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LEGAL SUPPORT FOR THE ENVIRONMENTAL GRASSROOTS: A CONCEPT PAPER

Viewpoint

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grassroots organizations and communities working to address environmental issues in the United States; two, that the value of expanded legal support far outweighs the costs of providing it; and three, that the avenues for such support not only exist but are being underutilized.

It is inspired by the “*Building Equity & Alignment Initiative*,” an initiative supported by The Overbrook Foundation but led by a cohort of thirty (and growing) grassroots organizations.¹ It came together in the belief that the “environmental movement” is neither realizing its full impact nor winning the battles it needs to, not because of a collective lack of passion, but because of a lack of a collective. Effective and trusting communication between grassroots groups and national green groups is missing, caused in part by an inequity in the way resources are distributed between them. The need is not just more money or closer ties to the Beltway, but a movement-wide effort to shift and expand resources (including legal resources), increase communication, and rediscover the environmental movement’s belief in itself.

The purpose of this paper is to outline the legal needs of grassroots environmental groups, to catalog existing legal resources, and to offer practical ways of expanding their relationship. It also aims to convince the reader that expanding legal support is viable for and valuable to both attorneys and grassroots groups.

Part I gives a brief overview of the environmental justice movement and then considers the potential for impact of expanded legal support on communities as well as the legal

[*Editor’s Note:* This Viewpoint article represents the views of the author. Articles expressing differing views on this topic, as well as Viewpoint articles on other issues, are welcome.]

Summary: This concept paper is motivated by three core beliefs: one, that we must increase the legal support for

¹ *Environment*, The OVERBROOK FOUNDATION, <http://www.overbrook.org/environment/> (last visited Dec. 2, 2013).

profession. Part II uses quantitative and qualitative data to outline the specific legal needs for grassroots organizations and grassroots coalitions. Part III surveys the currently available legal resources, and Part IV offers various concrete ways to match the resources with the needs. Finally, Part V recognizes the obstacles—both internal and external—of realizing this vision, suggests means to (mostly) overcome them, and outlines next steps for readers interested in becoming more involved.² For, while no cause is lost if there is but one fool left to fight for it,³ we would all win, and win a lot faster, if we fight for the cause together.

I. Why Should the Legal Profession Care About Environmental Justice?

A. Unfulfilled Potential

The legal profession should care about expanding legal support for grassroots environmental organizations for three really good reasons:

- 1) We are all members of a community or communities, and the impacts of environmental harms affect us all;
- 2) Building community organizations with resources (including access to legal support) to address environmental injustices and their impacts strengthens communities and makes them more resilient; and
- 3) Updating and innovating methods of delivering legal services not only benefits communities and provides replicable tools for other social movements—it also benefits younger attorneys who are facing uncertain economic and social futures.

B. Brief Histories

This section gives brief overviews of the history of the environmental justice movement and the legal tools that have been used to address environmental injustices. It does so to situate the reader within a historical context and as necessary precedent to

an examination of the detrimental effects to society of environmental injustices and lack of access to justice.

1. Of the Environmental Justice Movement

Many cite the struggle by the predominantly African-American community of Afton, North Carolina, to prevent the disposal of 60,000 tons of soil contaminated with PCBs in the nearby landfill as a decisive moment in the birth of the environmental justice movement.⁴ And it was. After state officials refused to take action, the community did something unexpected: it fought back. For weeks, Afton residents lay down on the roads to prevent the trucks carrying the waste to pass. Five hundred people were arrested—the first arrests over a landfill siting.⁵

Perhaps fewer people are familiar with Leroy Jones.⁶ A 16 year old in the segregated oil company town of Norco, Louisiana, he was mowing his neighbor's lawn in the summer of 1973. When he restarted the mower engine, a spark ignited the oil that was leaking from a Shell pipeline. The resulting explosion burned down his neighbor's house and killed his neighbor; residents recall Leroy running down the street, body on fire. At Leroy's funeral, witnesses claim that Shell representatives gave Leroy's mother a check for \$500 for her loss.⁷

The terrible effects of environmental pollution—on health, safety, life expectancy, communities and culture—and the inextricable links between exploitation of land and exploitation of people,⁸ have echoes throughout history. The term “environmental justice,” however, developed after the struggle in Afton and other horrors drew national attention.⁹ The public began to become aware of the disproportionate siting of power plants, incinerators, dumps and highways, and the converse lack of investment in infrastructure in lower-income communities and in communities with people of color. Called by many the “next phase of civil rights”—the burgeoning movement also drew many of its strategies and momentum from the success of environmental litigation a decade before.¹⁰

It is important to note there is no one agreed-upon definition of “environmental justice.” There are several working definitions

² The author is aware that, due to space constraints, this paper looks only briefly at subjects that would benefit from further in-depth examination and which may leave some readers feeling it omits critical viewpoints. However, despite these gaps, the author will claim success if it makes even one reader engage in thinking about how legal resources could help support and more fully realize the potential power of the environmental movement. For more information, go to <https://drive.google.com/tab=mo&authuser=0#folders/0BwRPVsPoMH-5WHI0Mjh0c1d1LXm>.

³ *No cause is lost if there is but one fool left to fight for it*, REEL LIFE WISDOM, http://www.reellifewisdom.com/no_cause_is_lost_if_there_is_but_one_fool_left_to_fight_for_it (last visited Dec. 6, 2013).

⁴ ROBERT D. BULLARD, POVERTY, POLLUTION, AND ENVIRONMENTAL RACISM: STRATEGIES FOR BUILDING HEALTHY AND SUSTAINABLE COMMUNITIES, A DISCUSSION PAPER PREPARED FOR THE NATIONAL BLACK ENVIRONMENTAL JUSTICE NETWORK (NBEJN) ENVIRONMENTAL RACISM FORUM WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT (WSSD) GLOBAL FORUM JOHANNESBURG, SOUTH AFRICA JULY 2, 2002 (2002), available at <http://www.ejrc.cau.edu/PovpolEj.html> (last visited Dec. 7, 2013).

⁵ *The Environmental Justice Movement*, NRDC, <http://www.nrdc.org/ej/history/hej.asp> (last visited Dec. 7, 2013).

⁶ *Community Group: Concerned Citizens of Norco*, LOUISIANA BUCKET BRIGADE, <http://labucketbrigade.org/section.php?id=23> (last visited Dec. 7, 2013).

⁷ *Id.*

⁸ Rev. M. Linda Jaramillo, *Almost Everything You Need to Know About Environmental Justice*, UNITED CHURCH OF CHRIST, http://www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/almost-everything-you-need-to-know-about-environmental-justice-english-version.pdf (last visited Dec. 7, 2013).

⁹ See *supra* note Error! Bookmark not defined.

¹⁰ R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 233 (1999).

of environmental justice and its core principles, and ongoing tension between the oft-cited U.S. Environmental Protection Agency (EPA) definition and the original “Principles of Environmental Justice” developed at the First National People of Color Environmental Leadership Summit in 1991.¹¹

This paper takes the position that environmental justice, at its heart, is about access to justice: fighting so that all—poor and rich, rural and urban, minority and majority—are ensured basic human rights and have control over their quality of life. Quoting from an elder in the movement for environmental justice: “[I]ssues of environmental racism and environmental justice don’t just deal with people of color. We are just as much concerned with inequities in Appalachia, for example, where the whites are basically dumped on because of lack of economic and political clout and lack of having a voice to say ‘no’ and that’s environmental injustice.”¹² Thus, references herein to the “environmental movement” or “grassroots environmental organizations” relate to a broad issue-umbrella, from food to health, from urban planning to land conservation, and to issues faced by

predominantly—but not exclusively—lower-income (both rural and urban) communities and communities of color.

Principles of environmental justice continued to develop throughout the 1980s and 1990s in convenings of environmental grassroots organizations, indigenous communities and nations. These include the aforementioned Principles of Environmental Justice, “Principles of Working Together,”¹³ and the Jemez Principles of Democratic Organizing.¹⁴ Environmental justice received a new level of national recognition in Executive Order 12898, which directed all federal agencies to “*make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.*”¹⁵

In the latter part of the 1990s, “environmental justice” may have faded from the media spotlight, due in part to the movement’s naturally diverse membership and a lack of resources to keep it connected. Nonetheless, the movement continued

¹¹ The EPA defines environmental justice as: “[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies,” stating that environmental justice “will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.” *Environmental Justice*, EPA, <http://www.epa.gov/environmentaljustice/> (last visited Dec. 2, 2013), but some claim the language represents a cooption of the environmental justice movement and its seventeen core principles: EJnet.org notes that “*the environmental justice movement isn’t seeking to simply redistribute environmental harms, but to abolish them.*” See also *Principles of Environmental Justice, First National People of Color Environmental Leadership Summit*, WASHINGTON D.C., EJNET (1991), <http://www.ejnet.org/ej/principles.html> (last visited Dec. 7, 2013) (listing the seventeen principles: 1) **Environmental Justice** affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction / 2) **Environmental Justice** demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias / 3) **Environmental Justice** mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things / 4) **Environmental Justice** calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food / 5) **Environmental Justice** affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples / 6) **Environmental Justice** demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production / 7) **Environmental Justice** demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation / 8) **Environmental Justice** affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards / 9) **Environmental Justice** protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care / 10) **Environmental Justice** considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide / 11) **Environmental Justice** must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination / 12) **Environmental Justice** affirms the need for urban and rural ecological policies to clean and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provided fair access for all to the full range of resources / 13) **Environmental Justice** calls for the strict e of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color / 14) **Environmental Justice** opposes the destructive operations of multi-national corporations / 15) **Environmental Justice** opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms / 16) **Environmental Justice** calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives / 17) **Environmental Justice** requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth’s resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations).

¹² Interview by Errol Schweizer with Robert D. Bullard, Ph.D. (July 1999), <http://www.ejrc.cau.edu/earthfirstinterviewrb.htm>.

¹³ *Principles of Working Together, First National People of Color Environmental Leadership Summit, Washington D.C.*, EJNET (1991), available at <http://www.ejnet.org/ej/principles.html>.

¹⁴ JEMEZ PRINCIPLES FOR DEMOCRATIC ORGANIZING, MEETING HOSTED BY SOUTHWEST NETWORK FOR ENVIRONMENTAL AND ECONOMIC JUSTICE (SNEEJ), JEMEZ, NEW MEXICO (Dec. 1996), <http://www.ejnet.org/ej/jemez.pdf>.

¹⁵ Executive Order No. 12,898 (Feb. 11, 1994), 3 C.F.R. 859 (1995), available at http://www.epa.gov/region2/ej/exec_order_12898.pdf.

to develop and deepen its roots, recognizing kinship with other movements, from civil rights to health to food justice, and reemerged into the public foreground along with the growing debate on climate.¹⁶

Today many organizations are working on issues that have an environmental justice component, even if not framed as such (e.g., housing rights). Grassroots groups have also formalized alliances—the Climate Justice Alliance, the New York City Environmental Justice Alliance, the Indigenous Environmental Network and the Global Alliance for Incinerator Alternatives—to name a few. However, despite the growing number and vibrancy of grassroots environmental organizations, financial imbalances continue to exist. Of the more than 16,000 organizations registered with the Internal Revenue Service (IRS) as “environmental,” the largest two percent get 50 percent of funding.¹⁷

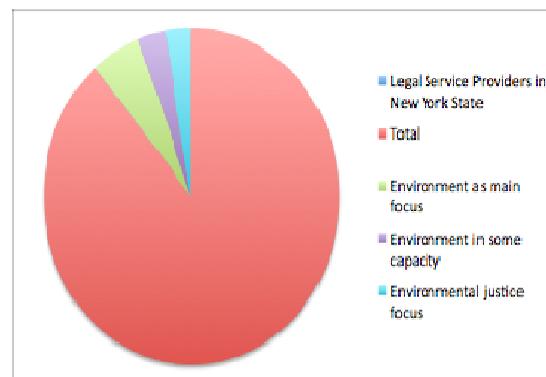
2. The Law and Access to Environmental Justice

The same imbalance holds true for access to legal services. The Legal Services Corporation estimates that out of the 60 million Americans who qualify for civil legal services, 80 percent will never get it, due to lack of capacity.¹⁸ Nearly three-fourths of low-income Americans and two-thirds of moderate-income Americans with identified legal needs either ignore their problem or try to resolve it without assistance.¹⁹

In terms of legal support for environmental organizations, less than 10 percent of surveyed nonprofit organizations with some legal component list environmental issues as part of their mission (and fewer still on issues related to environmental justice):

- 160+ organizations in New York State offer some legal aid/assistance;²⁰
- 8–10 focus directly on environmental issues;
- 4–6 address them in some capacity;
- 4–6 include an explicit focus on environmental grassroots issues.

Of the more than 1500 organizations listed nationally in the Public Service Jobs Directory, 125 were tagged as “environment” focused, or about eight percent.²¹



Legal advocacy is a critical tool in combating environmental injustice. Since the 1970s, legal advocates have invoked statutory, regulatory and common law to combat *actions*—discriminatory siting of polluting entities (e.g., power plants, landfills), discriminatory planning and zoning (e.g., lack of green spaces, highway construction)—and *harms* to human health caused by the resulting air pollution, water pollution, and toxic chemicals.²² Legal victories have been achieved by using existing environmental regulation, either (as Luke Cole said in his 1993 article) “straight-up” or “with a twist,” or by exploiting procedural errors of environmental impact statements and public participation requirements.²³ Public nuisance doctrine has been an intermittently useful tool for plaintiffs: WE-ACT, one of the first and major environmental justice organizations in the U.S., scored a decisive victory using the doctrine when the Dinkins Administration agreed to retrofit the North River Sewage Treatment Plant and pay a settlement of \$1.1 million.²⁴

However, the movement has seen less frequent success in the courtroom than it should, in part because the communities most

¹⁶ Dale Jamieson, *Justice: The Heart of Environmentalism*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM 85–101 (Donald D. Sandler & Phaedra C. Pezzullo ed., 2007).

¹⁷ SARAH HANSEN, NAT’L COMM. FOR RESPONSIVE PHILANTHROPY, CULTIVATING THE GRASSROOTS, A WINNING APPROACH FOR ENVIRONMENT AND CLIMATE FUNDERS 4 (2011), http://www.ncrp.org/files/publications/Cultivating_the_grassroots_final_lowres.pdf.

¹⁸ Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 15, 2013, at A1.

¹⁹ Justice Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1107 (2002).

²⁰ The spreadsheet was created using information from LawHelpNY.com, Probono.net and various other sources. It is accessible here: https://docs.google.com/spreadsheets/ccc?key=0AgRPVsPoMH-5dEw0Q3oxT3FOQ2JRWXZWRBsbY1pc2c&usp=drive_web#gid=0.

²¹ Data developed by author from PUBLIC SERVICE JOBS DIRECTORY, <http://www.psjd.org/> (last visited Dec. 13, 2013).

²² See SHEILA R. FOSTER, THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard & Sheila J. Foster eds., 2d ed. 2008); AMERICAN BAR ASSOCIATION, SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES (2008) (discussing the various legal mechanisms available to address environmental injustice, and their relative merits and drawbacks).

²³ Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L.J. 523 (1994).

²⁴ MASTER OF PUB. ADMIN. IN ENVTL. SCIENCE & POLICY, COLUMBIA UNIV., ASSISTING CONGRESS TO BETTER UNDERSTAND ENVIRONMENTAL JUSTICE 6 (May 2013), available at: <http://mpaenvironment.ei.columbia.edu/sitefiles/file/spring%2013%20reports/WEACT%20for%20Environmental%20Justice.pdf>.

affected by environmental injustices are often the very ones that have the fewest resources to combat them. In addition, the burden of proving standing—already difficult in civil rights and environmental contexts—is even higher in cases that combine the two.²⁵ The requirement of proving discriminatory impact by municipal authorities in zoning decisions that resulted in harms to human health meant that few Title VI and VIII cases met with success in the courtroom.²⁶ And the window of challenging agency action is usually a small one; New York State, for example, has a four-month state of limitations.²⁷ Too often the lack of available financial and legal resources of the community to quickly respond results in perpetuation of the status quo.²⁸ What is needed is not only continual pressure in courtrooms by lawyers, but legal support for organizations to empower themselves.

3. Community Access to Environmental Justice

That lower-income communities and communities of color disproportionately suffer from environmental degradation and pollution is not news. One need only look at a map of New York to see that its waste treatment plants and waste transfer stations are clustered in lower-income areas of Brooklyn, the Bronx and Queens, as are bus depots and heavy industry.²⁹ Green spaces, on the other hand, are in short supply in areas like the South Bronx. Unsurprisingly, these areas see higher rates of disease; for example, rates of death from asthma are three times the national average, and it is estimated that in some neighborhoods in the Bronx 20 percent of children have asthma.³⁰ African Americans living in New York's poorest neighborhoods have a lower life expectancy than any other racial or income group.³¹ But grim statistics are not isolated to urban areas or communities of people of color—an overlay of coal mining and poverty levels in West Virginia reveals a

strong correlation between the poorest areas and the areas of heaviest coal mining activity.³² Climate change is adding an additional layer of inequality: some of the populations most vulnerable to its effects are lower-income communities living in older public housing in coastal areas and depend on jobs threatened by extreme weather disruptions.³³

Vulnerable groups often do not have resources to raise awareness and confront issues, facing not only monetary challenges but ones of time, communication and limited public concern. Yet lack of access to justice affects not just those denied access, but every aspect of our society, and environmental injustice results in harms everyone pays for. The refusal by some state and local governments to prepare for climate change or provide resources for communities to do so will result in billions of dollars of damage and in significant population displacement of coastal communities—from *all* income ranges.³⁴ Lack of participation in urban planning and industrial siting decisions leads to communities with severe health concerns, which in turn leads to lost work days, increased strains on health care systems, and government expenditures that do not address the underlying issues.

But what if those communities had access to legal support?

What if, in the case of Afton, the community had had better access to understanding regulations that might have prohibited or delayed the dumping? Or access to expert witnesses? Such resources may not have resulted in a different outcome, but they would have certainly provided the community with alternatives to risking lives and living with chronic exposure to toxic chemicals, and might have provided resources to empower it for future challenges.

The same goes for Northwood Manor,³⁵ Hinkley,³⁶ the South Bronx, Appalachian communities combating mountaintop-removal mining,³⁷ Dimock,³⁸ the dumping of nuclear waste on the lands

²⁵ R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229, 233, 245–49 (1999) (highlighting the difficulties of proving discriminatory intent in environmental justice cases).

²⁶ *Id.*

²⁷ N.Y. C.P.L.R. 7801.

²⁸ CLIFFORD RECHTSCHAFFEN ET AL., SEATTLE UNIV. SCHOOL OF LAW LEGAL PAPER SERIES # 10–24, ENVIRONMENTAL JUSTICE, LAW, POLICY & REGULATION (2d ed. 2009), available at SSRN: <http://ssrn.com/abstract=1646574>.

²⁹ MTA Bus Depots & PA Bus Terminals in Communities of Color, <http://www.weact.org/Portals/7/Map%205.pdf> (last visited Dec. 7, 2013).

³⁰ Asthma and Air Pollution in the South Bronx, *South Bronx Environmental Health and Policy Study*, INST. CIV. INFRASTRUCTURE SYS., http://www.icisnyu.org/south_bronx/AsthmaandAirPollution.html (last visited Dec. 7, 2013).

³¹ N.Y.C. DEPT. OF HEALTH AND MENTAL HYGIENE, HEALTH DISPARITIES IN NEW YORK CITY 1 (Apr. 2010), available at <http://www.nyc.gov/html/doh/downloads/pdf/episrv/disparitiesone.pdf>.

³² *Sustainable Energy Economic Diversification*, COAL RIVER MOUNTAIN WATCH, <http://crmw.net/projects/sustainable-energy-economic-diversification.php> (last visited Dec. 7, 2013).

³³ TRACEY ROSS, CTR. FOR AMERICAN PROGRESS, A DISASTER IN THE MAKING ADDRESSING THE VULNERABILITY OF LOW-INCOME COMMUNITIES TO EXTREME WEATHER 2 (Aug. 2013) (quoting Alice Kaswan), available at <http://www.americanprogress.org/wp-content/uploads/2013/08/LowIncomeResilience-3.pdf>.

³⁴ *Id.*

³⁵ *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979).

³⁶ *Louis Sahagun, Tainted PG&E Groundwater Plume Again Threatens Residents of Hinkley, Calif.*, L.A. TIMES, NOV. 15 2010, <http://articles.latimes.com/2010/nov/15/local/la-me-hinkley-chromium-20101115/2>.

³⁷ *Large Numbers of Birth Defects Seen Near Mountaintop Mining Operations*, SCIENCE DAILY, June 23, 2011, <http://www.sciencedaily.com/releases/2011/06/110623090001.htm>.

³⁸ Jad Mouawad & Clifford Krauss, *Dark Side of a Natural Gas Boom*, N.Y. TIMES, Dec. 7, 2009, at B1.

of Native American nations,³⁹ and on and on. Not only could billions in cleanup costs have been avoided but the communities might not have had to suffer for years from the destruction of their environment and harms to their health, while not knowing what rules applied and what toxins infected them.

The conclusion some have drawn from the results of legal action in the past 40 years is not that the laws or legal action are useless, but that until the organizations and community groups facing environmental injustice have greater capacity to access them, they will not be effective in building towards environmental justice.

C. Opportunities for the Legal Profession

In today's world—or at least in America, and certainly in New York—it is safe to include the ubiquity of lawyers along with the existing certainties of death and taxes. This trend has only increased since the Great Recession:

- In 2009, 9,787 people passed the bar exam in the New York State.⁴⁰
- Analysts estimate that New York needs only 2,100 new lawyers each year through 2015.
- If trends continue, New York will continue to have an annual surplus of thousands of lawyers.⁴¹

That's a lot of lawyers. Nor do these figures include practicing attorneys (who are encouraged to complete 50 hours of pro bono work per year),⁴² retired attorneys and current law students (who must complete 50 hours of pro bono work before being admitted to the bar).⁴³

Unfortunately, it's not the best time to be a lawyer. The American Bar Association reported that just 56 percent of 2012 law graduates were employed in jobs requiring bar passage nine months after graduation,⁴⁴ and these statistics are unlikely to change in the near future.

The legal profession has for the most part successfully resisted external pressure to change, citing ethical and quasi-philosophical concerns.⁴⁵ However, as a growing number of legal scholars and practitioners have noted (including the New York City Bar Association⁴⁶) this reluctance to evolve diminishes the prospects of attorneys and the esteem in which the law is held. As it is, the most recent “Rule of Law Index” report finds the U.S. squarely in the bottom quarter of developed western democracies in providing access to civil justice.⁴⁷

Before getting too depressed, the legal profession should take pride in the fact that some of the very challenges communities and the legal profession now face can be turned into powerful resources. In fact, answering the call for legal services that narrow the gap between those who can and cannot afford them presents an opportunity to *expand* law's authority, esteem, and market. Just as C.K. Pralahad's “*Fortune at the Bottom of the Pyramid*” kickstarted a wave of interest by multinational corporations and social entrepreneurs in lower-income markets, so too are there untapped markets of legal “consumers.”⁴⁸

This is good news for recent law graduates entering an ever more uncertain landscape of employment. The small but growing sector of legal startups is more evidence that innovation in providing legal services will bend the law's structures, not break them.⁴⁹ And while access to the law is not a cure for what ails us, it nonetheless possesses unique power in a system “built of laws, not men.”⁵⁰

D. The Potential of Empowered Communities

Have you ever wanted to be part of something that made you feel part of something? To know that you were making a difference not just for your clients or community, but for the community of a movement?

It is time to act because we are *all* members of communities and because environmental justice ties into and affects

³⁹ PUB. CITIZEN & NUCLEAR INFO. AND RESEARCH SERV., RADIOACTIVE RACISM: THE HISTORY OF TARGETING NATIVE AMERICAN COMMUNITIES WITH HIGH-LEVEL ATOMIC WASTE DUMPS, <http://www.nirs.org/radwaste/scullvalley/historynativecommunitiesnuclearwaste06142005.pdf> (last visited Dec. 7, 2013).

⁴⁰ Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES (June 27, 2011), <http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/>.

⁴¹ *Id.*

⁴² 22 N.Y.C.R.R. § 6.1.

⁴³ 22 N.Y.C.R.R. § 520.16(a), available at http://www.nycourts.gov/attorneys/probono/Rule520_16.pdf.

⁴⁴ Mark Hansen, *Barely Half of All 2012 Law Grads Have Long-Term, Full-Time Legal Jobs, Data Shows*, A.B.A. J. (Mar. 29, 2013), http://www.abajournal.com/news/article/barely_half_of_all_2012_law_grads_have_long-term_full_time_legal_jobs_data/.

⁴⁵ See, e.g., NASSAU COUNTY BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE USE OF NON-LAWYERS IN CLOSING THE ACCESS TO JUSTICE GAP (Sept. 10, 2013), available at: https://www.nassaubar.org/UserFiles/Non_lawyer_task_force_report%209_10_2013.pdf; *Ethics Opinion 330: Unbundling Legal Services*, D.C. BAR (July 1, 2005), <http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion330.cfm>.

⁴⁶ N.Y. CITY BAR ASS'N, NARROWING THE “JUSTICE GAP”: ROLES FOR NONLAWYER PRACTITIONERS (June 2013), <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>.

⁴⁷ MARK DAVID AGRAS ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012–2013 (2012–2013), http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.

⁴⁸ Renee Newman Knake, *Why Law Students Should Be Thinking About Entrepreneurship and Innovation in Legal Services*, BLOOMBERG LAW (2012), <http://about.bloomberglaw.com/practitioner-contributions/innovation/>.

⁴⁹ See *id.*

⁵⁰ MASS. CONST. art. XXX.

everything from democratic participation to health to economic resiliency. Environmental justice is not just about re-siting power plants or preventing gentrification: it is about ensuring that everyone has access to basic human rights, dignity and quality of life, and the ability to meaningfully participate in decisions that affect their lives and communities.

Building pathways for meaningful participation also has implications beyond the environmental justice movement. Although the phrases “siloeed issues” and “siloeing movements” might justly be categorized as nonprofit-speak *du jour*, it is true that too often organizations must compete for funding and feel the need to guard their niche to survive. Unsurprisingly, this pressure often impedes exchange of information and speed of change.

More organizations are realizing the benefits of engaging in cross-issue collaborations. The members of Democracy Initiative (established to address the effects of *Citizens United*), for example, are unusual bedfellows, bringing together groups such as Greenpeace, NAACP, the Communications Workers of America, and the National Gay and Lesbian Task Force.⁵¹

And, just as the civil rights movement provided inspiration and guidance for the environmental justice movement, so too could tools developed for environmental grassroots organizations be useful for related struggles.

II. What are the Environmental Community’s Unmet Legal Needs?

Part II gives an overview of the types of existing organizations, communities, and networks that are working to address issues related to environmental justice. Parts II.B and II.C use collected qualitative and quantitative data, including information from a survey conducted by this author, to identify common legal needs of organizations and networks.

A. People & Power

The growth of “nonprofits” has outpaced growth in both the business and government sectors. Between 2001 and 2011, the number of nonprofits increased 25 percent, from 1,259,764 to 1,574,674.⁵² They now account for almost 10 percent of salaries

paid in the U.S.⁵³ As of 2012, there were at least 17,000 nonprofit public charities categorized as “environmental” by the IRS, with total 2012 revenue of \$8 trillion and assets of \$23 trillion.⁵⁴ About 1,000 of those are headquartered in New York, but that number does not include smaller, unincorporated community-based organizations, which likely number as many if not more.⁵⁵ That’s a lot of organizations, and a lot of money.

Unfortunately, the money is not distributed evenly among the organizations.⁵⁶ As noted above,⁵⁷ 50 percent of all philanthropic giving to environmental organizations goes to the largest two percent of organizations—meaning that the remaining 98 percent (i.e., about 15,000 organizations) have to fight over the remainder.⁵⁸ The result of this funding structure is a situation where small groups with potential for outsized impact will be unnecessarily constrained by poor capacity building, inadequate leadership development and muted public presence. It also means that many organizations with legal needs can neither afford to meet them, nor, in some cases, even properly articulate them.

As with Afton, imagine if that were not the case: what if—in the absence of a “Civil Gideon”⁵⁹ for individuals and organizations—we tapped the potential of existing and underused legal resources? What if we embraced the growing wave of technological innovations? What if we could help unleash the power of that 98 percent?

The following section gives a non-exhaustive look at legal needs of the environmental grassroots, categorized as either “mission-related,” “transactional,” or “indirect” legal support.

B. Community-Based Organizations (CBOs)

Community-based organizations are, one might say, the original nonprofits. Their work—whether focusing on religion, the arts, homelessness, youth, environment or public safety—is an essential part of a community’s fabric. CBOs tend to be small (less than 10 staff members), and, as their name suggests, focused on localized issues. In urban areas, many environmentally oriented CBOs are increasingly focused on food insecurity, environmental health, “green” jobs, sustainable housing, climate-resilient communities and youth leadership.

⁵¹ THE DEMOCRACY INITIATIVE, <http://www.democracyforus.org/> (last visited Dec. 7, 2013).

⁵² KATIE L. ROEGER ET AL., URBAN INST., *THE NONPROFIT ALMANAC 2012* (2013).

⁵³ *Quick Facts about Nonprofits*, NAT’L CTR. FOR CHARITABLE STATISTICS, <http://nccs.urban.org/statistics/quickfacts.cfm> (last visited Dec. 13, 2013).

⁵⁴ These numbers were obtained using the NCCS All Registered Nonprofits Table Wizard at <http://nccsweb.urban.org/tablewiz/bmf.php> (last visited Dec. 13, 2013).

⁵⁵ *Number of Public Charities in the United States, 2013*, NAT’L CTR. FOR CHARITABLE STATISTICS, <http://nccsweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=PC> (last visited Dec. 13, 2013).

⁵⁶ Collectively, only 15 percent of environmental grant dollars were classified as benefiting one of the 11 marginalized populations included in Nacre’s analysis. See HANSEN, *supra* note, at 4.

⁵⁷ See *supra* Part I.B.2.

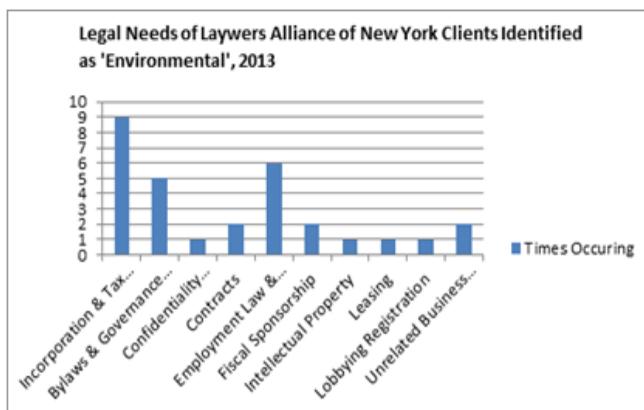
⁵⁸ *Id.*

⁵⁹ This refers to the idea that civil defendants should be accorded the same right to legal counsel as the U.S. Supreme Court held was owed to indigent defendants in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Mission-Related. Identified needs include legal research on the impacts of new regulations or the ability to propose policy changes, properly lodging notices of violations, and support in contesting permitting and zoning changes. Almost 100 percent of the survey respondents said they had been involved in a government agency decision-making process, and the same number said they would have liked to know more about that process.⁶⁰

Imagine, for example, that Clean Air Now (CAN), a hypothetical CBO in a lower-income area, is worried about the planned construction of a new thoroughfare in its community, which it only recently became aware of. The group's members are passionate about the issue, but are having difficulty navigating the treacherous terrain of agency regulation, knowing whom to contact, when to contact, how to submit comments and the limits of agencies' authority. One member then sees on an agency website that hearings on the new rule are happening in a week. Unfortunately, it's during the day, and all the members are working. So the group decides to submit written comments via email, but unlike their represented counterparts, does not have access to scientific experts or air-testing kits.

Transactional. Many CBOs are not incorporated, and would benefit greatly from legal support in the areas of incorporation and tax exemption. In fact, Lawyers Alliance for New York reports that ten percent of the approximately 1000 cases it handles each year deal with matters of incorporation.⁶¹



Organizations of any kind will also need to address contractual issues of all stripes, as well as questions about immigration, landlord/tenant issues and real estate and zoning.

Perhaps CAN was successful in getting a voice at the regulatory table, and maybe it wasn't. Imagine, however, that it managed, through protests and fliers, to catch the attention of Ms. Lotzacashe, reclusive heiress to the Q-Tip fortune, who lives

in the neighborhood and is concerned about the noise that more traffic will bring. She wishes to give a substantial donation—but her attorney is concerned that the organization is not formally registered and that the funds could be misused. The organization then wants to incorporate, but is unsure how to do so or where to go for support.

Indirect Support. Many CBOs have less than one or two paid staff, and would benefit greatly from capacity-building support. While some aspects of capacity building do not have a direct legal angle—leadership development, for example—others do, including support with financial literacy and governance development.

Suppose that Clean Air Now decided, even without incorporation, that it wished to formalize its organizational structure. Does it need a board? How best to manage accounting systems? Should they connect with other neighborhood alliances, or locate legal support going forward? Half of all survey respondents said they had thought about changing their governance structure in the past year.⁶²

In short, there are multiple areas where legal support could have been provided and could have had significant impact, either in producing a positive outcome or building organizational capacity to meet future challenges.

C. Networks and Coalitions

Throughout the movement's history, but especially in the 1990s and 2000s, environmental grassroots groups have been working with each other and strengthening communal roots. The results of this development are increasingly seen and felt through the growth in the number of issue-driven alliances (e.g., the Climate Justice Alliance, the New York Environmental Justice Alliance, the Grassroots Global Justice Alliance) and the increasingly cross-sectoral nature of their collaborations (like the Democracy Initiative and the Energy Action Coalition).⁶³

Transactional. Nonprofit support groups such as the Community Resource Exchange are reporting higher-than-ever numbers of organizational mergers and collaborations.⁶⁴

After gaining traction in its community, Clean Air Now feels it would have more impact if it merged with Water is Necessary (WIN), another community-based organization in the neighboring state of New Berzee working to protect the bi-state watershed. The organizations are worried that a merger could violate laws, and one of CAN's employees—an undocumented resident—is concerned about moving offices across state lines. They would like to contact an attorney—but are worried it will be too costly. Indeed, 75 percent of survey respondents indicated that

⁶⁰ Survey results on file with author.

⁶¹ Data from Lawyers Alliance for New York (on file with author).

⁶² Survey results on file with author.

⁶³ DEMOCRACY INITIATIVE, <http://www.democracyforus.org/> (last visited Dec. 13, 2013); ENERGY ACTION COALITION, <http://www.energyactioncoalition.org/> (last visited Dec. 13, 2013).

⁶⁴ Interview with Community Resource Exchange (Nov. 8, 2013) (notes on file with author).

cost was a reason they have not been able to access the legal support they need.⁶⁵

Mission-Related. Collaborations working on environmental issues across state lines will face cross-jurisdictional issues. Perhaps the regional watershed commission is proposing a new regulation allowing the discharge of treated fracking wastewater. The merged group—CAN-WIN—wants to produce a position paper of the impacts on their community, but would greatly appreciate legal support. Or perhaps the law has already gone into effect. CAN-WIN has combined its resources and wishes to sue—but all the law firms it reaches out to are concerned about conflict.

Indirect Support. Similar to needs of individual organizations, many networks would appreciate capacity-building support. CAN-WIN wants to improve its relationship with potential legal resources—but doesn't know whom to reach out to. There is an internal debate over how much they can say to the media about a proposed settlement with the watershed commission. So one passionate activist holds a press conference—and now the commission's attorney, Mr. Zealus-Advokayte, is threatening to sue.

III. Who Is Already Meeting that Need?

A. More is More

While many organizations have found ways in recent years to stretch their dollars, leaner budgets should not be equated with more effective or efficient outcomes. That is to say, while the organizations in Part III.B, *infra*, are doing remarkable things in the face of budget constraints, the impact would be even more significant if their work were expanded and if the underutilized resources outlined in Part III.C were tapped.

B. Existing Legal Service Providers

The spreadsheet linked to in Part I.B.2 (*see* note 20) generated a list of the approximately 160 New York City-based nonprofit groups providing legal services as all or part of their mission, with the goal of identifying organizations and organizational structures that could be expanded or replicated as nationwide models. A representative sampling is presented below.

1. Public Interest Law Offices

The most “traditional” or straightforward structure is that of a public-interest law office providing a large range of legal services—including direct legal representation—to its clients. It is characterized by relatively few in-house staff, although the issue focus can vary widely from region-specific to issue-specific,

individual and direct representation to organizational transactional assistance. Revenue generally comes from a mix of the New York State Interest on Lawyer Account Fund (IOLA) funds, Legal Services Corporation funds, foundations, law offices, private contributions, and discounted fee-for-service payments.

Direct Representation for Rural Regions. Rural Law Center of New York is a public interest law office established in 1996 through IOLA and the New York Bar Foundation, whose mission is to highlight the needs of low-income, rural New Yorkers. In addition to direct legal representation on family law, consumer debt, housing, rural seniors and youth issues, it offers trainings for rural attorneys, who in turn give pro bono representation on those topics. It also engages in policy-based advocacy to influence rural impact legislation and acts as a facilitator in rural coalition building. Its budget of \$700,000 comes from a mix of government grants and private contributions.

“In-House Counsel” for Urban Communities. Brooklyn Legal Services Corporation A focuses on the areas of North and East Brooklyn, and provides a wide array of legal services to low-income individuals and community groups. It partners with local grassroots organizations, such as the Cypress Hills Development Corporation, that focus on social and economic justice. Legal assistance includes traditional direct representation as well as community development, education and mobilization. Its \$3.5-million budget is funded equally through government grants and private contributions.

Issue-Specific Law Office. The Worker Justice Center of New York⁶⁶ was the result of the 2003 merger between Farmworker Legal Service of NY (FLSNY) and the Workers' Rights Law Center (WRLC). It provides direct legal services to low-wage workers, educates immigrant workers on their legal rights via trainings and community engagement, and engages in impact litigation. It has a budget of \$700,000, mainly from government grants and private contributions.

Environmental Justice Law Office. Smaller yet is New York Law and Environmental Justice Project, an unincorporated law office based in New York City, whose mission is to represent individuals and communities facing environmental health and justice issues. It engages in a mix of impact litigation, regulatory proceedings, and policy research. Its long-term goal is to support “Law and Environmental Justice Projects” across various states, which would have common access to scientific experts, experienced attorneys, and relevant legal research.

2. Clearinghouses and Collaborations

A second general structure is the network or clearinghouse. It may have fewer in-house staff while building partnerships and relationships with law firms, law schools and individual attorneys to provide legal support and/or legal resources. A greater proportion of funding comes from the law firms that

⁶⁵ Survey results on file with author.

⁶⁶ WORKER JUSTICE CTR. OF N.Y., <http://www.wjcn.org> (last visited Dec. 13, 2013).

contribute pro bono support, and these organizations often—though certainly not always—prefer transactional support to litigation.

Transactional Clearinghouse. The Lawyers Alliance for New York⁶⁷ provides transactional services to nonprofits and CBOs. It taps the services of pro bono departments from over one hundred large law firms for the approximately 1000 cases it handles per year. Its small in-house staff oversees each case and facilitates communication between volunteer and client. Nonprofit organizations interested in receiving the transactional legal support it primarily provides must fill out a screening application and attend an in-person meeting. Its \$189-million budget comes from corporations, law firms and foundations. This sizeable budget allows it to engage in issue-specific campaigns and awareness raising, such as its new Urban Health Campaign, launched in 2013.

Transactional Clearinghouse plus Issue-Specific Litigation. New York Lawyers for the Public Interest,⁶⁸ with a budget of about \$5 million, is an example of a nonprofit legal organization with strong pro bono ties as well as an active impact litigation focus. It manages a legal clearinghouse for community-based organizations and partners with organizations on litigation related to disability, health and environmental justice.

International Environmental Clearinghouse. The Cyrus R. Vance Center,⁶⁹ housed within the New York City Bar Association, established an “Environmental Program” in 2012 and manages trans-national environmental projects in Latin America. Its tiny in-house staff pairs large U.S. law firms, Latin American firm counterparts and the nonprofit client (which it selects) to work on cross-boundary issues including coastal reef and climate adaptation legislation. It does not provide direct legal representation, instead focusing on legislative and policy advocacy. Grants and the New York City Bar Association fund its budget of \$400,000.

3. Self-Help Resources

In resource-constrained settings, a cost-effective structure is one that primarily provides referral services, legal resources or self-help guides for pro se representation.

Regionally-Focused Public Interest Law Office. The client base of Legal Assistance of Western New York is heavily rural and low-income as compared to the rest of New York State. The low density of the population it serves means it is harder for those seeking legal assistance to visit in person. For those who are unable to seek in-person assistance, the organization has put

much of its information and resources on its (acronymically appropriate) www.lawny.org website. Its streamlined online format allows for easy access to relevant legal forms and resources. However, it has taken a further multimedia step and developed accompanying videos as aids to understanding often confusing legal issues.

Issue-Specific Self-Help Organization. The mission of Legal Information for Families Today (LIFT) is to enhance access to justice and self-empowerment for children and families by providing legal information and community education. It does so via an in-house staff and volunteers provided by established relationships with law schools and firms. It staffs a hotline, has stations in various family courts to answer questions, and provides 35 multilingual legal resource guides, but provides no direct representation. Its budget of \$1.7 million is funded by private donations and government grants.

Web-Based Legal Support. Last, but certainly not least, are the related organizations of Probono.net⁷⁰ and its spinoff LawHelp.⁷¹ Both offer no direct in-person legal services, but maintain some of the most comprehensive online legal resource guides in the country. Visitors may search either for specific issue guides and forms (which link to government websites or other organizations), or for issue-specific organizations (notably, environment/environmental justice/energy/climate/pollution are not available search criteria).

B. Under-Utilized Resources

The following section offers a brief overview of organizations whose resources should be more effectively expanded. Means of tapping their potential are explored in Part V.

1. Academia

Academia may seem like an unlikely candidate for “under-utilized resources” given that many of the articles referenced in this paper are from legal scholars and academics. However, missed connections exist between the page, the classroom and the “real world.” The legal lens of many environmental law courses remains zoomed in on case law, federal legislation and local zoning in land use planning. Collaborations like the one between Columbia’s Center for Climate Change Law and its Earth Institute should be encouraged, as should opportunities to explore the interconnections between health, food production, urban public space and climate change.⁷² Law students in urban

⁶⁷ LAWYERS ALLIANCE FOR N.Y., <http://www.lany.org/> (last visited Dec. 13, 2013).

⁶⁸ N.Y. LAWYERS FOR THE PUB. INTEREST, <http://www.nylpi.org> (last visited Dec. 13, 2013).

⁶⁹ CYRUS R. VANCE CTR. FOR INT’L JUSTICE, <http://www.vancecenter.org> (last visited Dec. 13, 2013); Interview with Vance Center (Aug. 3, 2013) (notes on file with author).

⁷⁰ PROBONO.NET, <http://www.probono.net> (last visited Dec. 13, 2013).

⁷¹ LAHELPO.ORG/NY, <http://lh2.lawhelp.org/ny/> (last visited Dec. 13, 2013).

⁷² COLUMBIA CTR. FOR CLIMATE CHANGE LAW, <http://web.law.columbia.edu/climate-change> (last visited Dec. 13, 2013); THE EARTH INSTITUTE, <http://www.earth.columbia.edu/> (last visited Dec. 13, 2013).

areas should also be encouraged to learn about and engage with support to community-based organizations.

2. Underemployed Attorneys / Lawyers in Transition

As noted in Section I.C.2, there are currently thousands of un- or underemployed young attorneys in New York State. Others may have non-legal employment (“do you want fries with that?”), though not by choice.⁷³ Many of these law graduates are eager to gain experience volunteering or working for discounted rates with nonprofit organizations. However, it can be difficult both for the attorney to know which organizations to reach out to, as well as for the organization that may have need for legal support but not the capacity to direct or supervise the attorney. Still—the suggested pro bono commitment for active attorneys is fifty hours per year,⁷⁴ and there is an estimated surplus of approximately 7,000 attorneys per year in New York alone. That adds up to 350,000 hours of pro bono service—or the equivalent of one attorney working 24-hours straight for 40 years—potentially going to waste.

3. Small-to-Medium Law Firms

Small-ish and mid-sized firms or solo practitioners might in some cases present fewer bureaucratic hurdles than trying to establish relationships with large firms’ pro bono departments, as larger firms are also more likely to have issues of conflict. If, for instance, Clean Air Now wants to sue CleanOil Co. for fumes from a refinery fire, BigLaw LLC is much more likely to have ties with the company than Goldilocks, Baby & Bear PLLC. Smaller firms might also welcome the good PR pro bono work would bring.

4. “New Legal Professionals” & Unbundled Legal Services

A growing number of legal academics, judicial administrators, and legislative bodies are calling for legal reforms that would

increase the opportunities for “new legal professionals.” In her paper “Stratification of the Legal Profession,” Professor Laurel Rigertas compared the legal and medical professions to show how previously exclusive professions can develop differentiated strata of support while maintaining quality of service.⁷⁵ Professor Gillian Hadfield, a leading advocate of the economic benefits of opening up delivery of legal services, cites the successful transition of the United Kingdom in expanding legal services and increasing competitiveness.⁷⁶ In fact, a recent UK study of the quality of wills by attorneys and “non-attorneys” showed that trained attorneys did just as well—or conversely—just as badly as all other groups.⁷⁷

As a first look at how the practice could look in the U.S., Washington State recently authorized the creation of “Limited Liability Legal Technicians.”⁷⁸ With 30 hours of classroom credit and 3000 hours of on-the-ground training, these “new legal professionals” can perform many legal functions—including drafting forms, explaining proceedings and assisting with legal procedures—without being held to have violated the prohibition on the unauthorized practice of law.

“Unbundled” legal services—representation limited in scope and duration—have had a slightly longer history. In New York, the concept has been embraced by the court system, and found one of its strongest advocates in Chief Judge Lippman. Since 2009, the New York court system has run a “Volunteer Lawyer for the Day” program, first for housing court, and recently expanded to include consumer debt and uncontested divorce.⁷⁹

5. Self-Help

The law has also lagged behind in embracing the use of technology. Companies like FindForms, and LegalZoom provide legal form templates.⁸⁰ Many legal service providers and nonprofit organizations provide free access to legal resources. Avvo and RocketLawyer host quasi-attorney “Yellow Pages.”⁸¹ Yet important gaps exist between accessing a legal template and accurately completing it, appropriately filing it and properly responding to any follow-up. Free legal resources are not helpful if consumers are unaware of their

⁷³ David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html>; *The Oh-So-Useful Law Degree*, WAITRESS J.D. BLOG (June 26, 2007, 10:49 AM), <http://waitressjd.blogspot.com/2007/06/who-am-i-kidding-bar-exam-is-way-of.html>; Jacob Gresham, *Law School Graduate Unemployment Rate Creeps Up*, WALL ST. J. LAW BLOG (June 20, 2013, 5:11 PM), <http://blogs.wsj.com/law/2013/06/20/law-school-graduate-unemployment-rate-creeps-up/>.

⁷⁴ 22 N.Y.C.R.R. § 6.1.

⁷⁵ Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, J. OF THE PROOF’S LAWYER (2012).

⁷⁶ Gillian Hadfield, *Legal Services Wanted; Lawyers Need Not Apply*, PAC. STANDARD (June 28, 2011), <http://www.psmag.com/legal-affairs/legal-services-wanted-lawyers-need-not-apply-32128/>.

⁷⁷ LEGAL SERVICES CONSUMER PANEL, REGULATING WILL-WRITING (July 2011), available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf.

⁷⁸ *In re Matter of Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, Order No. 25700-A-1005 (June 14, 2012), available at: <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

⁷⁹ *New York State Courts Access to Justice Program*, ACCESS TO JUSTICE: NY STATE COURTS (2010), http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2010_report.pdf.

⁸⁰ FINDFORMS.COM, <http://www.findforms.com/> (last visited Dec. 13, 2013); LEGALZOOM, <http://www.legalzoom.com/> (last visited Dec. 13, 2013).

⁸¹ AVVO, <http://www.avvo.com> (last visited Dec. 13, 2013); ROCKETLAWYER, <http://www.rocketlawyer.com> (last visited Dec. 13, 2013).

existence or must navigate difficult e-terrain to do so. Online listings are not always reliable indicators of quality.

Ethical considerations and prohibitions on the unauthorized practice of law have understandably slowed the legal profession's adaptation to the internet age, but its traditional reluctance to embrace change and its significant control over rulemaking has enabled this reluctance to impede necessary evolution. Online and technology-based tools are vastly under-used resources for increasing access by those who need legal services.⁸² As the reed warned the oak: "'tis better to bend than to break."⁸³

IV. How To Match the Needs with the Resources?

A. Modifying All of the Above

The spreadsheet referenced in Part I.B.2 of legal services providers lists organizations small to large, government-supported to privately-funded, offering direct representation or online self-help guides, networks to bar associations to law offices, well-staffed to volunteer-run, bureaucratic or streamlined, and addressing issues ranging from the arts to prison reform to economic justice to the deaf community. This range is proof that it is possible to leverage the law in the service of public good and that there is no insurmountable barrier to expanding legal support to the grassroots environmental community. This Part takes the needs outlined in Part II and the various existing legal resource structures described in Part III and offers recommendations on ways to match them that will be economically feasible and socially valuable.

B. Reduce Barriers to Information

A major stumbling block in unlocking the potential of law to empower the environmental movement is the complexity of legal forms and procedures. Some of that complexity is inevitable, some is not.

There are several concrete initiatives through which "the law" already can be made more accessible for grassroots environmental organizations and individuals. All of these projects are in various stages of development, some nascent, others more

fully formed. Some require sizable financial investments, while others make significant use of volunteer labor:

- Step-by-step guides for citizen enforcement of potential environmental violations (i.e., prosecuting Clean Water Act violations, judgment enforcement);
- Compilation of easy-to-navigate indices of laws related to environmental justice across different states;
- "Idealist.org" model for short-term legal research;
- Technologically sophisticated software models that can "walk" the viewer through often-encountered obstacles; and
- Attorneys trained on relevant topics with the goal of having them train community members or other attorneys.

Volunteer law students and recent graduates are good candidates to helm the creation and maintenance of legal resource databases. Cardozo's Access to Justice Clinic,⁸⁴ for example, maintains an index of laws related to social justice across the different states. Although databases that include legal resources on environmental issues do exist, an easy-to-use database on state-by-state legal resources for environmental justice would be valuable. The Center for Urban Environmental Reform at CUNY Law and the Feerick Center for Social Justice at Fordham Law have expressed interest in exploring this idea.⁸⁵

Several nonprofits provide legal resources, and organizations such as Legal Information for Families Today⁸⁶ and the Legal Action Center⁸⁷ provide comprehensive compilations of relevant legal forms and FAQs for pro se representation. Guides and forms on issues related to environmental justice could be similarly aggregated and centrally housed—probono.net is one possibility, as is reaching out to EJnet.⁸⁸ Law students and recent graduates could be incentivized to work on guides as opportunities to develop specialized knowledge.

Alternatively, websites like Idealist.org or PSJD⁸⁹ could develop sub-search criteria for organizations to post requests for regulatory research. For example, Idealist was successfully used to match a young attorney with the Metropolitan Waterfront Alliance for research on an area of maritime law.⁹⁰

In rural areas, legal service providers can engage in a "training of trainers" approach. The Rural Law Center of New York⁹¹ already provides training for volunteer attorneys on relevant topics, with the objective of increasing the attorneys' ability to

⁸² See, e.g., REINVENT LAW LABORATORY, <http://www.reinventlaw.com/> (last visited Dec. 13, 2013).

⁸³ *The Oak Tree and the Reed*, in AESOP'S FABLES.

⁸⁴ NAT'L CTR. FOR ACCESS TO JUSTICE, <http://www.cardozo.yu.edu/NCAJ> (last visited Dec. 13, 2013).

⁸⁵ CTR. FOR URB. ENVTL. REFORM, <http://cuer.law.cuny.edu/> (last visited Dec. 13, 2013); FEERICK CTR. FOR SOCIAL JUSTICE, <http://law.fordham.edu/feerick-center/feerickcenter.htm> (last visited Dec. 13, 2013). Interview with Rebecca Bratspies, Ctr. for Urb. Envtl. Reform, CUNY Law (Nov. 11, 2013) (notes on file with author).

⁸⁶ LEGAL INFORMATION FOR FAMILIES TODAY, <http://www.lifonline.org/> (last visited Dec. 13, 2013).

⁸⁷ LEGAL ACTION CENTER, <http://www.lac.org/> (last visited Dec. 13, 2013).

⁸⁸ EJNET, <http://www.ejnet.org/> (last visited Dec. 13, 2013).

⁸⁹ PUBLIC SERVICE JOBS DIRECTORY, <http://www.psjd.org/> (last visited Dec. 13, 2013).

⁹⁰ Interview with Metropolitan Waterfront Alliance (Nov. 21, 2013) (notes on file with author).

⁹¹ RURAL LAW CTR. OF N.Y., INC., <http://www.rurallawcenter.org/> (last visited Dec. 13, 2013).

provide related pro bono support in their community. The Center—and others like it—could be a resource for trainings on issues affecting rural environmental coalitions such as fracking. Bar associations can do the same: the Capital District Women’s Bar Association,⁹² among others, calls on its membership to provide workshops on different legal issues. The Western New York Law Center⁹³ hosts email discussion lists and operates a statewide technical support center for IOLA grantees; it could provide valuable lessons on how to increase sharing of lessons learned by legal service providers.

The IIT Chicago Kent College of Law has become a leader in the field of technology and the law, receiving funding from the Ford Foundation to explore synergies between the two. One result is A2J Author®:⁹⁴ a software tool that expands access to justice for self-represented litigants by enabling non-technical authors from courts, clerks’ offices and legal services programs to rapidly build and implement customer-friendly web-based interfaces for document assembly. While its development was costly, it suggests an exciting template for a legal-wiki, a professional-crowd-sourced tool for providing inside knowledge to outside groups.

C. Expand Opportunities for Community Decision-Making

A corollary to reducing barriers to information is to expand opportunities for community groups to actively participate in and shape decision-making processes. Such participation is a key component to achieving social justice, and one our society has not yet met. Moreover, inclusion in the period of initial regulatory decision-making presents a higher likelihood of a preferred outcome for community-based organizations, which in turn reduces the likelihood of a law or regulation meeting resistance—and incurring legal fees—down the road.

While increasing participatory decision-making requires structural changes that cannot be achieved by the legal profession alone (including reversing the systems of corporate influence and money in politics), there are still ways for legal professionals to make a difference. Specifically:

- Online guides that help navigate municipal regulatory processes; and
- Hubs connecting scientific expertise with communities addressing environmental health concerns.

Professor Rebecca Bratspies at the Center for Community Environmental Reform at CUNY Law has argued for the need to build “regulatory trust” through increased transparency by agencies and meaningful participation by community members.⁹⁵ One means of empowering community participation would be to make regulatory processes more transparent. An online “Portal-to-Justice”—similar to A2J Author’s work—could offer step-by-step guidance on agency decision-making for communities facing threats to their environmental health or safety. It would help inform community groups about which agencies are involved in an issue, what their powers/limitations are and how to engage them.

Such a resource could also offer access—within limits—to scientific experts. Informal referral systems already exist; the New York Law and Environmental Justice Project, for example, harnesses relationships developed through its work to provide community groups with access to scientific expertise, increasing the quality, accuracy and legitimacy of community concerns.⁹⁶

D. Increasing Availability of Legal Access & Capacity to Utilize It

To fully develop the voice of grassroots organizations at the negotiation table, legal resources must also focus on building internal organizational capacity. Legal support (e.g., developing governance procedures, promoting financial literacy) is a critical part of the larger goal of building equity and alignment in the environmental movement.⁹⁷ Such support includes:

- Expanding support by existing legal service providers to environmental justice organizations (broadly writ);
- Centralizing or franchising referral/resource hubs;
- Service models with expanded online components; and
- Community “in-house counsel.”

In recent years, a limited but influential group of legal service providers in New York have expanded their programmatic focus on issues encompassed within environmental justice.⁹⁸ The Lawyers Alliance for New York, for example, determined in conjunction with a periodic internal review that its 2014 campaign would focus on urban environmental health.⁹⁹ The New York Lawyers for the Public Interest—long an advocate

⁹² THE LEGAL PROJECT, <http://www.legalproject.org/index.php> (last visited Dec. 13, 2013).

⁹³ W. N.Y. LAW CTR., <http://wnylc.com/> (last visited Dec. 13, 2013).

⁹⁴ A2J Author, IIT CHICAGO-KENT COLLEGE OF LAW, <http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author#sthash.2L1nG42t.dpuf> (last visited Dec. 8, 2013).

⁹⁵ Rebecca M. Bratspies, *Regulatory Trust* (Mar. 18, 2009), available at <http://ssrn.com/abstract=1364314>.

⁹⁶ Interview with N.Y. Law & Justice Project (Nov. 19, 2013) (notes on file with author).

⁹⁷ See LISA RANGHELLI, NAT’L COMM. FOR RESPONSIVE PHILANTHROPY, LEVERAGING LIMITED DOLLARS: HOW GRANT MAKERS ACHIEVE TANGIBLE RESULTS BY FUNDING POLICY AND COMMUNITY ENGAGEMENT 7 (Jan. 2012), <http://www.ncrp.org/files/publications/LeveragingLimitedDollars.pdf>.

⁹⁸ In New York, these include: New York Lawyers for the Public Interest; Urban Justice Center; New York Law and Environmental Justice Project; Pace School of Law; CUNY School of Law; NRDC; Earth justice; River keeper; WE ACT; Local Initiatives Support Center; and Brooklyn Legal Services Corporation A.

⁹⁹ *Lawyers Alliance Launches Urban Health Program*, LAWYERS ALLIANCE FOR N.Y. 1 (Autumn 2013), http://www.lawyersalliance.org/pdfs/newsletters/Lawyers_Alliance_Autumn_2013_web.pdf; Interview with Linda Manley, Lawyers Alliance for N.Y. (Nov. 20, 2013) (notes on file with author).

for environmental justice—has expressed interest in further expanding its EJ program.¹⁰⁰

Equally critical to supporting organizations already working with grassroots environmental organizations is building support systems for organizations interested in but not yet doing so. It would be extremely valuable to have a nationwide survey on grassroots legal needs, data which would help legitimate the need and identify where what resources would be most effective.¹⁰¹ Participation rates (traditionally low for surveys) could be improved by reaching out to multiple networks as well as to coalitions trusted by the grassroots environmental community, and perhaps even by offering a small incentive (given that time is a resource stretched thin for all).

Increasing collaborative learning among attorneys is also key for long-term success, and was a founding principle of probono.net. Inspired (or rather, uninspired) by the lack of a unified legal response to the plight of the survivors of the Golden Venture shipwreck,¹⁰² its founders built an online platform in which attorneys could connect and share resources.¹⁰³ The resulting Immigration Advocates Network (IAN) now provides its members with a full host of tools, including a library of case law, listservs, community forums, podcasts and webinars, volunteer guides, a searchable member database and news updates. Probono.net has indicated its interest in exploring a similar network for practitioners interested in environmental justice.¹⁰⁴ Such a network could be extremely useful for disseminating self-help guides and legal forms to clients. It could keep practitioners engaged with each other and help build their own organizational capacity and impact. If properly publicized, such a platform could become a centralized hub for legal resources on environmental justice.

Another opportunity for harnessing the power of technology is the hybridization of technology, self-help and unbundled legal services. As noted in Part III.C, the availability of legal forms and access to rules and regulations, by themselves, are not a panacea. Organizations may not be willing or able to hire attorneys; nor are attorneys always willing or able to center a practice on short-term matters. A new wave of legal startups aims to fix that problem. Law Gives,¹⁰⁵ for example, is building a software platform for tech startups to ask legal questions and get legal answers from pre-screened attorneys. Sign-up is free for both the potential customer and legal service provider, as are questions and answers, with the expectation that satisfied consumers will

enter into longer-term relationships. Another tool, currently in beta, is the hosting of issue-specific “communities” on its website. An organization or coalition would be able to pose questions and share the answers with its members, while attorneys with relevant law expertise could “tag” and monitor questions posed by the group. Clean Air Now, for example, could post a question on whether non-EPA approved air monitors are admissible as evidence in court. Probono.net is similarly working with software developers on a legal access hybrid system where an individual could fill out a legal form, then send it to a pre-screened attorney for cursory review or to answer a limited set of pre-determined questions.¹⁰⁶

Sometimes, of course, a cursory review is insufficient, and technology cannot build the kind of trust found in personal relationships. “In-house counsel” for community groups could provide access to legal services commonplace in the private and corporate sectors. The model’s feasibility has already been proven by amazingly dedicated organizations such as Brooklyn Legal Services Corporation A,¹⁰⁷ which acts as counsel to CBOs in its service area. A similar initiative is underway through the New York Law and Environmental Justice Project; the initiative encourages former employees who have moved elsewhere to replicate the Project’s model and work to develop retainer agreements with community organizations. In turn, the “franchisees” would have access to a shared resource pool.¹⁰⁸

E. Build Inroads for the Unusual Suspects

The previous recommendations have looked at how the law could help community groups; we should also recognize that engaging on issues of environmental justice provides opportunities and benefits for the legal community, including:

- Greater opportunities for law school students to gain practical experience;
- Opportunities to raise the profile of and funding for multidisciplinary conferences of legal academics, legal service practitioners and grassroots activists;
- Promoting attorney-to-attorney mentoring; and
- Expanded opportunities for interested “Big Law” and non-Big Law attorneys to provide legal support to grassroots organizations.

¹⁰⁰ Interview with N.Y. Lawyers for the Public Interest (Oct. 16, 2013) (notes on file with author).

¹⁰¹ See Suzette Brooks Masters & Ted Perlmutter, *Networking the Networks: Improving Information Flows in the Immigration Field* (Sept. 2011) (providing detailed information on organizations working in the immigration field and where online resources would have the greatest impact) (on file with author).

¹⁰² Seth Faison, *12 Indicted on Charges of Smuggling Aliens*, N.Y. TIMES, June 22, 1993, <http://www.nytimes.com/1993/06/22/nyregion/12-indicted-on-charges-of-smuggling-aliens.html>.

¹⁰³ IMMIGRATION ADVOCATES NETWORK, <http://www.immigrationadvocates.org/> (last visited Dec. 13, 2013).

¹⁰⁴ Interview with Probono.net (Oct. 28, 2013) (notes on file with author).

¹⁰⁵ LAW GIVES, <https://lawgives.com/> (last visited Dec. 13, 2013); Interview with Law Gives (Nov. 4, 2013) (notes on file with author).

¹⁰⁶ Interview with Probono.net (Oct. 28, 2013) (notes on file with author).

¹⁰⁷ Interview with Brooklyn Legal Services Corporation A (Oct. 23, 2013) (notes on file with author); Interview with Cypress Hills Development Corporation (Nov. 26, 2013) (notes on file with author).

¹⁰⁸ Interview with New York Law and Justice Project (Nov. 19, 2013) (notes on file with author).

John Wycliffe put it best in his 1382 work, *Of prelates: charite schuld bigyne at hem-self*.¹⁰⁹ That is, if we want our legal system to continue to be accepted as the loom in the fabric of a just society, it must do more to help its future leaders learn how to weave.

Although law schools are increasing the opportunities—through clinics, practicum and internships—for students to develop practical legal experience in areas of environmental law, such collaborations are usually with larger, well-established organizations (e.g., NRDC, Earthjustice and the Sierra Club). Yet there are local organizations in every community that would greatly benefit from legal support.

There are admittedly significant barriers to doing so, including limited capacity of the organizations to identify their legal needs and properly supervise law students. One solution could be through the development of supervisory resource databases. For example, the multi-chapter student-run Iraqi Refugee Assistance Project (IRAP)¹¹⁰ provides legal support on immigration issues and requires attorney supervision for its cases. It does not require the attorney be available for in-person consultation, and student leaders have used *probono.net*'s Immigration Advocates Network to seek out immigration law experts.¹¹¹ An online legal resource hub for environmental justice could provide similar connections.

In addition to growing e-connections, significant value-adds would be derived from conferences between legal scholars, environmental grassroots activists and legal service providers. Not only would participants be able to engage in practical and academic discussions of what works and what doesn't, but such symposia could raise the profile—and drive dollars—for project implementation (such as the “Portal to Justice”).

It might be hard for some to find much sympathy for the legal profession. But for young attorneys having to voyage through increasingly choppy waters on the search for employment, leadership development is just as important as it is for smaller grassroots organizations. That recognition was a key motivation of the New York City Environmental Law Leadership Institute (NYCELLI),¹¹² and is why its alumni are in the process of expanding its concept to other cities.¹¹³ Such efforts are especially meaningful for those attorneys who do not have access to larger firms' established networking systems. Law students and recent graduates, who may be interested in “thinking outside the box” would benefit from being able to reach out to and learn from a collective group of attorneys with diverse backgrounds and experiences.

“Big Law” attorneys should be included in the effort to expand legal support for the environmental grassroots, especially

considering that the financial resources they bring to bear usually dwarf the resources of nonprofit legal service providers. Anecdotal evidence from large firms suggests a desire by attorneys to be more active in environmental issue areas, but attorneys often assume that such work will too often fall under the “conflict-barred” rubric. The Lawyers Alliance for New York—which distributes its list of pro bono opportunities to over 100 of the New York's largest law firms—has expressed willingness to consider including transactional legal support for grassroots environmental organizations in the pro bono listserv it sends to its law firm partners. In a similar vein, small or mid-size firms, many of whom do not have formalized pro bono policies, should be approached to assess their capabilities and willingness to increase pro bono service. A listserv could be tailored for their interests and abilities, and would present them with opportunities for increased publicity.

V. Where Will We Face Problems?

Part V addresses the obstacles to realizing a movement of “lawyers for the environmental grassroots.” It outlines both internal and external constraints, and acknowledges that while some obstacles can be overcome using tools suggested above, others are products of systemic societal imbalances and require systemic change.

A. Swimming Structurally Upstream

If all the recommendations outlined above were easy to implement, someone would have done so already (and invented a cure for the common cold while they were at it). Significant obstacles to movement building exist: internal (building trust and reducing historical mistrust between the legal profession and grassroots environmental organizations); external (entrenched structures aimed at preserving the status quo and limiting opportunity for inclusion); demographic (though the U.S. is increasingly non-white, support for leadership by people of color is severely lacking).

B. External Constraints

It is estimated that by 2042, non-whites will be the majority demographic in the United States.¹¹⁴ And yet, by virtually any statistical yardstick, social, economic and political investment in that demographic continues to be unacceptably low. The reasons for such disregard have long roots and are part of America's

¹⁰⁹ *The Meaning and Origin of the Expression: Charity Begins at Home*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/charity-begins-at-home.html> (last visited Dec. 13, 2013).

¹¹⁰ IRAQI REFUGEE ASSISTANCE PROJECT, <http://refugeerights.org/> (last visited Dec. 13, 2013).

¹¹¹ Interview with IRAP Chapter at CUNY Law (Nov. 15, 2013) (notes on file with author).

¹¹² N.Y.C. ENVTL. LAW LEADERSHIP INSTITUTE, <http://www.nycelli.org> (last visited Dec. 13, 2013).

¹¹³ Interview with New York City Environmental Law Leadership Institute (July 19, 2013) (notes on file with author).

¹¹⁴ Conor Dougherty, *Whites to Lose Majority Status in U.S. by 2042*, WALL ST. J., Aug. 14, 2008, <http://online.wsj.com/news/articles/SB121867492705539109>.

shameful—and shamefully ongoing—policies of disenfranchising minority groups.

Too often, lack of economic investment in, and political apathy towards, lower-income communities has resulted in systems of education, employment, health and safety that ensure social disadvantages begin from day one. Ideas do not find outlets, investments with high upfront costs and longer-term payback are harder to justify, and the built environment seems designed to perpetuate a world of lowered expectations. Under such circumstances, not only do legal needs go unmet, but it is often difficult for organizations to articulate them.

The lack of representation in decision-making by minority groups is well documented. Although some of it is attributable to clogged avenues of communication rather than ill intent, the ascension of corporate influence in recent years has precipitously reduced the ability of the non-wealthy to genuinely participate in political decision-making and influence policy. Decades of work and billions of dollars have gone into the effort to erect systems friendly to business.¹¹⁵ The American Legislative Exchange Council (ALEC),¹¹⁶ for instance, represents a highly osmotic collaboration between conservative legislators and industry: corporations draft business-friendly model legislation, and legislators enact it. There is no equivalently effective alternative for implementing “people-friendly” legislation. Activists for corporate justice cheered *Citizens United’s*¹¹⁷ determination that corporations were people (my friend). It unleashed an epic flood of money into local, state and national elections, and is effectively removing the voice of the non-wealthy in the political arena: more than 93 percent of the money Super PACs (political action committees) raised came in contributions of at least \$10,000 from just 3,318 donors (or 0.0011% of the U.S. population).¹¹⁸

In such a system, it also becomes financially and socially undesirable or even impossible for graduating professionals to enter fields of nonprofit or public service.

C. Internal Constraints

While this paper encourages law students to become legal environmental activists, all the support of all attorneys in the world will not result in change if the intended clients do not

wish to avail themselves of the resources. Building relationships with legal-service providers must go hand in hand with reaching out to existing on-the-ground communities and organizations and ensuring the goals and needs they identify are the ones that are supported.

Another consistent enemy of a good idea is that no one knows about it. There are many great ideas “out there”—but if the target audience is unaware of their existence, the wheel will continue to be reinvented. Any initiative, project, website or resource hub needs enough resources to ensure it is actively shared, monitored, and updated. Preference should also be given to expanding upon the work of existing organizations when appropriate.

Lack of financial resources has crippled many a potential game changer. Developing software tools like the “Portal to Justice” will require significant input of time and money. Plummeting enrollment is forcing law schools to slash budgets and organizations are unable to offer even minimal compensation for legal services. Legal service providers have noted that volunteer attorneys often leave immediately upon finding paid employment.¹¹⁹ However, many of the recommended tools do not require extensive funds and can leverage existing institutional resources. Other proven alternative models include Unemployment Action Center,¹²⁰ which is entirely law student-run on a budget of \$23,000. The Urban Justice Center¹²¹ places the fundraising responsibility on each of its 11 program directors. And DC 37, the Municipal Employees’ Union,¹²² provides prepaid legal services related to the job as well as selected civil legal issues. These models, though limited, provide evidence of the diversity of funding mechanisms and demonstrate that funding need not be the rock the ship of justice breaks upon.

VI. When Do YOU Join the Movement?

A. Now

Easy answer. This last Part leads you to concrete suggestions on ways to learn more and get involved.

Please follow this link: <https://drive.google.com/?tab=mo&authuser=0#folders/0BwRPVsPoMH-5WH10Mjh0c1d1LXM> for:

¹¹⁵ See, e.g., Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr. regarding Attack on American Free Enterprise System, at 2 (Aug. 23, 1971) (“No thoughtful person can question that the American economic system is under broad attack.”), <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>; *id.* at 4 (“What specifically should be done? The first essential—a prerequisite to any effective action—is for businessmen to confront this program as a primary responsibility of corporate management.”).

¹¹⁶ AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <http://www.alec.org/> (last visited Dec. 13, 2013).

¹¹⁷ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹¹⁸ BLAIR BOWIE & ADAM LIOZ, BILLION-DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS (Jan. 2013), http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf.

¹¹⁹ Interview with Urban Justice Center (Oct. 21, 2013) (notes on file with author).

¹²⁰ UNEMPLOYMENT ACTION CTR., <http://uac-ny.org/> (last visited Dec. 13, 2013).

¹²¹ URBAN JUSTICE CTR., <http://www.urbanjustice.org/> (last visited Dec. 13, 2013).

¹²² DC 37, <http://www.dc37.net/> (last visited Dec. 13, 2013).

- specific people and organizations to contact and ideas about what to do to do more—and what you can get out of it;
- the author's database of legal service providers; and
- to leave a comment (greatly appreciated!).

And please follow this link if you know of an organization that should fill out the legal needs survey: <https://www.surveymonkey.com/s/KDJLBKJ>

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LEGAL DEVELOPMENTS

AIR QUALITY

In Enforcement Action Concerning Illegal Motor Vehicle Inspections, DEC Commissioner Imposed Higher Proportion of Penalty on Repeat Offender

New York State Department of Environmental Conservation (DEC) staff alleged that Sugar Hill Service Station, Inc. (Sugar Hill) and two individual respondents completed onboard diagnostic (OBD) inspections of motor vehicles using noncompliant equipment and procedures in violation of 6 N.Y.C.R.R. § 217-4.2. The OBD system is intended to monitor major engine components, including those that control emissions. DEC staff alleged that respondents used a device to simulate the motor vehicle of record on five separate occasions and requested a civil penalty of \$2,500. The DEC Commissioner found that DEC staff had proven the liability of Sugar Hill and individual respondent Cristian A. Tejada by a preponderance of the evidence. The Commissioner, however, dismissed the cause of action against individual respondent Wael M. Rozeik, who was the president, vice president, treasurer, secretary and sole shareholder of Sugar Hill—but who had not performed any of the inspections—finding that DEC staff had not provided sufficient evidence of Rozeik's decision-making authority to establish individual liability. (As in previous cases, the DEC Commissioner dismissed alleged violations of 6 N.Y.C.R.R. § 217-1.4, which applies only to inspection stations authorized to conduct safety inspections of vehicles exempt from emissions inspection requirements.) The Commissioner noted that in past cases involving hundreds or thousands of violations, he had imposed a lower penalty than DEC staff had requested, but that since this

proceeding involved only a few violations, a lower per-violation penalty would provide insufficient deterrence. He therefore adopted staff's proposed penalty and divided it equally between Sugar Hill and Tejada. He cited Tejada's history of performing noncompliant inspections at other facilities as the reason for allocating him an equal share of the penalty, rather than assessing the facility a higher proportion of the penalty as had been done in previous enforcement actions. *In re Sugar Hill Service Station, Inc.*, DEC Case No. CO2-20100318-12 (Oct. 4, 2013).

DEC Commissioner Rejected ALJ's Factors for Reducing Penalties for Illegal Motor Vehicle Inspections

In another enforcement action alleging illegal OBD inspections, DEC staff alleged that Sheridan Garage Corp. and four individual respondents completed 680 motor vehicle inspections using noncompliant equipment and procedures and issued 680 certificates of inspection without testing the vehicles' OBD systems. The DEC Commissioner found that Sheridan and the three individuals who conducted the noncompliant inspections were liable for violating the regulatory requirements but dismissed the cause of action against the owner and operator of the facility because DEC staff had not shown that she was responsible for or influenced the noncompliant inspections. DEC staff had requested a civil penalty of \$340,000 to be assessed jointly and severally against each respondent, but the administrative law judge (ALJ) recommended a considerably lower \$102,800 penalty with \$60,000 assessed against the facility and the remainder allocated among the liable inspectors. The Commissioner ordered payment of \$121,000, with \$96,800 imposed on Sheridan and the remainder allocated among the liable inspectors based on the number of noncompliant inspections they had conducted. The Commissioner noted that Sheridan, as the inspection station licensee, was responsible for all inspections, and that it was not relieved of that obligation by the inspectors' own duties or by its directors' and shareholders' lack of understanding of its obligations. The Commissioner also indicated that certain factors cited by the ALJ did not warrant penalty reductions, including the fact that respondent Sheridan was a "small business," the revocation by the Department of Motor Vehicles (DMV) of Sheridan's license, DMV's imposition of a fine and the owner's personal circumstances. *In re Sheridan Garage Corp.*, DEC Case No. CO2-20100615-14 (Oct. 3, 2013).

ASBESTOS

Federal District Court Remanded Asbestos Action Where Manufacturer Sought to Rely on Federal Contractor Defense

Joseph Cuomo served as a quarter master in the U.S. Navy from 1974 to 1980. In 2009, he was diagnosed with lung cancer; he later died. He and his wife Susan Cuomo commenced a personal injury action in state court alleging that defendants had failed to warn Joseph of the dangers of asbestos exposure. Defendant Crane Co.

removed the action to the federal district court for the Southern District of New York, citing the federal officer removal statute. The district court granted the Cuomos' motion to remand the action to state court, finding that Crane had failed to offer a "colorable federal defense" to support removal under the federal officer removal statute. The court was not persuaded by Crane's attempt to rely on the federal contractor defense. The court found that Crane had presented no evidence that the Navy either forbid asbestos warnings altogether or "actively dictated the substance of any proposed asbestos warning," while the Cuomos had presented evidence that the Navy relied on manufacturers to identify hazards and provide the substance of warnings. In view of the Navy's silence on the issue of asbestos warnings, there was no conflict between state and federal law and therefore no basis for the federal contractor defense. *Cuomo v. Air & Liquid Systems Corp.*, 2013 U.S. Dist. LEXIS 157773 (S.D.N.Y. Nov. 1, 2013).

State Supreme Court Ruled That Whether Defendant Manufactured the Valves on Navy Ship Was a Question of Fact

Plaintiff, a former Reserve Officer Training Candidate and supply officer in the U.S. Navy, alleged in an action in the Supreme Court, New York County that he was exposed to asbestos-laden dust while other naval workers installed insulation on valves manufactured by Crane Co. aboard Navy vessels. The court denied Crane's motion for summary judgment, finding that plaintiff's deposition testimony raised an issue of fact as to whether the valves were manufactured by Crane. The court also rejected Crane's argument that it did not have a duty to warn consumers of the dangers of asbestos, citing the court's 2011 decision in *Sawyer v. A.C. & S., Inc.* that held that Crane had an affirmative duty to warn because it recommended the use of asbestos-containing products in conjunction with its valves. *Liman v. Air & Liquid Systems Corp.*, 2013 N.Y. Misc. LEXIS 4381 (Sup. Ct. N.Y. Co. Sept. 19, 2013).

State Supreme Court Allowed Asbestos Suit to Proceed Against Garment Press Manufacturer

Leslie McDonald worked as a steam presser for a number of drycleaners between 1941 and 1986. In a personal injury action commenced after he was diagnosed with mesothelioma in 2010, he alleged that he was exposed to asbestos-containing dust while operating, and changing the press pads and covers on, garment presses manufactured by Hoffman-New Yorker, Inc. (Hoffman), among other manufacturers. The Supreme Court, New York County denied Hoffman's motion for summary judgment, rejecting the arguments that there was no evidence that plaintiff had come into contact with asbestos-containing press pads manufactured by Hoffman and that Hoffman did not have a duty to warn of dangers posed by the products of third-party manufacturers. The court said that Hoffman's "unsupported, uncross-examined evidence" that replacement press pads compatible with its products did not have to contain asbestos did not provide a sufficient basis for summary judgment. The court

also noted that plaintiff had provided, among other things, an instruction manual and parts list from the New York Pressing Machinery Corp. (NYPMC) that advertised press pads containing an "asbestos side" that would "eliminate shine to a great extent on gabardines and other materials." The court noted that Hoffman had not defined the relationship between Hoffman and NYPMC in rebuffing the argument that the manual and other materials were irrelevant because plaintiff mentioned only "Hoffman" presses. *McDonald v. CBS Corp.*, 2013 N.Y. Misc. LEXIS 4322 (Sup. Ct. N.Y. Co. Sept. 19, 2013).

BANKRUPTCY

Second Circuit Affirmed Decisions Classifying Site Remediation Agreements as Low-Priority Unsecured Claims

After Lyondell Chemical Company entered bankruptcy, the trustee for the bankruptcy estate rejected agreements that Route 21 Associates of Belleville, Inc. (Route 21) had reached with the debtor concerning responsibility for the cleanup of a New Jersey site. The federal district court for the Southern District of New York affirmed the bankruptcy court's rejection of Route 21's attempts to force the debtor to fulfill its obligations under the agreements. In a summary order, the Second Circuit Court of Appeals also affirmed "for the reasons set forth in the thorough opinion of the district court." The Second Circuit agreed with the district court's conclusions that the cleanup agreements were executory contracts that could properly be rejected; like the district court, the Second Circuit was not persuaded by Route 21's contention that the relief it sought could not be monetized. The Second Circuit also agreed that Route 21's claims should not receive administrative priority because the agreements were all entered into prior to the bankruptcy petition, even though some costs were incurred post-petition. *Route 21 Associates of Belleville, Inc. v. MHC, Inc.*, 2013 U.S. App. LEXIS 21471 (2d Cir. Oct. 23, 2013). [Editor's Note: This action was previously covered in the June 2013 issue of *Environmental Law in New York*.]

CHEMICAL REGULATION

NRDC and FDA Agreed to Timeline for Completing Regulatory Process for Chemical in Antiseptic Products

In March 2013, the Second Circuit Court of Appeals reversed a district court ruling that the Natural Resources Defense Council (NRDC) did not have standing to bring a suit seeking to compel the U.S. Food and Drug Administration (FDA) to finalize its regulation of triclosan, a chemical used in over-the-counter antiseptic antimicrobial soap and other consumer products. On remand, NRDC and FDA reached agreement on a timetable for FDA's completion of its regulatory process for triclosan.

The agreed-upon schedule was embodied in a consent decree entered by the court on November 21, 2013, and includes time-lines for finalizing monographs—which would establish conditions under which the products are generally recognized as safe and effective—for Consumer Antiseptic Hand Wash Products, Healthcare Antiseptic Products and Consumer Antiseptic Hand Rub Products for the active ingredient triclosan. FDA agreed to publish a tentative final monograph for Consumer Antiseptic Hand Wash Products by December 16, 2013, and to publish the final monograph by September 15, 2016. The monograph for Healthcare Antiseptic Products will be finalized by January 2018, and the monograph for Consumer Antiseptic Hand Rub Products by April 2019. FDA must submit status reports to the court and NRDC every six months. *Natural Resources Defense Council, Inc. v. United States Food and Drug Administration*, No. 1:10-cv-05690 (S.D.N.Y. Nov. 21, 2013). [Editor's Note: This case was previously covered in the July 2012, October 2012, December 2012 and June 2013 issues of *Environmental Law in New York*.]

ENERGY

DEC Commissioner Ordered Penalty for Gas Well Owner That Did Not Submit Annual Well Report

Respondent owned a productive gas well known as the West Seneca Well. In June 2012, DEC staff commenced an administrative enforcement proceeding alleging that respondent had violated the statutory and regulatory requirement to file an annual well report for 2009. The DEC Commissioner issued an order on October 27, 2013 granting staff's motion for default judgment and also finding that staff was entitled to judgment based on record evidence. The Commissioner noted that respondent had informed DEC in December 2010—nine months after the annual report was due—that it wished to transfer responsibility for the well to another company and that DEC granted this request in April 2011. In July 2012, after commencement of the enforcement proceeding, the new company filed the 2009 report. The Commissioner stated that the late filing could not absolve respondent of liability and ordered respondent to pay a \$1,500 civil penalty. *In re Buffalo China, Inc.*, DEC Case No. 525-2012DK (Oct. 27, 2013).

ENVIRONMENTAL CONSULTANTS

Federal District Court Issued Default Judgment Against Environmental Consultant

Plaintiffs commenced an action in the federal district court for the Eastern District of New York against an environmental consultant and its sole principal. Plaintiffs alleged breach of contract, negligence, malpractice and unjust enrichment claims arising from defendants' failures in connection with 2009 and 2010 agreements to investigate and remediate property in Brooklyn

owned by one of the plaintiffs. Among other things, the consultant was to prepare a site characterization report pursuant to an Order on Consent between the property owner and DEC. Plaintiffs alleged that the consultant did not comply with the schedule set by the Order on Consent, submit monthly progress reports as required by the Order on Consent, acknowledge or respond to DEC's comments on drafts of the site characterization report, or provide information to or cooperate with a new environmental consultant retained by Watermark to address the deficiencies in the consultant's work. Plaintiffs claimed that much of the work done by the consultant had to be repeated. The district court adopted the report and recommendation of the magistrate judge—who had concluded that plaintiffs established the elements of a breach of contract claim—and granted plaintiffs' motion for default judgment. The court awarded \$146,010 in expectation damages, representing plaintiffs' payments to the consultant for work that was not performed, as well as pre- and post-judgment interest. Since plaintiffs' other claims were based on the same facts and legal obligations as the breach of contract claim, they were dismissed. *J & H Holding Company, LLC v. Kloss*, 2013 U.S. Dist. LEXIS 161861 (E.D.N.Y. Nov. 13, 2013).

HAZARDOUS SUBSTANCES

Second Circuit Affirmed Dismissal of Shopping Plaza Owner's Claims Against BP and Environmental Consultant

Plaintiff alleged that BP Products North America Inc.'s (BP's) operation of a gas station contaminated plaintiff's nearby shopping plaza property and that environmental consultant Fisher Associates failed to detect or warn plaintiff about the contamination. The federal district court for the Western District of New York dismissed plaintiff's complaint on summary judgment. In a summary order, the Second Circuit affirmed, rejecting plaintiff's contention that there was a genuine issue of material fact as to BP's partial responsibility for the contamination from the gas station. The Second Circuit also affirmed the lower court's determination that no actual privity existed between plaintiff and the environmental consultant, which had been retained by the party that assigned the contract for sale of the shopping plaza property to plaintiff. The environmental consultant completed its Phase I study of the property prior to plaintiff's formation and never knew of plaintiff's pending formation. Furthermore, because the original complaint did not contain factual allegations about plaintiff's subsequent transactions with the environmental consultant, the Second Circuit determined that the district court properly ruled that plaintiff's attempts to add claims arising out of those transactions were untimely because the claims did not relate back to the original pleading. *Ridge Seneca Plaza, LLC v. BP Products North America Inc.*, 2013 U.S. App. LEXIS 21999 (2d Cir. Oct. 29, 2013). [Editor's Note: This action was previously covered in the April 2009 and September 2011 issues of *Environmental Law in New York*.]

Citing Uncertainty About Permanent Disposal of Radioactive Waste, Court Dismissed Action over Legal Obligations for Disposal of West Valley Waste

In 2013, New York State entities (New York) and the United States and the Secretary of the U.S. Department of Energy (DOE) each filed motions to dismiss the outstanding cause of action in their dispute over the cleanup, maintenance and decommissioning of the Western New York Nuclear Service Center (Site) at West Valley, New York. In the remaining cause of action, New York requested a declaration that the U.S. was responsible for any costs related to the ultimate disposal of solidified high-level radioactive waste stored at the Site. The federal district court for the Western District of New York granted New York's motion to dismiss the cause of action on ripeness grounds. The court stated that New York had a reasonable basis at the time it filed the action in 2006 for believing that judicial resolution of the issue of responsibility for permanent disposal of the radioactive waste would be necessary by 2010, but that such projections "had since been radically revised" because it had become apparent that a permanent disposal facility would not be available for decades, if at all. The court concluded that resolution of the legal obligations of the parties would be premature in the absence of a final determination by DOE regarding acceptance of the West Valley wastes for permanent disposal at a federal repository, especially given that future congressional action likely could have unanticipated effects on the legal obligations. The court declined to reach the issue of its jurisdiction over Nuclear Waste Policy Act civil claims, which the United States urged as a basis for dismissing the cause of action. The court cited its discretion to consider dismissal on threshold issues such as ripeness prior to addressing subject matter jurisdiction. *New York v. United States*, 2013 U.S. Dist. LEXIS 166365 (W.D.N.Y. Nov. 20, 2013).

Settlement Reached for Payment for Queens West Cleanup

In 2010, Queens West Development Corporation (QWDC) and a developer brought a lawsuit in the federal district court for the District of New Jersey against Honeywell International, Inc. (Honeywell) seeking to compel Honeywell to pay for the remediation of a site in Queens that was formerly the site of a factory of a Honeywell predecessor. The cost of the remediation is approximately \$20 million. QWDC is a subsidiary of the Empire State Development Corporation and a cooperative undertaking between the State of New York and the Port Authority of New York and New Jersey created to remediate and redevelop 74 acres of former industrial waterfront property along the East River. In November 2013, the parties announced that they had agreed to a settlement, the terms of which were not disclosed. *Queens West Development Corp. v. Honeywell International, Inc.*, No. 3:10-cv-04876 (D.N.J. Nov. 13, 2013).

INSURANCE

Federal Court Ruled Against Northrop Grumman in Environmental Insurance Coverage Dispute

In this dispute over environmental insurance coverage in connection with multiple sites on Long Island, the federal district court for the Southern District of New York denied the motion by defendant Northrop Grumman Corp. and related entities (Northrop) to reconsider its decision that though plaintiff Travelers Indemnity Co. (Travelers) had a duty to defend Northrop in an action commenced by the Town of Oyster Bay, the court would keep in place a pre-existing allocation pursuant to which Travelers paid only 25 percent of the defense costs. The court noted that it was undisputed that certain occurrences cited in the action for which Northrop sought coverage were outside the time periods covered by the Travelers policies, and that it made little sense to require Travelers to pay defense costs for coverage periods for which it had no obligation to provide coverage—but the court left room for the parties to replead the allocation issue later on a more developed factual record. The court also denied reconsideration of its determination that Northrop had not provided timely notice of its claim to plaintiff Century Indemnity Co. (Century). Among other things, the court found that a letter submitted by Northrop to Century in the 1980s could not have constituted notice because Northrop itself admitted that it did not know about the contamination until the mid-2000s. Nor was the court persuaded that Century had waived its defense of late notice. On two new motions for partial summary judgment, the court also ruled against Northrop, finding that Northrop had failed to provide timely notice to Travelers with respect to claims regarding a Bethpage facility under a claims-made policy and that Northrop had also failed to provide notice until 2008 with respect to claims involving the Calverton Naval Weapons Industrial Reserve Plant (Calverton) site. The court cited "the long litany of evidence" of contamination at the Calverton site prior to 1995, which would have led any reasonable person to believe that the insurance policies were implicated. The court called the strategy employed by Northrop the "Ostrich Defense"—in other words, "it made a conscious determination to try and maintain ignorance and then use that ignorance as an excuse," which could not excuse late notice. Nor could Northrop's proclaimed belief that the Navy would pay for the remediation relieve it of its duty to provide timely notice. *Travelers Indemnity Co. v. Northrop Grumman Corp.*, 2013 U.S. Dist. LEXIS 161552 (S.D.N.Y. Oct. 31, 2013). [Editor's Note: This action was previously covered in the June 2013, September 2013 and October 2013 issues of *Environmental Law in New York*.]

Appellate Division Affirmed That Lead Exclusion Was Properly Added to Landlord's Policy

Defendant Donnelly owned a home where defendant Jackson lived in 1995. Between 1993 and 1996, Donnelly held a landlord insurance policy issued by plaintiff. Upon renewal of the policy

in 1994, plaintiff added an exclusion to the policy barring coverage for bodily injuries “resulting from inhalation or ingestion of dust, chips or other residues of lead or lead based materials adorning the interior or exterior of the covered building(s).” After Jackson sued Donnelly alleging injuries arising from exposure to lead paint, plaintiff commenced an action in the Supreme Court, Oneida County, alleging that it had no duty to defend or indemnify Donnelly. The Appellate Division, Fourth Department affirmed the supreme court’s decision granting summary judgment to plaintiff. The Fourth Department found that plaintiff had established that the lead exclusion was properly added to Donnelly’s policy and that Donnelly was notified of the amendment. Although plaintiff did not present evidence that it mailed the policy to Donnelly, the Fourth Department concluded that plaintiff’s evidence of its standard office procedures created a presumption that Donnelly received the notice. Two dissenting justices would have reversed because plaintiff had not offered evidence of “internal verification procedures” to show how it ensured that all envelopes to be mailed were delivered to the mail room, and that all envelopes delivered to the mail room were in fact mailed. The Fourth Department held, moreover, that the lead exclusion did not violate public policy, finding that the exclusion was not inconsistent with the Real Property Law’s requirement that property be in a habitable condition. Nor was the exclusion inconsistent with the requirements of state and local law and the insurance policy itself that landlords use a protective coating of paint to prevent deterioration since the requirements did not specify that lead-based paint be used. The Fourth Department also held that the use of the word “adorn” in the lead exclusion did not limit its application to “decorative paint such as murals and frescos.” The Fourth Department was not swayed by Jackson’s contentions that plaintiff had waived, or was estopped from asserting, its right to assert the exclusion despite plaintiff having settled an earlier lawsuit involving Jackson’s sibling. *Preferred Mutual Insurance Co. v. Donnelly*, 2013 N.Y. App. Div. LEXIS 7363 (4th Dept. Nov. 8, 2013).

In Reinsurance Dispute, State Supreme Court Denied Summary Judgment on Reasonableness of Insurer’s Allocation of Settlement

Plaintiff issued a Commercial Excess Umbrella Policy to Kaiser Aluminum & Chemical Corp. (Kaiser). Defendant reinsured portions of plaintiff’s policy. Plaintiff and other affiliated insurers reached a global settlement with Kaiser in 2006 for coverage of asbestos bodily injury claims, with losses paid on a “ground-up, rising bathtub approach” so that a given layer of coverage was not implicated until the layer beneath it was completely exhausted. When payment of losses reached plaintiff’s level of coverage, plaintiff billed defendant and then sued defendant in the Supreme Court, New York County when defendant failed to pay. The court granted plaintiff’s motion for summary judgment on the defenses that plaintiff’s notice was untimely, that plaintiff did not have adequate policies and practices to ensure timely notice, and that plaintiff had breached a

retention warranty. The court denied summary judgment on the issue of whether plaintiff’s allocation of the global settlement to defendant was reasonable, finding that plaintiff had not produced sufficient evidence that it had not burdened defendant with amounts attributable to the policies of the other insurers who were parties to the global settlement. *New Hampshire Insurance Co. v. Clearwater Insurance Co.*, 2013 N.Y. Misc. LEXIS 5117 (Sup. Ct. N.Y. Co. Oct. 31, 2013).

LAND USE

Federal Court Found City’s Emergency Plans Did Not Adequately Accommodate People with Disabilities

A class of plaintiffs including all people with disabilities within New York City and the area served by the City’s emergency preparedness programs commenced a lawsuit in the federal district court for the Southern District of New York alleging that the City’s emergency preparedness programs did not adequately accommodate their needs. After a six-day bench trial on the question of the State’s liability under federal and City law, the court ruled that the City’s “benign neglect” and failures to make “affirmative accommodations” rendered it in violation of the Americans with Disabilities Act, the federal Rehabilitation Act of 1974 and the New York City Human Rights Law in several ways. The court identified the following areas in which the City’s services did not meet the laws’ requirements: inadequate evacuation plans with respect to high-rise evacuation and accessible transportation; insufficiently accessible shelter systems; the absence of a plan for canvassing or otherwise ensuring that people with disabilities have access to services in an emergency; lack of accessible communications at places where resources are distributed after a disaster; lack of opportunity for people with disabilities to develop personal emergency plans; and insufficient communications regarding available accessible services in an emergency. In other areas, such as the City’s recommendation that residents be prepared to shelter in place for 72 hours, the court found that the City was not violating the laws. The court began and ended its opinion by praising the City, stating: “The record in this case makes clear that, although the City’s emergency preparedness plans fall short of legal requirements in several significant respects, they are still remarkable in many ways. The challenges facing cities in general, and this city in particular, are immense, and New York City has done an admirable job of preparing for a wide range of disasters, both manmade and natural, that could strike at almost any time.” The determination of the steps that the City must take to address the insufficiencies of the programs will be addressed in the next phase of the case; the court directed the parties to discuss how to determine the remedies through alternative dispute mechanisms. *Brooklyn Center for Independence of the Disabled v. Bloomberg*, 2013 U.S. Dist. LEXIS 159532 (S.D.N.Y. Nov. 7, 2013).

In Longstanding Zoning Dispute over Proposed Lowe's in Brookhaven, Court of Appeals Ruled for Town

Rocky Point Drive-In, L.P. (Rocky Point) owns a 17-acre parcel in the Town of Brookhaven. Rocky Point and its predecessor in interest, Sans Argent, Inc. (Sans Argent), sought unsuccessfully for a number of years to develop the parcel as a site for a 152,050-square-foot Lowe's Home Improvement Center. The parcel was originally zoned J-2, which permitted retail stores as of right but not "commercial centers," i.e., a building or buildings used for commercial purposes occupying a site of five or more acres. In 1997, the Town adopted a comprehensive plan that created a new "commercial recreation" (CR) zoning classification intended for uses such as sports complexes, amusement and theme parks and ice hockey and ice skating rinks. In 2000, just before Sans Argent submitted a site plan to the Town to build a Lowe's Center on the parcel, the Brookhaven Town Board for the first time discussed rezoning the parcel as CR. Just before the Town's vote on the rezoning, Sans Argent filed a protest triggering the supermajority requirements of Town Law § 265. Despite the protest, the Town Board twice approved the rezoning with a simple majority and declared the parcel rezoned, only to have the state supreme court twice declare the rezoning null and void. In 2002, the Town Board amended its Town Code to permit simple majority votes of approval to overcome rezoning protests and subsequently rezoned the property to CR again. Rocky Point commenced an action alleging that because the Town had unduly delayed review of the site plan application, the plan should be subject to review under the J-2 zoning classification. The matter once again made its way through the courts, where the Supreme Court, Suffolk County found (on remand from an Appellate Division, Second Department reversal of an earlier decision) that facts showing selective enforcement of the CR classification warranted application of the J-2 classification to the site plan application, only to have the Second Department again reverse its decision, this time on the grounds that the supreme court's determinations were not supported by the trial evidence. The Court of Appeals affirmed, concluding that Rocky Point had failed to meet a threshold requirement for invoking the "special facts" exception to the general rule that the zoning law in effect when an application is decided applies. To qualify for the special facts exception, the owner must be in full compliance with requirements at the time of the application so that proper action upon the application would have given the owner time to acquire a vested right. There must also have been extensive delay indicative of bad faith. The Court of Appeals noted that the record established that Rocky Point was not entitled to the requested land use permit under the J-2 classification because the proposed Lowe's Center exceeded the classification's five-acre spatial limit. The Court of Appeals rejected Rocky Point's argument that the special facts exception should apply because the Town historically ignored the zoning requirements, holding that the Second Department's finding that the similarly situated applicants that Rocky Point cited as receiving different treatment were not similarly situated at all more nearly comported with the weight of the evidence.

The Court of Appeals therefore determined that even if a negligence rather than a bad faith standard were applied to the consideration of the Town's delay in considering the application, as Rocky Point argued should be the case, the special facts exception was inapplicable to Rocky Point's case because of its failure to meet the threshold requirement that it would have been entitled to the approval at the time of application. *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 2013 N.Y. LEXIS 3128 (N.Y. Nov. 14, 2013). [Editor's Note: This action was previously covered in the May 2007, October 2009 and July 2012 issues of *Environmental Law in New York*.]

Appellate Division Reinstated Permit for Outdoor Advertising Sign Constructed in Good-Faith Reliance on Later-Rescinded Permit

After the New York City Department of Buildings (DOB) revoked petitioner's permits for an outdoor advertising sign and the Board of Standards and Appeals (BSA) upheld DOB's decision, petitioner commenced an Article 78 proceeding challenging the revocation. The Supreme Court, New York County denied the petition, but the Appellate Division, First Department reversed. The First Department concluded that petitioner had constructed the sign in good-faith reliance on a 2008 determination by the Manhattan Borough Building Commissioner that the sign was a permissible replacement for a similar sign that was removed when a building on the property was demolished. The court likened petitioner's appeal to BSA to a request for a variance, and cited its decision in *Matter of Pantelidis v. New York City Board of Standards and Appeals*, which affirmed a state supreme court decision requiring BSA to consider good-faith reliance on a later-rescinded permit in its evaluation of variance applications. The First Department directed DOB to reinstate the permit and vacated fines imposed in connection with the sign. *Matter of Perlbinder Holdings, LLC v. Srinivasan*, 110 A.D.3d 611, 973 N.Y.S.2d 622 (1st Dept. 2013).

Appellate Division Affirmed Classification of Rooftop Sign as "Accessory Business Sign"

BSA denied petitioner's appeal of a DOB determination that a rooftop sign was not an "advertising sign." BSA instead concluded that the sign was an accessory business sign. Petitioner challenged BSA's determination in an Article 78 proceeding in the Supreme Court, New York County. The Appellate Division, First Department affirmed the court below's denial of the petition, finding that BSA's determination was not arbitrary and capricious. The First Department held that the court had "properly deferred to BSA's fact-based analysis as to whether the accessory use of the sign was clearly incidental to and customarily found in connection with the principal use of the property." *Matter of Atlantic Outdoor Advertising, Inc. v. Srinivasan*, 110 A.D.3d 598, 973 N.Y.S.2d 613 (1st Dept. 2013).

State Supreme Court Rejected Adjoining Property Owner's Claim that Restaurant Was Abandoned Nonconforming Use

In April 2013, the Building Inspector of the Village of Goshen determined that a property in the Village had been in use as a restaurant/bar within the preceding 12 months and issued a building permit for alteration of the building's interior. In May and June 2013, he issued a certificate of occupancy for the property and a building permit for sign replacement. An adjoining property owner filed an unsuccessful appeal with the Zoning Board of Appeals (ZBA) challenging the Building Inspector's determinations. The ZBA found that the property had "long been utilized as a restaurant/eating dining establishment and that said use was before Zoning was adopted in the Village and was long protected as a pre-existing, nonconforming use." The adjoining property owner subsequently commenced an Article 78 proceeding challenging the ZBA's denial of the appeal. The Supreme Court, Orange County denied the petition, citing the ZBA's broad discretion and indicating that the record contained sufficient evidence to support the rationality of the ZBA's determination. The court noted, moreover, that petitioner had not sought injunctive relief and that the completion of the improvements and opening of the restaurant rendered the Article 78 challenge academic. The court also indicated that transfer to the Appellate Division would have been improper because the "substantial evidence" standard of CPLR 7803(4) did not apply to review of zoning board determinations. *Matter of DPL & B LLC v. Village of Goshen Zoning Board of Appeals*, 2013 N.Y. Misc. LEXIS 5380 (Sup. Ct. Orange Co. Nov. 22, 2013).

LEAD

Appellate Division Reinstated Negligent Abatement Claim Against Landlord But Otherwise Affirmed Decision in His Favor

Plaintiff sought damages for injuries allegedly arising from his exposure to lead paint as a child while he lived in two apartments owned by defendants. In September 2012, the Supreme Court, Oneida County granted the motion by one of the landlords for summary judgment dismissing the claims against him and denied most aspects of plaintiff's cross-motion. The Appellate Division, Fourth Department affirmed in part and reversed in part. The Fourth Department ruled that the landlord had established that he had no actual or constructive notice of the hazardous lead paint condition until the Oneida County Department of Health conducted an inspection, and that plaintiff could not rely on Real Property Law § 235-b or 42 U.S.C. § 4581 to establish the landlord's liability or to place him on notice. The Fourth Department further held that plaintiff had not established his entitlement to judgment as a matter of law on the issue of liability against both landlords since he had presented no proof that he was observed ingesting paint fragments on their premises or that peeling paint

was observed on their premises prior to his diagnosis of elevated levels of lead in his blood. The Fourth Department reinstated plaintiff's claim for negligent abatement, which was not addressed in the landlord's motion, and remitted the issue to the supreme court. *Bell v. Wright*, 2013 N.Y. App. Div. LEXIS 7578 (4th Dept. Nov. 15, 2013).

Appellate Division Affirmed Denial of Summary Judgment on Landlord's Liability, But Dismissed Some of Landlord's Defenses

Plaintiffs commenced an action in the Supreme Court, Monroe County, alleging that they suffered bodily injuries as a result of childhood exposure to lead paint in properties owned by defendants. After the court denied plaintiff's motion for partial summary judgment on a number of issues, the Appellate Division, Fourth Department affirmed in part and reversed in part. Among other things, the Fourth Department ruled that the court below had not erred in declining to take judicial notice of state and federal laws, regulations and guidelines concerning lead paint, which "do not establish as a matter of law that defendants had notice of a dangerous condition or that defendants are liable." The Fourth Department noted that plaintiffs themselves had raised issues of fact as to whether defendants had notice of the lead paint condition. The Fourth Department reversed portions of the supreme court decision that denied dismissal of affirmative defenses that sought to hold plaintiffs responsible for their actions prior to the age at which they were legally responsible. The Fourth Department also dismissed defenses asserting that plaintiffs' parents created or exacerbated the hazardous lead paint condition, finding no factual support in the record for such defenses. *Burgess v. Meyer*, 2013 N.Y. App. Div. LEXIS 7318 (4th Dept. Nov. 8, 2013).

OIL SPILLS & STORAGE

Appellate Division Ruled That Notice of Claim Was Sufficient to Alert County to Potential Navigation Law Cause of Action

Owners of residential properties near an Orange County Department of Public Works facility served notices of claim on the County alleging that the County had been negligent, reckless and careless in the filling, inspection and maintenance of underground fuel storage tanks and other machinery used at the facility, resulting in fuel spills, leakage and seepage that caused soil and groundwater contamination on the owners' properties. The owners subsequently commenced an action against the County in the Supreme Court, Orange County, seeking, among other things, damages pursuant to Navigation Law § 181. The Appellate Division, Second Department affirmed the denial of the County's motion to dismiss the Navigation Law § 181 claim. The Second Department held that, contrary to the supreme court's determination, the inclusion of information and allegations specific to the Navigation Law § 181 claim in

the notice of claim was a condition precedent to asserting the claim. The Second Department agreed with the supreme court, however, that plaintiffs had provided sufficient information in the notice of claim to enable the County to investigate the allegations while information concerning the alleged fuel spills, leakage and seepage was still readily available, and that the notice was therefore sufficient to alert the County to the potential cause of action. *Bartley v. County of Orange*, 2013 N.Y. App. Div. LEXIS 7644 (2d Dept. Nov. 20, 2013).

State Settled with Exxon Regarding Costs of Spill Cleanup on Canadian Border

Attorney General Eric Schneiderman announced on November 22, 2013 that ExxonMobil Oil Corporation (ExxonMobil) would pay the State \$8.05 million to reimburse it for costs incurred by the New York Environmental Protection and Spill Compensation Fund (Oil Spill Fund) to investigate and remediate a spill in Ogdensburg along the St. Lawrence and Oswegatchie rivers. For many decades ending in 1984, ExxonMobil operated a major oil storage facility at the location. Eight billion gallons of petroleum were distributed from the facility on an annual basis. After petroleum contamination was discovered at the site in 2001, further investigation revealed widespread contamination. The site was cleaned up in 2006 and 2007 under the oversight of DEC, and the investigation and cleanup were paid for by the Oil Spill Fund. *New York v. ExxonMobil Oil Corp.*, No. 1000110/2010 (Sup. Ct. Albany Co. Nov. 14, 2013).

DEC Commissioner Cited Due Process Concerns in Declining to Increase Requested Penalty in Navigation Law Enforcement Proceeding

DEC staff alleged that respondent violated sections 173, 175 and 176 of the Navigation Law in connection with its misdelivery and discharge of approximately 150 gallons of fuel oil into the basement of a residence in Brooklyn. DEC staff alleged that respondent failed to report the unlawful discharge or to take immediate steps to contain the spill. Staff requested a civil penalty of "no less than \$30,000." The DEC Commissioner granted staff's motion for default judgment and ordered payment of a \$30,000 penalty as well as submission of a plan for remediation of the spill. The Commissioner noted that he would not follow the administrative law judge's recommendation that the requested penalty be increased to \$90,000, with \$60,000 suspended pending completion of the remediation, even though such a penalty would provide an incentive for cleanup. He noted that respondent, who had failed to appear, was on notice that it could be liable for anywhere between \$30,000 and \$10,425,000 (the statutory maximum for the penalty), which was not adequate notice of the specific penalty amount it could face. The Commissioner expressed concern that the imposition of a penalty higher than the amount cited in the complaint would implicate due process concerns. The Commissioner also indicated that staff had not provided adequate information to guide him in the assessing a specific penalty. *In re*

Reliable Heating Oil, Inc., DEC Case No. R2-20121116-725 (Oct. 30, 2013).

DEC Commissioner Ordered Payment of \$8,000 Penalty for Failure to Renew Registration for Petroleum Storage Facility

Respondent owned a petroleum storage facility in the Bronx that contained a 4,000-gallon aboveground petroleum storage tank. The registration for the storage facility pursuant to 6 N.Y.C.C.R. § 612.2 expired in 2004. In May 2012, DEC staff served a complaint alleging violations of the registration requirement, and two weeks later DEC received a renewal application. The registration was renewed as of August 15, 2012. On October 27, 2013, the DEC Commissioner granted staff's motion for default judgment and also found that staff was entitled to judgment based on record evidence. The Commissioner determined that the \$10,000 penalty requested by staff was in accordance with penalty guidelines for violations of greater than five years, but he reduced the penalty to \$8,000 because respondent had renewed its registration during the pendency of the enforcement proceeding. *In re Palushaj Properties LLC*, DEC Case No. PBS 2-268690NMW (Oct. 27, 2013).

DEC Commissioner Ordered Payment of \$10,000 Penalty for Failure to Reregister Petroleum Storage Facility for More than 15 Years After Acquisition

Respondent owned a petroleum storage facility in the Bronx that contained a 3,000-gallon aboveground petroleum storage tank. The New York City Department of Housing Preservation and Development (HPD) had previously owned the storage facility and had registered it with DEC. The non-transferable registration expired in 1997. In 1998, HPD transferred the facility to respondent. Respondent never reregistered the facility after assuming ownership. In 2013, DEC staff commenced an administrative enforcement proceeding against respondent alleging failure to comply with 6 N.Y.C.R.R. § 612.2, which requires reregistration within 30 days of the transfer of ownership of a facility. The DEC Commissioner granted staff's motion for default judgment and also found that staff was entitled to judgment based on record evidence. The Commissioner ordered payment of a \$10,000 penalty and submission of a reregistration application. *In re 906 Eagle Avenue Housing Development Fund Corp.*, DEC Case No. PBS 2-601106NBT (Oct. 27, 2013).

SEQRA/NEPA

Appellate Division Affirmed Dismissal of Challenge to Phase-Out of Number 4 and 6 Fuel Oils

In 2011, the New York City Department of Environmental Protection (DEP) issued regulations that provided for the eventual prohibition of the use of Number 4 and Number 6 heating

oils. During its review process, DEP received comments from the National Oil Recyclers Association (NORA) arguing that the regulations would adversely affect the benefits of used oil recycling, lead to the proliferation of the illegal and improper disposal of used oil, and lead to environmental damage. In its review under the State Environmental Quality Review Act (SEQRA), however, DEP concluded that the rules would not have a significant adverse impact on the environment. After the regulations were finalized, NORA members challenged the new rules in an Article 78 proceeding in the Supreme Court, Queens County, which dismissed the proceeding. The Appellate Division, Second Department affirmed. The Second Department concurred with the court below that petitioners did not have standing to make SEQRA claims, finding that petitioners had alleged economic harm but no environmental harm that was different from that of the public at large. The Second Department also affirmed that the provision of the New York City Charter requiring City agencies to publish regulatory agendas each year—and, where an agency proposes rules not mentioned in the agenda, to provide an explanation in the notice of proposed rulemaking—was merely “precatory in nature.” *Matter of County Oil Co., Inc. v. New York City Department of Environmental Protection*, 2013 N.Y. App. Div. LEXIS 7433 (2d Dept. Nov. 13, 2013). [Editor’s Note: This proceeding was previously covered in the June 2012 issue of *Environmental Law in New York*.]

Appellate Division Affirmed Dismissal of Challenge to Corning School District Facilities Plan

In 2010, the Board of Education for the City of Corning School District approved a district-wide plan to reorganize and upgrade the district’s facilities and also passed a resolution authorizing the issuance of bonds to finance the project. The plan included consolidating and renovating the existing two high schools and the two middle schools, repurposing the closed school buildings and upgrading technology at all schools. The district’s decision-making process included a review of the project under SEQRA, in which the Board classified the project as a Type I action and issued a negative declaration. While petitioner’s unsuccessful petition to the New York State Commissioner of Education to challenge the bond authorization and negative declaration was pending, the district’s voters approved the bond resolution. In the petitioner’s ensuing Article 78 proceeding, the Supreme Court, Albany County dismissed the petition, and the Appellate Division, Third Department affirmed. The Third Department concluded that the facilities project and bond resolution did not violate the district’s constitutional and statutory debt limits because indebtedness was not incurred for purposes of the debt limits until the bonds were actually sold. The Third Department also held that petitioner lacked standing to challenge the SEQRA review. The location of petitioner’s property “two blocks” from one of the school buildings scheduled for repurposing

did not create a presumption that petitioner would be adversely affected. Nor had petitioner identified actual injury or direct harm that he would suffer that was distinct from harm experienced by the general public. *Matter of O’Brien v. New York State Commissioner of Education*, 2013 N.Y. App. Div. LEXIS 7207 (3d Dept. Nov. 7, 2013).

State Supreme Court Dismissed Proceeding Seeking SEIS for Downtown Brooklyn Project

In 2004, the New York City Council approved the Downtown Brooklyn Development Plan (the Plan) after a SEQRA review process led by the Office of the Deputy Mayor for Economic Development and Rebuilding. In connection with the Plan, the City entered into long-term ground lease agreements in 2007 with a private developer for development of the City Point project on City-owned land. Prior to entering into the ground leases, the City issued a Modification Technical Memorandum that concluded that changes to the City Point project and changes in background conditions would not result in impacts not identified in the 2004 final environmental impact statement (FEIS) for the Plan. In 2010, the parties executed a modified ground lease that permitted development of the City Point project in stages. In 2013, petitioners sent a letter to City officials and agencies and then filed an Article 78 proceeding demanding preparation of a supplemental environmental impact statement (SEIS) analyzing the cumulative impact of the City Point project on surrounding neighborhoods and the impact on socioeconomic conditions of affected communities of low wages paid to construction workers. The Supreme Court, New York County dismissed the proceeding, finding that petitioners did not have standing to bring the SEQRA claims and, moreover, that such claims were time-barred. The court noted that petitioners’ injuries were “purely economic” in nature as they had presented no basis supporting the idea that low wages for construction workers were a recognized environmental impact or that low wages affected existing patterns of population concentration or neighborhood character. Nor could petitioners claim standing based on City Point’s socioeconomic impacts on Downtown Brooklyn communities since the proximity of the homes of certain members of one of the petitioner organizations to the project was insufficient to establish that they would experience more direct harm than the community as a whole. With respect to the statute of limitations, the court noted that it was well established that parties could not use a request to conduct supplemental review such as petitioners’ letter to the City to circumvent the four-month limitation period. Nor had petitioners established the existence of new information that would require an SEIS. The court also denied as unripe petitioners’ request to enjoin further financing or construction of the project because respondents had not made any final determinations approving the financing or subsidies anticipated by petitioners. *Matter of Families United for Racial and Economic Equality v. Bloomberg*, 41 Misc. 3d 1211(A) (Sup. Ct. N.Y. Co. 2013).

TOXIC TORTS

Appellate Division Precluded Expert Testimony in Mold Case

Plaintiff sought to recover for personal injuries and property damage allegedly sustained as a result of defendants' mold remediation work. The Supreme Court, New York County denied defendants' motions to preclude plaintiff's experts' testimony. The Appellate Division, First Department reversed. The First Department ruled that the testimony was inadmissible because the experts did not "identify the specific mold alleged to be the cause of plaintiff's injuries, set forth that the specific mold is capable of causing the claimed injuries, or quantify the level of exposure needed to cause the illness at issue, a worsening of plaintiff's respiratory and dermatologic conditions." Because plaintiff could not establish his claims without the testimony, the claims were dismissed. *Lindkvist v. Travelers Insurance*, 2013 N.Y. App. Div. LEXIS 7388 (1st Dept. Nov. 12, 2013).

TRANSPORTATION

Appellate Division Affirmed Dismissal of Challenge to New York City's Taxi E-Hail Pilot Program

Representatives of the black, or livery, car industry filed an Article 78 proceeding in the Supreme Court, New York County against New York City and its Taxi and Limousine Commission seeking to enjoin a 12-month pilot "E-Hail Program" allowing medallion cabs to arrange for passenger pickups using smartphone applications. The Appellate Division, First Department affirmed the supreme court's dismissal of the proceeding. The First Department ruled that the program was a permissible pilot program under the City Charter, that the program's temporary authorizations for communications systems necessary for the E-Hail Program met the requirements of the Administrative Code, and that the program did not violate the Administrative Code by permitting taxis to ignore E-Hail requests or cancel previously accepted requests. The First Department also summarily affirmed that TLC had complied with SEQRA and City Environmental Quality Review (CEQR) requirements, and that it was not subject to the City Administrative Procedure Act. With respect to SEQRA and CEQR, the supreme court had noted that petitioners' affidavits contending that the E-Hail Program would have substantial environmental impacts were "undercut" by their failure to mention evidence already available from the unrestricted use of e-hail applications by petitioners' own fleets since May 2011. *Matter of Black Car Assistance Corp. v. City of New York*, 110 A.D.3d 618, 973 N.Y.S.2d 627 (1st Dept.), *aff'g* 2013 N.Y. Misc. LEXIS 1692 (Sup. Ct. N.Y. Co. Apr. 23, 2013).

WATERS

Appellate Division Affirmed Dismissal of Challenge to Permit for Spillway

In 2012, the Supreme Court, Erie County dismissed an Article 78 proceeding against DEC, the Town of Clarence, the Erie County Department of Health and two individuals challenging the issuance of permits for and construction of a spillway in a freshwater pond in the Town of Clarence. The Appellate Division, Fourth Department affirmed. The Fourth Department rejected petitioners' contention that the supreme court was limited on a CPLR 3211(a)(1) motion to ascertaining whether there was a cognizable legal theory. The Fourth Department also concluded that the supreme court had properly determined that none of the causes of action had merit. *Matter of Strobel v. New York State Department of Environmental Conservation*, 2013 N.Y. App. Div. LEXIS 7597 (4th Dept. Nov. 15, 2013).

Appellate Division Resuscitated DEC's General Permit for Stormwater Discharges from Municipal Sewers

In January 2012, the Supreme Court, Westchester County annulled DEC's approval of the general permit for stormwater discharges from municipal separate storm sewer systems (MS4s). The supreme court held that the general permit established an "impermissible self-regulatory system," but at the same time also dismissed certain other claims regarding the general permit's shortcomings. In November 2013, the Appellate Division, Second Department reversed all portions of the supreme court's decision that were adverse to DEC but upheld the portions of the decision that were adverse to petitioners. The Second Department held that the general permit was "consistent with the scheme for general permits envisioned by the EPA, and . . . designed to meet the maximum extent practicable standard" required by federal and state law. The Second Department further concluded that the general permit's enforcement measures were sufficient to comply with the standard since, among other things, the ultimate decision regarding whether an MS4's discharges would be covered by the permit was DEC's. The court indicated that petitioners' "systemic challenge" to the permitting scheme was therefore flawed, and that no challenge to any specific challenge to DEC's assessment of any MS4's stormwater management plan was before the court. (In rendering its decision, the Second Department repeatedly noted that the supreme court erred to the extent that it relied on alleged statutory and regulatory violations in determining that DEC's approval of the general permit was affected by error of law.) The Second Department also reversed the supreme court's determinations that the general permit failed to specify compliance schedules with respect to effluent limitations and water quality standards and that DEC had unlawfully failed to provide public hearings on proposed notices of intent prior to their submission to DEC. *Matter of Natural Resources*

Defense Council, Inc. v. New York State Department of Environmental Conservation, 2013 N.Y. App. Div. LEXIS 7446 (2d Dept. Nov. 13, 2013). [Editor's Note: This proceeding was previously covered in the May 2012 issue of *Environmental Law in New York*.]

Appellate Division Affirmed State Law Preemption of Local Law Prohibiting Withdrawal of Water for Use by Other Municipalities

In 2012, the Supreme Court, Orange County ruled that State law preempted a local law passed by the Village of Woodbury that prohibited the removal of groundwater for use outside the Village. In 2013, the Appellate Division, Second Department affirmed, holding that provisions of the Transportation Corporations Law and Environmental Conservation Law (ECL) clearly established that the State Legislature intended to preempt local government regulation of the withdrawal and transfer of water resources. The Second Department noted that the Transportation Corporations Law provides for the formation of water-works corporations, which may be formed to supply water to municipalities, with the consent of the municipalities to be served. The Second Department further noted that the Transportation Corporations Law provided for extensions of the service areas of water-works corporations but did not require the consent or permission of the municipality in which the water-works corporation was originally incorporated, thus comporting with "the long-recognized policy in favor of the extension of water resources to less-advantageously situated municipalities." Moreover, the Second Department cited the ECL's vesting of power over the regulation and control of water resources in the State, as well as the ECL's establishment of a permitting process for operating water withdrawal systems that accounted for the very limitations on water resources that Village sought to address in the local law. The State had therefore "evinced an intent to preempt local laws, like the one in this case, which regulate the withdrawal of groundwater." *Woodbury Heights Estates Water Co., Inc. v. Village of Woodbury*, 2013 N.Y. App. Div. LEXIS 7429 (2d Dept. Nov. 13, 2013). [Editor's Note: This action was previously covered in the July 2012 issue of *Environmental Law in New York*.]

State Supreme Court Ruled That Challenge to DEC Certification for Vessel General Permit Was Moot

In 2011, EPA proposed to issue a Vessel General Permit (VGP) for discharges from commercial vessels. As required by section 401 of the Clean Water Act, EPA obtained certification in September 2012 from DEC that the discharges would comply with applicable effluent limitations, state water quality standards and standards of performance. Petitioner then commenced an Article 78 proceeding in the Supreme Court, Albany County. Petitioner alleged that the certification was affected by an error of law and also that DEC had acted arbitrarily and capriciously because in issuing the certification it had reversed agency precedent without any explanation and because the conditions of the

certification failed to assure compliance with New York water quality standards. While the Article 78 proceeding was pending, EPA finalized the VGP, and petitioner filed a federal action to prevent EPA from enforcing a federal regulation that had been interpreted as prohibiting the addition of conditions to a VGP after final EPA action. The federal district court dismissed the action as unripe because DEC had not asked EPA to modify the certification. The state court thereafter granted intervenor-respondents' motion to dismiss the challenge to the certification. The state court concluded that the federal regulation's language supported the interpretation that EPA's ability to modify the VGP after final agency action was limited. Since a court order requiring the addition of conditions to the certification or remanding the matter to DEC would not affect the VGP, the matter was moot. *Matter of National Wildlife Federation v. Martens*, Index No. 6181-12 (Sup. Ct. Albany Co. Oct. 10, 2013).

NEW YORK NEWSNOTES

Mayor Bloomberg Signed More Building Resiliency Laws

On November 19, 2013 and December 2, 2013, Mayor Michael R. Bloomberg signed ten more bills aimed at protecting New York City buildings and their inhabitants from future storms. The bills emerged from the recommendations of the Building Resiliency Task Force established by Mayor Bloomberg and Council Speaker Christine Quinn after Hurricane Sandy. As of mid-December, the City had enacted laws to implement 13 of the Task Force's 33 recommendations.

The bills signed on November 19 establish requirements for hospitals and health care facilities in flood zones (Local Law 95) and mandate the posting of hurricane evacuation information in residential buildings (Local Law 98). The November 19 bills also ease restrictions on telecommunication cable length and storage of fuel oil at higher elevations in buildings in flood-prone areas to eliminate barriers to locating such building infrastructure on higher floors (Local Law 99); establish requirements for new and renovated buildings to move vulnerable building elements such as electrical services and hazardous materials tanks above the flood line in flood zones, with special requirements for hospitals (Local Law 100); and amend the mechanical code to protect buildings and building systems from wind damage (Local Law 101). Another law signed on November 19 requires that Federal Emergency Management Agency (FEMA) Preliminary Flood Insurance Rate Maps (FIRMS) be used as a baseline standard for flood-zone mapping effective 30 days after such preliminary maps are issued (Local Law 96). (FEMA issued the Preliminary Flood Insurance Study and FIRMS on December 5.) The bills signed by Mayor Bloomberg on December 2 include requirements for secondary power in adult homes and other group living facilities in flood-prone areas (Local Law 108) and requirements for providing a drinking water source in residential building common areas

using pressure from a public water main (Local Law 110), as well as laws reducing certain barriers to the installation of backup generators (Local Law 111) and encouraging temporary flood protection on sidewalks (Local Law 109).

New York City Law Will Require Use of Bioheating Fuel in City Buildings

Mayor Bloomberg signed a law on December 2, 2013 (Local Law 107) that will require City-owned buildings to use bioheating fuel containing at least five percent biodiesel (B5) after October 1, 2014. The City will also operate a one-year pilot program in which at least five percent of City-owned buildings will use bioheating fuel containing at least ten percent biodiesel (B10). The City will also study the possible use of B5 in all buildings in the City; the law directs that a report on the feasibility of such a requirement be issued by April 1, 2015.

New Law Regulates Snowmobile Noise

As of November 1, 2013, snowmobiles cannot be operated in New York State unless they are outfitted with a muffler “in good working order and in constant operation,” thanks to a new law signed by Governor Andrew M. Cuomo on November 13, 2013. The amendment to section 25.17 of the Parks, Recreation and Historic Preservation Law further provides that noise emissions may not exceed 78 decibels at 50 feet at full throttle or 88 decibels “as measured at four meters from an inline position from the exhaust and four thousand rpm.” The new law (chapter 473 of 2013) was supported by the New York State Snowmobile Association, which hoped the restrictions on noise emissions would encourage private landowners to reopen their lands to snowmobiling.

Man Pleaded Guilty to Lacey Act Violations for Illegal Rhinoceros Horn Trafficking

The Department of Justice announced on November 5, 2013 that Michael Slattery had pleaded guilty to conspiracy to violate the Lacey Act in connection with illegal rhinoceros horn trafficking. Trade in rhinoceros horn has been regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora for almost 40 years. Slattery admitted that he traveled throughout the United States to illegally purchase and sell endangered rhinoceros horns. He was arrested in September 2013 as part of “Operation Crash,” which the Justice Department describes as “a nationwide, multi-agency crackdown on those involved in the black market trade of endangered rhinoceros horn.” Slattery and his co-conspirators purchased a taxidermied black rhinoceros mount in Texas, which they sold in New York using a fictitious “Endangered Species Bill of Sale.”

DEC Added Additional Sites to Its Public Database of Remedial Sites

After receiving an increasing number of requests for information about possible contamination at properties in the State, DEC announced that it would make information available on its website about almost 2,000 additional sites for which it has records regarding hazardous waste contamination. DEC had previously made information available about these additional sites only on request. These sites join approximately 2,500 sites that are already listed in DEC’s searchable database because they are State Superfund sites; are enrolled in a State brownfield program such as the Brownfield Cleanup Program, Voluntary Cleanup Program or Environmental Restoration Program; or are subject to a corrective action under the Resource Conservation and Recovery Act (RCRA). The newly added sites are classified as Class P (Potential), Class PR (Potential RCRA Action) and Class N (No Further Action at this Time). Class P sites are sites being considered for classification as State Superfund sites. Class PR sites are sites that were or are regulated under RCRA because the generation, treatment, storage or disposal of hazardous waste occurred or is occurring at the sites. Class PR sites are investigated to determine whether RCRA corrective action is necessary. Class N sites include sites for which remediation under a brownfield program was not completed for economic or other reasons, and sites for which applications to a brownfield program were submitted but were eventually withdrawn or terminated, as well as sites that were once Class P but which DEC determined did not warrant listing as State Superfund sites. DEC cautioned that information about contamination at all of these types of sites is often preliminary, incomplete or not verified, and that the information should not be used to form conclusions about site contamination beyond what the definition of the classification provides. DEC’s environmental site remediation database is available at <http://www.dec.ny.gov/cfmx/extapps/derexternal/index.cfm?pageid=3>.

New State Law Permits Peconic Bay Community Preservation Funds to Be Used to Protect Undeveloped Shorelines from Sea Level Rise

On October 22, 2013, Governor Cuomo signed into law an amendment to Town Law § 64-e (chapter 423 of 2013) that includes the preservation of undeveloped beaches and shorelines “including those at significant risk of coastal flooding due to projected sea level rise and future storms” as one of the aspects of preserving community character for which the Peconic Bay Community Preservation Fund may be used. The Peconic Bay region includes the towns of East Hampton, Riverhead, Shelter Island, Southampton and Southold. The Community Preservation Fund is funded by a two-percent real estate transfer tax through 2030.

WORTH READING

Charlotte A. Biblow, *Are New Liquefied Natural Gas Facilities Coming to New York?*, N.Y.L.J., at 3 (Nov. 21, 2013).

Howard B. Epstein & Theodore A. Keyes, *Key Rulings Concerning Cleanup of Former Grumman Sites*, N.Y.L.J., at 3 (Dec. 11, 2013).

Michael B. Gerrard, *Michael Bloomberg's Environmental Record, Bill de Blasio's Promises*, N.Y.L.J., at 3 (Nov. 14, 2013).

Anthony S. Guardino, *Default Approval of Subdivision Applications*, N.Y.L.J., at 3 (Nov. 27, 2013).

Jonathan Martel, Christopher Jaros & Allison Rumsey, *Regulating the Regional Impact of Greenhouse Gas Emissions*, 223 Daily Env't Rep. (BNA) B-1 (Nov. 19, 2013).

David A. Pellegrino & Carl D. LeSueur, *Anti-SLAPP Motions in New York's Federal Courts?*, N.Y.L.J., at 4 (Nov. 21, 2013).

Process, Powers, and Lessons for the Future: 25 Years of New York City Charter Revisions, N.Y.L. Sch. L. Rev., vol. 58, issue 1 (2013–2014).

Bar Association, 42 West 44th Street, New York City. For information, see <http://www.eli.org/events/new-york-environmental-year-review>.

February 27, 2014

NYU Schack Institute of Real Estate, Center for the Sustainable Built Environment, 3rd Annual Conference on Sustainable Real Estate, "Big Data and Disruptive Innovation: Is the Real Estate Industry Next?," NYU Kimmel Center for University Life, Rosenthal Pavilion, 60 Washington Square South, New York City. For information, see <http://www.scps.nyu.edu/academics/departments/schack/conferences-events/sbe-conference.html>.

April 4, 2014

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

UPCOMING EVENTS

February 25, 2014, 8:00-10:00 AM

New York Environmental Year in Review (co-sponsored by the Environmental Law Institute, the New York City Bar Association Committee on Environmental Law and the Columbia Law School Center for Climate Change Law), New York City

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