit allowing such construction and that defendants wrongfully conditioned the consideration of a 2005 application to construct a clubhouse on the same property on the withdrawal of both the still unresolved health spa application and a state court action challenging the denial of the spa application. The federal district court for the Eastern District of New York granted summary judgment to the defendants on the due process claims in September 2012. In September 2013, the court granted summary judgment to the defendants on the First Amendment claim. The court said that the owner's judicial appeal of the 2002 denial was not entitled to First Amendment protection because the 2002 denial did not constitute an abuse of discretion and the appeal was without a reasonable basis. Even if there were a constitutionally protected interest, the owner had failed to raise a genuine issue of material fact regarding the elements of a First Amendment claim. The court said that no rational jury could find that the defendants' refusal to consider the 2005 application separately while the 2002 application was pending was motivated by anything other than the Town's duty to consider cumulative environmental impacts in its review under the State Environmental Quality Review Act (SEQRA). The court noted that the Town had offered the opportunity to amend the 2005 application to include the health spa, but that the owner instead withdrew the appeal of the 2002 application. The court also concluded that since the owner had sold a portion of the property for \$10 million the owner had not suffered the type of concrete non-speech harm necessary to defeat summary judgment on the First Amendment claim; nor was there any actual chilling of speech since the 2005 application could have been amended to add

the health spa. In addition, the individual defendants were entitled to qualified immunity. *Soundview Associates v. Town of Riverhead*, 2013 U.S. Dist. LEXIS 141285 (E.D.N.Y. Sept. 30, 2013). [Editor's Note: This matter was previously covered in the November 2010 and January 2013 issues of *Environmental Law in New York*.]

Appellate Division Affirmed Denial of Use Variance for Ski Lift Extension

The Appellate Division, Fourth Department affirmed the denial by the Supreme Court, Cattaraugus County, of an Article 78 petition challenging the decision of the zoning board of appeals (ZBA) of the Village of Ellicottville to deny an application for a use variance allowing extension of a ski lift. The Fourth Department cited the "great deference" due the ZBA and found that the ZBA properly determined that despite the presentation of expert testimony the variance applicant had not shown that it was entitled to the variance by establishing that it could not realize a reasonable rate of return without the variance. The applicant had also not established that extension of the ski lift would not alter the essential character of the neighborhood. Moreover, the applicant's hardship was self created because it had previously agreed that the area it sought to develop would be protected as an "undisturbed green area." *Matter of Holimont, Inc. v. Village of Ellicottville Zoning Board of Appeals*, 112 A.D.3d 1315, 977 N.Y.S.2d 514 (4th Dept. 2013).

Appellate Division Ruled for Property Owner in Dispute with Town over Zoning Map Boundaries

Petitioner owned a 2.26-acre property in an unincorporated area in the Town of Greenburgh. The Town's official zoning map and prior zoning maps depicted the property in the CA-I district in which multifamily residential complexes were permitted, but when petitioner submitted a site plan to the Town, petitioner was told that it had come to the attention of the Town that the property was in fact located in a single-family residential district. According to petitioner, the Commissioner of the Town's Department of Community Development and Conservation then unilaterally ordered the alteration of the zoning map to show the property in the single-family district. The Town's zoning board of appeals denied petitioner's appeal of the Commissioner's determination, but in the subsequent Article 78 proceeding challenging these actions, the Supreme Court, Westchester County denied the Town respondents' motion to dismiss and granted the petition. The Appellate Division, Second Department affirmed, noting that it was within its authority to review the merits of the proceeding even though the Town respondents had not filed an answer or an administrative record. The Second Department said that the Commissioner's actions violated the Town code's provision that the zoning map "shall be the final authority," as well as the Town Law's requirements for amending zoning regulations, restrictions and boundaries. The Second Department noted that there was no evidence that the zoning map's classification of the property was a scrivener's error, and that the Town had failed to

produce zoning maps for the period between 1957 and 2000 or any other map pertaining to the purported scrivener's error in response to a Freedom of Information Law request. *Matter of S & R Development Estates, LLC v. Feiner*, 112 A.D.3d 945, 977 N.Y.S.2d 377 (2d Dept. 2013).

State Court Ruled That City's Approval of NYU Expansion Plan Violated Public Trust Doctrine

Petitioners challenged New York City's approvals of New York University's (NYU's) plan to expand its physical plant at its Washington Square campus in Greenwich Village. The Supreme Court, New York County dismissed five of petitioners' six causes of action, but ruled that the City had alienated parkland without approval of the State Legislature in violation of the public trust doctrine. The court therefore enjoined NYU from beginning any project construction that would result in alienation of the three parcels found by the court to be parkland unless and until legislative authorization was obtained. The court was not persuaded by the City's argument that the parcels, which were still mapped as streets, could not have been impliedly dedicated as parkland because "the history of failed efforts" to have the parcels remapped as parkland prevented petitioners from showing the City's "unequivocal intention" to dedicate the land as parkland. The court instead cited precedent suggesting that "the long continued use of a property as a park can, itself, establish the property as parkland by implication" and noted that the City's argument "would effectively superimpose the requirement of express dedication on the doctrine of implied dedication." Moreover, the court said that the public trust doctrine applied even where the alienation was temporary, as it would be for two of the parcels that would be remapped as parkland as part of the expansion project but would be subject to an NYU easement during a 20-year construction period. The court found that petitioners had shown long continuous use of the parcels as parks and noted the "extensive use of signage indicating some amount of management of the properties by the [Department of Parks and Recreation], and at least some intention of the City to identify the parcels as parks and encourage members of the public to consider and utilize them as parks." With respect to petitioners' other causes of action, the court ruled that the challenge to a Letter of Resolution between NYU, the Office of Parks, Recreation and Historic Preservation and the Dormitory Authority of the State of New York (DASNY) with respect to actions that NYU would take to mitigate impacts on historic resources was not ripe because DASNY had not yet agreed to provide funding to NYU or taken any other final agency action. The court also ruled that petitioners had no standing to challenge the lifting of restrictions in deeds that NYU entered into when it purchased the properties that were the site of the proposed expansion; moreover, the agreements at issue provided for such changes. In dismissing petitioners' SEQRA cause of action, the court addressed and rejected a number of alleged shortcomings in the environmental review, including the failure to require NYU to consider the possibility of developing its project in other areas of New York City. The court concluded that the City was not arbitrary and capricious in

failing to require analysis of such an alternative because it was at odds with NYU's purpose "to facilitate the cross-discipline interaction of NYU's faculty and students." The court also rejected petitioners' claims that the City did not take an independent hard look; that the City should have required additional environmental review of project modifications made when the City Planning Commission and City Council considered the project (the court noted that such modifications had been evaluated in technical memoranda and that petitioners had not indicated how the modifications, which decreased the size of the project, would create new environmental impacts); that the final environmental impact statement (FEIS) had mischaracterized current open spaces; and that the FEIS did not consider construction delays (the court wrote that petitioners had offered "mere speculation" in support of their contention that the project would experience significant delays). The court also ruled that the City had not violated the Uniform Land Use Review Procedure or the Open Meetings Law. *Glick v. Harvey*, 2014 N.Y. Misc. LEXIS 35 (Sup. Ct. N.Y. Co. Jan. 7, 2014). [Editor's Note: This proceeding was previously covered in the May 2013 and July 2013 issues of *Environmental Law in New York*.]

OIL SPILLS & STORAGE

DEC Commissioner Imposed \$10,000 Penalties for Failures to Reregister Petroleum Tanks After 1990s Property Transfers

Staff of the New York State Department of Environmental Conservation (DEC) alleged that Grand Concourse East Housing Development Fund Corporation and 428 East 157th Street Housing Development Fund Corporation violated 6 N.Y.C.R.R. § 612.2 when they failed to reregister petroleum storage tanks after acquiring the properties on which the tanks were located from the City of New York Department of Housing Preservation and Development in 1995 and 1999, respectively. The DEC Commissioner found that staff were entitled to default judgment, as well as judgment based on record evidence, and ordered each respondent to pay a \$10,000 civil penalty and to submit a petroleum bulk storage facility registration application and applicable registration fees. *In re Grand Concourse East Housing Development Fund Corp.*, DEC Case No. PBS 2-601185NBT (Nov. 27, 2013); *In re 428 East 157th Street Housing Development Fund Corp.*, DEC Case No. PBS 2-601195NBT (Nov. 27, 2013).

SEQRA/NEPA

State Court Ruled That East Hampton Trustees Had Standing to Challenge Zoning Board's Approval of Revetment

In November 2012, the Zoning Board of Appeals of the Town of East Hampton granted approvals for construction of a

147-linear foot stone armor revetment backed by a 32-foot vinyl seawall. In comments on the application for the revetment, the Trustees of the Freeholders and Commonality of the Town of East Hampton (Trustees) commented that the revetment would extend below the mean high water mark onto "Commonlands" owned and governed by the Trustees. The Trustees challenged the ZBA decisions on multiple grounds in an Article 78 proceeding in the Supreme Court, Suffolk County. They claimed, among other things, that the ZBA had failed to comply with the requirements of SEQRA in issuing a negative declaration for the action and that the ZBA had acted *ultra vires* in permitting construction of part of the revetment on property not owned by the applicants. The court denied respondents' motion to dismiss for lack of standing. The court rejected respondents' argument that the only basis for standing alleged by the Trustees was their "ownership and governance of the Commonlands between the high water and low water marks" along Gardiner's Bay, and instead concluded that the Trustees' allegations of "potentially significant adverse impacts to the beaches that are under their control as part of the 'the Commonlands' in the western and eastern proximity of the proposed revetment" established standing, obviating any need for the Trustees to establish that the revetment would be located on their property or that their property abutted the subject property. The court also said that the Trustees had standing under SEQRA because the alleged injuries fell within the zone of interests protected by SEQRA and also by the Town's zoning law and local waterfront revitalization plan. *Trustees of Freeholders of Commonality of Town of East Hampton v. Zoning Board of Appeals of Town of East Hampton*, 2013 N.Y. Misc. LEXIS 4648 (Sup. Ct. Suffolk Co. Oct. 2, 2013).

State Court Dismissed Service Station Challenge on Standing Grounds

In March 2012, the Town Board of the Town of Smithtown amended the zoning code to permit the construction of a service station and convenience store. Petitioners—the owner of gasoline service station 600 feet from the subject premises and two couples with residences in the vicinity of the subject premises—sought to annul the amendment in an Article 78 proceeding in the Supreme Court, Suffolk County. They alleged that a positive declaration should have been issued and an environmental impact statement prepared under SEQRA and that the Town had engaged in spot zoning. The court dismissed the proceeding on standing grounds. With respect to the gasoline service station, the court noted that economic harm created by business competition was not an interest protected by zoning laws and that the 600-foot distance between the petitioner service station and the subject premises did not make the service station's alleged traffic concerns any different from those of the public at large. With respect to the petitioners whose residences were in the vicinity of the subject premises, the court noted that some of the alleged injuries had been perpetrated by other commercial neighbors and that the balance of the alleged harms were speculative because the actual site plan for development had not been approved at the time the Article 78 proceeding was commenced. Moreover, the

alleged complaints regarding traffic, light pollution and noise were not unique to the residential petitioners. *Gasoline Heaven at Commack, Inc. v. Town of Smithtown Town Board*, 2013 N.Y. Misc. LEXIS 5748 (Sup. Ct. Suffolk Co. Nov. 26, 2013).

SOLID WASTE

Finding Violation of Public Trust Doctrine, State Court Enjoined New York City's Operation of Composting Facility in Spring Creek Park

Raritan Baykeeper, Inc. d/b/a New York/New Jersey Baykeeper and two individuals sought a declaration that New York City's operation of a 20-acre composting facility in Spring Creek Park on Northern Jamaica Bay in Brooklyn violated the public trust doctrine. The Supreme Court, Kings County granted petitioners' motion for summary judgment and issued an injunction prohibiting the City from operating the composting facility unless and until the State Legislature approved the use of the park for the facility. The court rejected the municipal respondents' argument that the facility was a permissible park use because it generated compost for City parks. The court said that though the goal of composting leaves and branches was a "worthy" one, the facility "is more accurately characterized as a working garbage dump." In concluding that the use constituted an impermissible alienation of parkland, the court cited the large, industrial scale of the facility and the fact that the area used by the facility was inaccessible to the public and provided no typical park benefits such as leisure or recreational activities or "aesthetic or enjoyable appearance." The court also noted that even if the use were temporary, it would still be prohibited without state legislative approval. The court said that preliminary injunctive relief was justified because petitioners had shown both likelihood of success on merits and irreparable harm, and that the balancing of the equities weighed in petitioners' favor, given the "flagrant disregard" of the public trust doctrine. The court denied, however, petitioners' motion to consolidate the proceeding with a pending Article 78 proceeding against DEC, finding that there was not a commonality of issues. During DEC's permitting process for the facility, an administrative law judge had determined that the use of the park would constitute parkland alienation and require legislative approval, but this determination was ultimately overridden in 2012 by the DEC Commissioner, who ruled that the parkland alienation issue was outside DEC's jurisdiction. The court determined, however, that the issue raised in the Article 78 proceeding was not whether the public trust doctrine had been violated but whether DEC acted arbitrarily and capriciously in issuing the permit. The court also noted that the other proceeding raised a separate question of law regarding compliance with the City's waterfront program. The court imposed a modest undertaking of \$1,000—given petitioners' not-for-profit status and the limited economic impact on the municipal respondents—and indicated that petitioners could renew their application to compel the City to remove fences, berms and other barriers to public entry if the legislature did not act in six months. *Raritan Baykeeper,*

Inc. d/b/a New York/New Jersey Baykeeper v. City of New York, 2013 N.Y. Misc. LEXIS 6256 (Sup. Ct. Kings Co. Dec. 20, 2013).

DEC Commissioner Ruled That Vehicle Dismantling Business That Dissolved in January 2011 Violated Law by Not Filing 2010 Report

DEC staff alleged that respondent H & S Repair Corp. (H&S)—which operated a vehicle dismantling facility in Willets Point, Queens—violated the annual report requirements for such facilities when it failed to submit a report for 2010. The reporting requirements for vehicle dismantling facilities are found in Title 23 of Article 27 of the Environmental Conservation Law and at 6 N.Y.C.R.R. pt. 360-12.1(c). The DEC Commissioner granted staff's motion for default judgment and also found that staff was entitled to judgment on record evidence. The commissioner noted that although H & S was dissolved as of January 26, 2011, the obligation to file the annual report accrued on January 1, and "subsequent dissolution of that business has no bearing on the proceeding." The commissioner imposed a \$5,000 civil penalty and ordered H&S to submit the 2010 report. The commissioner's order included a mild reprimand of DEC staff for failing to check the respondent's official name in the New York State Department of State website database. *In re H & S Repair Corp.*, DEC Case No. CO2-20130325-01 (Nov. 1, 2013).

WATERS

Court Ruled That Jump from Playland Park Pier into Long Island Sound Was Not Trespass

Defendant was charged with criminal trespass in the third degree and disorderly conduct after he allegedly climbed a fence on the pier at Playland Park and jumped into Long Island Sound. Defendant moved to dismiss the charges as facially insufficient. The Rye City Court engaged in a brief discussion of the history of the ownership of Long Island Sound and determined that defendant, as a member of the public, had a right to enter Long Island Sound "and traverse the adjoining shoreline up to the mean high water mark." The court noted that neither the State of New York nor the United States, which own Long Island Sound up to the mean high water mark, had conveyed to defendant any order not to enter or remain in the water. The court wrote: "If the defendant had emerged from Long Island Sound and climbed over the fence on the pier, that might have been a trespass, but not by going the other way." Therefore, while defendant's action "may have been stupid," a charge of trespass could not be sustained. The court did not dismiss the disorderly conduct charge, however, concluding that the allegation that defendant created a hazard to boaters when he jumped in the water was facially sufficient to sustain the charge. *People v. Om*, 2013 N.Y. Misc. LEXIS 6419 (City Ct. Westchester Co. Dec. 23, 2013).

NEW YORK NEWSNOTES

Crude Oil Rail Transport and Oil Terminal at Port of Albany Will Receive Increased Regulatory Scrutiny

After derailments of trains carrying crude oil in North Dakota and Québec raised public awareness of the risks posed by rail transport of crude oil and other petroleum products, Governor Andrew M. Cuomo issued Executive Order No. 125 on January 28, 2014 requiring five State agencies to take actions to address these risks. Having noted that federal law preempted state regulation in several areas such as rail car safety standards, the executive order directed the Departments of Environmental Conservation, Homeland Security and Emergency Services, Transportation and Health to petition federal agencies “to upgrade tanker car and rail line safety, assess federal agency needs and risks, and pre-deploy appropriate spill response equipment and resources to protect New York State’s communities, residents, land, and waterways from accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge.” DEC and the Department of Homeland Security and Emergency Services (DHSES) were also ordered to work with other state and federal agencies to assess the State’s “spill prevention and response rules and inspection programs governing the transportation of crude oil and other petroleum products,” and DEC and DHSES, along with NYSERDA and the Departments of Health and Transportation, are to submit a report by April 30, 2014 to the governor on the State’s existing capacity to address accidents related to the transportation of crude oil and other petroleum products. The raised profile of the safety and environmental risks of crude oil rail transport also brought increased scrutiny to a proposed expansion of a crude oil terminal at the Port of Albany. DEC agreed in early February 2014 that it would require the operator of the terminal to file an “enhanced” environmental justice plan for public participation in connection with the proposed expansion.

Changes Afoot for the Brownfield Cleanup Program

The 2014-2015 Executive Budget released by Governor Andrew M. Cuomo on January 21, 2014 contained a number of proposals to extend and reform the Brownfield Cleanup Program (BCP). Tax credits under the reformed program would be available for sites accepted into the program by the end of 2022 and issued a certificate of completion (COC) by the end of 2025. Sites already in the BCP would be subject to different deadlines, depending on the date of their acceptance into the program. Sites accepted prior to June 23, 2008 would have to receive a COC by the end of 2015 and sites accepted on or after June 23, 2008 but before July 1, 2014 would have to receive a COC prior to the end of 2017 to avoid termination from the program. (Sites that are terminated would have the opportunity to reapply to the BCP as modified by the Cuomo legislation.) The proposed legislation would also amend the definition

of “brownfield site” to remove the requirement that “the redevelopment or reuse . . . be complicated by the presence or potential presence of a contaminant” and instead base the determination of eligibility on the presence of one or more contaminants at levels exceeding soil cleanup objectives or other health-based or environmental standards. A significant change would be the governor’s proposal’s restriction on eligibility for the tangible property credit component of the brownfield tax credit. Applicants to the program wishing to qualify for the tangible property credit component would have to demonstrate (1) that the site has been vacant or has had one or more vacant buildings for at least 15 years or that the site has a lot or building that has been both vacant and tax delinquent for at least 10 years; (2) that the cost of investigation and remediation exceeds the certified appraised value of the site absent contamination; or (3) that the project planned for the site is a “priority economic development project” as determined by the Department of Economic Development with the sanction of the municipality in which the site is located. “Priority economic development project” is a defined term in the proposed legislation, with specific criteria for job creation and capital investment. In addition, to be eligible for the tangible property credit, at least some of the contamination would have to emanate from the site itself, and DEC may not have determined that the site was previously remediated sufficiently to permit the intended use. Alterations to the calculation of the tax credit and to the types of activities eligible for the credit are also part of the reform package. The reforms would also include establishment of a “BCP-EZ” program for sites that do not pose a significant threat and for which the applicant waives any claim for tax credits, changes to timeframes for taking certain actions and requirements for submitting and adhering to schedules for implementation, changes to the Track 1 cleanup requirements, and a requirement that the certificate of completion identify the entities eligible for tax credits. The proposed BCP legislation is Part Q of the Revenue Article VII Legislation and can be viewed at <http://publications.budget.ny.gov/eBudget1415/fy1415artVIIbills/REVENUEArticleVII.pdf>.

Capital Region Communities Agreed to \$140-Million Plan to Reduce Combined Sewer Overflows to Hudson River

On January 15, 2014, DEC Commissioner Joseph J. Martens signed an order on consent under which six municipalities—Albany, Troy, Rensselaer, Cohoes, Watervliet, and the Village of Green Island—along with the sewer districts of Albany and Rensselaer Counties will be required to implement a long term control plan (LTCP) to reduce combined sewer overflow (CSO) discharges to the Hudson River. The six communities are responsible for approximately 90 CSO outfalls. Full implementation of the LTCP will result in the capture and treatment of 85% of annual CSO volume. Components of the LTCP include pump station upgrades, sewer system improvements and sizing the new bacterial disinfection systems in the Albany and Rensselaer County treatment plants to accommodate and treat more

stormwater-related volume. A new satellite treatment facility to disinfect CSO flow and control sewage-related floatable waste at the largest CSO outfall in the system will be constructed in Albany, and multiple projects will be implemented to create separate lines for stormwater and sewage. A long-term green infrastructure strategy, including green roofs, pervious pavement and rain gardens, is intended to further reduce CSO releases.

DEC Rescinded Cleanup Guidance Documents

In the December 24, 2013 issue of the *Environmental Notice Bulletin*, DEC announced that it had rescinded Program Policy DER-15, Presumptive/Proven Remedial Technologies, and Technical and Administrative Guidance Memorandum (TAGM) 4051, Early Design Strategy. DEC indicated that DER-15 was not reflective of current best practices, and that the cost to revise and maintain its one-size-fits-all content to reflect the evolution of technologies would not be justified, given that it was essential to consider site-specific conditions when selecting a site remedy. DEC directed qualified environmental professionals to the definition of “presumptive remedy” in DER-10, Technical Guidance for Site Investigation and Remediation, and part 375 of the DEC regulations for guidance on remedy selection. With respect to TAGM 4051, DEC noted that it was obsolete, due to DEC’s current practice of including Remedial Design/Remedial Action in consent orders.

NY Green Bank Received \$210 Million in Initial Funding

On December 19, 2013, Governor Cuomo announced \$210 million in initial funding for the NY Green Bank, comprising \$165 million redirected from other programs (and approved by the Public Service Commission (PSC)) and \$45 million from the Regional Greenhouse Gas Initiative. The NY Green Bank will provide financial products such as credit enhancement, loan loss reserves and loan bundling to support securitization and build secondary markets to support clean energy projects that are economically viable but that cannot currently obtain financing due to market barriers, such as federal policy uncertainty, insufficient performance data and the lack of publicly traded capital markets for clean energy. The PSC will have oversight of the NY Green Bank to ensure that its products meet investment criteria established by the PSC.

Governor Announced New \$108 Million Funding Commitment for NY-Sun Budget

Also on December 19, 2013, Governor Cuomo announced an additional funding commitment of \$108 million for commercial and residential solar projects as part of the NY-Sun initiative, bringing the New York State Energy Research and Development Authority (NYSERDA) total solar budget for the next two years to \$216 million. The governor’s press release said that the decision by the PSC will allow NYSERDA to move to a “regional

megawatt block structure” that will allocate funding based on regional budgets and market conditions, and which will also provide a longer-term schedule for incentive rebates. Since the NY-Sun initiative was created in 2012, 299 megawatts of solar photovoltaic has been installed or is under development, more than was installed in the previous decade.

Underreporting of Summer Flounder Catch Resulted in Year in Jail

After pleading guilty to one count of wire fraud and two counts of falsification of federal records in connection with underreporting of his summer flounder catch, a New York commercial fisherman was sentenced to one year and one day in prison followed by three years of supervised release and 100 hours of community service, and ordered to pay a \$5,000 fine and \$99,800 in restitution. The fisherman had been participating in the federal Research Set-Aside program, which uses sale of catches in the program to fund research and compensate vessel owners for participating in research. A fish dealer that had participated in the fisherman’s scheme by ensuring its reports to the National Marine Fisheries Service matched the fisherman’s falsified logs also pleaded guilty to wire fraud and falsification of federal records and was ordered to pay a \$275,000 fine and \$99,800 in restitution. Both the fisherman and the dealer must relinquish their federal fishing permits and are prohibited from participating in the Research Set-Aside program. The fisherman must divest his interest in the vessel he operated.

WORTH READING

Charlotte A. Biblow, *Mayor de Blasio’s Sustainability Program for New York City*, N.Y.L.J., at 3 (Jan. 23, 2014).

Michael B. Gerrard, *President Obama Tackles Climate Change Without Congress*, Trends, at 2 (Jan./Feb. 2014).

Anthony S. Guardino, *Parkland Reservation: The “Findings” Requirement*, N.Y.L.J., at 5 (Jan. 22, 2014).

Kingsley Osei, *Public-Private Partnerships for Infrastructure Projects*, N.Y.L.J., at 4 (Feb. 4, 2014).

UPCOMING EVENTS

April 4, 2014

Tenth Annual Symposium on Energy in the 21st Century, Syracuse. For information, see <http://www.energy21symposium.org/>.

April 22, 2014

Jill and Ken Iscol Distinguished Environmental Lecture, Luc Gnacadja, Past Executive Secretary, UN Convention to Combat Desertification, “Grounding Human Security: Land and Soil in the Global Sustainability Agenda,” David R. Atkinson Center for a Sustainable Future, Cornell University,

Ithaca. For information, see <http://www.acsf.cornell.edu/events/iscol/index.php>.

April 25, 2014

24th Annual Assembly, Regional Plan Association, Waldorf-Astoria, 301 Park Avenue, New York City. For information, see <http://www.rpa.org/calendar>.

April 29, 2014

Oil Spill Symposium, New York State Bar Association, Environmental Law Section, New York State Bar Center Great Hall, Albany. For information, see <http://www.nysba.org/Environmental/>.

April 29, 2014

New York City Roundtable on Strengthening the City's Brownfields Approach & Brownfields Marketplace Lunch, New Partners for Community Revitalization. For information, see <http://npcr.net/index.html>.

May 14, 2014

Legislative Forum, New York State Bar Association, Environmental Law Section, New York State Bar Center Great Hall, Albany. For information, see <http://www.nysba.org/Environmental/>.

May 29, 2014

EPA Region 2 Conference (co-sponsored by EPA Region 2; the American, New York State, New York City, and New Jersey State bar associations; and the Columbia Law School Center for Climate Change Law), Columbia Law School, New York City.

June 2–3, 2014

Eighth Annual Brownfields Summit, New Partners for Community Revitalization, Albany. For information, see <http://npcr.net/index.html>.

June 11–14, 2014

Association for Environmental Studies and Sciences, 2014 AESS Conference, “Welcome to the Anthropocene: From Global Challenge to Planetary Stewardship,” Pace University, 1 Pace Plaza, New York City. For information, see http://aess.info/content.aspx?page_id=22&club_id=939971&module_id=144409.

September 19–21, 2014

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

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