2014

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

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Recommended Citation
25 Env'tl. L. in N.Y. 101 (May 2014)

Developments in Federal and State Law

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Editor

ENVIRONMENTAL LAW IN NEW YORK

ARNOLD & PORTER LLP

LexisNexis™

Volume 25, No. 5

May 2014

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

(Part 2 of 2)

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Part 2—NYC: Climate Change Tensions and Challenges

Threaded throughout the 438-page PlaNYC *A Stronger, More Resilient New York* report published after Super Storm Sandy are messages about the strength, toughness and machismo of New Yorkers.[1] The underlying message appears to be that "tough guys" care about climate change, and, ultimately, New Yorkers—at least if they get on board with the City's initiatives—are tougher than climate change.

However, data and projections from the Intergovernmental Panel on Climate Change (IPCC), New York City Panel on Climate Change (NPCC) and other reputable bodies suggests that climate change itself is tough and getting tougher with each passing day.[2] This raises a number of critical questions. Despite the progressiveness and robustness of the City's initiatives, do the initiatives go far enough fast enough? Do the green code amendments do enough to reduce the City's contribution to climate change and protect vulnerable businesses and residences? Does the City's New Waterfront Revitalization Plan prioritize climate change-related considerations highly enough? By reducing greenhouse gas emissions 30% below 2005 levels by 2030, are New Yorkers doing their part to prevent increases in average global temperatures?

[1] CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 44 (June 2013), *available at* http://www.nyc.gov/html/sirr/html/report/report.shtml.

[2] *See* Sarah Adams-Schoen, *On the Waterfront: New York City's Climate Change Adaptation and Mitigation Challenge*, Part 1, 25 ENVTL. L. IN N.Y. 81, 83–84 (Apr. 2014). *See also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), *Summary for Policymakers*, in ASSESSMENT REPORT 5 PHASE I REPORT, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 12 (Mar. 31, 2014) (copyedit pending version) (identifying numerous "high confidence" risks of continued global warming including the "breakdown of food systems" and "death, injury, ill-health, or disrupted livelihoods" from storm surges, coastal flooding, and sea-level rise, and periods of extreme heat), *available at* http://ipcc-wg2.gov/AR5/images/uploads/IPCC_WG2AR5_SPM_Approved.pdf.

Is the City's Approach to Building Codes Tough Enough?

One question the City's approach begs is whether its "green" building code proposals go far enough to address NPCC's "sobering" projections.[3] Indeed, the City has reported that:

> [E]nergy consumption in building operation [in New York City] translates into greater local pollution, including emissions of sulfur dioxide, nitrogen oxides, particulate matter, carbon dioxide, and mercury. These pollutants contribute to respiratory disease, heart disease, smog, acid rain, and climate change. Moreover, as energy demand rises, so does [the City's] reliance on dirty, inefficient power plants, as well as the nation's dependence on foreign oil and natural gas.[4]

An examination of the City's approach to climate change mitigation and resiliency should consider both whether amending the building codes, as opposed to mandating compliance with LEED[5] standards for the private sector, is the most effective approach, and whether the New York City Green Codes Task Force's 111 proposals, which were published in 2010, are sufficient to address the projections in the most recent NPCC and IPPC reports.[6]

A. To LEED or Not to LEED?

The Green Codes Task Force concluded that "greening" the building codes "has significant advantages over mandating LEED for the private sector."[7] The Task Force's report reasoned that codes provide a host of benefits—presumably in contrast to mandated LEED standards for the private sector—including: (a) economies of scale in expertise and materials with resulting cost reductions; (b) enforceability; (c) efficient use of existing institutions and industry practices; (d) sufficient flexibility to respond to the priorities and conditions of a particular jurisdiction; (e) the ability to correct market failures, such as split incentives (e.g., landlords who do not want to pay for improvements because the benefits would go to their tenants); and (f) social equity and environmental justice.[8]

The options for increasing the resiliency and decreasing the substantial carbon footprint[9] of New York City buildings are far from binary, however. As the U.S. Green Building Council (USGBC) observes: "On the road to sustainability, it's not a choice between rating systems or codes. We need both, and more."[10] Options range from green building ordinances that apply only to municipal construction or renovation projects, to those that apply to private projects that receive public funding, to those that apply to both public and private projects.[11] Further options exist within each of these schemes, including application of requirements based on project size or type of building. With respect to rating systems, some municipalities use LEED rating systems, others use different third-party rating systems, and still others create their own rating systems. Some municipalities permit developers to meet LEED "equivalents" or comply with LEED guidelines without requiring receipt of LEED certification. Even among those that mandate LEED certification (or "equivalents"), different municipalities

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[3] *See* Foreword from Mayor, in 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 ("[W]e 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.").

[4] LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2005, LOCAL LAW 86 OF 2005, § 1, *available at* http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf. *See also* Keith H. Hirokawa, *At Home with Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment*, 39 ENTVL. L. 507, 511 (2009) ("Probably no urban activity has greater impact on human health and the environment than building construction and use.").

[5] LEED refers to the U.S. Green Building Council's (USGBC) Leadership in Energy and Environmental Design Green Building Rating System. LEED standards are third-party benchmark assessment tools that promote sustainable design and construction principles. USGBC, GREENING THE CODES 1 (updated May 2011), http://www.usgbc.org/Docs/Archive/General/Docs7403.pdf.

[6] *See* Sarah Adams-Schoen, *On the Waterfront: New York City's Climate Change Adaptation and Mitigation Challenge*, Part 1, 25 ENVTL. L. IN N.Y. 81, 83–84 (Apr. 2014) (describing most recent climate change-related projections for New York City). The most recent IPCC report further underscores the urgent need for comprehensive action to address climate change. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), *Summary for Policymakers*, in ASSESSMENT REPORT 5 PHASE I REPORT, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY (Mar. 31, 2014) (copyedit pending version), *available at* http://ipcc-wg2.gov/AR5/images/uploads/IPCC_WG2AR5_SPM_Approved.pdf.

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

[8] *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), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_executive_summary.pdf.

[9] 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 greenhouse gas emissions, 94% of the City's electrical consumption and 85% of its water usage. 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/ll84_year_two_report.pdf.

[10] USGBC, POLICY BRIEF—LEED AND GREEN BUILDING CODES: DISTINCT & COMPLEMENTARY POLICY TOOLS (not dated), http://www.usgbc.org/Docs/Archive/General/Docs9246.pdf (last visited Mar. 10, 2014). *See also* Keith H. Hirokawa, *At Home with Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment*, 39 ENVTL. L. 507, 514–19 (2009) (describing various green building benchmarking systems).

[11] Patricia E. Salkin, *Cooperative Federalism and Climate Change: New Meaning to "Think Globally—Act Locally,"* 40 ENVTL. L. REP. 10,562, 10,567 (2010). Numerous municipalities have mandated LEED certification for new construction and major renovations or otherwise required that city-owned buildings be built according to green building criteria, including Atlanta, Austin, Boston, Boulder, Chicago, Dallas, Los Angeles, Portland (Oregon), San Diego, San Francisco, San José and Seattle. *See* LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2005, LOCAL LAW 86 OF 2005, § 1, *available at* http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf (listing municipalities).

require different levels of LEED certification and allow waivers under different scenarios. Finally, some ordinances mandate that developers meet certain standards, while others create various incentive schemes. For example, some municipalities have created incentive programs for privately owned green building construction that include the use of direct subsidies, density bonuses and expedited permitting.[12]

Additionally, many states, including New York, require LEED for state-owned buildings. The State of New York also provides tax credits for buildings that meet certain green building criteria and requires state agencies to reduce energy use and carbon dioxide emissions and utilize green building principles.[13]

Recognizing that "[e]ven in today's greenest buildings, our impact is still net negative,"[14] USGBC recommends adoption of a range of compliance, incentive, education and lead-by-example initiatives to create a "best-case scenario of push and pull market-driving tools."[15] USGBC also argues that use of "beyond-code rating systems" is necessary to prevent codes from being seen as "the best we can possibly do, rather than the most we can reasonably expect." Thus, USGBC recommends that "[a]ny jurisdiction engaged in sustainability planning should consider the universe of available green building policy options, and also press hard to further the policy innovations that have become a hallmark of the green building movement."[16]

Although not readily apparent from the Green Codes Task Force report, New York City has adopted a scheme that includes "greening" its building codes and mandating LEED certifiability, at least for public sector developments. New York City enacted Local Law 86 in 2005, a green building law that requires municipal projects costing more than $2 million to be designed to meet or exceed certain LEED criteria, although actual certification is not required.[17] The LEED requirements also apply to private developments that receive more than 50% City funding or more than $10 million of City money.[18]

Local Law 84 lists numerous benefits from mandating LEED certifiability for publicly funded projects, including: (a) substantially reducing the City's electricity consumption, air pollution and water use; (b) improving occupant health and worker productivity; (c) encouraging market transformation; (d) reducing overall energy demand with a resulting reduction of dependence on foreign oil; and (e) saving money. The City Council's financial analysis indicated that, "without taking any other savings or social benefits into account, savings in water and energy cost will offset debt service payments on any increase in capital expenditures resulting from [Local Law 84]."[19]

Given these stated benefits, the question is clearly not one of greening the codes versus mandating LEED, but rather the question is whether the City is *both* greening the codes *and* utilizing green benchmarking standards, such as LEED, sufficiently to mitigate and adapt to climate change. In other words, with respect to both building codes and benchmarking standards, could the City be doing more mitigation (i.e., decreasing its greenhouse gas emissions and increasing its greenhouse gas sinks) and more adaptation (i.e., increasing the City's ability to withstand future flooding and other climate change-related weather extremes)? The City should at a minimum continue to explore whether it is using LEED or other green benchmarking criteria as effectively as it could be. For example, the City should examine whether it should require certification, as opposed to certifiability;[20] if it continues to require certifiability, the City should examine the guidelines and checklists it requires to verify LEED compliance; and, regardless of whether it moves to an actual certification model, the City should reassess the types of projects and buildings to

[12] LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2005, LOCAL LAW 86 OF 2005, § 1, *available at* http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf (summarizing green building initiatives).

[13] LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2005, LOCAL LAW 86 OF 2005, § 1, *available at* http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf (summarizing green building initiatives).

[14] USGBC, POLICY BRIEF—LEED AND GREEN BUILDING CODES: DISTINCT & COMPLEMENTARY POLICY TOOLS (not dated), http://www.usgbc.org/Docs/Archive/General/Docs9246.pdf (last visited Mar. 10, 2014).

[15] USGBC, GREENING THE CODES 7 (updated May 2011), http://www.usgbc.org/Docs/Archive/General/Docs7403.pdf.

[16] USGBC, GREENING THE CODES 7 (updated May 2011), http://www.usgbc.org/Docs/Archive/General/Docs7403.pdf.

[17] Buildings classified in occupancy groups G or H-2 must achieve the lowest level of LEED certifiability; all other buildings must achieve a minimum of LEED silver certifiability. LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2005, LOCAL LAW 86 OF 2005, § 2, *available at* http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf.

[18] LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2005, LOCAL LAW 86 OF 2005, § 2, *available at* http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf.

[19] LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 2005, LOCAL LAW 86 OF 2005, § 1, *available at* http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf.

[20] *See* Simi Hoque, *LEED Certifi-able vs. LEED Certified*, GREENBIZ.COM, Mar. 11, 2008, http://www.greenbiz.com/blog/2008/03/11/leed-certifi-able-vs-leed-certified (arguing that a LEED certifiable, as opposed to LEED certified, requirement is "a missed opportunity, a weak gesture by city leaders to promote sustainable development," "a little like saying that buildings must be greenish").

which the LEED requirements apply and the situations under which waivers are granted.[21]

Note, however, that as the City continues to strengthen its portfolio of resiliency mechanisms, it must remain mindful of potential state and federal preemption challenges.[22] For example, in 2008, a New Mexico federal district court issued a preliminary injunction barring enforcement of the City of Albuquerque's green building code pending the outcome of a lawsuit, concluding that federal law likely preempted the City's green building code.[23] In 2010, the court granted partial summary judgment in favor of the plaintiffs, which were HVAC and water heating equipment trade organizations, contractors and distributors. The court held that code provisions that required HVAC systems and equipment in small retail and office buildings and one- and two-family detached dwellings and townhouses to comply with minimum efficiency standards were preempted by federal law, and that fact issues remained as to whether the code's provisions that allowed compliance via LEED Silver certification were preempted.[24] At the preliminary injunction stage, the judge characterized the City's goals as "laudable," but lamented that "the drafters of the Code were unaware of the long-standing federal statutes governing the energy efficiency of certain HVAC and water heating products and expressly preempting state regulation of these products when the Code was drafted and, as a result, the Code, as enacted, infringes on an area preempted by federal law."[25]

A 2009 Southern District of New York case suggests that a municipality in New York may be able to avoid a finding of preemption if it "only indirectly regulates parties within a preempted field and presents regulated parties with viable, non-preempted options."[26] However, the court in the Albuquerque case rejected this argument, concluding that it was not consistent with Supreme Court preemption precedent.[27]

B. Do New York City's Green Code Proposals Go Far Enough?

As of March 1, 2014, the City had enacted 48 of the Green Codes Task Force's 111 proposals.[28] These proposals are comprehensive and proactive, putting New York City at the forefront of municipalities using building code reform as a means of climate change adaptation and mitigation. However, a review of model codes, USGBC recommendations and initiatives of other major cities such as London, suggests that, while New York City's approach puts it ahead of many municipalities, the City should continue to examine whether it is responding appropriately to the urgency and scope of the climate change problem. And, indeed, the Green Codes Task Force proposals call for continued examination of how the codes can be most effectively amended to mitigate and adapt to climate change.[29]

Of the 111 proposals included in the Task Force Report, nine proposals specifically targeted building resiliency:

> BR1: Develop flood maps that reflect projected sea level rise and increases in coastal flooding through the year 2080. Currently, flood maps are based on historical data and do not account for projected climate change-related sea level rise. This proposal would create a New York City Climate Change Flood Map, which would be updated at least once every ten years.[30]

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[21] *But see* Patricia E. Salkin, *Cooperative Federalism and Climate Change: New Meaning to "Think Globally—Act Locally,"* 40 ENVTL. L. REP. 10,562, 10,567 n.57 (2010) (noting recent debate regarding whether LEED requirements decrease housing affordable and cautioning practitioners that "LEED certification standards continue to evolve, and what may be understood as required today, may not be enough to satisfy the criteria in the future").

[22] Patricia E. Salkin, *Cooperative Federalism and Climate Change: New Meaning to "Think Globally—Act Locally,"* 40 ENVTL. L. REP. 10,562, 10,566–67 (2010).

[23] *See* Patricia E. Salkin, *Cooperative Federalism and Climate Change: New Meaning to "Think Globally—Act Locally,"* 40 ENVTL. L. REP. 10,562, 10,566–67 (2010) (citing and discussing Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706 (D.N.M. Oct. 3, 2008)).

[24] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 835 F. Supp. 2d 1133, 1134 (D.N.M. 2010).

[25] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706, at *37 (D.N.M. Oct. 3, 2008).

[26] Metropolitan Taxicab Bd. of Trade v. City of New York, 633 F. Supp. 2d 83, 95–96 (S.D.N.Y. 2009).

[27] *See* Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 835 F. Supp. 2d 1133, 1136 (D.N.M. 2010) (citing Metropolitan Taxicab Bd. of Trade v. City of New York, 633 F. Supp. 2d 83, 95–96 (S.D.N.Y. 2009) ("[T]he district court for the Southern District of New York does not indicate where *Travelers Insurance* and *Dillingham Construction* hold that a local law is not preempted if it presents 'viable, non-preempted options.' ").

[28] CITY OF NEW YORK, PLANYC, GREEN BUILDINGS & ENERGY EFFICIENCY, GCTF ENACTED PROPOSALS, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 8, 2014); *see also 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. For a brief summary of the enacted codes, see Sarah Adams-Schoen, *On the Waterfront: New York City's Climate Change Adaptation and Mitigation Challenge, Part 1*, 25 ENVTL. L. IN N.Y. 81, 88–89 (Apr. 2014).

[29] *See, e.g.*, URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR1-3 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf (recommending that City undertake study to determine how building code and zoning resolution should be strengthened to protect buildings from sea level rise and flooding).

[30] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR1-1 to BR1-3 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

BR2: Require toxic materials stored in the 100-year floodplain to be located in flood-proof areas.[31]

BR3: Require a multi-agency study of building codes, zoning resolutions and urban design in relation to the 100-year flood map projected out to 2080. Building code revisions to be considered would include: (a) foundation requirements that take into account the effect of rising sea levels on structures and buildings due to buoyancy and water infiltration; (b) freeboard, frame and wash-away structures at first floors; (c) areas of refuge in the event of a citywide power outage; (d) hurricane-resistant buildings; and (e) mold-resistant construction. Zoning revisions to be considered would include: (a) raising "measuring points" within the flood zone; (b) specifying zoning uses to be included within flood zones; and (c) requirements for shelter areas and areas of refuge. The study would also include urban design aspects.[32]

BR4: Require the City to undertake a study to determine whether building code and zoning changes are necessary to diminish the impacts of non-flood climatic hazards.[33]

BR5: Require the City to undertake a study examining the climate risks posed to buildings through 2080. This study would determine whether impacts will vary across the city or have a uniform impact, and then define and map hazard zones in the city based on these risks. This study would analyze risks from the following hazards: rainfall quantity, frequency, intensity and seasonal modifications; heat waves; increased humidity; increased temperatures; probability of other extreme weather events; rise in groundwater table; encroachment of salinity; increased wind velocities; electrical grid disruptions caused by extreme weather events; interaction of increased temperatures with the urban heat island effect; and impact of increased temperature, changes in precipitation and humidity on air quality.[34]

BR6: Require the City to undertake a study of passive survivability[35] and dual-mode functionality[36] and propose code changes to incorporate these concepts into the City's building codes. This proposal also includes a study on refuge areas in sealed buildings.[37]

BR7: Amend the New York City Plumbing Code to require that toilets and faucets are capable of operating without building power for at least two weeks.[38]

BR8: Amend the New York City Plumbing Code to prohibit the removal of existing water towers and require water towers in all new and renovated buildings.[39]

BR9: Endorse the Mayor's Office of Environmental Coordination's effort to provide guidance for analyzing climate change in environmental assessment conducted pursuant to the City Environmental Quality Review (CEQR). CEQR is the process by which agencies review the effects of proposed actions on the environment. Under the Mayor's proposal, as endorsed by

[31] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR2-1 to BR2-3 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[32] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR3-1 to BR3-2 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[33] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR4-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[34] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR5-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[35] Task Force member Alex Wilson formulated the concept of "passive survivability," which is the idea that buildings should be designed and built so that they can remain habitable in the absence of an outside power supply. Proposal BR6 notes that, "[i]n the aftermath of Hurricane Katrina, 30,000 residents of New Orleans sought refuge in the Superdome for several days. This rapidly turned into a nightmare because without electricity and air conditioning, temperatures within the building became almost unendurably hot. In contrast, the people who stayed in the French Quarter were relatively comfortable. This is because the older buildings in the Quarter were designed for some degree of passive cooling since they were built before air conditioning was available." URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR6-2 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[36] "Dual mode functionality" refers to reducing the emergency energy needs of the building by designing it to function in two modes—a "standard mode" and a "low energy" mode. URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR6-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[37] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR6-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[38] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR7-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[39] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR8-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

> the Task Force, the CEQR guidelines would be updated to include an assessment of the impact of climate change on proposed actions.[40]

As of March 1, 2014, six of the nine building resiliency proposals have been implemented: BR 2 (Safeguard Toxic Materials Stored in Flood Zones),[41] BR 3 (Study Adaptive Strategies to Flooding),[42] BR 4 (Study Adaptive Strategies to Non-Flood Climatic Risks),[43] BR 5 (Forecast Non-Flood Climatic Hazards to 2080),[44] BR 6 (Analyze Strategies to Maintain Habitability During Power Outages),[45] and BR 7 (Ensure Toilets and Sinks Can Operate During Blackouts).[46] BR 1, BR 8 and BR 9 have not yet been implemented.

In evaluating the Task Force's proposals, one potentially useful point of comparison is the International Green Construction Code (IgCC). USGBC recommends that states and local jurisdictions adopt the International Code Council's (ICC's) IgCC.[47] The IgCC was developed to provide a model building code for construction projects that establishes minimum green requirements to promote sustainability and energy efficiency.[48] Although the IgCC was not explicitly crafted for the purpose of promoting disaster resilience, the USGBC regards the adoption of model codes like the IgCC as essential to minimizing the negative effects of extreme weather events.[49]

Although the IgCC is intended to be adopted on a mandatory basis in order to raise the floor for environmental standards,[50] most local jurisdictions that have adopted the IgCC have made it voluntary.[51] For example, Florida has adopted the IgCC as an option for the retrofitting and new construction of all state-owned facilities. Boynton Beach, Florida adopted the IgCC as the core of its local voluntary green code. In Arizona, the cities of Phoenix and Scottsdale and the Kayenta Township (a tribal community) adopted the IgCC for voluntary use.[52]

The Green Codes Task Force proposals include many requirements that are the same or substantially similar to the IgCC, including: (a) requiring that alterations made to existing buildings conform to the new green codes;[53] (b) limiting the

[40] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at BR9-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[41] *See Green Buildings & Energy Efficiency, GCTF Enacted Proposals*, PLANYC, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 8, 2014) (citing N.Y.C. Building Code app. G and N.Y.C., Local Law 143 of 2013).

[42] *See Green Buildings & Energy Efficiency, GCTF Enacted Proposals*, PLANYC, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 8, 2014) (citing Special Initiative for Rebuilding and Resiliency and Building Resiliency Task Force).

[43] *See Green Buildings & Energy Efficiency, GCTF Enacted Proposals*, PLANYC, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 8, 2014) (citing Special Initiative for Rebuilding and Resiliency and Building Resiliency Task Force).

[44] *See Green Buildings & Energy Efficiency, GCTF Enacted Proposals*, PLANYC, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 8, 2014) (citing N.Y.C., Local Law 81 of 2013).

[45] *See* CITY OF NEW YORK, PLANYC, GREEN BUILDINGS & ENERGY EFFICIENCY, GCTF ENACTED PROPOSALS, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 8, 2014) (citing Special Initiative for Rebuilding and Resiliency and Building Resiliency Task Force).

[46] *See* CITY OF NEW YORK, PLANYC, GREEN BUILDINGS & ENERGY EFFICIENCY, GCTF ENACTED PROPOSALS, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 8, 2014) (citing N.Y.C. Local Law 79 of 2013).

[47] USGBC, BUILD BETTER CODES, http://www.usgbc.org/advocacy/campaigns/build-better-codes (last visited Mar. 10, 2014). The IgCC includes ASHRAE (American Society of Heating, Refrigerating and Air-Conditioning Engineers) Standard 189.1 as a compliance pathway. ASHRAE has published a guide to its Standard 189.1 and an "FAQ." ASHRAE JOURNAL'S GUIDE TO STANDARD 189.1: BALANCING ENVIRONMENTAL RESPONSIBILITY, RESOURCE EFFICIENCY & OCCUPANT COMFORT (June 2010), https://www.ashrae.org/File%20Library/docLib/Publications/AJSupplement_189-1-1-.pdf; FAQ—STANDARD 189.1: STANDARD FOR THE DESIGN OF HIGH PERFORMANCE, GREEN BUILDINGS EXCEPT LOW-RISE RESIDENTIAL BUILDINGS (not dated), https://www.ashrae.org/File%20Library/docLib/Publications/189-1-FAQ-4-26-12.pdf (last visited Mar. 10, 2014).

[48] INT'L CODE COUNCIL, AN OVERVIEW OF THE 2012 INTERNATIONAL GREEN CONSTRUCTION CODE (2012), http://www.iccsafe.org/cs/IGCC/Documents/Media/2012_IGCC-Overview.pps.

[49] USGBC, GREENING THE CODES 6 (updated May 2011), http://www.usgbc.org/Docs/Archive/General/Docs7403.pdf.

[50] "Where adopted on a mandatory basis, the IgCC raises the floor of sustainability for all buildings—positioning the IgCC to achieve massive environmental benefits not possible with voluntary rating systems." INT'L CODE COUNCIL, AN OVERVIEW OF THE 2012 INTERNATIONAL GREEN CONSTRUCTION CODE (2012), http://www.iccsafe.org/cs/IGCC/Documents/Media/2012_IGCC-Overview.pps.

[51] *See* INT'L CODE COUNCIL, ICC FACT SHEET—FIRST INTERNATIONAL GREEN CONSTRUCTION CODE (IGCC) ADOPTIONS (not dated), http://www.iccsafe.org/cs/IGCC/Documents/First_IgCC_Adoptions_FactSheet.pdf; *see also* INTERNATIONAL CODES-ADOPTION BY STATE, INT'L CODE COUNCIL (Mar. 2014), http://www.iccsafe.org/gr/Documents/stateadoptions.pdf (state-by-state adoption of the I-codes).

[52] *See* INT'L CODE COUNCIL, ICC FACT SHEET—FIRST INTERNATIONAL GREEN CONSTRUCTION CODE (IGCC) ADOPTIONS (not dated), http://www.iccsafe.org/cs/IGCC/Documents/First_IgCC_Adoptions_FactSheet.pdf.

[53] INT'L CODE COUNCIL, SECTION 1003 ALTERATIONS TO EXISTING BUILDINGS, *available at* http://publicecodes.cyberregs.com/icod/IgCC/2012/icod_IgCC_2012_10_sec003.htm; URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at OC3-1 to OC3-2 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

presence of volatile organic compounds (VOCs) from carpets, paints and adhesives;[54] (c) restricting the presence of formaldehyde in building materials;[55] (d) requiring air-conditioning systems serving occupied spaces to have filters rated at MERV 11 or higher;[56] and (e) requiring post-construction, pre-occupancy air testing.[57] Both the Task Force proposals and the IgCC establish performance standards for building envelopes with respect to heat loss. The Task Force proposal uses ASHRAE (American Society of Heating, Refrigerating and Air-Conditioning Engineers) 90.1 with additional fixed performance standards.[58] The IgCC requires that building envelopes exceed the requirements of the International Energy Conservation Code by no less than 10%.[59]

The Task Force proposals also include numerous recommendations that go above and beyond the IgCC.[60] These proposals include: (a) requiring entry mat systems to protect indoor air from street particulates;[61] (b) requiring improved design parameters, testing and balancing for exhaust ventilation systems in new residential construction;[62] (c) requiring the use of mold-resistant gypsum board and cement board in water-sensitive locations such as bathrooms;[63] (d) prohibiting the issuance of new permits for boilers using #4 and #6 fuel oil and requiring all new burners to use #2 fuel or gas fuel;[64] (e) phasing out all existing polychlorinated biphenyl and magnetic ballasts by 2019;[65] (f) reducing the level of required emergency lighting, which would reduce battery size;[66] (g) requiring wastewater from concrete mixer trucks to be either treated on site or returned to the manufacturing plant for treatment;[67] (h) requiring various design features and signage to promote stairway use as a means of promoting fitness and physical activity;[68] and (i) increasing the number of required water fountains in commercial buildings to reduce consumers' intake of bottled water and sugary sodas.[69] The Task Force also proposed to require all new residential buildings of three stories or less to be constructed

[54] IgCC § 806; URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT1-1 to HT2-5 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[55] IgCC § 806; URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT3-1 to HT3-5 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[56] IgCC § 803.5; URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT5-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf. Note that the Task Force proposal imposes this requirement only on systems providing ventilation of outdoor air with a design capacity greater than or equal to 5,000 cfm.

[57] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT8-1 to HT8-5 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf; IgCC § 804. The IgCC regulates permissible concentrations of a greater number of air pollutants than do the Task Force proposals, which regulate only formaldehyde, PM10, total VOCs, 4-phenylcyclohexene and carbon monoxide. Both the Task Force proposals and the IgCC would require a MERV 8 or higher filter for air conditioning systems during the construction of a building. The Task Force proposals would require a post-construction air flush of certain indoor spaces intended for occupancy. Both the IgCC and the Task Force proposals provide for minimum ventilation standards for the construction period of a given building.

[58] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at EF3-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[59] IgCC § 605.

[60] This is not surprising given that the IgCC is not specifically targeted at disaster resiliency and the IgCC was intended to be a set of minimum standards.

[61] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT4-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[62] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT6-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[63] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT7-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[64] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT9-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[65] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT10-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf. The IgCC has no such requirement, but has a verification requirement providing that "prior to issuance of a certificate of occupancy, the field inspector shall confirm the installation of luminaires, type and quantity; lamps, type, wattage and quantity, and ballasts, type and performance for not less than one representative luminaire of each type, for consistency with the *approved* construction documents." IgCC § 608.10.

[66] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT12-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf. The IgCC provides code enforcement officials with the discretion to waive its lighting efficiency requirements because of emergency lighting considerations. IgCC § 608.9.

[67] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HR13-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[68] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT15-1 to HT18-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf; *see also id.* at HT19-1 (the Task Force also recommends including a zoning bonus as an incentive for buildings that make stairs prominent and accessible).

[69] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at HT20-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

pursuant to Energy Star standards.[70] The IgCC does not apply to residential structures of three stories or less.

One issue in need of further evaluation is the inclusion of multiple compliance options or, alternatively, the use of ASHRAE Standard 90.1 (recommended by the Task Force) versus ASHRAE Standard 189.1 (incorporated as a compliance option in the IgCC). Currently, the New York Energy Conservation Code essentially consists of two separate but comprehensive codes, allowing individual designers to choose as their compliance option either ASHRAE Standard 90.1 or Chapter 8 of the International Energy Conservation Code. The Task Force found that the simultaneous enforcement of two codes is no longer tenable and proposed requiring all commercial buildings to comply with ASHRAE 90.1.[71] Similarly, prior to the creation of the IgCC, the ICC's International Energy Conservation Code referenced ASHRAE 90.1, allowing individual designers to choose ASHRAE 90.1 as a compliance path. This essentially created two compliance paths in every participating jurisdiction. The IgCC eliminated this system by including ASHRAE 189.1 as an optional compliance pathway for *jurisdictions*, not *individual designers*, to adopt on a mandatory basis.[72]

High-Priority Areas for Further Examination

A number of additional tensions warrant further examination. These issues include whether the City's emissions reductions target is aggressive enough, the "super wicked" problem of waterfront development, problems related to delay in assisting vulnerable populations displaced by Super Storm Sandy with rebuilding, and problems related to fragmentation and a lack of transparency in climate change-related policies.

A. Is 30% by 2030 Enough?

As discussed in Part 1, PlaNYC includes more than a dozen interconnected goals for creating "a greener, greater New York," including reducing greenhouse gas emissions by 30% below 2005 levels by 2030.[73] The 2013 progress report states 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.[74]

The City's commitment to reduce greenhouse gas emissions 30% by 2030 and its progress toward that goal are certainly laudable. However, the City should consider increasing its emissions reduction goal in light of the most current data on climate change and the risks posed by future climate change-related weather extremes.

By way of comparison, London, England has set CO2 emissions reductions targets (from 1990 levels) of 20% by 2015, 40% by 2020, 60% by 2025 and 80% by 2030.[75] In 2007, Parliament enacted the Greater London Authority Act 2007, which imposes a duty on the London mayor to address climate change as it relates to Greater London, including strategies for minimizing greenhouse gas emissions and increasing efficient production and use of energy.[76]

B. The "Super Wicked" Problem of Waterfront Development

Public policy scholars characterize as "wicked problem[s]" policy problems that defy resolution because of "enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution."[77]

[70] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at EF2-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[71] URBAN GREEN COUNCIL, NYC GREEN CODES TASK FORCE: FULL PROPOSALS, at EF1-1 (Feb. 2010), http://www.nyc.gov/html/gbee/downloads/pdf/gctf_all_proposals.pdf.

[72] INT'L CODE COUNCIL, SYNOPSIS—INTERNATIONAL GREEN CONSTRUCTION CODE, PUBLIC VERSION 2.0, NOVEMBER 2010 (Dec. 15, 2010), http://www.iccsafe.org/cs/IGCC/Documents/PublicVersion/IGCC_PV2_Synopsis.pdf.

[73] CITY OF NEW YORK, PLANYC PROGRESS REPORT 2013: A GREENER, GREATER NEW YORK 46 (2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf (summarizing goals).

[74] 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.

[75] Mayor of London, *Executive Summary*, *in* DELIVERING LONDON'S ENERGY FUTURE: THE MAYOR'S CLIMATE CHANGE MITIGATION AND ENERGY STRATEGY viii–ix (Oct. 2011), http://www.london.gov.uk/sites/default/files/Energy-future-oct11-exec-summ.pdf.

[76] GREATER LONDON AUTHORITY ACT 2007, CHAPTER 24, §§ 42–44, *available at* http://www.legislation.gov.uk/ukpga/2007/24/pdfs/ukpga_20070024_en.pdf.

[77] *See* Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009).

Climate change generally, and the policy conundrum faced by municipalities' regulation of waterfront development in particular, poses a "super wicked problem."[78]

To highlight the wickedness of the waterfront development problem, consider the repeated dire projections for vulnerable coastal areas;[79] continued development of these areas, including publicly funded development;[80] the devastation of these areas during Sandy, including loss of lives, displacement of thousands of residents and businesses, and massive property and infrastructure losses;[81] and political assurances post-Sandy that without question "we'll rebuild it."[82]

Professor Maxine Burkett of the University of Hawai'i urges that devastation in vulnerable coastal areas is a failure of local governments to respond adequately to known risks:

> Instead of rezoning at-risk areas to cease development, . . . decision makers in New York and New Jersey allowed continued heavy development of risky coastal areas even though they were increasingly aware of the potential for "massive storm surge in the region." At least two fatalities in Staten Island occurred in developments completed as recently as the 1990s in coastal areas at extreme risk of storm surge flooding. Regarding New Jersey, which suffered economic losses estimated at $9 to $15 billion, researchers at Princeton University in 2005 found that the rapid population growth in New Jersey's "coastal counties was setting the scene for monumental environmental damage and property loss."[83]

Although governments "do not ordinarily dictate where people can live, own property, or operate their businesses," they can "use sound zoning regulations and natural hazards management programs, along with appropriate building codes and practices, to help ensure that people are encouraged to avoid especially hazardous locations."[84] Governments "can also enact even stricter requirements for critical facilities, such as schools and nursing homes, which house particularly vulnerable populations."[85]

Unfortunately, the damage from a storm like Sandy was not "unthinkable," as described by New Jersey Governor Chris Christie.[86] Rather, Sandy was foreseeable, and future damaging storms of its magnitude and of greater magnitude are also foreseeable. Thus, New York City officials—and other municipal leaders considering how to reduce the mounting toll of floods and other hazards—would be wise to "keep foremost in [their] minds that the best disaster response and recovery comes from proper planning, land use, and building codes that prevent the disaster from ever happening in the first place."[87] Moreover, in light of the devastation from Sandy and the projections of more frequent and more intense future storms, proper planning must include curtailment of development in the most vulnerable waterfront areas.[88]

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[78] *See* Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–60 (2009) (arguing that climate change is a "super wicked problem").

[79] 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, 782 n.46 (2013) (citing New York and New Jersey master plans and reports predicting the growing dangers from continued development).

[80] *See* John Rudolf et al., *Hurricane Sandy Damage Amplified by Breakneck Development of Coast*, HUFF. POST, Nov. 12, 2012, http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html ("On Staten Island, developers built more than 2,700 mostly residential structures in coastal areas at extreme risk of storm surge flooding between 1980 and 2008, with the approval of city planning and zoning authorities, according to a review of city building data by scientists at the College of Staten Island. Some of this construction occurred in former marshland along the island's Atlantic-facing south shore.").

[81] *See* Sarah Adams-Schoen, *On the Waterfront: New York City's Climate Change Adaptation and Mitigation Challenge, Part 1*, 25 ENVTL. L. IN N.Y. 81, 82–83 (Apr. 2014).

[82] Colleen Curry, *NYC Neighborhood Hit Hard by Superstorm Sandy Would Rather Sell Than Rebuild*, ABC NEWS, Apr. 29, 2013, http://abcnews.go.com/US/superstorm-sandy-hit-neighborhood-smarter-sell-rebuild/story?id=19066168 (quoting New Jersey Governor Chris Christie as saying there is "no question" "we'll rebuild it").

[83] 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, 782 (2013) (citations omitted).

[84] EDWARD THOMAS ET AL., NATURAL HAZARD MITIGATION ASS'N, PLANNING AND BUILDING LIVABLE, SAFE & SUSTAINABLE COMMUNITIES: THE PATCHWORK QUILT APPROACH 7 (2013), http://nhma.info/uploads/publications/Patchwork%20QuiltUPDATED.pdf.

[85] EDWARD THOMAS ET AL., NATURAL HAZARD MITIGATION ASS'N, PLANNING AND BUILDING LIVABLE, SAFE & SUSTAINABLE COMMUNITIES: THE PATCHWORK QUILT APPROACH 7 (2013), http://nhma.info/uploads/publications/Patchwork%20QuiltUPDATED.pdf.

[86] Cavan Sieczkowski, *Hurricane Sandy Damage Photos: Superstorm's 'Unthinkable' Aftermath Revealed (PICTURES)*, HUFF. POST, Oct. 30, 2012, http://www.huffingtonpost.com/2012/10/30/hurricane-sandy-damage-photos-superstorm-unthinkable-aftermath_n_2044099.html ("Chris Christie said the wreckage is 'beyond anything I thought I'd ever see.' Adding, 'The level of devastation at the Jersey Shore is unthinkable,' according to CNN.").

[87] EDWARD THOMAS ET AL., NATURAL HAZARD MITIGATION ASS'N, PLANNING AND BUILDING LIVABLE, SAFE & SUSTAINABLE COMMUNITIES: THE PATCHWORK QUILT APPROACH 7 (2013), http://nhma.info/uploads/publications/Patchwork%20QuiltUPDATED.pdf.

[88] Edward Thomas, President of the Natural Hazard Mitigation Association, warns that "[w]e need to reduce or eliminate unnecessary damage caused by human occupancy of hazardous areas. Then, we should look at ways to design and engineer disaster relief and recovery as a fair, efficient, and sustainable process based upon the foundation of recognition of natural disasters and mitigation." EDWARD THOMAS ET AL., NATURAL HAZARD MITIGATION ASS'N, PLANNING AND BUILDING LIVABLE, SAFE & SUSTAINABLE COMMUNITIES: THE PATCHWORK QUILT APPROACH 6 (2013), http://nhma.info/uploads/publications/Patchwork%20QuiltUPDATED.pdf.

C. Fragmentation and a Lack of Transparency

Despite the City's numerous and detailed publicly available reports, it is incredibly difficult to identify how all the City's various initiatives, reports and plans fit together to create a unified regulatory scheme—if, in fact, they do.

As Touro Law Center Dean Patricia Salkin urges in the context of New York State's climate change initiatives, "the true potential of [the state's substantial activity with respect to climate change and energy efficiency issues] will not be fully realized" without "a coordinated, comprehensive, and fully integrated inter-jurisdictional approach to addressing these challenges."[89] As she wrote in 2009:

> While the websites of a number of state agencies contain information about state-sponsored programs on climate change, energy efficiency, sustainable development, green procurement, and other related topics, municipal officials must search through all of these sites to find funding opportunities, data, reports, and technical assistance. This is often confusing and inefficient.[90]

This critique applies with equal force to New York City. For example, over a dozen City, State and federal agencies play a role in regulating New York City's waterfront and waterways. *A Stronger, More Resilient New York* (which cataloged the City's post-Sandy resiliency initiatives) concluded that "[e]fforts by these agencies are not completely aligned. This lack of unified and coordinated regulatory oversight can lead to delayed and unpredictable waterfront activity, complicating the achievement of important public goals, including coastal resiliency."[91] Without coordination, "the proliferation of programs and initiatives may lead to confusion, potential diffusion of resources, less than perfect communication within and among government entities, and missed opportunities."[92] Possible remedies for this lack of coordination include the creation of a climate change information clearinghouse and catalog of climate change laws.[93]

D. Coordination, Lag and Delay

Problems with coordination, lag and delay in helping displaced vulnerable populations to rebuild threaten to undermine the efficacy of the City's "we're tougher than climate change" message. Complex rules, multiple layers of government (as well as other stakeholders) and high stakes contribute to coordination, delay and lag problems. For example, as of March 1, 2014, 16 months after Super Storm Sandy, none of the more than 19,000 people who applied for assistance to the City's Build it Back program had yet to start construction, and only 154 award recipients had been selected.[94] For these displaced constituents, reports such as *A Stronger, More Resilient New York* and *A Greener, Greater New York* likely feel like nothing more than "PR."

Conclusion

New York City, like other major cities around the world, has acknowledged the problem of climate change and begun to implement proactive policies to decrease the city's contribution to the problem (i.e., mitigation) and to make the city less vulnerable to the effects of climate change (i.e., adaptation). The City's initiatives have been comprehensive and progressive, especially its climate change-related data analysis and communication initiatives including NPCC, and its comprehensive reform of building and other related codes. The City's commitment to reduce greenhouse gas emissions by 30% by 2030 and its progress toward that goal are also laudable, but the City should consider increasing its emissions reduction goal in light of the most current data on climate change and the risks posed to the city. The City would also be wise to further examine its approach to waterfront development, problems related to fragmentation and a lack of transparency in climate change-related policies, and the underlying causes of delay in assisting displaced persons to rebuild.

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[89] Patricia E. Salkin, *New York Climate Change Report Card: Improvement Needed for More Effective Leadership and Overall Coordination with Local Government*, 80 U. COLO. L. REV. 921, 925 (2009).

[90] Patricia E. Salkin, *New York Climate Change Report Card: Improvement Needed for More Effective Leadership and Overall Coordination with Local Government*, 80 U. COLO. L. REV. 921, 954 (2009) (citations omitted).

[91] *See* 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 (discussing coordination challenges).

[92] Patricia E. Salkin, *New York Climate Change Report Card: Improvement Needed for More Effective Leadership and Overall Coordination with Local Government*, 80 U. COLO. L. REV. 921, 923 (2009).

[93] Patricia E. Salkin, *New York Climate Change Report Card: Improvement Needed for More Effective Leadership and Overall Coordination with Local Government*, 80 U. COLO. L. REV. 921, 926 (2009).

[94] NYC RECOVERY, SANDY FUNDING TRACKER, http://www1.nyc.gov/sandytracker/#132 (last visited Mar. 1, 2014); *see also* Gloria Pazmino & Laura Nahmias, *New Yorkers Affected by Hurricane Rally for Relief*, CAP. N.Y., Feb. 24, 2014, http://www.capitalnewyork.com/article/city-hall/2014/02/8540760/new-yorkers-affected-hurricane-rally-relief; Colby Hamilton & Katie Honan, *High-Level Sandy Recovery Official Steps Down*, DNAINFO NY, Feb. 19, 2014, http://www.dnainfo.com/new-york/20140219/rockaway-beach/another-high-level-sandy-recovery-official-leaves-de-blasio-administration.

Adams-Schoen thanks John M. D'Elia (Villanova University School of Law 2016) and Jose Manalo, Jr. (Columbia Law School 2014) for the pro bono research assistance they provided to the LUSD Institute. D'Elia's research on green building codes and Manalo's research on comparative climate change policies provided an empirical foundation for this article and will help the LUSD Institute continue to contribute to the creation of sound climate change adaptation and mitigation policies.

LEGAL DEVELOPMENTS

AIR QUALITY

DEC Commissioner Imposed Penalties for Illegal Vehicle Inspections on Individual Inspectors, Not on Their Nonexistent Corporate Employer

New York State Department of Environmental Conservation (DEC) staff alleged that UNS Auto Repairs Inc. (UNS) and four individual respondents, including the president of UNS, completed onboard diagnostic (OBD) II inspections of motor vehicles using noncompliant equipment and procedures in violation of 6 N.Y.C.R.R. § 217-4.2. The OBD system is intended to monitor major engine components, including those that control emissions. DEC staff alleged that respondents used a device to simulate the motor vehicle of record on 979 separate occasions and requested a civil penalty of almost $500,000. The DEC Commissioner dismissed the charges against UNS Auto Repairs Inc. because there was no domestic corporation in New York State under that name. The commissioner also refused to hold the alleged president of UNS liable for all 979 inspections as a corporate officer because DEC had not advanced this theory of liability, but did hold the president and two other individual respondents liable for the illegal inspections they personally conducted. The commissioner dismissed the charges against the fourth individual respondent since he had died before the inspections took place. (As in previous cases, the DEC Commissioner dismissed alleged violations of 6 N.Y.C.R.R. § 217-1.4, which applies only to inspection stations authorized to conduct safety inspections of vehicles exempt from emissions inspection requirements.) The commissioner calculated a penalty of $171,000, based on the penalty range established by section 71-2103(1) of the Environmental Conservation Law (ECL), the impacts of the illegal activity and penalties imposed in previous OBD II enforcement proceedings. However, the penalties that would have been assessed against the corporation and the deceased individual were subtracted from the total calculated penalty. The actual penalty assessed was $32,800, allocated among the three liable individuals based on the number of inspections each conducted. *In re UNS Auto Repairs Inc.*, DEC Case No. CO2-20100615-19 (Feb. 6, 2014).

ASBESTOS

Federal Court Granted Summary Judgment to Defendant in Asbestos Action After Declining to Remand Based on Defendant's Asserted Colorable Government Contractor Defense

Husband and wife plaintiffs commenced a personal injury lawsuit in the Supreme Court, Jefferson County, alleging that the husband acquired cancer as a result of his exposure to asbestos while serving in the Navy. Defendant Crane Co. (Crane) removed the action to the federal district court for the Northern District of New York based on the federal officer removal statute. The district court denied plaintiffs' motion to remand. Viewing the facts in the light most favorable to Crane, the court determined that Crane had set forth sufficient facts to state a "colorable" government contractor defense against plaintiffs' design defect and failure-to-warn claims, and that Crane had established the other elements necessary for removal under the federal officer removal statute, including that it was "acting under" a federal officer and that there was a "causal nexus" between Crane's conduct under federal direction and plaintiffs' claims. Evidence submitted by Crane included documents and affidavits indicating that the Navy was aware of the dangers of asbestos and that it dictated the specifications for products provided by Crane and the contents and format of product warnings. In a second opinion issued the same day, the court granted summary judgment to Crane, though not on the basis of the government contractor defense. Instead, the court found that there was no evidence in the record that the husband was exposed to original valves manufactured by Crane and installed on the Navy vessels on which he served, given that he served on the vessels years after they were commissioned. There was also a lack of evidence that Crane manufactured replacement gaskets or packing materials to which the husband allegedly was exposed. There also was nothing in the record to support plaintiffs' assertion that the husband was exposed to "Cranite," an asbestos-containing material manufactured exclusively for Crane, or that Crane supplied Cranite to the Navy. *Crews v. Air & Liquid Systems Inc.*, 2014 U.S. Dist. LEXIS 20055 (N.D.N.Y. Feb. 18, 2014), 2014 U.S. Dist. LEXIS 20054 (N.D.N.Y. Feb. 18, 2014).

BANKRUPTCY

Federal Court Ruled That Company Had Provided Constitutionally Adequate Notice to Bar Diacetyl Claims

Chemtura Corporation (Chemtura)—a producer and supplier of diacetyl, a butter-flavoring ingredient used in food products—filed for bankruptcy in 2009. Its creditors included claimants alleging injuries arising from diacetyl exposure. In the course of the bankruptcy proceedings, Chemtura mailed notices to all

known creditors and published general and site-specific notices for all unknown creditors to inform them that they were required to file proofs of claim by October 31, 2009. The site-specific notices included one published in a New Jersey newspaper that identified Firmenich in Plainsboro, New Jersey as one of the companies to which Chemtura had supplied diacetyl and indicated that persons who had been exposed to diacetyl and in whom the exposure caused injury "that becomes apparent either now or in the future" could have a claim for damages. After the deadline passed, nine Firmenich employees commenced personal injury lawsuits against defendants including Chemtura. The bankruptcy court found that their claims against Chemtura had been discharged in the bankruptcy and enjoined the Firmenich employees from prosecuting their suits. The federal district court for the Southern District of New York affirmed, holding that Chemtura had provided constitutionally adequate notice. The court rejected the employees' contention that notice was inadequate because they had been unaware that they had diacetyl-related claims against Chemtura prior to the deadline. The court said that the notice in this case provided sufficient information to make Firmenich employees aware that their substantive rights might be affected by the deadline for filing claims by putting them on notice that "(1) they might have been exposed to diacetyl while working at the plant; (2) they might have been injured by that exposure; (3) they would have a claim even if their injury had not yet manifested itself; and (4) they would lose their rights to recover on that claim if they did not file a proof of claim form by the [deadline]." *Gabauer v. Chemtura Corp.* (*In re Chemtura Corp.*), 2014 U.S. Dist. LEXIS 16470 (S.D.N.Y. Feb. 10, 2014).

HAZARDOUS SUBSTANCES

Second Circuit Partially Remanded Response Costs Allocation for Niagara Falls Sites

In a longstanding dispute over response costs allocation at two Niagara Falls properties, the Second Circuit issued a summary order affirming in part and reversing in part the allocations of the district court for the Western District of New York. The Second Circuit ruled that the district court's use of combined monitoring well data, rather than site-specific monitoring well data, was not an abuse of discretion where the combined data was "averaged with site-specific pumping well data . . . [and] used to bridge the wide variation between the experts' estimates." The court also upheld the allocation of 98% of chlorinated benzenes at a so-called "Olin Hot Spot" to Olin Corporation, noting that the district court had on remand properly applied the Second Circuit's factual finding in a 2011 decision that attributing only 6.35% of the costs to Olin was without support in the record. The Second Circuit also refused to grant E.I. du Pont de Nemours & Co. (DuPont) a 10% reduction in its share of response costs for the Olin Hot Spot, where DuPont's rationale for the reduction was based on contamination at the second site that could not have migrated to the Olin Hot Spot. The Second Circuit also held that the district court was within its discretion to extrapolate from site-specific pumping well data from 2002 to allocate costs incurred between 2007 and 2011 (Past Future Costs) rather than using data collected after the court allocated Past Future Costs, but ruled that the district court had abused its discretion in using older 2004–2006 monitoring well data when contemporaneous 2007–2011 data was available. The Second Circuit said that while the district court was entitled to discretion in its creation of an allocation formula, it had provided no justification for plugging older data into its formula when contemporaneous data was available. *New York v. Solvent Chemical Co.*, 2014 U.S. App. LEXIS 1348 (2d Cir. Jan. 24, 2014). [*Editor's Note:* This matter was previously covered in the December 2006, October 2007, December 2008, May 2010, April 2012, September 2012, November 2012 and March 2013 issues of *Environmental Law in New York*.]

INSURANCE

Federal Court Ruled That Insurer Was Obligated to Pay All Defense Costs

In a dispute over insurance coverage for claims involving a contaminated site in Massachusetts, the remaining issues boiled down to whether and the extent to which the insurer was obligated to pay plaintiff's defense costs. Plaintiff sought to enforce an earlier ruling by the federal district court for the Southern District of New York that the insurer had a duty to defend in the underlying action in Massachusetts. Having already lost its defense that the policy's pollution exclusion precluded a duty to defend, the insurer put up a number of additional defenses in an attempt to limit its liability, all of which the court rejected. The court concluded that under the law of Rhode Island, which applied because the cause of action for breach of duty to defend accrued there, plaintiff's action was timely since it was brought within 10 years of the final judgment against it in the underlying litigation. The court also rejected the insurer's argument that the defense costs should be allocated pro rata among the various insurers, concluding instead that the Massachusetts Supreme Judicial Court (MSJC) would allocate defense costs jointly and severally in this case. The court distinguished an MSJC decision that had apportioned indemnification costs on a pro rata basis, concluding that the duty to defend in the policy and under applicable legal principles was broader than the duty to indemnify, and that policies weighing against joint and several allocation for indemnification did not apply in the case of defense costs allocation. The court also required the insurer to pay the costs of a defense strategy that had "collateral benefits" in other lawsuits involving plaintiff. The court noted that had the insurer elected to defend plaintiff in the underlying action, "it could have pursued whatever strategy it thought most prudent, and balanced the overall liability against the defense costs incurred. [Insurer] cannot abdicate its duty to defend and now second-guess the defense it declined to undertake." The court did, however, require plaintiff

to pay its own costs in a bankruptcy action where its contribution action to minimize its liability with respect to the Massachusetts site "morphed into a broader action" after the defendant filed for bankruptcy. The court also required the insurer to pay plaintiff's costs in the instant action, stating that "[a]s long as [insurer] continues to contest the extent of its defense costs in this action, it will owe [plaintiff] the reasonable costs of pursuing its claim." *Narragansett Electric Co. v. American Home Assurance Co.*, 2014 U.S. Dist. LEXIS 21405 (S.D.N.Y. Feb. 18, 2014). [*Editor's Note:* This case was previously covered in the July 2013 issue of *Environmental Law in New York*.]

Federal Court Excluded Expert Testimony in Northrop Grumman Coverage Dispute

In this dispute over insurance coverage in connection with contamination at multiple Northrop Grumman (Northrop) sites on Long Island, the federal district court for the Southern District of New York granted three motions—one from Northrop, two from the insurers—to exclude expert testimony. The court rejected the expert testimony proffered by Northrop regarding "the customs and practices in how environmental insurance policies, both generally and specifically with respect to [the insurers in this case], were and should be interpreted." The court concluded that almost all of the expert's opinions "impermissibly invade the provinces of the judge and jury." For the same reason, the court rejected testimony proffered by the insurers regarding the "legal framework" (e.g., applicable environmental laws) under which the insured operated. The court also excluded a Northrop expert's testimony as to the "root cause" of the failure of a storage tank at the site known as the Bethpage facility, where the court found that the expert had not observed the tank "whether in person, in photographs, or in recreations" and did not know information about the materials and methods used to construct the tanks. *Travelers Indemnity Co. v. Northrop Grumman Corp.*, 2014 U.S. Dist. LEXIS 14981 (S.D.N.Y. Jan. 27, 2014).

Federal Court Ruled That Insurer Did Not Owe Coverage to Northrop Grumman for Bethpage Facility

In a subsequent decision in this dispute over insurance coverage for Northrop Grumman sites, the district court granted Travelers Indemnity Co.'s (Travelers's) motion for summary judgment with respect to the Bethpage facility. Noting that "[t]he mere fact that submissions on summary judgment are extensive (even requiring a small moving truck) does not mean that there is a genuine issue for trial," the court ruled that statutory pollution exclusions and pollution exclusions in Travelers policies precluded coverage. The court found that Northrop failed to show that the discharges of contaminants were "sudden and accidental" or that they were not "expected" or "intended." In reaching this conclusion, the court noted that Northrop's own documents and other submissions were clear that its "long-term, historical practices" caused contamination, and that the lawfulness of Northrop's practices and whether Northrop knew the "pollutant potential" of the substances it was discharging to the environment were not relevant to application of the exclusion. The court also ruled that the "concurrent causation rule" on which Northrop attempted to rely—which provides that a pollution exclusion will not automatically preclude coverage if, in the case of multiple releases, at least one "sudden and accidental" release contributed substantially to contamination—was not a viable way for Northrop to escape the pollution exclusion. The court in its January 27, 2014 opinion (discussed above) had excluded the testimony of an expert who opined on the sudden and accidental nature of releases from a tank at the Bethpage facility, and in this decision the court excluded the opinion of a second expert whose testimony was similarly "conjectural and implausible." The court further found that Northrop had not established a triable issue of fact as to whether it had provided timely notice or as to whether notice was futile or had been waived as a defense. Among other findings, the court said that Northrop knew about contamination at the site by the late 1970s, and the court ruled that Northrop's asserted belief in its non-liability was not reasonable based on the factual record, even if such a belief could be recognized as an excuse as a matter of law. In addition, it was undisputed that when Northrop finally did send a "potentially responsible person" letter from DEC to Travelers, it sent the letter to the wrong address for Travelers and there was no triable issue of fact as to whether notice was received. Finally, the court also grounded its decision in Northrop's failure to raise a triable issue as to whether it had made voluntary payments without the consent of Travelers in violation of the policies. The court was not persuaded by Northrop's argument that Travelers had waived its right to require compliance with this requirement of the policies by refusing to participate in the clean-up process. *Travelers Indemnity Co. v. Northrop Grumman Corp.*, 2014 U.S. Dist. LEXIS 25194 (S.D.N.Y. Feb. 25, 2014). [*Editor's Note:* This case was previously covered in the June 2013, September 2013, October 2013 and February 2014 issues of *Environmental Law in New York*.]

LAND USE

Federal Court Dismissed Malicious Prosecution Action Against Town of Riverhead in Tree-Clearing Matter

Plaintiff brought a 42 U.S.C. § 1983 action for malicious prosecution under the Fourth Amendment of the U.S. Constitution and New York State law against the Town of Riverhead, the Town Supervisor, another Town Board member and the Town Code Enforcement Officer. The complaint followed an earlier unsuccessful Section 1983 action and stemmed from the Town's reaction to the activities of plaintiff and his business

partner in the fall of 2004, when they began clearing trees from a property in the Town, apparently to prepare the parcel for agricultural use so that such use would be grandfathered in under a pending rezoning. Plaintiff alleged, among other things, that defendants issued five Informations and two Superceding Informations charging him with violations of the Town Code, which were non-felony offenses, and that he was ultimately required to make approximately 11 court appearances over the course of seven years. Although the federal district court for the Eastern District of New York was inclined to find under ambiguous Second Circuit precedent that plaintiff had demonstrated that there was "a post-arraignment seizure," the court dismissed the action for failure to state a claim, concluding that as a matter of law defendants had probable cause to pursue their prosecution of plaintiff for violating the Town Code's prohibition on clearing vegetation within 150 feet of a freshwater wetland without a permit. Although agricultural activity was exempt from the permit requirement, agricultural activity did not include clear-cutting trees, and plaintiff had himself asserted in the earlier 42 U.S.C. § 1983 action that he had had the parcel cleared of trees. *Oxman v. Downs*, 2014 U.S. Dist. LEXIS 20714 (E.D.N.Y. Feb. 14, 2014). [*Editor's Note:* The prior 42 U.S.C. § 1983 action involving the same facts and circumstances was discussed in the November 2012 and July 2013 issues of *Environmental Law in New York*.]

Court of Appeals Ruled That Restaurant in Union Square Park Was a Valid Park Purpose

The New York Court of Appeals upheld New York City's grant of a license permitting a private company to operate a seasonal restaurant in a pavilion in the 3.6-acre Union Square Park in Lower Manhattan. The court rejected plaintiffs' claim that the restaurant was not a valid park purpose and therefore violated the public trust doctrine. The Court of Appeals noted that it had recognized in a 1965 decision concerning a restaurant use in Central Park that "although it is for the courts to determine what is and is not a park purpose, . . . the Commissioner [of the New York City Department of Parks and Recreation] enjoys broad discretion to choose among alternative valid park purposes." The court had thus "eschewed" the type of "fact-specific" inquiry that plaintiff urged it to take to determine whether a particular restaurant or other use is a valid park purpose, though the court did leave open the possibility that a future restaurant might "run afoul" of the public trust doctrine. The court also rejected plaintiff's argument that the agreement between the City and the private company was a lease, not a license, and therefore an illegal alienation of parkland. The court said that despite the 15-year term and payment structure of the agreement, its language confirmed that it was a license. The court cited the substantial control retained by the City over daily operations, the seasonality and non-exclusiveness of the restaurant use, environmental and community-based provisions in the agreement, and the City's broad authority to terminate the agreement. *Union Square Park Community Coalition, Inc. v. New York City Department of Parks and Recreation*, 2014 N.Y. LEXIS 205 (Feb. 20, 2014). [*Editor's Note:* This case was previously covered in the September 2013 issue of *Environmental Law in New York*.]

Appellate Division Ruled That BSA Was Required to Consider Good-Faith Reliance in Appeal of Revocation of Sign Permit

The Appellate Division, First Department reversed a decision by the Supreme Court, New York County, and annulled a New York City Board of Standards and Appeals (BSA) resolution that upheld the revocation of petitioner's permits for an outdoor advertising sign. The First Department ruled that the BSA had been incorrect in concluding that it could not consider petitioner's good faith in relying on a 2008 determination of the Manhattan Borough Building Commissioner that the sign was a permissible replacement for a sign that was removed when a building was demolished. The court said that petitioner had in effect sought a variance from BSA, and that BSA had failed to appropriately address the authority granted to it by section 666(7) of the New York City Charter to grant variances. The court therefore remanded the matter to the BSA for a determination applying the factors of section 666(7). The court indicated that precedent required that the BSA's determination include consideration of petitioner's good-faith reliance, which the First Department said had been established as a matter of law. The First Department rejected, however, petitioner's contention that no variance was required, noting that the new sign had a different location and position from the sign it replaced. *Matter of Perlbinder Holdings, LLC v. Srinivasan*, 2014 N.Y. App. Div. LEXIS 928 (1st Dept. Feb. 13, 2014). [*Editor's Note:* This case was previously covered in the February 2014 issue of *Environmental Law in New York*.]

Appellate Division Ruled That Zoning Challenge Posed No Justiciable Controversy and Was Also Time-Barred

The Appellate Division, Fourth Department affirmed the dismissal of an action that sought a declaration that plaintiff's properties in Utica were zoned for two-family residential development. The Fourth Department agreed with the Supreme Court, Oneida County that there was no justiciable controversy because the City of Utica defendants had conceded that the parcels at issue were zoned two-family residential. The court noted that plaintiff had abandoned any contentions regarding the propriety of this basis for dismissal of the action by not addressing it in its main brief, and that arguments made for the first time in the reply brief were not properly before the court. The Fourth Department also affirmed on the alternative ground that plaintiff's challenge was not timely. The appellate court rejected the argument that the statute of limitations had not begun to run because the City had failed to undertake a State Environmental Quality Review Act (SEQRA) review prior to approving

the rezoning. The court noted that Court of Appeals precedent dictated that a four-month statute of limitations, measured from the time of enactment of legislation, applied to proceedings alleging SEQRA challenges to the legislation. *Becker-Manning, Inc. v. Common Council of City of Utica*, 114 A.D.3d 1143, 980 N.Y.S.2d 651 (4th Dept. 2014).

Appellate Division Upheld Rezoning for Retirement Community in Town of Huntington

The Appellate Division, Second Department upheld the 2011 rezoning of property in the Town of Huntington from a single-family residential district in which one residence per acre was permitted to an R-RM Retirement Community District where a developer planned to build 66 townhouses. The Second Department held that the rezoning was in compliance with the Town's master plan, which outlined goals that included not only maintenance of the Town's "low-density, village-like character" but also goals recognizing the need for diverse housing stock, senior housing and affordable housing. The court summarily rejected arguments that the rezoning constituted illegal spot zoning and that the Town had not complied with SEQRA. *Matter of Hart v. Town Board of Huntington*, 980 N.Y.S.2d 128 (2d Dept. 2014).

Appellate Division Affirmed "Extraordinary Hardship" Waiver for Business in Long Island Pine Barrens

In June 2011, the Central Pine Barrens Joint Planning and Policy Commission granted an "extraordinary hardship" waiver under the Long Island Pine Barrens Protection Act of 1993. The waiver permitted a commercial business to operate in the core preservation area of the Long Island Central Pine Barrens, which overlies the sole source of drinking water for millions of Long Islanders. The property had been used as a state police barracks from the 1970s until 2008, after which the waiver applicant used it for a landscaping and horticultural services business, which reduced the intensity of the land use. The Long Island Pine Barrens Society and its executive director challenged the waiver in an Article 78 proceeding, which was dismissed by the Supreme Court, Suffolk County on standing grounds, and, alternatively, on the merits. The Appellate Division, Second Department affirmed the dismissal. The Second Department rejected the procedural contention that petitioners had limited their appeal to the standing issue, noting that petitioners' reference to standing in their notice of appeal "constitute[d] language describing the judgment" and therefore did not limit the issues on appeal. The Second Department then reversed the ruling on standing, saying that petitioners had established the elements of standing, including that the Society's executive director used and enjoyed the Pine Barrens to a greater degree than the general public. The court noted that where the executive director lived was not dispositive of this issue. The Second Department affirmed denial of the petition on the merits, however, finding that the Commission was not arbitrary and capricious in determining that the applicant had established the existence of unique circumstances and that its hardship was not self created. *Matter of Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning and Policy Commission*, 113 A.D.3d 853, 980 N.Y.S.2d 468 (2d Dept. 2014).

Appellate Division Upheld Allocation of Pine Barrens Credits

Petitioners, who owned property located in the core preservation area of the Long Island Central Pine Barrens where development was generally prohibited, applied unsuccessfully to the Pine Barrens Credit Clearinghouse and Central Pine Barrens Joint Planning and Policy Commission for transferable development rights known as "Pine Barrens Credits." In 2009, the Appellate Division, Second Department concluded that the Commission had erred in finding that petitioners were entitled to no Pine Barrens Credits but also concluded that petitioners had not established entitlement to the 50.42 credits they sought because such an allocation would not take into account the fact that local zoning restrictions would permit development of only 20% of the property. On remittal, the Commission allocated 18.46 Pine Barrens Credits to the property, and petitioners again challenged the Commission's determination. The Second Department upheld the allocation, rejecting petitioners' argument that its earlier determination that local zoning restrictions must be taken into account was dicta. Rather, the court said, the earlier determination was the law of the case, and the Commission had acted in accordance with the court's directive in allocating the credits. *Matter of Tuccio v. Central Pine Barrens Joint Planning and Policy Commission*, 113 A.D.3d 693, 978 N.Y.S.2d 350 (2d Dept. 2014). [*Editor's Note:* This matter was previously covered in the May 2008, March 2010 and May 2012 issues of *Environmental Law in New York*.]

State Supreme Court Sided With Village of West Hampton Dunes in Dispute With Town of Southampton Regarding Authority Over Beaches

The Incorporated Village of West Hampton Dunes (Village) commenced an action against the Trustees of the Freeholders and Commonalty of the Town of Southampton (Trustees) and the Town of Southampton and its Town Board. The Village sought, among other things, a declaration limiting the scope of the Trustee's, Town's and Town Board's powers and duties with respect to the Village's ocean beaches. The Supreme Court, Suffolk County granted summary judgment to the Village, ruling that the Trustees, Town and Town Board had "no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance and use of structures and lands located anywhere within the Village's ocean beaches." The only activities over which the Trustees retained authority were set forth in an 1818 law, and

included "taking seaweed from the shores of any of the common lands of the town, or carting or transporting to or from, or landing property on said shores." The court also declared any extension of the Town's zoning powers to the ocean beaches in the Village via the incorporation of the "Trustees Blue Book" (a set of rules and regulations "for the Management and Products of the Waters of the Town") into Town law to be unlawful, unenforceable, null and void. The court rejected contentions that the Village did not have standing because it did not own the ocean beaches and that there was no justiciable controversy. *Incorporated Village of West Hampton Dunes v. Semlear*, 2014 N.Y. Misc. LEXIS 515 (Sup. Ct. Suffolk Co. Feb. 6, 2014).

OIL SPILLS & STORAGE

DEC Commissioner Imposed Penalty for Failure to Comply With Petroleum Spill Stipulation

The DEC Commissioner issued an order that found the owners of the site of a former service station in Queens liable for violations of ECL § 71-1929 for failing to comply with the terms of a 2009 stipulation with DEC. The stipulation required them to investigate and remediate a petroleum spill first reported in 2002. The order also found the respondents liable for violations of Navigation Law § 176 and its implementing regulations for failing to take action to contain the petroleum discharge. The commissioner ordered payment of a $62,500 penalty within 30 days and submission of a remedial investigation report, as required by the 2009 stipulation, within 15 days. The respondents had protested the amount of the penalty, arguing that DEC had improperly relied on an order issued in a separate proceeding as an aggravating factor; the respondent in that proceeding—a company in which an individual respondent in the instant proceeding was a shareholder—was found liable for violations at another former service station property. The commissioner, however, agreed with the administrative law judge (ALJ) that the determination of the appropriate penalty did not require reliance on this order. The commissioner, like the ALJ, also rejected respondents' argument that DEC was attempting to predicate liability under Navigation Law § 176 solely on ownership of property. The commissioner noted that respondents had offered "no evidence that they are 'faultless' or have lacked capacity to take action to prevent the discharge or clean up the contamination." *In re Benaim*, DEC Case No. R2-20120809-487 (Jan. 27, 2014). [*Editor's Note:* A related matter was covered in the May 2008 issue of *Environmental Law in New York.*]

SEQRA/NEPA

State Supreme Court Ruled That NYPD's World Trade Center Security Plan Complied With SEQRA

Residents and workers in the downtown Manhattan neighborhood near the World Trade Center (WTC) challenged the New York City Police Department's (NYPD's) compliance with SEQRA in the development of the WTC Campus Security Plan. The Supreme Court, New York County dismissed the Article 78 proceeding brought by these parties, finding that the NYPD had complied with environmental review procedures and mandates. The court concluded that the NYPD had considered a reasonable number of alternatives, including an "unrestricted Liberty Street" alternative responsive to petitioners' traffic flow concerns. This alternative would have allowed east-west vehicular traffic but, according to the NYPD, "would allow unfettered access for any vehicle into the WTC site, and thus, would run counter to its goal." The court said that SEQRA did not require NYPD to consider other alternatives, such as off-site vehicle inspection, favored by petitioners. The court also ruled that the NYPD had adequately addressed other concerns raised by petitioners, including traffic and pedestrian congestion, pollution and noise caused by tourist buses; the isolation of the WTC from surrounding neighborhoods; and the health effects of radiation from x-rays machines used to inspect vehicles. *Matter of Perillo v. Kelly*, 2014 N.Y. Misc. LEXIS 545 (Sup. Ct. N.Y. Co. Feb. 4, 2014).

TOXIC TORTS

Appellate Division Issued Mixed Ruling in TCE Contamination Class Action Against IBM

Plaintiffs were members of two families whose cases against IBM Corporation (IBM) related to trichloroethylene (TCE) contamination from its machine manufacturing facility in the Village of Endicott were being tried first in a class action alleging negligence, private nuisance and trespass. After the Supreme Court, Broome County partially granted IBM's motion for partial summary judgment, the Appellate Division, Third Department affirmed in part and reversed in part. The Third Department concluded that the court below properly denied summary judgment to IBM with respect to negligence claims asserted by two plaintiffs who had been diagnosed with cancer. Although IBM presented expert proof that it had complied with the standard of due care, the court said that plaintiffs' documents and affidavits raised questions of fact "without the necessity of expert proof" regarding whether the standard had been met. The court stated: "An ordinary layperson could conclude that a corporation fails to meet the standard of due care if it allows toxic chemicals to form into a large underground pool and then migrate onto or through properties up to a mile away, especially considering the estimates of the amounts of solvents and the time period over which the pool must have

formed." For similar reasons, the Third Department ruled that the court below had properly deferred a final determination on whether plaintiffs could rely on the doctrine of res ipsa loquitur. The Third Department partially reversed the denial of summary judgment to IBM on plaintiffs' trespass claims, ruling that only trespass claims related to soil contamination were viable. Trespass claims arising from vapor intrusion or air emissions were not valid because they involved "intangible intrusions" that do not affect exclusive possession of property, while trespass claims based on contaminated groundwater could not survive because groundwater is a natural resource entrusted to the state. The Third Department also said that the supreme court had properly granted summary judgment to IBM on private nuisance claims by persons without an ownership interest in property, and that summary judgment was properly granted to IBM on claims involving exposure to TCE at locations other than plaintiffs' homes (since no expert had provided an exposure level for any other locations). With respect to plaintiffs' claims for medical monitoring consequential damages, the Third Department ruled that such damages could be pursued only by a plaintiff who alleged that exposure to TCE had caused his kidney cancer and by a plaintiff who brought trespass claims alleging property damage (but not by a plaintiff who had discontinued her property damage claims after selling her home). *Ivory v. International Business Machines Corp.*, 2014 N.Y. App. Div. LEXIS 1200 (3d Dept. Feb. 20, 2014).

WILDLIFE AND NATURAL RESOURCES

DEC Commissioner Denied Request to Renew Licenses for Wild Animal Possession and Exhibition

In 2011, the Director of DEC's Division of Fish, Wildlife and Marine Resources (DFWMR) denied respondent's requests to renew special licenses that authorized her to possess certain wild animals at a facility in Granville. After the Supreme Court, Washington County ruled in 2013 that respondent was entitled to a hearing prior to the determination not to renew her licenses, DEC held an adjudicatory hearing before an ALJ, who recommended that renewal be granted for one season with "very stringent oversight by the DEC staff." The DEC Commissioner declined to adopt this recommendation and instead affirmed DFWMR's denial of the request for renewal. The commissioner found that "a preponderance of the credible evidence" demonstrated that the denial was "authorized and appropriate." The commissioner's order enumerated 21 violations of applicable statutes, regulations, orders or license conditions committed by respondent, including the unauthorized loan of an alligator, unauthorized acquisition and possession of an African lion and failures to meet regulatory standards for housing facilities and enclosures. The commissioner held that respondent was not fit to hold the special licenses and gave her 105 days to transfer all DEC-regulated animals in her possession to individuals or entities authorized to possess them. *In re Bardin*, DEC Case No. OHMS 2013-68159 (Feb. 10, 2014).

DEC Commissioner Ordered Revocation of License After Fishing and Hunting Guide Was Convicted of Assault

The DEC Commissioner ordered the revocation of respondent's fishing and hunting guide license after respondent was convicted of third-degree assault, petit larceny and fighting in a public fishing rights area. The convictions stemmed from "a violent, unprovoked, and unjustified assault" on another man who was fishing on the Salmon River in Oswego County. Respondent said that he believed that the victim had slashed his tires, but the DEC Commissioner found no evidence to support respondent's arguments that he had acted in self-defense, that his actions were justified by an agreement with DEC that he would act as a confidential informant against the other man, or that respondent's actions were the result of DEC officers' negligent, reckless and intentional exposure of respondent's role as a confidential informant. The commissioner also rejected the ALJ's recommendation for a reduced revocation period in recognition of, among other things, respondent's assistance to DEC in its enforcement efforts and the fact that he had been a licensed guide for 20 years without incident. Instead, the commissioner revoked the license for the maximum one-year period, finding that the "seriousness and violence of the assault" justified the maximum revocation period. The commissioner said that respondent's assistance to DEC did not justify his "unilateral" attack based on an "unsubstantiated belief" that the victim slashed his tires and that respondent's record was in fact not "unblemished" since the record contained some evidence of an earlier altercation with the victim. The commissioner also noted that respondent persisted in a belief that the incident was a "personal" matter but that in fact the assault was "a serious breach of the Department's fishing regulations that directly reflects upon respondent's competence as a licensed fishing and hunting guide in the State of New York." *In re Mahoney*, DEC Case No. CO 7-20110601-100 (Jan. 27, 2014).

NEW YORK NEWSNOTES

Public Service Commission Issued Order Requiring Con Edison, Other Utilities to Undertake Climate Resiliency Programs

On February 20, 2014, the New York State Public Service Commission (PSC) approved a settlement pursuant to which Con Edison must implement a $1-billion program of storm hardening and resiliency measures to ready its infrastructure

for the impacts of climate change, including sea level rise. The order was issued in proceedings initiated by Con Edison's January 2013 rate filings. Under the terms of the order, the work of the Con Edison Resiliency Collaborative—a group convened in June 2013 that includes PSC staff and Con Edison representatives, as well as representatives of local and state government, environmental groups, university research centers and unions—will continue. The Collaborative's work led to the adoption by Con Edison of a new design standard for infrastructure based on the most current floodplain maps published by the Federal Emergency Management Agency plus three feet of protective construction to accommodate climate change-related sea level rise, a standard that it will re-evaluate on an ongoing basis. The Collaborative's work will continue on longer-term issues, including Con Edison's 2014 climate change vulnerability study, which is required pursuant to the PSC order; review of storm hardening initiatives; identification of alternative resiliency strategies such as microgrids and distributed generation; quantification of natural gas leaks; and development of a cost/benefit model to assess the resiliency program. Con Edison will file reports with the PSC in September 2014 and September 2015 regarding storm hardening projects planned for the next year. The reports will also include progress reports and recommendations related to the second phase of the Collaborative's work. The scope of the PSC's order appears to extend to other utilities as well. The order states that "the considerations addressed in the Collaborative are specific to Con Edison, yet they have important implications for the regulatory regime in New York. The obligation to address these considerations should be broadened to include all utilities" and that "[w]e expect the utilities to consult the most current data to evaluate the climate impacts anticipated in their regions over the next years and decades, and to integrate these considerations into their system planning and construction forecasts and budgets." The PSC also noted that "resilience efforts must be accompanied by a continued commitment to reduce carbon emissions in order to mitigate long-term risks that will continue to challenge our adaptive capabilities."

DEC Released New Environmental Easement Procedures

On February 20, 2014, DEC announced the availability of new procedures for conveying environmental easements for properties enrolled in the Brownfield Cleanup, Environmental Restoration and State Superfund Programs. The new procedures are intended to streamline the process and make it less costly and time consuming. For example, DEC indicates that a "last owner" search will now be sufficient to document an owner's authority to convey an easement for most properties, thereby allowing many owners to bypass the need for a comprehensive title search. DEC reserves the right, however, to require title searches in situations where the property's ownership history is more complex, such as where properties contain "lands under water," where restricted deed transfers such as a Quit Claim deed have been used, and where properties are owned by multiple parties. Requirements for site surveys have also been simplified, as has the environmental easement checklist that must be certified by the site owner and attorney. Links to information about the new requirements are at http://www.dec.ny.gov/chemical/48236.html.

DEC Proposed Update to Environmental Monitor Policy

In the February 12, 2014 issue of the *Environmental Notice Bulletin*, DEC published a notice of a proposed commissioner policy to update its existing On-Site Environmental Monitor Policy. The policy provides criteria and procedures for determining which facilities, sites and regulated activities subject to the ECL require a level of DEC oversight beyond that provided by DEC's normal level of review and oversight. The proposed policy would supersede the existing policy, which was last revised in 1992 in Organization and Delegation Memorandum #92-10. The proposed policy establishes four criteria for determining instances in which DEC will require environmental monitoring: (1) where environmental monitoring is required by law; (2) where material being handled at a facility or site is of particular concern due to its characteristics or quantity; (3) where the compliance history or past practices of a regulated entity has included significant or repeated violations of applicable laws or has resulted in threats to public health and the environment (or indicates that such threats are likely to occur in the future); or (4) where the facility, site or regulated activity needs additional oversight due to exceptional circumstances relating to size, throughput, location (such as proximity to sensitive receptors or proximity to environmental justice areas) or the nature of its operations. The proposed policy describes four methods of providing the environmental monitoring services, with monitoring by DEC employees the most preferred method and monitors hired by the regulated entity (and working under DEC oversight) the least preferable. The draft policy is available at http://www.dec.ny.gov/docs/materials_minerals_pdf/draftmonitor.pdf.

NY Green Bank Issued First RFP for Clean Energy Financing Partnerships

The NY Green Bank launched on February 11, 2014 with the issuance of a request for proposals (RFP) that seeks proposals for partnership arrangements with the Green Bank to facilitate the financing of clean energy projects. The initial $210 million of public funding that was approved in December 2013 will be deployed to attract private financing for renewable energy and energy efficiency projects by offering credit enhancements, strategic co-investment and loans. The projects must involve commercially proven technologies, a list of which the Green Bank published with the RFP, although the Green Bank would

consider proposals that demonstrate "a potential for increased deployment of energy efficiency or renewable energy and/or a potential for carbon dioxide emissions reductions in New York State." The list of commercially proven technologies includes solar photovoltaics and solar thermal, onshore and offshore wind, fuel cells and hydroelectric. Information about the NY Green Bank and its first RFP is available at http://greenbank.ny.gov/.

Costco Paid $60,000 Penalty for Prohibited Sale of Pesticide in Long Island

On February 6, 2014, DEC announced that Costco Wholesale Corporation would pay a $60,000 civil penalty for violating DEC restrictions on selling certain pesticides in Long Island. DEC launched an investigation after a concerned resident reported that Costco's Holbrook location was selling Bayer Advanced Law Complete Weed Killer, which bears a label specifying that it is not for sale or distribution in Nassau, Suffolk, Queens and Kings Counties. DEC found that Costco sold 296 containers of the pesticide while it was on the store's shelves and that Costco had violated ECL requirements to register any pesticide that is distributed, sold or offered for sale in New York. DEC ordered Costco to upgrade its pesticide check system to prevent future sales of unregistered pesticides. The pesticide restrictions are in place to protect Long Island's sole source aquifer.

DEC Closed Waters to Shellfishing Due to Coliform Concerns

Effective January 29, 2014, DEC closed certain shellfish lands in the towns of Hempstead, Islip, Brookhaven, Southampton, East Hampton and Southold to shellfish harvesting. Some waters were closed year-round, while other shellfish lands were closed only seasonally. The closures had been imposed on an emergency basis in November 2013; the emergency adoption expired on January 29. DEC cited evaluations of water quality data that indicated bacteriological standards were not being met in the areas affected by the rulemaking, posing health threats to consumers. The amended regulations are at 6 N.Y.C.R.R. part 41.

DEC Proposed Mandatory Restrictions on Animal and Plant Life on Boats Launching from Lands Under DEC Jurisdiction

In an effort to control the spread of aquatic invasive species, DEC published proposed regulations in the January 8, 2014 issue of the *NYS Register* that would prohibit the launching of watercraft from boat launches and fishing access sites under DEC jurisdiction unless they have been drained and have no visible plant or animal life attached to them. The rule would also prohibit departure from boat launch sites unless visible plant and animal life are removed and the watercraft is drained. Exceptions would be granted by permit for certain species—zebra and quagga mussels—that are difficult to remove. Boats that are seasonally moored or docked in bodies of water infested with such species may be removed for storage at the end of the season and be cleaned at the storage location. The proposed regulations would add a new 6 N.Y.C.R.R. § 59.4 and amend 6 N.Y.C.R.R. § 190.2. DEC has encouraged the voluntary adoption of these practices in the past.

WORTH READING

Debbie M. Chizewer & A. Dan Tarlock, *New Challenges for Urban Areas Facing Flood Risks*, 40 Fordham Urb. L.J. 1739 (2013).

Edward Hyde Clarke, *Green Alert: The Need to Rescue New York's Renewable Energy Portfolio Standard*, N.Y. Envtl. Law., at 24 (Fall/Winter 2013).

Edward Hyde Clarke (on behalf of the Student Editorial Board), *With EPA Uncertainty, New York Must Lead*, N.Y. Envtl. Law., at 6 (Fall/Winter 2013).

Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 Fordham Urb. L.J. 1859 (2013).

Ezra Dyckman & Libin Zhang, *Restoring Historic Landmarks While Saving on Taxes*, N.Y.L.J., at 5 (Feb. 26, 2014).

Christine A. Fazio & Ethan I. Strell, *New York State Leading on Utility Climate Change Adaptation*, N.Y.L.J., at 3 (Feb. 27, 2014).

Larry Levy & Andrew Rafalaf, *City Lobbying Law Change Expands Minefield of Regulatory Obligations*, N.Y.L.J., at 4 (Feb. 28, 2014).

John R. Nolon, *Changes Spark Interest in Sustainable Urban Places: But How Do We Identify and Support Them?*, 40 Fordham Urb. L.J. 1697 (2013).

NYU Schack Institute of Real Estate, *New York State Brownfield Cleanup Program and Tax Credit Analyses* (Jan. 28, 2014), http://www.nycbrownfieldpartnership.org/pdf/NYSBTC-Jan_28_revised.pdf.

Michael Rikon, *Parkland, the Public Trust Doctrine and Prior Public Use*, N.Y.L.J., at 3 (Feb. 28, 2014).

Marla E. Wider, Chris Saporita & Joseph A. Siegel, *EPA Update*, N.Y. Envtl. Law., at 7 (Fall/Winter 2013).

Hannah J. Wiseman, *Urban Energy*, 40 Fordham Urb. L.J. 1793, 1795 (2013).

Michael Allan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 Fordham Urb. L.J. 1835 (2013).

Randall C. Young, *DEC Update*, N.Y. Envtl. Law., at 16 (Fall/Winter 2013).

Josh Zaharoff, *The Efficiency of Energy Efficiency: Improving Preemption of Local Energy Conservation Programs*, 37 N.Y.U. Rev. L. & Soc. Change 783 (2013).

UPCOMING EVENTS

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 19–21, 2014

Local Solutions: Northeast Climate Change Preparedness Conference (sponsored by Antioch University New England and EPA Regions 1 and 2), The Center of New Hampshire at the Radisson Hotel, Manchester, New Hampshire. For information, see http://www.antiochne.edu/innovation/climate-change-preparedness/.

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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ENVIRONMENTAL LAW IN NEW YORK (USPS 008-162, ISSN 1048-0420, EBOOK ISBN 978-1-5791-1260-8) is published monthly for $528 per year by Matthew Bender & Co., Inc., 1275 Broadway, Albany, NY 12204-2694. Periodical Postage is paid at Albany, New York and at additional mailing offices.

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