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Remediating Contaminated Sites in New York City Under the E-Designation Program

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I. INTRODUCTION

During the past few years, New York City has rezoned vast tracts of land to allow residential development in areas that historically were limited to manufacturing uses. Because these amendments to the New York City Zoning Map were approved after preparation of environmental assessment statements (EASs) *or* environmental impact statements (EISs) pursuant to the City Environmental Quality Review (CEQR),[1] developers and property owners often assume that they will be able to obtain building permits and proceed with their developments without further environmental review.

However, during the process of approving zoning amendments, many tax lots may be assigned an "E-designation" requiring mandatory review by the New York City Department of Environmental Protection's Office of Environmental Planning and Assessment (DEP) for evaluating the potential of contamination by hazardous materials as well as noise and air quality impacts.[2] As a result, developers eager to take advantage of the hot residential real estate market could find their projects delayed by an unanticipated environmental investigation and may have to modify their design plans during construction to accommodate mitigation measures or even perform disruptive post-construction investigations or building modifications. In some instances, the E-designation program may impose investigation or remedial obligations that go beyond those required by the New York State Department of Environmental Conservation (DEC).

This article will discuss the requirements and procedures that DEP has established under the E-designation program for

[1] Executive Order No. 91 of 1977, as amended, established CEQR and centralized most environmental review functions in two "co-lead agencies," the Department of Environmental Protection (DEP) and the DCP. To expedite environmental reviews, the City's CEQR process was substantially modified in 1991 by the CEQR Rules of Procedure (Title 62, Chapter 5 of the Rules of the City of New York) which provide that each City agency acts as lead agency for projects that it approves, funds, and/or directly implements.

[2] The DEP E-designation regulations for hazardous materials appear at Chapter 24 of Title 15 of the Rules of the City of New York. 15 RCNY § 24. The process for evaluating noise and air quality impacts is found in the air and noise chapters of the CEQR Technical Manual.

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addressing potential contamination from hazardous materials and provide practical advice on how to minimize delays that could be associated with the E-designation process.[3]

II. E-DESIGNATION LISTING PROCESS

A. Property Subject to E-Designation

The E-designation is a tool used when environmental reviews identify the potential for significant impacts from hazardous materials[4] contamination on tax lots that are likely to be developed as a direct result of rezoning.[5] CEQR requires environmental reviews for zoning map amendments that need approval pursuant to Sections 197-c and 197-d of the New York City Charter.

The potential for significant impacts related to hazardous materials can occur when elevated concentrations of hazardous materials exist at a site, when development creates new pathways of exposure to the hazardous materials, or when the activity increases the risks by using hazardous substances.[6] For example, contaminated soil or dust could be transported to adjacent sites during excavation or construction. Construction activities could cause contaminants to migrate offsite. Contaminated vapors from gasoline or chlorinated solvents from soil or groundwater may concentrate beneath impermeable barriers or migrate into adjacent buildings creating a potential health hazard.

Pursuant to Section 11-15 of the Zoning Resolution of the City of New York, three city agencies play key roles in implementing the E-designation program. DEP has adopted comprehensive regulations governing the implementation of the E-designation program for potential contamination from hazardous materials. DEP has identified certain types of facilities, uses and conditions that warrant an E-designation or at least require some level of investigation to determine if an E-designation is warranted.[7] The agency is also responsible for setting standards and procedures for assessing and remediating contamination from hazardous materials, determining when proposed developments must comply with the requirements of the E-designation program, as well as finding when those requirements have been satisfied.[8] As will be discussed in more detail later, DEP has developed three types of approvals: Notice of No Objection, Notice to Proceed, and Notice of Satisfaction.

The New York City Department of City Planning (DCP) has the primary responsibility for identifying tax lots that are to be assigned an E-designation in connection with a zoning map amendment. DCP may assign an E-designation to tax lots when the agency determines that a tax lot has a potential for development and where there is a possibility of contamination from hazardous materials.[9] DCP will generally make this determination based on the current or past uses of the affected parcel or proximity to a manufacturing or commercial site. When a tax lot is proposed for E-designation pursuant to an application for rezoning under Section 197-c and Section 200 or Section 201 of the City Charter because of the potential for hazardous material contamination, DCP is required to notify the property owner no less than 60 days prior to such designation.[10]

The CEQR Technical Manual contains a list of actions that may require hazardous materials assessments. Developers are advised to examine sites that have been potentially impacted from the presence of existing or historical land uses involving hazardous materials to evaluate possible exposure pathways[11] and potential impacts on public health or the environment. Actions that may require hazardous materials assessments include but are not limited to the following:

[3] This article does not address noise or air quality impact E-designations.

[4] 15 RCNY § 24-03 defines "hazardous materials" as any material, substance, chemical, element, compound, mixture, solution, product, solid, gas, liquid, waste, byproduct, pollutant, or contaminant which when released into the environment may present a substantial danger to the public health or welfare or environment, including but not limited to those classified or regulated as "hazardous" and "toxic" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*; List of Hazardous Substances, 6 NYCRR Part 597; New York City Hazardous Substances Emergency Response Regulations, 15 RCNY Ch. 11; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*; Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601; Transportation of Hazardous Materials Act, 49 U.S.C. § 5101; Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*; and/or Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*

[5] The E-designation regulations promulgated by DEP identify two classes of sites subject to the program — development sites and project sites. 15 RCNY § 24-03 defines a "development site" as one or more tax lots within the rezoned area that are not under the control or ownership of the applicant seeking the rezoning and that are likely to be developed as a result of the zoning map amendment. A "project site" refers to one or more tax lots within the rezoned area that are under the control or ownership of the applicant seeking to remove the E-designation and that the applicant proposes to redevelop.

[6] Examples of actions that can lead to exposure of hazardous materials include excavation, dewatering, grading, or construction activities on a contaminated site; creating fugitive dust from exposed soils containing hazardous materials; demolition of buildings and structures that include hazardous materials such as asbestos and lead-based paint; and building on former landfills or swampland where methane production is occurring or may occur in the future.

[7] 15 RCNY § 2404; 15 RCNY App. A.

[8] 11-15(c) of the Zoning Resolution of the City of New York (ZR 11-15).

[9] The maps of E-designated lots are available at www.nyc.gov/html/dcp/html/zone/zmapintr.shtml. The zoning maps will display an (E) symbol indicating the general location of properties that have CEQR (E) Requirements Declarations. A chart of the CEQR (E) Requirements Declarations is available at www.nyc.gov/html/dcp/pdf/zone/ceqr.pdf.

[10] 62 RCNY § 2-02(e); ZR 11-15(d).

[11] Potential routes of exposure to hazardous materials can include direct contact between contaminated soil and skin (dermal), breathing of volatilized chemicals or chemicals associated with suspended soil particles (inhalation), swallowing soil (ingestion), or drinking contaminated water (oral). Public health may also be threatened when soil gases or soil vapors migrate naturally through the subsurface or along preferential pathways (i.e., building foundations, utility conduits, duct work, etc.) and concentrate under barriers of low permeability (i.e., concrete slabs, asphalt, clay liners, etc.) resulting in potentially explosive conditions.

- Rezoning a manufacturing zone to a commercial or residential zone;
- New development in a manufacturing zone;
- Development adjacent to a manufacturing zone or existing manufacturing or commercial facilities (including nonconforming uses) listed in Appendix I of the Technical Manual;
- Rezoning from commercial to residential, including mixed-use zones, if the rezoned area would have allowed a use that may have stored, used, disposed of, or generated hazardous materials;
- Development on a vacant or underutilized site if there is a reason to suspect contamination or illegal dumping;
- Development in an area with fill material of unknown origin;[12]
- Development on or adjacent to a solid waste landfill site, inactive hazardous waste site, power-generating/transmitting facility, or railroad tracks or a railroad right-of-way;
- Development where underground and/or aboveground storage tanks are on or adjacent to the site;
- An action directly affecting a site on which asbestos-containing materials or transformers possibly containing PCBs are present;
- Development adjacent to former municipal incinerators or coal gasification sites; or
- Granting of variances or permits allowing residential use in manufacturing zones.

DEP has codified a list of facilities, activities or conditions requiring hazardous materials assessment.[13] If the affected parcel or an adjacent property has had one of the environmentally suspect activities or conditions, DCP is required to perform a preliminary screening assessment, which generally consists of a review of historical documentation or regulatory records to determine current or past uses of the potential development site.

B. Interaction with the Department of Buildings

Perhaps the key enforcement mechanism of the E-designation process is that the New York City Department of Buildings (DOB) is prohibited from issuing building permits for tax lots with E-designations without first receiving a notice from DEP that the environmental requirements for the lot have been satisfied.[14] The DOB E-designation process operates much like that used for Landmarks Preservation Commission approval. After receiving notice of an amendment to the zoning map from DCP, DOB will record the E-designation in its Building Information System (BIS) Property Profile Overview Screen to alert examiners and clerks that DEP approval is a required application item for the proposed work. During their initial review, plan examiners and clerks will review the application to make sure that the required DEP approval is obtained.[15] Where there is a merger or subdivision of tax lots or zoning lots with an E-designation, the E-designation will apply to all portions of the property.[16] Thus, when an E-designated lot is subdivided, all the newly created lots will be E-designated.

For building applications involving E-designated lots, the DOB will not issue any approvals, building permits, sign-offs, certificates of completion, Temporary Certificates of Occupancy (TCO) or final Certificates of Occupancy (COO) without either a Notice of No Objection or a Notice to Proceed from DEP for the following categories of construction activity:

- Any development;
- An enlargement, extension or change of use involving a residential or community facility use; or
- An enlargement that disturbs the soil on the lot.[17]

DOB will not issue any application approvals until it receives either a DEP Notice of No Objection or a Notice to Proceed, and will not issue any final sign-offs until receipt of a Notice of Satisfaction (when a Notice to Proceed was previously issued) or a previously issued Notice of No Objection.[18] Although the E-designation program is comprehensive, there are a number of moving parts that sometimes do not mesh as seamlessly as envisioned and can result in knotty problems for regulators and developers. For example, sometimes a developer knowing that a zoning change is imminent may submit a building permit

[12] Fill material historically used in New York City has included hydraulic dredge material that may contain petroleum and heavy metal contamination, and ash from burning garbage in residential and commercial buildings in the City. Fill material may produce methane if it is composed of organic wastes and/or if present in former low-lying swamp areas. Thus, it is not uncommon to find elevated levels of hazardous materials in fill material where the past and current activities may not suggest that contaminants should be present. This is especially true for properties that are adjacent to waterways where large volumes of fill material may have been used. In some cases, fill material can form preferential pathways for the movement of contaminants especially when utility conduits have been filled with permeable material.

[13] 15 RCNY App. A.

[14] Operations Policy and Procedure Notice #2/05 (OPPN #2/05). This memo applies to DOB approvals affected by ZR §§ 11-15 and 93-051 (Hudson Yards District). OPPN #2/05 summarizes procedures and requirements for permit applications affecting lots that have an hazardous materials E designation as set forth in Operations Policy and Procedure Notice #1/03 (OPPN #01/03). OPPN#2/05 also establishes that these procedures also apply to lots located within the Special Hudson Yards District that have E designations for potential hazardous materials contamination, noise and/or air quality impacts.

[15] *Id.* BIS identifies the E-designation lots in the Little E Restricted field as HAZMAT/NOISE/AIR, as appropriate.

[16] *Id.*

[17] OPPN #2/05.

[18] OPPN #2/05.

application so that construction could begin as soon as the zoning change is approved. If DCP has not yet completed the E-designation process, the BIS might not reflect any need for DEP approval. Thus, DOB could issue a building permit without requiring any approval from DEP and then be notified that the parcel has been assigned an E-designation. What happens if the developer then proceeds with the project without compliance with the DEP requirements? The DEP E-designation regulations prohibit the DOB from issuing any TCO or COO without DEP issuing a determination that the developer has complied with its E-designation requirements.[19] Thus, when the developer applies for its TCO or COO, the BIS will indicate that the developer must obtain DEP approval. In such case, DEP could require the developer to perform post-construction investigation such as having to drill through the slab to collect soil vapor samples or implement post-construction modifications such as a vapor barrier.

Moreover, any permit issued by the DOB for work on an E-designated application is conditioned upon full satisfaction of all DEP environmental requirements related to the hazardous materials E-designation. Thus, a failure to obtain the appropriate DEP approval prior to an application for certificate of occupancy, or prior to final inspection and verification of compliance with applicable law, can result in a revocation of the permit. For example, if a developer obtains a DEP Notice to Proceed but DEP refuses to issue a Notice of Satisfaction because of failure to adequately comply with DEP requirements, DOB may revoke the permit.[20]

If projects are modified after construction, it is possible that further excavation could cause previously unanticipated health impacts to residents or construction workers or may result in significant impacts in the future. An applicant may have to file a post-approval amendment (PAA) and obtain DEP approval of the modified application or plans where the PAA would disturb soil or increase the scope of the remedial work previously approved by DEP.[21]

Another question that frequently arises is how does the E-designation process work when a redevelopment involves only an interior renovation to an existing building (e.g., conversion of industrial space to residential units) where no exposed soil will be disturbed. Project proponents frequently argue that since no soil is being disturbed, the E-designation procedures concerning contamination from hazardous materials should not be triggered and DOB should not hold up a building permit until the developer prepares a work plan acceptable to DEP. If the issue of concern is the potential for disbursal of asbestos fibers from asbestos-containing materials within a building to be renovated, DEP could issue a Notice of No Objection as long as the renovation complies with the DEP's asbestos workpractice rules. However, where the current or former use involved chemicals that could have infiltrated or been absorbed into building materials such as floor beams or walls, or if the structure is likely to contain lead-based paint, DEP could require the applicant to perform certain indoor air sampling.

Thus, it is advisable for developers who believe that an E-designation is likely to be imposed on a property to consult with DEP about the proposed construction plan as soon as possible. If a developer is unsure if a particular lot has or is likely to be assigned an E-designation, the developer should contact DCP.

III. E-DESIGNATION INVESTIGATION AND REMEDIATION PROCESS

Many sites in urban areas contain soils and/or groundwater that may be contaminated. However, the presence of hazardous materials on a site may not be obvious. Sites that appear to be clean and have no commonly known sources of contamination may have been affected by past uses on the site or in the surrounding area, or by fill material of unknown origin.

Developers with projects on E-designated sites must complete and submit to DEP a Phase I Environmental Site Assessment conducted in accordance with the requirements of the E-1527 "Standard Practice for Environmental Site Assessments: Phase I Site Assessment Process" developed by the ASTM International for Development Sites; Certified Architectural Plans; and a detailed written description of the proposed development project. Based on the review of the aforementioned material, DEP may determine that hazardous materials may have impacted a site. If this is the case, DEP will request a Phase II Environmental Site Assessment (ESA) to characterize the type and potential extent of contamination from those materials.

A Phase II scope of work (Phase II protocol) and Health and Safety Plan (HASP) prepared in accordance with the CEQR Technical Manual must be approved by DEP prior to implementation.[22] Because DEP sampling protocols may differ in some respects from that required by DEC, the developer should

[19] 15 RCNY § 24-07(b) and (c).

[20] OPPN #2/05. OPPN #2/05 also discusses DOB's permit revocation procedures. In general, DOB will issue a letter of intent to revoke that may contain an immediate order to stop work. If the applicant does not provide an adequate response within 10 days or an extended grace period approved by DOB, then DOB will issue a Revocation of Approval and Permit letter with an immediate order to stop work. If the applicant cures the violation, DOB will issue a Rescission of Notice of Intent to Revoke letter.

[21] OPPN #2/05.

[22] 15 RCNY § 24-06(b).

consult with DEP prior to developing the Phase II protocol.[23] Once DEP approves the Phase II protocol and HASP, the Phase II Investigation may begin.

Approval of a Phase II protocol does not eliminate the need to comply with any reporting requirements under state or federal environmental laws. If a petroleum spill or discharge or evidence of a reportable quantity of hazardous materials or hazardous wastes that poses a potential or actual threat to public health or the environment is discovered on the affected tax lot, the developer must comply with all Federal, State, or local notification requirements.[24]

IV. REMEDIATION PLANS

Upon completion of the Phase II sampling, a Phase II ESA Investigative Report must be prepared and submitted to DEP.[25] Based on DEP's review of the Phase II sampling results, DEP may require preparation and implementation of a Remedial Action Plan (RAP) and a site-specific HASP.[26] DEP should be notified at least 10 days prior to implementing the RAP. DEP's goal is to eliminate, reduce to acceptable levels, or control sources of contamination that may result in a significant impact on public health or the environment. DEP allows a risk-based approach in determining the proper course of remediation. A risk-based approach evaluates the current and proposed future land use of the site along with the proposed action (i.e., construction, excavation, etc.) against the known contaminants of concern and potential exposure pathways in determining what remedial course of action, if any, is appropriate for a site.

The RAP may require, for example, excavation of contaminated soil, removal of underground storage tanks (including dispensers, piping, and fill-ports), placement of at least two feet of clean soil in all areas that will either be landscaped or otherwise not covered by an impermeable cap, or installation of a vapor barrier to prevent migration of contaminated vapors from soil or groundwater. DEP may allow historically impacted soils such as "Urban Fill" to be addressed as part of the construction for redevelopment of the property. In other words, the removal of impacted soils can be combined with the demolition and excavation activities for the new project.

The DEP will generally use DEC guidance for determining remedial objectives. DEC has not promulgated formal regulations for remediating contaminated sites. Instead, DEC has issued a series of guidance documents that establish cleanup goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for Volatile Organic Compounds (VOCs), Semi-volatile Organic Compounds (SVOCs), heavy metals, pesticides and PCBs is the Technical and Administrative Guidance Memorandum (TAGM) 4046. The recommended soil cleanup objectives apply to in-situ (non-excavated) soil and excavated soil that will be placed back into the original excavation or consolidated elsewhere on a site. Since December 2000, TAGM 4046 has also been used to develop soil cleanup objectives for gasoline and fuel oil contaminated soils that will be remediated in-situ. The Spill Technology and Remediation Series (STARS) Memo #1 provides guidance on the handling, disposal and/or reuse of ex-situ (excavated) non-hazardous petroleum-contaminated soil. STARS Memo #1 also provides guidance on sampling soil from tank pits and stockpiles. Excavated petroleum-contaminated soil must meet the guidance values listed in STARS Memo #1 before it can be reused off-site. The principal guidance document for establishing groundwater cleanup goals is the Technical and Operational Guidance Series (TOGS) # 1.1.1.

The groundwater of the five boroughs is classified as Class GA groundwater except where the criteria for saline groundwater are met. DEP will usually follow the DEC Water Quality Regulations for Surface Waters and Groundwater[27] and the TOGS #1.1.1 when evaluating groundwater contamination. However, if volatilization of contaminants from groundwater is a concern, DEP will look to the draft soil vapor guidance developed by DEC and the State Department of Health.

After a remediation action plan has been reviewed and approved, DEP will issue a Notice to Proceed (discussed below) to the DOB, announcing that all permits except a TCO or COO may be issued.[28]

The DEP-approved RAP must be implemented within a year. Upon the expiration of the one-year approval period, the developer will have to resubmit a new RAP for approval unless a request for an extension is filed at least 30 days before the RAP expiration date and DEP has approved the extension.[29]

It should be noted that implementation of any remedial measures does not absolve the site owner from additional investigation and remedial measures in the future should conditions warrant (e.g., site use changes). In addition, DEC or other agencies may require additional investigation or remedial measures.

[23] The Phase II ESA Work Plan for E-designated sites generally will include soil samples collected just below grade and at the depth of the bottom of the proposed excavations. If the water table is near the elevation of the bottom of the proposed excavation, groundwater samples should also be collected in case dewatering will be required and to ensure safety of the construction workers. The potential for off-gassing of contaminants into the proposed structure will also be evaluated. In accordance with the CEQR Technical Manual, DEP will require that each sample be analyzed by a State Department of Health (DOH) laboratory certified by the Environmental Laboratory Accreditation Program (ELAP) for: Volatile Organic Compounds (VOCs) by EPA Method 8260; Semi-volatile Organic Compounds (SVOCs) by EPA Method 8270; Pesticides/PCBs by 8081/8082; and Target Analyte List (TAL) Metals. TAL Metals are metals that are commonly found in the environment and that are typically sampled for in site investigations.

[24] 15 RCNY § 24-10.

[25] 15 RCNY § 24-06(f).

[26] 15 RCNY § 24-06(i).

[27] 6 NYCRR Parts 700–705.

[28] 15 RCNY § 24-07(b)(2).

[29] 15 RCNY § 24-07(b)(3).

In addition to a RAP, the applicant must also prepare a site-specific HASP to protect the health and safety of all on-site personnel. The site-specific HASP must describe each of the potential hazards at the site and describe the methods to mitigate these hazards. Special attention must be given to the methods to monitor for potential exposure and the various levels of protection required for the tasks to be completed at the site. The site-specific HASP should also describe any community monitoring that may be needed.

Once the items of concern outlined in the RAP or a substantially equivalent remediation are approved by DEC, the work must be summarized in a Closure Report that is certified by a Professional Engineer or Architect. This report should demonstrate that all remediation activities have been implemented.[30] If a petroleum spill was addressed under DEC oversight as part of the RAP, a copy of the State's spill case closure letter should be included in the Closure Report. It should also include copies of manifests for soil removed from the site and describe the installation of any vapor barriers.

Upon review and approval of the Closure Report, DEP will issue a Notice of Satisfaction to DOB. This notice shall include a description of any post-construction remedial obligations such as an operation, maintenance and monitoring (OM&M) program that may be required beyond the issuance of a TCO or COO.[31]

It should be noted that if a developer has determined that a Phase II ESA is warranted, the results of a Phase I, Phase II Work Plan and the Sampling HASP can be submitted to DEP for review at the same time. Likewise, the Phase II report, RAP and Remediation HASP may also be submitted together.[32]

V. DEP APPROVALS

DEP will issue approvals indicating if the proposed development would affect potential hazardous material contamination on the subject parcel(s), if remediation is necessary in connection with the permit, and if the applicant has completed the remediation work to the satisfaction of the DEP.

A. Notice of No Objection

If DEP determines that the proposed E-sensitive application work does not present hazardous material contamination concerns (or that the E-sensitive application work is not subject to ZR § 11-15), DEP will issue a Notice of No Objection letter to the Department of Buildings. This is typically limited to projects that do not require subsurface activities such as excavations for foundations or utilities.

The Notice of No Objection letter states that DEP does not oppose issuance of an application approval and permit, and that DEP approval is not required upon completion of the E-sensitive application work. Thus, a Notice of No Objection will satisfy both the DEP Notice to Proceed required item and the DEP Notice of Satisfaction required item, and DOB may issue a permit without further review of the application work by DEP.

The Notice of No Objection is issued to the appropriate DOB Borough Commissioner. The notice identifies, at a minimum, the application number, street address, block and lot. In addition, DEP indicates its approval and date of approval on one complete set of application plans. The Notice of No Objection is retained in the DOB job folder.[33]

B. Notice to Proceed

If DEP determines, based upon review of the Phase II ESA testing results, that remedial work is required because of the potential for hazardous material contamination on the E-designated parcel(s), DOB will not issue a demolition, excavation or building permit until it receives a Notice to Proceed from DEP. The Notice to Proceed indicates that DEP has approved the RAP and site-specific HASP, and that the application has met the environmental requirements related to the E-designation provided that all such requirements are fully implemented and a Closure Report is submitted to DEP for review and approval upon completion of the permitted work.

DEP issues the Notice to Proceed to the appropriate DOB Borough Commissioner. The Notice to Proceed identifies, at a minimum, the application number, street address, block and lot. Upon receipt of the Notice to Proceed, DOB will issue the necessary permits. However, the permits are subject to DEP's final review and approval of the completed application work. The Notice to Proceed is retained in the DOB job folder.[34]

C. Notice of Satisfaction

DEP will issue a Notice of Satisfaction (NOS) to the appropriate DOB Borough Commissioner after the Closure Report has been reviewed and approved by DEP. The NOS states that the work has met all environmental requirements related to the E-designation and identifies any OM&M requirements. Once the NOS is received, DOB may issue the COO.

If all impacted soil has been removed, a Final Notice of Satisfaction (FNOS) may be issued to the appropriate DOB Commissioner and DCP indicating that there are no longer any E-requirements for the property and requesting that the E-designation be removed. However, these types of final NOS are very rare. In fact, only three have been issued to date. Moreover, it should be noted that DCP will remove the E-designation only when it has received a Notice of Satisfaction for all lots on a given block specified in the CEQR declaration for the rezoning.[35]

[30] 15 RCNY § 24-07(c)(1).
[31] 15 RCNY § 24-07(c)(2).
[32] 15 RCNY § 24-06(g).
[33] OPPN #01/03.
[34] OPPN #01/03.
[35] 15 RCNY § 24-08(c).

VI. COORDINATION WITH THE DEC BROWNFIELD PROGRAM

In some instances, an applicant may seek to address potential impacts from hazardous materials identified in a Draft Environmental Impact Statement by enrolling in the DEC Brownfields Cleanup Program (BCP).[36] In such cases, applicants often assert that there is no need for the tax lot to be assigned an E-designation or that the E-designation process will be addressed through the BCP and therefore no DEP approvals are required before issuance of DOB permits. This poses concerns particularly where the rezoning would allow the developer to be issued a building permit as a matter of right without any further review from DCP or DEP. A developer may build a structure as-of-right if the DOB determines that the project complies with the zoning and the building code.

Because it is possible that an applicant may not be accepted into the BCP or that the applicant could elect to withdraw from the BCP, DEP will generally require the applicant to enter into a Restrictive Declaration or other contingency to ensure that future development would proceed in a manner protective to public health.[37]

VII. CONCLUSION

The E-designation program is a powerful tool for remediating contaminated sites. Because it is linked to development projects, it operates in some ways like some state property transfer statutes such as the New Jersey Industrial Site Recovery Act[38] and the Connecticut Transfer Act.[39] Like those state laws, the E-designation can result in unanticipated environmental costs and project delays. For this reason, DEP conducts pre-submission meetings with applicants to discuss the requirements and scheduling of the E-designation program.[40] DEP also reviews submissions and provides comments within 30 days of submission.[41] DEP strongly encourages applicants contemplating filing an E-sensitive application to consult with DEP prior to submitting the required documentation to expedite the approval process.

The contents of this article are the opinions of the authors and do not represent the official position of the New York City Department of Environmental Protection.

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[36] N.Y. Envtl. Conserv. L § 27-1401 *et seq.*

[37] The E-designation rules apply where one or more tax lots are in an area that is subject to a zoning amendment and are not under the control or ownership of the person seeking the zoning amendment and have been identified as likely to be developed as a direct consequence of the rezoning action. 15 RCNY § 24-02. Therefore, for those lots under the control or ownership of the person seeking the zoning amendment DEP requires a Restrictive Declaration to ensure that required sampling and remediation occur prior to issuance of any DOB permit and that development otherwise proceeds in a manner that is protective of human health and the environment. The Restrictive Declaration is recorded in the land records and is binding on all future owners or lessees or assigns. Thus, the Restrictive Declaration can be an effective tool for ensuring that the site use remains unchanged and that no alterations occur to the site without DEP approval to ensure that potential impacts from hazardous materials have been properly addressed.

[38] N.J. Stat. Ann. § 13:1K-6 *et seq.*

[39] Conn. Gen. Stat. § 22a-134 *et seq.*

[40] 15 RCNY § 24-09(a).

[41] 15 RCNY § 24-09(b).

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LEGAL DEVELOPMENTS

AIR QUALITY

Discovery Disputes Resolved in Architectural and Industrial Maintenance Coatings Case

Sherwin-Williams, Co. and the National Paint and Coatings Association, Inc. (NPCA) sued the State of New York claiming its architectural and industrial maintenance coatings (AIM) rules were unconstitutional. (*See* 15 Envtl. L. in N.Y. 229 (Nov. 2004) for another ruling in this matter.) Discovery disputes were the focus of this decision. The State served a discovery request on NPCA that required responses from the individual members, including identification of the members. NPCA argued the discovery request violated its First Amendment rights to assemble freely and that its members were not parties to the suit. It also claimed the State sought data that contained privileged and confidential trade secrets.

The District Court for the Northern District of New York held that requiring NPCA to disclose its members' identities was not a First Amendment violation because there was no implication that the information would be used to harass the members or otherwise adversely affect the group's membership. However, the court found the particular interrogatory that asked how each member voted did violate the First Amendment and quashed it.

The court agreed with the plaintiffs that the State was required to serve nonparty discovery requests on each NPCA member, rather than through the NPCA. The court also narrowed the time period for the information sought by the State, from nine years of records to three.

The court found that discovery seeking sales volume, research on AIM coatings, and any financial burden caused by the AIM regulations was privileged if not otherwise publicly available. However, the court found that a marketing product sold by NPCA provided much of the requested information. Additionally, information the Environmental Protection Agency (EPA) designated ineligible for a confidentiality exemption must be disclosed. The court issued a protective order to the extent that some of the business information of NPCA or its members was confidential business information or was declared confidential by EPA. The order could be invoked by NPCA individual members if served with a subpoena by the State. The discovery deadline was extended until September 15, 2006. *Sherwin-Williams Co. v. Spitzer*, Civil No. 1:04-CV-185(DNH/RFT), 2005 U.S. Dist. LEXIS 18700 (N.D.N.Y. Aug. 24, 2005).

Inmate's Negligence Claims for ETS Exposure Survived Summary Judgment

An inmate sued the City of New York for injuries he claimed he suffered while in different jails in New York City. He argued that being exposed to second hand smoke caused his bladder cancer, and argued the City defendants acted either intentionally or negligently by failing to provide a smoke-free environment. The City argued the inmate's cause of action required a finding that the City owed him a special duty. The court rebuffed the argument. Municipal defendants had an obligation to prevent unsafe conditions for those in their custody. The court denied the City's motion for summary judgment. The court then ordered the City to produce documents in response to the inmate's discovery demand, including records pertaining to cigarette sales at the commissaries of the City jails. The City had stipulated it would search for the sales records in 2004, but did not. The court set a deadline for the production of the records or an affidavit why the records did not exist. If the City missed the deadline it would be precluded from disputing that it sold large quantities of cigarettes to inmates. The City was also ordered to turn over any studies of air quality in the jails during the relevant period. *Marquez v. City of New York*, N.Y.L.J., April 21, 2005, p. 18, col. 1 (Sup. Ct. New York Co. Apr. 5, 2005).

ASBESTOS

Death Benefits for Asbestosis Victim Possible Under Jones Act

The decedent in this case worked as an oiler aboard a dredge in the New York Harbor following a career working as a welder where he was exposed to asbestos. Decedent retired less than a year after starting the oiler work and filed a disability claim against the employer Weeks Marine, Inc. for asbestosis. The decedent claimed Weeks was solely responsible for compensation because it was the last employer to expose him to asbestos. During discovery in the administrative proceeding before the U.S. Department of Labor, it was revealed that the decedent had entered settlement talks with asbestos manufacturers without the consent or knowledge of Weeks. Accordingly, the decedent's disability claim under the Longshore and Harbor Workers' Compensation Act (LHWCA) was dismissed. Subsequently, his widow sought death benefits from Weeks. Her claim was dismissed because it was found the decedent was excluded from LHWCA coverage because decedent was a member of a crew on a vessel and therefore not eligible under the LHWCA.

On appeal before the Second Circuit, the court held that the dredge was a vessel. However, the court found the decedent's work was substantially connected to the vessel and that his widow could be eligible for death benefits under the Jones Act for benefits. *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138 (2d Cir. 2005).

ENERGY

Abandoned Well Mooted Spacing Dispute

This decision regarding the well spacing of the County Line natural gas field mooted an earlier ruling requiring a hearing. In a March 2005 decision, the DEC Assistant Commissioner had found the spacing along the western boundary of the field required adjudication. (*See* 16 Envt. L. in N.Y. 163–164 (Aug. 2005) for the decision.) However, the Assistant Commissioner had since learned that the well challenged by Western Land Services, Inc. was plugged and abandoned, and therefore was

not pulling gas from Western Land's property. Because the unit was closed, Western Land no longer had an interest in the proceeding. The Assistant Commissioner found Western Land's appeal was moot and directed the Department of Environmental Conservation (DEC) to set the field-wide spacing as established. *In the matter of Field-Wide Spacing for the County Line Field*, DEC Project No. DMN-02-05 (DEC Ass't Comm'r Aug. 24, 2005).

Local Legislation

♦ A law required the New York City Taxi and Limousine Commission to approve one or more hybrid electric vehicle models for use as taxis by October 20, 2005. To qualify under this law, a hybrid electric vehicle need only be a commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine integrated with an electric propulsion system. NYC Local Law 72 (July 20, 2005) (Int. No. 664).

HAZARDOUS SUBSTANCES

CERCLA Defendant in Default Had No Meritorious Defenses

The Second Circuit reviewed a default judgment entered against Kevan M. Green and his company, Polymer Applications, Inc. for remediation costs. The State of New York had sued defendants for cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for a contaminated site in Tonawanda. Defendants failed to reply to the complaint and did not respond to the motion for a default judgment, of which defendants claimed they never received notice. When the District Court of the Western District of New York refused to vacate the default, defendants appealed.

The Second Circuit first rejected defendants' argument that because they did not get notice, the default was fatally flawed. The court held that under Rule 55(b)(2), notice was only required where a defendant had appeared in the action. While defendants had discussed remediation with the State and were represented by counsel, they had never actually participated in the action and the notice requirements under Rule 55(b)(2) did not apply.

Next, the court rejected defendants' argument that the default should be vacated because they had a meritorious defense and the State would not be prejudiced. The court found neither was true. First, the court reviewed the record to find that defendants' correspondence with the State was designed to delay the process and did not raise any defense. While they claimed they had affirmative defenses under CERCLA, they did not provide any affidavits or other evidence to support their allegations. Further, there was prejudice to the State as the pollution on the site could spread. The appeal was denied. *New York v. Green*, No. 04-4070-cv, 2005 U.S. App. LEXIS 17527 (2d Cir. Aug. 18, 2005).

No Successor Liability Without Continuity of Ownership

The State of New York sued National Service Industries, Inc. (NSI) under Section 107 of CERCLA to recover costs for remediation at the Blydenburgh Landfill in Islip. The State argued that NSI was the legal successor liable for the contamination caused by Serv-All Uniform Rental Corp. In 1979 DEC ruled that Serv-All had dumped over 50 drums of perchloroethylene in the landfill. Serv-All was sold in an Asset Sale Agreement in 1988 to Initial Service Investments, Inc. NSI purchased the stock of Initial in 1992 and Initial was merged into NSI in 1995. In 2001 the District Court for the Eastern District of New York held that NSI was Serv-All's legal successor under the substantial continuity test, and NSI was ordered to pay the State $12.5 million. The Second Circuit reversed holding the substantial continuity test had been rejected by the U.S. Supreme Court. (*See* 15 Envtl. L. in N.Y. 74–5 (April 2004) for the decision.) Successor liability was to be determined based on common law principles of corporate liability.

On remand the District Court found it unnecessary to determine whether state common law or federal common law was to be used. NSI was not liable under either. The court found no *de facto* merger had occurred. Under the now-defunct substantial continuity test, the fact that key employees and all assets remained would be enough to show NSI was liable. But a basic tenet of a *de facto* merger was that there must also be a continuity of ownership. There was no continuity of ownership here. The court rejected the State's argument that a "relaxed" standard of continuity of ownership similar to what was used in products liability cases should apply. To impose liability on NSI would require it to pay to cleanup property it never owned. All claims against NSI were dismissed. *New York v. National Service Industries, Inc.*, 2005 wl 1862617 (E.D.N.Y. July 28, 2005).

Criminal Conviction Required Knowing Violation

M&H Used Auto Parts & Cars, Inc. and its owner were tried and convicted of violating the Environmental Conservation Law (ECL) by dumping oil and antifreeze into State waters. Specifically, they were found to have violated ECL § 71-2712(4) — endangering public health, safety or the environment; § 17-0701(a)(a) — discharging pollutants into State waters without a permit; and § 71-2711(3) — endangering the public or the environment by releasing petroleum (two counts) and ethylene glycol (two counts). They appealed, arguing that they did not knowingly commit the crimes.

The Appellate Division held that the mental state "knowingly" applied to each of these environmental crimes. It likened the statutes to the federal Resource Conservation and Recovery Act (RCRA), where proof of the knowing element did not require proof that the person knew he was breaking the law, only that he knew he was committing the act. In this case, the evidence showed a sump pump was used to discharge oil and antifreeze into the sewer system, which eventually dumped the pollutants into State waters. The defendants conceded that petroleum and ethylene glycol (antifreeze) were hazardous to the public health or environment. The court found defendants' argument that they did not know that contaminants poured into storm sewers would end up in natural waters "belie[d] common sense." The court

refused to disturb the jury findings and upheld the fines of an unspecified amount. *People v. M&H Used Auto Parts & Cars, Inc.*, 799 N.Y.S.2d 784 (App. Div. 2d Dept. Aug. 8, 2005).

Fraud Claims Barred by Terms of Mortgage

Bram Manufacturing Corp. mortgaged property in Congers through the Bank of New York (BONY) and was guaranteed by several parties. The property, however, turned out to be contaminated by trichloroethylene, and cleanup expenses far outweighed the value of the property. When Bram defaulted on the mortgage, BONY sought payment from both Bram and the guarantors.

The guarantors argued that BONY fraudulently concealed the contamination when they entered the guarantee. They also claimed they were fraudulently induced by BONY. These theories, plus the special facts doctrine, were raised as affirmative defenses. According to the guarantors, they provided justification for not making good on the guarantee. Not so, held the court. The guarantee language provided that the guarantors waived any right to impose any defense against BONY in collecting payment. Additionally, the theory of special facts failed here because BONY was not a fiduciary to the guarantors and it did not have superior knowledge. Certain of the guarantors had owned the property prior to execution of the guarantee. The court said it was "disingenuous" of the guarantors to expect BONY to be more diligent in examining the property than they, the former owners, were. There was no evidence that BONY had performed a Phase I environmental site assessment and hidden the results.

The court refused to impose liability on BONY under CERCLA's lender liability provisions. The court did not find any indication that BONY exercised the control over the management of the property required to impose such liability. *Bank of New York v. Bram Manufacturing Corp.*, 2005 N.Y. Slip Op. 51130(U), 8 Misc. 3d 1017A (Sup. Ct. Rockland Co., July 20, 2005).

Legislation

♦ Under a new law, municipalities may issue waivers of property tax interests, penalties and other charges for brownfield sites. The tax districts may allow the waivers on any property subject to a brownfield site cleanup agreement by a volunteer under ECL § 27-1409. 2005 N.Y. Laws 221 (July 12, 2005) (S3044).

♦ A companion statute to Chapter 221 above provides for revocation of the waivers on interest, penalties or other charges on brownfields properties under certain circumstances. Failure of a brownfields developer to get a certificate of completion or the revocation of a certificate is grounds for a tax district to revoke any waiver of interest, penalties or other charges received. The law amends Real Property Tax Law § 924-b. 2005 N.Y. Laws 219 (July 12, 2005) (A8910).

HISTORIC PRESERVATION

Sign Restrictions in Historic District Were Lawful

The District Court for the Southern District of New York reviewed whether an ordinance restricting signs in a historic district violated the First Amendment. Under the ordinance, any changes within the historic district of Cold Springs required a Certificate of Appropriateness (COA) from the Review Board. Any alteration or improvement to property must retain the historic architectural features and be compatible with the historical character and exterior features of neighboring properties. The plaintiff in this case, a homeowner living in the historic district, posted and wanted to continue to post, signs of a political nature. He argued the zoning code was a prior restraint and was unconstitutional.

The court found the restrictions were content neutral and therefore applied intermediate scrutiny. It found the restrictions served to further an important governmental interest in maintaining the architectural character of the district. The regulations were not more burdensome than necessary to achieve that goal. Residents wanting to change the appearance of their property, such as by altering their home or posting a sign, must go before the Review Board to obtain permission. If permission was denied there were alternative avenues of communication available. The court rejected the argument that the Board had unfettered discretion in granting a COA. Five factors in the ordinance were to be considered when determining compatibility with the neighboring properties. The content of a sign was not among the factors.

The court also reviewed Cold Spring's Signs and Placards rules. It found one section was unconstitutional. It required that anyone who wanted to post signs on public fora, such as utility poles, public streets and sidewalks, had to obtain a permit from the mayor. No guidelines or standards existed for consideration; issuance was entirely in the mayor's discretion. This was unconstitutional. A second chapter in the code was also unconstitutional as it allowed flags, badges or insignia but not signs. The court found it was a content-based restriction that did not serve a government interest. Enforcement of those portions of the code was enjoined. *Lusk v. Village of Cold Spring*, No. 04 Civ. 8633 (CM)(LMS), 2005 U.S. Dist. LEXIS 18021 (S.D.N.Y. Aug. 19, 2005).

Sale of Building Did Not Violate Gift Clause of Constitution

The City of New York agreed to sell the Huntington-Hartford Building on Columbus Circle in Manhattan to the Museum of Arts and Design. The Museum planned to change the exterior. Opponents of the sale claimed it violated the Gift and Loan clause of the New York State Constitution. According to the plaintiffs, the terms of the sale were too good. The City allowed $4 million of the sales price to be interest free for five years and would provide $3.075 million to the Museum from the City budget in the next two years, according to the plaintiffs. The City defended itself saying that by contributing to a public

museum, the money was used for a public purpose and did not violate the law.

The Supreme Court stated that as New York was the country's "preeminent cultural center," public support of the arts served a vital municipal purpose. The $3 million from the City was a small portion of the $20 million needed for the renovations. Additionally, as the sales price of the building exceeded its appraised value, there was no gift. The price would dip below the appraised value only if the building were opened within 24 months, because the City agreed to reduce the purchase price by $2 million in that event. The court found that was an acceptable incentive to encourage rapid transformation of the building, resulting in only a $150,000 differential between the sales price and the appraised value.

The court also rejected plaintiffs' argument that the sale would violate the New York City Charter as the property was inalienable under City law. The Huntington-Hartford building was not inalienable property, however, as it had not been designated a public place on the City map. Similarly, plaintiffs' argument that the sale required state legislative approval as it was held in trust for the benefit of the public failed. The building was not dedicated for a public purpose. *Landmark West! v. City of New York*, Index No. 103689/2005, 2005 N.Y. Slip Op. 25362, 2005 N.Y. Misc. LEXIS 1853 (Sup. Ct. New York Co. Sept. 1, 2005).

Effort to Force Recusal of Landmarks Commissioner Head Failed

Landmark West!, a group opposed to the sale and alteration of the Huntington-Hartford building, sued to stop the Commissioner of the New York City Landmarks Commission from participating in actions pertaining to the building. The group contended Robert Tierney had been influenced by the future owners of the building and that the landmark designation process had been corrupted.

After first finding no sign of undue influence on Tierney, the court then held that Landmark West! did not have the right legal vehicle to force action by the Commission. The Article 78 petition failed because it could not be used to restrain purely administrative actions — such as whether to hold a public hearing to debate the landmark status of the building. Additionally, a writ of mandamus did not apply to activities that were not legally-required, such as whether Tierney could talk to certain people, or whether he should recuse himself from decision-making. The court rejected the petition, but criticized the process of the Commission's decision, describing it as "internal, essentially private and effectively unreviewable." The court said the finding that the Huntington-Hartford building was not a worthy subject of a public hearing "may have affected the Commission's reputation as a guardian and arbiter of New York City's architectural heritage and undermined public confidence in the process."

The court also refused to apply sanctions against petitioners. While the relief they sought was denied, the court did not find the action was frivolous. The court noted that there was no provision for a review of the Landmarks Commission's decision and the petitioners' attempt to extend the law was not unreasonable. *Landmark West! v. Tierney*, Index No. 107387/05 (Sup. Ct. New York Co. Sept. 1, 2005).

INSURANCE

Continuous and Intentional Contamination Not Covered by Insurance

A lessee on property in Gates discovered a dry well containing PCBs, 1,1,1-trichloroethane (TCA) and other contaminants. The site became listed on New York's Registry of Inactive Hazardous Waste Disposal Sites. According to the owner of the site, Emerson Enterprises LLC, it was directed by DEC to remove the well and remediate the property. Emerson brought suit under CERCLA, as well as under state law. Emerson claimed a previous occupant had polluted the site and that others were strictly liable for the cleanup. Emerson also sued its insurers.

PG Insurance Co. was granted summary judgment and dismissed. PG did not provide any pollution liability on the premises, unlike the other insurers. The insurance policies by Glens Falls Insurance Co., Continental Insurance Co., and Firemen's Insurance Co. only provided coverage where the contamination was "sudden and accidental." The court said the phrase clearly applied only when pollution did not occur over a long period of time and was not intentional. However, under the facts of this case where the previous occupant's employees purposefully dumped chemicals into a hidden dry well for years, the contamination was neither sudden nor accidental. Summary judgments were granted to Glens Falls, Continental and Firemen's, finding these companies had no duty to defend Emerson. *Emerson Enterprises, LLC v. Kenneth Crosby-New York, Inc.*, 2005 WL 1902503 (W.D.N.Y. Aug. 9, 2005).

LAND USE

Zoning Denial for Religious School Could Impose Substantial Burden on Religion

The Village of Mamaroneck Zoning Board of Appeals (ZBA) denied the application of the Westchester Day School to build a new school building and make other changes to its Orthodox Jewish school. The instant legal battle was over whether the ZBA should be granted a motion to dismiss or summary judgment on several issues.

The District Court for the Southern District of New York reviewed whether the school had made a prima facie case under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by showing denial of the application imposed a substantial burden on the religious exercise of its institution. The court found that the school had established enough facts supporting the religious use of the project to survive a motion to dismiss. The new building would be used not just for education but as a chapel and to allow Jewish scholarship.

Next the court reviewed whether the denial of the application imposed a substantial burden. The District Court held the record showed there were issues of fact as to whether the ZBA actually

issued a complete denial or recommended modifications instead. Additionally, the issue of whether any such denial caused a substantial burden was still in dispute. Because the record was unclear, the court was unable to issue a summary judgment in favor of the ZBA.

The court considered whether the school had established a § 1983 claim. While there was no dispute that the exercise of religion was a First Amendment right, thus establishing the first prong of a Section 1983 claim, the school did not show that the ZBA action was motivated by a desire to trample that right. The school failed to plead the required nexus between the exercise of its First Amendment rights and the defendants' motivation to thwart the exercise of religion. The Section 1983 claim was dismissed. *Westchester Day School v. Village of Mamaroneck*, 379 F. Supp. 2d 550 (S.D.N.Y. July 27, 2005).

Town Supervisor Erred in Not Allowing Petition to Incorporate

A petition to incorporate the Village of Defreestville was rejected by the Town Supervisor of North Greenbush, and the group filing the petition, the Defreestville Area Neighborhood Association (DANA), brought an Article 78 proceeding. The Supreme Court found their petition to incorporate complied with the law and directed that it be granted. The appellate court affirmed.

The Article 78 petition was opposed not only by the Town Supervisor but by a citizens group called United North Greenbush, Inc., and Thomas and John Gallogly, property owners in the affected area. The Galloglys claimed that DANA lacked personal service over them because the complaint was sent to their attorney, not to them. However, the court found that the Galloglys failed to provide their addresses in their affidavits objecting to the petition to incorporate at the time of the public hearing. Accordingly, DANA was excused from not knowing the Galloglys' addresses.

Respondents argued that a certain parcel of land included in the boundaries of the proposed village had been annexed, making the petition to incorporate invalid because the boundaries were not accurate. The court held that because the land was annexed after filing of the petition to incorporate and was an action outside of DANA's control, the petition was not defective. The court also rejected the claim that the physical boundaries were not drawn with common certainty.

The final controversy was whether DANA had established that 500 regular inhabitants occupied the proposed territory. The court found DANA had diligently used public records such as voter enrollment and school tax rolls. The fact that the list of 2,752 included some people who had died or moved during the process did not render the list nugatory. The court refused to impose a standard requiring the list to be free from defect, such as used by the Second Department. The purpose for the list of inhabitants was to find that a minimum of 500 people resided in the area, and the court found it met that purpose. In response to a challenge not to the petition but to the process, the court held that the State Environmental Quality Review Act (SEQRA) was not applicable to village incorporation. *Defreestville Area Neighborhood Ass'n, Inc. v. Tazbir*, 2005 N.Y. Slip Op. 06539, 2005 N.Y. App. Div. LEXIS 8790 (3d Dept. Aug. 25, 2005).

Denial of Area Variance Was Improperly Based on Community Opinion

The Board of Appeals of Massapequa Park denied an application for an area variance. The Supreme Court annulled the determination and the Appellate Division affirmed. The appellate court found that the Board of Appeals had been improperly swayed by public opinion. The Board based its denial on "generalized community objections," in particular, relying on the uncorroborated complaints of two neighbors and failing to perform any empirical studies. Neither the topic of the area variance nor the substance of the community objections were provided in the decision. The court found the Board's decision was not based on substantial evidence and remitted the matter for issuance of the area variance. *Greenfield v. Board of Appeals of Massapequa Park*, 2005 N.Y. App. Div. LEXIS 8676 (2d Dept. Aug. 22, 2005).

Nonconforming Use Was Abandoned

The Appellate Division held that a nonconforming use of property had been abandoned and therefore, had lapsed. The property had been used as a mobile home park, but one year after being acquired by Suffolk County, in 1987, the County destroyed and removed all trailers on the property. The property was conveyed to a new owner in 1995, who conveyed it to another at an unknown date. The newer owner began using the lot for mobile homes claiming it was a legal nonconforming use. The Town Board of Southampton sued to enjoin the property from being used a mobile home park. The Supreme Court had held there was an issue of fact, but the appellate court found no dispute. Under Southampton Town Code, a nonconforming use is deemed abandoned when it has not been used continuously for three years. The court found no dispute that the property had not been used as a mobile home park for more than three years prior to the newer owner's possession. *Town Board of Southampton v. Credidio*, No. 2004-06803, 2005 N.Y. App. Div. LEXIS 8691 (2d Dept. Aug. 22, 2005).

Substantial Variance Would Adversely Change Area's Character

The owners of a 15,000-foot lot were denied area variances by the Islip Board of Zoning Appeals to divide their lot in half. Zoning in the district requires 11,250-foot lots with at least 25 feet for the rear yard set-back. The Supreme Court annulled the Board's determination, but was reversed by the Appellate Division. The appellate court gave due deference to the Board, which had found the variances were substantial and the difficulty self-created. If the variances were granted they would create two substandard lots, something the Board found would produce an undesirable change in the neighborhood. The owners' challenge of the Board denial was dismissed. *Ram v. Islip*, 2004-07508, 2005 N.Y. App. Div. LEXIS 8602 (2d Dept. Aug. 15, 2005).

Subdivision Denied Due to Right of Way Problems

The Planning Board of the Town of Philipstown approved an application for a two-lot subdivision. Under Town Law, the Planning Board had discretion in approving subdivision applications that would result in an existing private right-of-way being accessed by more than four lots. The decision implied that the subdivision application would require such a right-of-way. The Appellate Division agreed with the lower court that the Article 78 petition challenging the Planning Board's decision should be denied. The appellate court found the Planning Board's decision was not arbitrary and capricious. *Blake v. Planning Board of Phillipstown*, 799 N.Y.S.2d 746 (App. Div. 2d Dept. Aug. 15, 2005).

No Tax Exemption for Trust Land that Was Not Used by Public

A non-profit corporation, the Ksiaze Chylinski-Polubinski Trust, Inc. (Trust), bought land in several New York counties. The Trust had conservation of natural resources as one of its purposes and developed forest management plans and included part of its land in the federal wetlands reserve program. It planted thousands of trees for reforestation and put trails on the property. The Trust was exempted from state and federal sales tax, and in 2003 it sought tax exemption from the towns in which its parcels were located. All three towns denied the applications. The Trust filed an Article 78 petition that was rejected by the Supreme Court. The Appellate Division affirmed. It found that the Trust had not qualified for tax exemption for its real property. It could not show that the property was used primarily for a public purpose. Despite its work improving the land, and despite posting that the property permitted public use, the Trust could not show that the property was actually used by other people. *Ksaize Chylinski-Polubinski Trust, Inc. v. Board of Assessment Review for De Kalb*, 799 N.Y.S.2d 631 (App. Div. 3d Dept. 2005).

Denial of Variance for Off-Street Parking Annulled

The ZBA of Oyster Bay denied an application for an area variance for a commercial building in Massapequa. The building had applied for an area variance allowing it to provide less off-street parking than required by area zoning. The Supreme Court found the ZBA denial was not supported by substantial evidence and reversed.

The court noted some procedural irregularities in the ZBA determination. First, the ZBA did not vote at the conclusion of the hearing in violation of the Open Meetings Law. Second, the findings of fact were not adopted contemporaneously with the Board's decision, but were prepared after the Article 78 petition was filed.

Substantively, the record provided no evidence supporting the ZBA finding that the variance would change the character of the neighborhood. The use was already in place. Although the ZBA claimed the variance would harm neighboring properties, there were no objections by those neighbors to the application. The court annulled the determination and directed the ZBA to issue the variance. *SHAMS v. Zoning Board of Appeals of Oyster Bay*, N.Y.L.J., Aug. 23, 2005, p. 20, col. 3 (Sup. Ct. Nassau Co.).

No Adverse Possession Where Use Was Not Hostile

A homeowner in Staten Island claimed he had acquired use of an 5-foot easement across his neighbor's property to access a portion of his back yard. The homeowner argued the easement existed as an open, notorious and hostile use since 1983. The neighbor argued that since the homeowner had only had title to the property for eight years, he could not establish adverse possession for 10 years. The homeowner argued that he had lived there since 1983 with his grandmother, who held the title until she died. Under the theory of tacking, there was no break or interruption of the use of the easement.

The court said the issue of tacking was moot. The problem with the homeowner's case was that the record did not show the use of the pathway was hostile. Until the neighbor had moved in and fenced-off the property in 2002, the use had been cooperative. The court said permissive use can be inferred as a neighborly accommodation. Where the use was not under a claim of right, the fundamental elements of an adverse possession claim were lacking. The action was dismissed. *Urciuoli v. Yeneic*, N.Y.L.J., Aug. 17, 2005, p. 19, col. 3 (Sup. Ct. Richmond Co.).

Court Blamed New York City Buildings Department for Builder's Delays

The owners of two homes sued Giovanni Culotta, their builder. Each plaintiff claimed Culotta had failed to give them their Certificate of Occupancy (COO). Both homes closed in 1998, yet Culotta had not obtained a final Certificate of Occupancy for either dwelling at the time of the suit. The court found plaintiffs' remedies against Culotta were limited to breach of contract and that the damages were hard to assess. The costs of obtaining a COO were further complicated by the fact that Culotta had not filed proof that the wells were installed properly for each home, a necessary element for obtaining a COO. Ultimately, the court decided damages were too vague to be determined and refused to award them until COOs were obtained or the plaintiffs were ordered from their homes by the City.

The court found it had jurisdiction to prevent violations under the building code. It had the power to grant injunctive relief with regard to enforcing housing standards. A COO was a basic housing standard, according to the court. The New York City Department of Buildings (DOB) had the authority to compel builders to obtain COO, and according to the court, had the legal obligation to do so. The court said DOB's inaction was "ludicrous." Because Culotta was named as the applicant for each home he built, DOB had an obligation to see that he performed as he promised when it issued the building permits. DOB could

deny Culotta building permits if he failed to perform. The court described the situation as follows: "If [Culotta] has been too busy to complete the work on these homes because the Buildings Department has let him build other houses, then the Buildings Department has the obligation to act to protect the public from the actions of this defendant." The court ordered a hearing to determine why DOB should not be enjoined from issuing vacate orders to the plaintiffs, why DOB has failed to seek remedies against Culotta, and why DOB should not revoke all outstanding permits to Culotta. *Washington v. Culotta*, 2005 NY Slip Op. 51404, 2005 N.Y. Misc. LEXIS 1896 (Civ. Ct. Richmond Co. July 21, 2005).

Attorney General Opinion: Local Law Inconsistent with Town Law § 268 Was OK

The Attorney General issued an Informal Opinion regarding superseding Town Law § 268. The attorney for the Town of Huntington had inquired whether Huntington could issue a local zoning law that provided for incarceration only upon a third offense. Town Law § 268 provided incarceration beginning with the first offense. The Attorney General found that such a local law was allowed. An earlier opinion had held that larger penalties under Town Law § 268 were a legitimate supersession (Op. Atty. Gen. (Inf.) No. 84-32). The instant opinion noted that Towns are generally allowed to control their own zoning matters, and unless expressly forbidden by the State legislature, town zoning laws could supersede state laws. The Attorney General found no evidence that the legislature intended to pre-empt this particular matter. While the local law was inconsistent with Town Law § 268, the local law was consistent with the state law's purpose. Op. Atty. Gen (Inf.) No. 2005-18 (Aug. 9, 2005).

LEAD

Individual Defendants Released from Liability

The Supreme Court denied motions for summary judgment by defendants in a lead-paint poisoning case. On appeal, the court found a defendant, identified only as Tiretta, was managing agent of the apartment building in title only, and that he never had complete control of the building or duties related to remedying the lead paint. The claim to hold him individually liable was dismissed. The claim for individual liability was also dismissed against a defendant called Zuckerman, who the court held was acting in his capacity as agent for the corporate owner. Zuckerman was the president and sole shareholder of the corporate owner. The summary judgment motion by defendant United Rehabilitation Corp. was denied as there was an issue of fact whether the company had constructive notice that a child under the age of seven lived in the apartment. A concurring opinion stated that the plaintiffs failed to show Zuckerman acted outside his capacity as a corporate officer. *Worthy v. New York City Housing Authority*, 799 N.Y.S.2d 518 (App. Div. 1st Dept. Aug. 18, 2005).

Non-Professional Lead Remediation May Have Been Inadequate

Defendants in a lead-paint poisoning case sought summary judgment, arguing that because the infant-plaintiff had not been tested for blood lead levels while she resided in defendants' apartment, there was no proof she was exposed there. The court held that since blood tests taken shortly after the plaintiff lived in defendants' building showed elevated lead levels, plaintiff raised an issue of fact that the lead exposure occurred at defendants' building.

The court also rejected the defendants' arguments that they had remediated any lead hazard in their building the year before the plaintiff moved in. The court said defendants' do-it-yourself remediation did not comply with many standard remediation methods, and plaintiffs had raised an issue of fact that the remediation was "improper and inadequate." There was also conflicting testimony as to whether peeling and chipping paint existed in the apartment at the time of the alleged exposure. The court found there was a material issue of fact whether the defendants had constructive knowledge of the lead paint hazard. *Haggray v. Malek*, 799 N.Y.S.2d 689 (App. Div. 3d Dept. Aug. 11, 2005).

Local Legislation

♦ Landlords in New York City may be eligible for a tax exemption for lead paint remediation expenses. Under a new law, certain multiple dwellings as defined under Local Law 1 of 2004 are eligible where repairs are completed within 12 months of initiation, are made to dwellings and common areas concurrently with a capital improvement, require a permit, and do not cost more than twice that capital improvement. NYC Local Law 74 (Aug. 9, 2005) (Int. No. 607).

♦ Certain products that contain lead, such as litargirio, are banned in New York City under new legislation. The law prohibits the sale of candy products containing lead and the sale of litargirio powder, which is sold for personal use as a fungicide, deodorant and a treatment for burns. Litargirio is manufactured outside of the United States and, according to the Food and Drug Administration, has no proven health benefits. Violators are subject to a civil penalty up to $250 for each violation. A knowing violation includes a prison term of no more than six months. The law will be enforced by the City Department of Consumer Affairs and the Department of Health. The law takes effect in January 2006. NYC Local Law 49 (July 20, 2005) (Int. No. 396).

NOISE

Music in Restaurant Was Not Used as Advertising

A restaurant in New York City, The Slipper Room, used a DJ to play music while people dined. A Department of Environmental Protection (DEP) issuing officer (IO) heard music from the restaurant while standing outside. The restaurant was cited for using noise for commercial or advertising purposes. The Slipper Room contested the charge. The Administrative Law Judge (ALJ) found the fact that the IO could hear music on the street was satisfactory evidence that the noise rule under NYCAC § 24-220(b) had been violated.

On appeal, the Environmental Control Board (ECB or Board) Reversed. The Board agreed with The Slipper Room that no advertising purpose was served by having a DJ. The doors and windows of the restaurant stayed shut, and the music was not used to entice people from off the street to come in and buy a meal. The Board found DEP failed to meet its burden of proof and the charge was dismissed. *New York City v. GH Ville d/b/a The Slipper Room*, Appeal 40470 (ECB April 21, 2005).

Music from Nightclub Used to Attract Business from Street

GPG Corp. owned a nightclub in New York City. DEP cited the nightclub for a noise violation because the doors of the club were open and music could be heard outside. GPG was charged with violating NYCAC § 24-220(b). The nightclub argued it was not selling anything related to the noise and that therefore, the music was not for commercial or advertising purposes. GPG also contended that the only applicable code section was § 24-241.1 that prohibits noise over 45 dB(A), and there was no proof of a noise-level violation.

The ECB disagreed with GPG's theories. It found a nightclub had a definite business purpose in attracting people from the street with music. The Board found it significant that the nightclub propped open the door and that there were speakers directly over the door (on the inside). The elements necessary to show a violation of § 24-220(b) were met. The Board held in favor of DEP. *New York City v. GPG Corp.*, Appeal No. 34601 (ECB Feb. 24, 2005).

OIL SPILLS & STORAGE

Evidence in Spanish Criminal Trial Ordered Released Under U.S. Discovery Rules

The Kingdom of Spain sued several New York corporations for their alleged responsibility in the sinking of the oil tanker the Prestige off the coast of Spain. This decision pertains to discovery disputes. The defendants, the American Bureau of Shipping, ABS Group of Companies, Inc. and ABSG Consulting Inc. (together ABS), sought disclosure of information being kept by the Spanish government in connection with a criminal trial related to the tanker spill. Under Spanish law, evidence gathered by the presiding judge in a criminal action to determine whether there is enough cause to proceed to trial remains sealed until the trial phase begins.

The District Court for the Southern District of New York reviewed the principles of international comity to find that a foreign sovereign that brings suit in the United States must subject itself to U.S. discovery procedures. The court found the United States' interests, including billion-dollar claims against American companies, were "more substantial" in this case than Spain's interests in protecting the information. Although the defendants did not know the substance in the sealed file, the court held it was important to the litigation because the plaintiff knew the information. The court found the hardship on Spain in producing the documents was limited. The government had done little to enforce the ban — when protected information was leaked to the Spanish press no action was taken. The court rejected Spain's argument that producing other related documents was evidence of good faith. The court found those documents were voluminous but that they were prepared at the direction of a defendant in the criminal action. The information ABS sought was not readily attainable from other sources and the request was not a fishing expedition. Spain was ordered to produce the file.

Spain also withheld some of a report by the Permanent Commission on the Investigation of Maritime Casualties, arguing that it was protected by the deliberative process. The court found that while Spain could invoke the privilege, it had failed to support its claim. The privilege log submitted did not give "precise and certain reasons for asserting confidentiality." Additionally, an *in camera* review showed the documents were not deliberative or predecisional. None of the documents related to policy formulation. The court held Spain did not support claims that other documents were privileged under the attorney-client or work-product privileges. The documents did not reflect any thought processes of counsel and did not contain legal advice of a confidential nature. Those documents were also ordered released. *Reino de Espana v. American Bureau of Shipping*, No. 03 Civ. 3573 (LTS) (RLE), 2005 U.S. Dist. LEXIS 15685 (S.D.N.Y. Aug. 1, 2005).

Criminal Prosecution for Failure to Comply with FDNY Order Was Not Dismissed Even Though Order Was in Error

Criminal charges were brought in Kings County for failing to comply with an order to close and seal two out-of-service fuel oil storage tanks as directed by the New York City Fire Commissioner. The fire department subsequently found out that the order had been issued in error and dismissed the order. The oil tanks had been removed by the City in 1995, prior to the defendant's purchase of the property. The court reviewed whether the criminal prosecution should continue for the defendant's failure to comply with a now-defunct order that had been issued in error.

The court held that the issue before it was not whether the defendant had fuel tanks that needed closing but whether the

defendant had complied with an order of the Fire Department. The court held that it could not review the propriety of the underlying administrative order. The defendant was obligated to appeal the violation of the order to the New York City Board of Standards and Appeals, and its attempt to defeat the order before the instant court failed. Because the defendant's motion papers raised none of the statutory factors required to show the misdemeanor charge should be dismissed in the interest of justice, the court refused to dismiss on those grounds. *People v. Second Avenue Woodworking Corp.*, N.Y.L.J., July 8, 2005, p. 20, col. 3 (Criminal Ct. Kings Co.).

Disputes Over Amount of Spill, Reporting Time Required Hearing

DEC claimed Robani Energy, Inc. and Crystal Transportation Corp. spilled 90 gallons of fuel oil in the basement of a house. DEC also brought administrative enforcement actions against the owners of the home (*see* below). DEC moved for an order without hearing and sought a total civil penalty of $93,425 from Robani and Crystal. DEC also moved to amend its 2003 complaint.

Robani and Crystal argued that the pleading could not be amended because an earlier ruling determined the 2003 complaint required a hearing to determine liability and relief. The ALJ granted the motion to amend the pleading. However, the court refused to grant the motion for an order without a hearing. The first issue, whether Robani and Crystal spilled more than 90 gallons of oil, was disputed by the evidence, including testimony at a related civil action that the amount of oil in the basement was "the size of a quarter." The second claim regarding reporting of the spill was not adequately supported by evidence. It was unclear when the spill was actually reported. And because the amount of the spill was in dispute, the reporting requirements were still undetermined. The court held material issues of fact prevented an order without hearing. As for the claim that Robani and Crystal failed to take steps to contain the spill, the ALJ held that DEC's evidence was contradictory. Some evidence showed that an oil absorbant was used by respondents to soak up the oil. Additionally, the jury in the related civil action found the spill was promptly cleaned up. Issues also remained as to whether the site had been adequately remediated. A hearing was ordered. *In the matter of Robani Energy, Inc.*, DEC No. R2-2003-0109-9 (DEC ALJ Aug. 3, 2005).

Disputed Facts About Fuel Spill Sent to Hearing

In this companion case to the Robani and Crystal case, above, DEC argued that the homeowners failed to report the fuel oil spill as required by Navigation Law. DEC claimed the fuel spill was not reported for nearly 44 months and sought a civil penalty of $33,500. The respondents, Eli and Elina Avila, argued that they attempted to report the spill on the date it happened. At issue was whether the reporting requirements under Nav. L. § 175 applied to residential properties. The ALJ held they did. However, the ALJ found DEC had not proven whether the spill occurred on April 9, 1999, or was a chronic condition. The judge also noted that the amount of the spill had been successfully disputed in the Robani and Crystal case, which could change the reporting requirements. The judge rejected the Department's motion for an order without hearing. *In the matter of Eli Avila*, DEC No. R2-20030422-102 (DEC ALJ Aug. 3, 2005).

PESTICIDES

Insecticide Manufacturer Denied Summary Judgment in Lobster Die-Off Action

A class action lawsuit was brought by lobster fishermen of Long Island Sound who claimed that pesticides used in New York City to kill mosquitoes polluted the Sound and caused huge numbers of lobsters to die. Cheminova, Inc., the maker of Fyfanon, brought a motion for summary judgment arguing the following: 1) the plaintiffs' claims were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); 2) it was immune under the Government Emergency Doctrine; 3) there were no issues of fact as to state law claims of negligence and public nuisance; and 4) plaintiffs did not show Fyfanon caused the lobster die-off.

The District Court for the Eastern District of New York denied the summary judgment motion. Plaintiffs claimed the Fyfanon was mislabeled. Defendants countered that FIFRA pre-empted labeling disputes. The U.S. Supreme Court in *Bates v. Dow Agrosciences, LLC*, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005) held that FIFRA pre-empted any state rule that added to or was different than the federal rule (*see* 16 Envtl. L. in N.Y. 175 (Aug. 2005) for the decision). If Fyfanon's label contained a false or misleading statement, or omitted necessary warnings, it violated FIFRA. Plaintiffs argued that the label used on the 1999 spray omitted necessary warnings that EPA had found should be changed on the label. However, the court found there was a dispute as to when the new label would go into effect. The chronology of the label change was an issue of fact for trial.

The court rejected Cheminova's government emergency doctrine claim, finding no support for the theory in applicable state or Second Circuit law. The court found the legislature did not intend to extend the government's immunity to private businesses. Additionally, the mosquito spraying was not conducted pursuant to a state of emergency.

The remaining issues hinged on the causation of the lobster deaths and therefore could not be dismissed on summary judgment. The court found that whether Cheminova had a duty to warn was an issue of fact. Plaintiffs' claim of public nuisance also involved issues of fact, as pollution of public waterways could be a nuisance, but plaintiffs still had to show causation. The plaintiffs would have to show whether Fyfanon was sprayed over Long Island Sound, and whether spraying was the proximate cause of the lobster die-off or were other events or products the cause.

Cheminova also sought to exclude 10 experts of the plaintiff. The court held that *Daubert* hearings would be necessary, but the issue was premature as no witnesses had been identified for

trial. *Fox v. Cheminova, Inc.*, No. 00-CV-5145 (TCP) (ETB), 2005 U.S. Dist. LEXIS 19915 (E.D.N.Y. Aug. 25, 2005).

Reversal of EPA Pesticide Rule Not Entirely Justified

In 2001 EPA rescinded its rule to require a bittering agent and a dye in pesticides to act as child-safety measures. It stated that the rule was being revoked following a "mutual agreement with the rodenticide registrants." West Harlem Environmental Action and the Natural Resources Defense Council, Inc. (NRDC) sued EPA claiming the Agency had violated FIFRA and the Administrative Procedure Act (APA). The District Court for the Southern District of New York found that EPA had demonstrated substantial evidence for revoking the rule pertaining to the dye but not for the bittering agent rule.

Dye was to be added to pesticides so that when touched, the substance would leave a colored mark. EPA found that the so-called indicator dye was not available. The court found the lack of availability was a good reason for rescinding the indicator dye requirement. However, no justification was shown for eliminating the bittering agent. EPA argued that a 1994 report that discussed the use of a bittering agent in rodenticides in Chicago provided reason to abandon the rule, but the court said that document showed no causal relationship between adding the agent and an increased rat population. In fact the District Court said, "EPA lacked even the proverbial scintilla of evidence justifying its reversal of the requirement it had imposed." The bittering agent issue was remanded to EPA. *West Harlem Environmental Action v. EPA*, No. 04 Civ. 8858(JSR), 2005 U.S. Dist. LEXIS 15955 (S.D.N.Y. Aug. 8, 2005).

SEQRA/NEPA

Newark Bay Project Could Interfere with CERCLA Study; Hard Look Needed

The Army Corps of Engineers planned to deepen shipping channels in the New York—New Jersey Harbor by dredging and blasting. The Harbor Deepening Project (HDP) would cut through sections of Newark Bay that were highly contaminated by a former Agent Orange plant nearby. The bay was declared part of a Superfund site in 2004. NRDC argued that the HDP would skew the sampling required to determine the contamination distribution of the site. NRDC claimed the Corps needed to prepare a supplemental environmental impact statement (SEIS) to consider any adverse effects from dredging on the Remedial Investigation/Feasibility Study (RI/FS) that would be conducted at the Superfund site.

The Corps argued that dredging Newark Bay had been considered in detail in the EIS and that there were no substantial changes to warrant a SEIS. NRDC argued that the dredging project would have an indirect effect of interfering with the RI/FS and could reduce the effectiveness of whatever cleanup plan was determined as the result of the study. The court found the Corps did not take a hard look at the impact of the HDP on the RI/FS, when the Corps declared that the mere designation of Newark Bay as a Superfund site did not require an additional environmental review. It described the Corps' review as conclusory, relying only on incomplete, informal statements by EPA regarding the dredging. The court, however, refused to direct the Corps to prepare an SEIS, stating that the Corps needed only to take a hard look at the issue. The Corps had offered to prepare an environmental assessment. The court directed the parties to brief the issue whether that review would be sufficient. *Natural Resources Defense Council, Inc. v. U.S. Army Corps of Engineers*, No. 05 Civ. 762 (SAS), 2005 U.S. Dist. LEXIS 15969 (S.D.N.Y. Aug. 5, 2005).

Article 78 Petition Not Required in Hybrid Action Against Zoning Board

Plaintiffs filed a summons with notice, challenging an area variance and negative declaration under SEQRA and seeking to annul the Middlebury ZBA approval of a 300-foot tower. Plaintiffs contended that the hearing at which the area variance was considered was conducted without public notice. The defendants argued that the action was not properly commenced. Defendants claimed the plaintiffs had to bring an Article 78 petition. The court said the action was a hybrid action, seeking review of the ZBA decision and also seeking a declaratory judgment to enforce the Open Meetings Law. The court held the plaintiffs were entitled to bring their claims in any manner that satisfied the commencement-by-filing provisions of the CPLR. The court held the action was filed timely.

Defendants also argued that the ZBA was an indispensable party. The court agreed. However, the plaintiffs had named as defendants the four members of the ZBA who voted for the tower project. Because the notice and complaint were directed to official actions, the court held it was clear the action was not against anyone in their personal capacity. The court found no prejudice to the defendants by allowing the suit to be amended to identify the ZBA as a defendant. *Donohue v. Zoning Board of Appeals of Middlebury*, No. 35788, 2005 NY Slip Op. 51242U, 8 Misc. 3d 1023A, 2005 N.Y. Misc. LEXIS 1628 (Sup. Ct. Wyoming Co. July 21, 2005).

Legislation

♦ Environmental Conservation Law § 8-0109 has been amended. Under the revised law draft and final environmental impact statements (EISs) are required to be posted on publicly available internet sites beginning February 27, 2006. The web address of the online publication will be included in the printed filings and notices of the documents. Draft EISs are required to be posted only until the final EIS is online. Final EISs may be taken offline when all necessary permits have been issued for the project. 2005 N.Y. Laws 641 (Aug. 30, 2005) (S5786).

SOLID WASTE

Abatement Order Allowed Even if Environmental Damage Could Be Remediated

DEC issued a summary abatement order (Order) against Crosby Hill Auto Recycling, Murtaugh Recycling Corp., and Richard and Gail Murtaugh. The Order required the respondents to stop their auto recycling operations immediately and to remediate the site. According to DEC, the operations were causing irreparable harm to the environment by spilling hazardous substances. Following an administrative hearing, the ALJ issued a findings report that was adopted by the Acting Commissioner of DEC.

The Acting Commissioner found that spilling petroleum and anti-freeze during the car dismantling process was standard operating procedure for the respondents. Additionally, the Acting Commissioner found respondents dumped fill into wetlands without a permit, and used the site to store waste, also without a permit. She denied respondents' argument that the order was deficient. Respondents had claimed that because the site could be remediated, they had not caused the irreparable harm required before a summary abatement order could be issued. The ALJ had noted that the statute governing such orders made no exception for damage that could be remediated. *In the matter of Richard Murtaugh*, DEC Case No. 7-0001-03-11 (DEC Aug. 26, 2005).

Faxed Petition Did Not Prejudice Parties

The ALJ allowed a faxed petition to be filed in the dispute pertaining to the Sullivan County Division of Solid Waste's permit application for expanding its landfill in Monticello. DEC and the County objected to the method of filing and to the *ex parte* contact the attorney had initiated with the ALJ to get permission to file by fax. The ALJ found that the substance of the petition was nearly identical to a 16-page letter submitted by that attorney on behalf of another client that had chosen not to be a party to the matter due to "resource constraints." The judge found that the issues in the petition had been before the County and DEC when he directed them to review the letter. The ALJ did not find any prejudice to the parties by allowing the faxed filing. Although faxes were not an acceptable method of filing normally, the judge said that restriction was a matter of his convenience, not one of law or regulation. The ALJ denied the motions by DEC and the County to dismiss the petition.

The judge refused to allow the content of subsequent letters from the petitioner's attorney and its expert, finding that information was submitted after the filing deadline. However, the ALJ stated that DEC staff should consider the arguments made in those letters to see if they raised legitimate concerns, specifically regarding emissions and odors. *In the matter of the Sullivan County Division of Solid Waste*, DEC App. No. 3-4846-00079/00027 (DEC ALJ July 29, 2005).

Legislation

♦ Under the Reporting Requirements Reform Act, the Commissioner of the Department of Economic Development is allowed to combine two annual reports regarding use of recycled materials. Section 261 of the Economic Development Law requires an annual report of activities regarding reuse of secondary materials in the state. That report may be combined with the status report of commercial and industrial waste reduction and development of markets for secondary materials required under Econ. Dev. L. § 263. The changes are found in sections 22 and 23 of the statute. The Act as a whole addresses reporting requirements in various branches of State government, clarifying to whom certain reports are to be made and eliminating redundancies. 2005 N.Y. Laws 524 (Aug. 16, 2005) (A4257).

TOXIC TORTS

Personal Jurisdiction Argument Lost in MTBE Suit

Two defendants in the methyl tertiary butyl ether (MTBE) litigation claimed the court lacked jurisdiction over them. Defendant Lyondell-Citgo Refining LP (LCR) argued jurisdiction was improper in the suits brought by 14 states and New York City. Defendant Equistar Chemicals, LP claimed there was no personal jurisdiction in cases filed in nine states. The District Court for the Southern District of New York denied both motions. The court found minimum contacts existed between the companies and the forum states. Both companies supplied MTBE or MTBE-containing gasoline to national suppliers. Accordingly, they should have reasonably expected that their products would reach all states, and therefore purposefully availed themselves of the privilege of doing business in the forum states. The court noted that LCR derived "substantial revenue" from selling chemicals throughout the country in addition to its MTBE gas sales. Therefore, it had continuous and systematic contact with the states. Equistar, which sells MTBE to LCR, was linked to the states using the same analysis. The court found that it was reasonable to exercise jurisdiction over both defendants.

The court reviewed the long-arm statutes of the appropriate states. For the New York long-arm statute, the court held that a foreign defendant that caused injury in the state by a tortious act outside the state was subject to jurisdiction if it could reasonably expect the act to have consequences in the state and it derived substantial revenue from the commerce. The court did not show how much of the companies' combined $10 billion in revenue was derived from New York sales, but found the state could exercise personal jurisdiction over both defendants. *In re: Methyl Teritiary Butyl Ether (MTBE) Products Liability Litigation*, 1:00-1898, MDL 1358 (SAS), M21-88, 2005 U.S. Dist. LEXIS 17091 (S.D.N.Y. Aug. 16, 2005).

Chlorine Dioxide Gas Leak Was Not Due to Contractor's Negligence

Two people claimed they suffered pulmonary burns as the result of inhaling chlorine dioxide gas discharged from International Paper. S.W.B. Construction Co. (SWB) had been hired by International Paper to switch its processes from chlorine gas to chlorine dioxide gas. The plaintiffs claimed SWB negligently failed to maintain the systems at International Paper and failed to warn of an allegedly dangerous condition. The Supreme Court granted SWB's motion for summary judgment dismissing the claims of negligent design, construction or alteration of International Paper's ventilation system. The Appellate Division affirmed, holding that International Paper had knowledge of the condition of its ventilation system and that SWB had no duty to warn. The employee in charge of International Paper's environmental health and safety program had submitted an affidavit that stated the ventilation system was designed to eject gas just as it did in the underlying incident. Accordingly, no warning from SWB was necessary. *Hurlburt v. S.W.B. Construction Co.*, 799 N.Y.S.2d 616 (App. Div. 3d Dept. 2005).

Late Filing Allowed for WTC-Related Injury Claimed by Con Ed Employee

An employee of Consolidated Edison sued the City of New York for respiratory problems he claimed were caused because the City failed to provide the proper respiratory equipment for people working near the World Trade Center following the attacks of September 11. He said he was exposed to toxic substances. He claimed he first became aware of a respiratory problem when he failed the pulmonary test at his annual physical.

The court reviewed whether the plaintiff would be allowed to file a late notice of claim against the City. He began his proceeding September 7, 2004. The court held that the appropriate time to begin measuring the one year and 90-day statute of limitations was not on September 11, 2001, but from when the claim accrued — when he knew of his lung problem. The court said in order to determine whether the plaintiff had met the statute of limitations, he would have to be allowed to file his claim. The court found the City certainly had knowledge of the facts surrounding the alleged injury. The court refused to decide whether the City owed a duty to an employee of a private contractor, whether the plaintiff had been exposed to toxic substances, or even whether the plaintiff had a viable claim. Plaintiffs were not required to demonstrate an ultimate entitlement to judgment at this stage of litigation, according to the court. It simply deemed the notice of claim was filed timely. *Galasso v. City of New York*, No. 112817/04, 2005 NY Slip Op. 51284U, 2005 N.Y. Misc. LEXIS 1685 (Sup. Ct. New York Co. Aug 3, 2005).

WATER

Seasonal Docks Over State-Owned Submerged Lands Were Taxable Real Property

Property owners in Huron disputed the tax valuation of their property. At issue was the value of seasonal docks that extended over 400 feet into Sodus Bay. The Town of Huron claimed the piers and docks had a taxable value of $850,000. The property owners claimed they did not own the land under the docks and that the docks themselves were personal property, not real property.

The deeds to the land described the property as ending at the shoreline or the high water line. The State owned the submerged land. The riparian rights of the owners only extended 40 feet from the shoreline, but the long docks were a permitted use under a Submerged Lands License from the State. Under the law pertaining to Submerged Lands Licensing, property attached to the State's lands could be taxable as real property. The court held that based on that law, the owners' docks were taxable as real property. Additionally, Real Property Taxation Law § 102 included piers and wharves attached to land in its definition of taxable property. The court found that the owners' docks qualified as wharves under the law. *Lupo v. Board of Assessors of Huron*, 799 N.Y.S.2d 405 (Sup. Ct. Wayne Co.).

Shandaken Tunnel Permit Issues Set for Adjudication

An ALJ set the adjudicable issues pertaining to the City of New York's State Pollutant Discharge Elimination System (SPDES) permit application. The permit was needed for the 18-mile Shandaken Water Tunnel that brings water from the Schoharie Reservoir for the City of New York. The issue was that the water from the tunnel was more turbid than the creek into which the water was discharged.

The judge found the specific turbidity limit was an issue for adjudication, but if the parties, including Trout Unlimited, could agree to a sliding limit rather than a fixed one, no adjudication would be needed. Another dispute was over the structural changes required by the permit. The City argued that complying with the terms of the EPA filtration avoidance determination (FAD), under which the City was bound, would bring about the structural changes sought by this proceeding. Trout Unlimited argued that the City should not be given another 18 months as allowed by FAD to study the issue. The judge found a hearing was required to determine what structural response will be necessary to satisfy the permit. As pertained to non-structural measures to reach compliance, such as stream management plans, the parties had not reached an agreement. The ALJ encouraged resolution but designated the issue for adjudication if a decision could not be reached.

The phosphorus limit required adjudication if the parties could not reach agreement. The SPDES permit would include a 12-month rolling average limit for phosphorus in addition to the daily average loads. Petitioners from the watershed areas argued

that the proposed phosphorus limits were too high. They wanted best management practices to be employed rather than a specific limit.

Other issues did not require adjudication. The ALJ found that the dispute regarding the maximum temperature level had been resolved. The parties argued whether the draft permit's conditions allowing exceptions for water levels in the cases of drought warnings or emergencies were too strict. The City wanted to be allowed to move water to prevent drought conditions, but the ALJ found the City's proposal was too "open-ended." Adjudication was not necessary for this issue or for flow requirements in void situations because DEC was bound by federal requirements. The ALJ also refused to adjudicate permit language that prohibited the City from discharging effluents at levels that would violate water quality standards, finding the language was boilerplate SPDES language. The ALJ refused to adjudicate recreational releases as requested by certain petitioners. *In the matter of the New York City Department of Environmental Protection*, DEC App. No. 3-5150-00420/00001 (DEC ALJ June 22, 2005).

Legislation

♦ The Reporting Requirements Reform Act specifies to whom DEC files its annual reports under the New England Interstate Water Pollution Control Compact. The annual report is required to be submitted to the Governor, the President of the Senate, the Speaker of the Assembly, the Chairs of the Senate Finance and House Ways and Means Committees, and the Chairs of the Senate and Assembly Environmental Conservation Committees. The amendment is found in section 28 of the Act and revises ECL § 21-0101 and adds Section 54-0102. 2005 N.Y. Laws 524 (Aug. 16, 2005) (A4257).

WILDLIFE AND NATURAL RESOURCES

Legislation

♦ The Albany Pine Bush was added to the State Natural and Historical Preserve by a 2005 statute. The law adds the 3,010 acres of inland pine barrens to the protected status under the State Natural and Historical Preserve, which can be alienated only upon the approval of two successive legislatures. 2005 N.Y. Laws 217 (July 12, 2005) (A8447).

Local Legislation

♦ New York City enacted a law requiring the New York City DEP to create a Jamaica Bay Watershed protection plan. The law also created a seven-member advisory committee. The protection plan must be completed by September 1, 2006, and must include measures the City will implement to protect the water quality and ecological integrity of the Bay. The plan must require best management practices for soil erosion and stormwater runoff, and the City is required to use land use practices to restrict development that may adversely impact Jamaica Bay. NYC Local Law 71 (July 20, 2005) (Int. No. 565).

NATIONAL DEVELOPMENTS

*Revised EPA Orders Will Address Post-*Aviall *Liability Concerns*

EPA issued interim revisions to model administrative orders used in CERCLA cases. The revisions are designed to address concerns that existing administrative orders on consent (AOC) would not allow a party to seek contribution under the Supreme Court decision of *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004). Under *Aviall*, a potentially responsible party (PRP) is allowed to seek contribution only during or after a civil action or in cases where the PRP has resolved its liability to the government in a settlement. One change by EPA is to the title of the orders to include the word settlement, and are now called Administrative Settlement Agreement and Order on Consent. Additionally, the revised orders contain language stating that the settlement resolves the PRP's liability for the purposes of CERCLA and does not limit the government's right to pursue non-parties for cost reimbursement. The revised models were prepared by the EPA Office of Site Remediation Enforcement. The document announcing the changes is available online at www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf. Memo from Director, EPA Office of Site Remediation Enforcement, to Regional Directors, "Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)" (Aug. 3, 2005).

Rancher Wins $600K in Defamation Suit Against Environmentalists

An Arizona rancher was successful in suing the Center for Biological Diversity and several of its individual members for defamation. Jim Chilton was awarded $600,000 against the Center, including $500,000 in punitive damages. The Center had put photos of land grazed by Jim Chilton's cattle on the internet, purporting to show the cattle had changed grassland into dusty wasteland. The rancher, who is also the owner of a Los Angeles investment bank, brought his own photos to court to show that the damage had been caused by a campout by several hundred people weeks earlier. He claims to have spent $350,000 in legal fees to make the case and will use the excess money to help other ranchers. The Center is appealing. Jim Carlton, *Rancher Turns the Table*, Wall Street Journal (Aug. 14, 2005).

Developer and Lawyers' RICO Suit Against Activists Ruled Frivolous

A San Diego developer and his attorneys were ordered to pay over a quarter million dollars to a community activist and three Forest Service employees who opposed a condominium development on Big Bear Lake. Foley & Lardner represented developer Irving Okovita to make charges under the Racketeer Influenced and Corrupt Organizations Act (RICO) against the four defendants. A federal judge called the action a "frivolous lawsuit,"

and the lawyers, the law firm, and the developer were directed to pay $267,000. Okovita's RICO suit was filed after his project was enjoined for its "potential to both harass and harm the bald eagle." Henry Weinstein, *Law Firm Sanctioned for Forest Service Suit*, Los Angeles Times (Aug. 16, 2005).

Owner Criminally-Liable for Illegal Haz Mat Disposal by Employees

The Third Circuit held that criminal charges under RCRA also contemplated vicarious liability embodied in 18 U.S.C. § 2. In this case the president of a dry cleaning supply company arranged to have his warehouse emptied after the business closed. The warehouse included drums of hazardous waste. The president put an employee in charge of emptying the warehouse, an employee with no experience with hazardous materials. Different waste haulers were involved, but the haz mat was never properly moved or disposed of. The president was convicted by a jury on transporting hazardous material without a manifest, transporting hazardous material to an unauthorized storage or disposal facility, and causing the disposal of hazardous waste without a permit.

The president argued that he was only a generator of hazardous waste and could not be convicted of disposing of it. He also argued that being convicted of transporting and disposing of the waste was duplicative. The court rejected the arguments, first finding RCRA was intended to address hazardous waste from cradle to grave. Generating, transporting, and disposing were each separate actions. Also, the court found the RCRA criminal provisions included the implied "aided and abetted" language in each count. The fact that the transporting element included "transports or causes to be transported," while the disposed of element did not include similar "causes to be disposed" language did not eliminate the application of vicarious liability to the statute. The president was rightfully convicted of aiding and abetting disposal of the waste even though he did not do the actual disposing. *United States v. Wasserson*, No: 04-1339, 2005 U.S. App. LEXIS 15605 (3d Cir. July 29, 2005).

Good NEPA Practices Compiled by CEQ

The Council on Environmental Quality (CEQ) issued a collection of useful practices used in the National Environmental Policy Act (NEPA). The document was assembled by the NEPA Task Force that had been assembled by CEQ. It is a compendium of case studies or other agency efforts to improve the NEPA process. According to CEQ, the document is designed to be updated regularly. The practices are divided into Adaptive Management/Monitoring, Collaboration, Environmental Management Systems, Programmatic Analysis and Tiering, and Technology. Examples from the Minerals Management Service, the Bureau of Land Management, the Tennessee Valley Authority, and the Forest Service are all used. It is available online at ceq.eh.doe.gov/ntf/compendium/compendiumhtml. CEQ, "Compendium of Useful Practices."

EPA Emphasizes that PRPs Should Pay for Remediation Study

A new EPA memorandum emphasizes the Agency's commitment to have polluters perform the Remedial Investigation/Feasibility Study (RI/FS). To help ensure that PRPs bear the costs of the studies, EPA is pushing Region Offices to search hard for PRPs early in the process. To determine whether PRPs are capable of performing an RI/FS, EPA should consider the financial viability of the PRPs and their technical capacity. EPA also encourages issuing a Unilateral Administrative Order (UAO) when the parties refuse to settle. The memo is directed at EPA employees and is available online at www.epa.gov/compliance/resources/policies/cleanup/superfund/enf-first-rifs.pdf. Memo from Director, Office of Site Remediation Enforcement to Superfund National Policy Managers (Aug. 9, 2005).

Continued Monitoring of Contaminated Site Was Stayed by Bankruptcy

A U.S. Bankruptcy Court held that once remediation of a contaminated site was completed and only monitoring remained, an action against the debtor to provide monitoring was a money judgment and was not stayed under 11 U.S.C. § 362 as a police enforcement action. The court held that Sherman Wire Co., the debtor, was liable under CERCLA only for "a *past* transgression" (emphasis in original), and EPA did not seek to enjoin the debtor from sending more hazardous waste to the sites in the future. The monitoring wells sought by EPA were not aimed at the prevention of future harm, said the court, because the soil cleanup had already been completed. The debtor had signed a consent decree agreeing to pay 13 percent of remediation and response costs incurred at the site. The court held that the only way to satisfy the terms of the agreement was via payment of money. That would "eviscerate the money judgment exception" in the bankruptcy code, according to the court. The court held that EPA's action was stayed by § 362 of the Bankruptcy Code. *In re FV Steel & Wire Co.*, 324 B.R. 701 (Bankr. E.D. Wis. 2005).

Money for SEPs in North Carolina Owed to State Schools

The Supreme Court of North Carolina ruled that money paid to fund supplemental environmental projects (SEP) in lieu of a civil penalty to the Department of Environment and Natural Resources (DENR), was a fine that was owed to the North Carolina public schools under state law. Under North Carolina Constitution Article IX § 7, monetary payments to county and state agencies are designated to be pooled and allocated for state public schools. In 1998 DENR provided an alternative to paying cash for environmental violations. It acknowledged the school fund, but stated that the system returned "very little to the environment." Instead, violators were allowed to negotiate a settlement where they would provide projects that were beneficial to the environment or public health. DENR argued the SEP plan was voluntary and made payments to a third party and

therefore, was not subject to Article IX. The Supreme Court held that the payment was made to a third party only because DENR had assessed a civil penalty against a violator. The court rejected the idea that a SEP was voluntary, describing it as "punitive in nature." The court also found the program was not remedial, as argued by DENR. *North Carolina School Boards Association v. Moore*, 614 S.E.2d 504 (N.C. 2005).

NEW YORK NEWSNOTES

State Wildlife Conservation Strategy Announced

DEC has released a draft Comprehensive Wildlife Conservation Strategy to help reduce the impacts of state actions on endangered wildlife. The draft was begun in 2001 and is more than 700 pages. It lists more than 580 species from all classes with the greatest need of conservation. The Conservation Strategy provides information on threats to those species and trends in their populations. It also recommends priority efforts to maintain or increase wildlife populations. The recommended management plans are based geographically on watersheds. An appendix provides information based on taxonomic group. Funding for the program came from a federal grant for State Wildlife Grants. A copy of the Conservation Strategy is available online at www.dec.state.ny.us/website/dfwmr/swg/cwcs2005.html. ENB—Statewide Notices (Aug. 10, 2005). DEC Press Release (Aug. 17, 2005).

Fewer Violations of Diesel Emissions Requirements Found

DEC's July Emission Patrol found 99 violations of the State Heavy-Duty Vehicle Emissions Reduction Act. The 2005 numbers show a reduction in emission offenses from the 2004 Emission Patrol when more than 300 tickets were issued for emission problems. The Emission Patrol targeted diesel emissions in all nine DEC regions, stepping up road checks and other patrols. Twenty-nine of the 896 trucks inspected were placed out of service for being unfit to be on the highways. An additional 380 other violations were cited. The Emission Patrol was staffed by DEC as well as members of 11 other State and local agencies. DEC Press Release (Sept. 7, 2005).

Farm Spill Blamed for Massive Fish Kill

DEC cited a Lewis County farm for releasing several million gallons of liquid manure that drained into the Black River. The Department estimates that up to a quarter million fish were killed as a result of the spill, which occurred on August 10, 2005. Marks Dairy Farm, Inc. was cited for water quality violations and for violating its concentrated animal feeding operations permit. The liquid manure was spilled onto an adjacent field and moved through a drainage ditch before reaching the river, according to DEC. DEC Press Release (Aug. 23, 2005).

GM Will Pay $897,690 for St. Lawrence Superfund Site

General Motors Corp. (GM) settled a CERCLA case with EPA, agreeing to pay $897,690 plus interest for contamination at the GM-Central Foundry Division Superfund Site in St. Lawrence County. The CERCLA site includes a 12-acre industrial landfill, lagoons and other disposal areas. The settlement was made under CERCLA § 107 to reimburse EPA for its response costs. It includes a covenant not to sue GM. 70 Fed. Reg. 48132 (Aug. 16, 2005).

Water Pollution Plans for Greenwood Lake and Finkle Brook Released

The Draft Total Maximum Daily Load (TMDL)/ Impaired Water Restoration Plans were issued for Greenwood Lake and Finkle Brook. The phosphorus plan for Greenwood Lake in Orange County is consistent with a TMDL adopted in New Jersey because the lake straddles the boundary between the states. The plan for Finkle Brook in the Lake George Watershed addresses sediment and focuses on stormwater and non-point source reduction to improve Lake George. The TMDL plans will be available online at www.dec.state.ny.us/website/dow/tmdl.html. The comment period ended in September. ENB—Statewide Notices (Aug. 17, 2005).

New Region II Administrator Announced

EPA appointed a new Administrator for Region II. Alan J. Steinberg is now in charge of the New York, New Jersey, Puerto Rico and Virgin Islands area. He formerly served as the Small Business Administration Region II Regional Advocate. EPA Region II Press Release (Aug. 26, 2005).

New York City Boiler Filing Redundancies Eased

Buildings with boilers in New York City have easier filing requirements because the City merged the boiler report processes of DOB and DEP. The new requirements went into place September 6, 2005. Under the old rules, regulated buildings were required to submit boiler reports every six months to DOB, and every four months to DEP. The new procedure allows one form to be used combining both filings. DEP Press Release (Aug. 17, 2005).

New York to EPA: Regulate Outdoor Wood Boilers

The New York Attorney General's Office issued a report showing outdoor wood boilers in New York are contributing to air pollution and causing health problems. The outdoor wood boilers are not regulated for emissions as furnaces and wood stoves are. Recent tests showed the outdoor wood boilers release 12 times the fine particle pollution as indoor wood stoves and 1000 times more fine particle pollution than oil furnaces. The Attorney General's office petitioned EPA to regulate the pollution produced by the boilers. The chimneys of the boilers tend to be lower than household chimneys causing smoke to be low-hanging. Additionally, many people use the boilers not just for wood but to burn anything. The Attorney General's office has written the four largest manufacturers regarding their advertising. Some claim to burn "just about anything," which could add more toxic chemicals to the air than just burning wood. The office is concerned that the boilers will increase in popularity

with high petroleum costs discouraging the use of gas or oil furnaces. The report is available online at www.oag.state.ny.us/press/2005/aug/august%202005.pdf. Attorney General Spitzer Press Release (Aug. 11, 2005).

UPCOMING EVENTS

November 7, 2005

"Innovations in Disaster Mitigation: Beyond the Edge and the Prospects for Change," sponsored by University of San Diego School of Law and the Land Use Law Center of Pace University School of Law. Location: White Plains. Information: www.sandiego.law.edu.

November 17, 2005

"Reinventing Redevelopment Law," sponsored by the Land Use Law Center of Pace University School of Law. Location: Association of the Bar of the City of New York, Manhattan. Information: Anne Marie McCoy amccoy@law.pace.edu.

December 5 & 6, 2005

"Environmental Insurance Coverage and Claims," (CLE available) sponsored by the American Conference Institute. Location: Flatotel, New York City. Information: AmericanConference.com/enviroinsurance, (888) 224-2480.

December 8, 2005

"Intersection of Environmental Justice and Land Use Planning," an invitational workshop for members of planning and zoning boards and legislative bodies, municipal officials, professional planners and municipal attorneys, sponsored by the National Academy of Public Administration in conjunction with the Government Law Center at the Albany Law School. Information: Patricia Salkin, (518) 445-2351, psalk@mail.als.edu.

April 28, 2006

"EPA Region II Update," sponsored by: EPA Region II, American, New York State, New York City, and New Jersey Bar Associations. Location: Fordham Law School. Information: Helen Herman, (212) 636-6885.

WORTH READING

Mary L. Clark, *Lessons from the World Trade Center for Open Space Planning Generally and Boston's Big Dig Specifically*, 32 B.C. Envtl. Aff. L. Rev. 301 (2005).

David J. Freeman & Lawrence P. Schnapf, *Brownfield Cleanup Program's Final Site Eligibility Criteria*, 25 The New York Environmental Lawyer, No. 2, p. 13 (Spring/Summer 2005).

Robert H. Freilich & Seth D. Mennillo, *Kelo v. City of New London*: *How Does the Supreme Court Decision Affect New York Law on Condemnation for Economic Development and Municipal Revitalization?*, 6 New York Zoning Law and Practice Report, No. 1, p. 1 (July/August 2005).

Anthony S. Guardino, *County Coordination of Zoning Approvals*, New York Law Journal, p. 16 (Aug. 16, 2005).

Philip E. Karmel & Peter R. Paden, *Consumer Protection Law Claims in Toxic Torts Litigation*, New York Law Journal, p. 3 (Aug. 24, 2005).

Stephen L. Kass & Jean M. McCarroll, *Judge Roberts' Environmental Record*, New York Law Journal, p. 3 (Aug. 26, 2005).

Walter E. Mugdan, *EPA's 'All Appropriate Inquiries' Rule and the Superfund Liability Exemptions Established by the Brownfields Law of 2002*, 25 The New York Environmental Lawyer, No. 2, p. 8 (Spring/Summer 2005).

John R. Nolon & Jessica A. Bacher, *Court of Appeals Again Restrains Lower Courts*, New York Law Journal, p. 5 (Aug. 17, 2005).

Richard L. Weber, *State v. Speonk Fuel*: *The Untold Story Behind the Court of Appeals Decision*, 25 The New York Environmental Lawyer, No. 2, p. 16 (Spring/Summer 2005).

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