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Michael B. Gerrard
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A STORMWATER FEE, WITH STRONG AND EQUITABLE CREDITS FOR GREEN INFRASTRUCTURE, COULD BENEFIT NEW YORK CITY AS A WHOLE AND ENVIRONMENTAL JUSTICE COMMUNITIES SUCH AS THE SOUTH BRONX

Viewpoint

Mandy DeRoche

IN THIS ISSUE

I. Introduction

There are over 1,400 municipalities in the United States today that charge stormwater fees.[1] As described in more detail below, a stormwater fee is a charge paid by a property owner for the amount of stormwater runoff a parcel discharges into the water and sewer system. Nearly all existing stormwater fee programs include credits to the fee based on a property owner's efforts to mitigate stormwater runoff, most commonly through green infrastructure installed to absorb the stormwater onsite.

The New York City Department of Environmental Protection (NYC DEP) and the New York City Water Board studied the potential for a stormwater fee in New York City in 2009, following the introduction of *PlaNYC 2030: A Greener, Greater New York*, and its Green Infrastructure and Sustainable

[1] W. KY. UNIV., STORMWATER UTILITY SURVEY 2013, 1–3 (July 6, 2013), http://www.wku.edu/engineering/civil/fpm/swusurvey/western_kentucky_university_swu_survey_2013.pdf [hereinafter WKU STORMWATER UTILITY SURVEY].

Stormwater Management Plans.[2] Nearly five years later, no plans to institute a stormwater fee seem to be in the works.

This article explores the potential impacts on, and potential benefits to, environmental justice communities,[3] and particularly the South Bronx, if a stormwater fee were implemented in New York City. Because a stormwater fee would incentivize green infrastructure on both private and public property, a fee could improve the environmental and public health of the city and its residents, as long as the stormwater fee program is designed to ensure that the installation of green infrastructure is equitably distributed throughout every community.

Many environmental justice communities, such as the South Bronx, have limited amounts of green space, higher than average unemployment rates, and higher than average adverse health impacts, such as asthma. A stormwater fee, if effective and equitable incentives for green infrastructure are included, could potentially alleviate all three issues.

A. What Is Stormwater Runoff, and What Is a Stormwater Fee?

Stormwater runoff is rainwater that is not absorbed into the ground. Stormwater runoff results in a significant amount of water pollution. Nationwide, the U.S. Environmental Protection Agency (US EPA) estimates that urban stormwater runoff is the primary source of water quality impairment for 13 percent of all rivers and streams, 18 percent of all lakes, and 32 percent of all estuaries.[4] Beach closings and advisories are often due to stormwater runoff and resulting pollution.[5] Many environmental justice communities, including much of the South Bronx, are also Significant Maritime and Industrial Areas (SMIAs),[6] with toxic substances and other industrial materials on site, and are particularly sensitive to stormwater runoff.

In New York, over 72 percent of the city's land is covered by impervious surfaces.[7] As such, the vast majority of rainwater flows instead through the storm drains, mixing with pollutants on the ground, and often mixing with sewage in the stormwater pipes. Stormwater runoff is especially a problem, and a large municipal expense, for an older city like New York, which, like most northeastern cities, has an aging combined sewer system that cannot handle all the rainfall that flows through the pipes. When it rains, not all stormwater flows to a wastewater treatment plant, but instead goes into local waterways untreated.

Indeed, almost every time the rainfall exceeds a certain amount (often less than an inch) in a certain timeframe, New York City's combined sewer system becomes overwhelmed. In other words, water and sewage combine in the system to overflow into local waterways, called combined sewer overflows (CSOs). There are over 400 CSO outfalls in New York City, where untreated water is discharged on a regular basis. That discharge contains sewage pollutants and contaminants, including unhealthy levels of bacteria, as well as trash, litter and other materials and fluids from the street. The regularity of CSO events renders much of New York City's water unswimmable—and in violation of the Clean Water Act. These violations cost the city millions of dollars in fines.

Approximately 30 billion gallons of untreated stormwater are discharged from CSOs into New York City waterways every year.[8] There are 13 Tier 1 CSO outfalls in New York City.[9] Tier 1 CSO outfalls discharge over 500 million gallons of untreated stormwater per year and constitute roughly

[2] Press Release, N.Y.C. Dept. of Envt'l Prot. (NYC DEP), Comprehensive Study of Water Rates Presented to New York City Water Board (Dec. 18, 2009), http://www.nyc.gov/html/dep/html/press_releases/09-14pr.shtml; BOOZ ALLEN HAMILTON, EVALUATION OF EXPENDITURES, REVENUE SOURCES, AND ALTERNATIVE WATER, WASTEWATER AND STORMWATER RATE STRUCTURES IN NEW YORK CITY: FINAL REPORT (Dec. 18, 2009), http://www.nyc.gov/html/dep/pdf/water_board/waterboard_rate_study_12182009.pdf [hereinafter 2009 WATER BOARD RATE STUDY]; *see also* NYC DEP, WATER AND SEWER RATE STUDY (Mar. 18, 2010), http://www.nyc.gov/html/dep/pdf/water_board/dep_water_rate_study_03182010.pdf [hereinafter 2010 WATER AND SEWER RATE STUDY].

[3] Environmental justice communities are low-income neighborhoods and communities of color that are disproportionately burdened by noxious and undesirable land uses and deprived of beneficial land uses. *Environmental Justice*, N.Y. LAWYERS FOR THE PUBLIC INTEREST, http://www.nylpi.org/main.cfm?actionId=globalShowStaticContent&screenKey=cmpEnvironmentalJustice&s=NYLPI (last visited Nov. 11, 2013); *see also Principles of Environmental Justice*, WE ACT FOR ENVT'L JUSTICE, http://www.weact.org/Home/PrinciplesofEnvironmentalJustice/tabid/226/Default.aspx (last visited Nov. 11, 2013).

[4] Natural Res. Def. Council (NRDC), NRDC Policy Basics: Clean Water (Feb. 2013), http://www.nrdc.org/legislation/policy-basics/files/policy-basics-clean-water-FS.pdf; *see also* U.S. Envt'l Prot. Agency (US EPA), Presentation on National Stormwater Calculator 3 (Oct. 23, 2013), http://water.epa.gov/learn/training/wacademy/upload/stormwater-calculator-10022013.pdf [hereinafter National Stormwater Calculator Presentation].

[5] NRDC, TESTING THE WATERS: EXECUTIVE OVERVIEW 3–5 (June 2013), http://www.nrdc.org/water/oceans/ttw/2013/ttw2013_Executive_Overview.pdf; *see also* National Stormwater Calculator Presentation, *supra* note 4.

[6] N.Y.C. DEPT. OF CITY PLANNING, VISION 2020: N.Y. CITY COMPREHENSIVE WATERFRONT PLAN, app. B (Significant Maritime and Industrial Areas), at 174 (Mar. 2011), http://www.nyc.gov/html/dcp/pdf/cwp/vision2020/appendix_b.pdf; *see also Waterfront Justice Project*, N.Y.C. ENVT'L JUSTICE ALLIANCE, http://nyc-eja.org/?page_id=311 (last visited Nov. 11, 2013).

[7] *Stormwater*, NYC DEP, http://www.nyc.gov/html/dep/html/stormwater/index.shtml (last visited Nov. 11, 2013); *see also* NYC DEP, 2013 Office of Green Infrastructure Public Meeting Presentation 4 (June 10, 2013), http://www.nyc.gov/html/dep/pdf/green_infrastructure/city-wide_meeting_on_nycdeps_green_infrastructure_program.pdf [hereinafter 2013 OGI Presentation].

[8] NYC DEP, The NYC Green Infrastructure Plan & Community Engagement Program Presentation 4 (Feb. 2, 2011), http://www.nyc.gov/html/dep/pdf/green_infrastructure/nycgreeninframeeting_02022011.pdf.

[9] *Mapping New York City's Sewage System and CSO Outfalls*, NYC TRANSPORTED (Feb. 15, 2011), http://nyctransported.com/2011/02/mapping-new-york-city-sewage-system-cso-outfalls.

50 percent of all CSO volumes. Tier 2 CSO outfalls discharge between 250 to 500 million gallons of untreated stormwater per year and make-up an additional 20 percent of CSO volume. Tier 3 CSO outfalls discharge between 50.7 to 250 million gallons of untreated stormwater per year and make up an additional 10 percent of CSO volume.[10] In the South Bronx, for example, there is one Tier 1 CSO outfall, one Tier 2 CSO outfall and two Tier 3 CSO outfalls.[11]

There are many approaches available to mitigate CSOs. Many of them require long-term, substantial capital investment by the City, for example, by replacing the City's combined sewers with separate sewers, or by building more treatment plants with the capacity to handle the vast amount of water discharged into the sewers during storms. However, a stormwater fee with credits for green infrastructure is one way to reduce the number of harmful CSO events with less reliance on grey infrastructure solutions. The US EPA defines green infrastructure as efforts that "use or mimic natural processes (interception, infiltration, evapotranspiration) to retain and treat stormwater on site."[12]

A stormwater fee, in its most common and legally defensible form, as discussed in more depth below, is a charge based on a parcel's impervious surfaces, often measured by the square foot.[13] Impervious surfaces do not allow rainwater to seep down into the soil underneath, and include concrete, pavement and roofs. Pervious surfaces, by contrast, allow for absorption of rainwater and prevent drainage into local pipes, and include grass, trees, gardens, bioswales and green roofs—these types of surfaces are known as "green" infrastructure. Certain types of "blue" infrastructure collect and store stormwater during a storm, allowing the water to be utilized later (*i.e.*, to water plants or lawns in the following days), or to flow through the storm drains at a later time when the system is less overwhelmed and therefore able to treat it. Examples of blue infrastructure include rain barrels and retention roofs. Municipalities most often utilize "grey" infrastructure to deal with stormwater, which includes water treatment plants, retention tanks and other large built structures to retain and treat stormwater. In most stormwater fee programs in place around the country, property owners can qualify for a reduction in their assessment by adopting measures to reduce the amount of runoff generated by their property's impervious surfaces, either through green or blue infrastructure.

The costs of stormwater management are significant for municipalities, and stormwater fees can be an important revenue source for increasingly cash-strapped cities and towns seeking funding to mitigate the environmental harms caused by stormwater runoff. By some estimates, stormwater expenditures are approximately twenty percent of the NYC DEP budget.[14]

The proceeds from a stormwater fee, as discussed below in more detail, can be utilized by the city to install and support the installation of more green, blue and grey infrastructure, to meet regulatory requirements to mitigate CSO events. A stormwater fee can also raise dedicated revenue to ensure that the green infrastructure installed is equitably distributed throughout the city via affordability incentives and rebates, green jobs training programs, education and outreach.

That being said, many stormwater fees around the country seem to be quite low. For example, in Los Angeles, the average monthly fee for a single-family residential parcel appears to be $1.92.[15] The average monthly single-family residential stormwater fee for Houston, Texas seems to be $5.00.[16] Miami's average single-family residential stormwater fee is $4.00 per month, and Philadelphia's is $13.48 per month.[17]

B. A Stormwater Fee with Strong and Equitable Credits for Green Infrastructure Can Improve the Urban Environment and Public Health

Environmental justice communities, by definition, suffer more than their fair share of environmental harm and have less access to beneficial land uses.[18] The South Bronx is no exception. Ringed by highways and with trucks clogging its local streets, asthma rates and asthma hospitalizations for children in the South Bronx are significantly higher than the city averages.[19] Increased green infrastructure in the South Bronx as a result of a well-designed stormwater fee program would be especially welcome because of the environmental and public health impacts of green infrastructure.

Direct environmental benefits of green infrastructure include improved water quality and reduced flooding due to the absorption of rainwater, rather than discharge into the storm drains. Studies have also shown that there are tremendous environmental

[10] N.Y.C. MAYOR'S OFFICE OF LONG-TERM PLANNING & SUSTAINABILITY, PLANYC 2030: GREEN INFRASTRUCTURE PLAN 15 (2010), http://www.nyc.gov/html/dep/pdf/green_infrastructure/NYCGreenInfrastructurePlan_LowRes.pdf [hereinafter GREEN INFRASTRUCTURE PLAN].

[11] *CSO Outfalls Map*, NYC DEP, http://www.nyc.gov/html/dep/pdf/green_infrastructure/cso_outfalls_map.pdf (last visited Nov. 11, 2013).

[12] National Stormwater Calculator Presentation, *supra* note 4.

[13] *See* Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S. ILL. U. L.J. 505, 517 (2002); WKU STORMWATER UTILITY SURVEY, *supra* note 1, at 6–10 (observing the different ways municipalities calculate stormwater fees).

[14] GREEN INFRASTRUCTURE PLAN, *supra* note 2, at 59; *see also* 2009 WATER BOARD RATE STUDY, *supra* note 1, at 24.

[15] WKU STORMWATER UTILITY SURVEY, *supra* note 1, at 17.

[16] WKU STORMWATER UTILITY SURVEY, *supra* note 1, at 44.

[17] WKU STORMWATER UTILITY SURVEY, *supra* note 1, at 21, 41. It is unclear how representative these single-family residential averages may be for multi-family residential, commercial, and industrial properties.

[18] *See* discussion *supra* note 3.

[19] N.Y.C. DEPT. OF PARKS & REC. ET AL., GREENING HUNTS POINT: A COMMUNITY FORESTRY MANAGEMENT PLAN 9 (Dec. 2003), http://www.milliontreesnyc.org/downloads/pdf/ahunts_point_report.pdf [hereinafter GREENING HUNTS POINT].

"co-benefits" from the installation of green infrastructure, such as improved air quality, fewer carbon dioxide (CO2) emissions, energy savings and decreased urban heat island effect. For example, green infrastructure can mitigate the urban heat island effect through added shade and evapotranspiration, thereby reducing the demand for electricity for air conditioning, air pollution, and heat stress-related mortality and illness. By saving energy, green infrastructure can reduce CO2 emissions and other air pollutants emitted by energy production, thereby improving air quality. New York City's street trees already reduce atmospheric carbon dioxide by 113,016 tons as well as 129 tons of ozone, 63 tons of particulate matter, and 193 tons of nitrous dioxide every year.[20] Saving energy also means saving money. For example, residents of the South Bronx pay on average 9.3 percent of their income to electric utilities, whereas residents of most city neighborhoods pay one to two percent of their incomes toward electricity.[21]

Green infrastructure has highly localized impacts. For example, research has shown that certain species of "trees planted near pollution sources can inhibit the spread of pollutants," and that "the combined effect of trees on asthma-causing pollutants can be significant [because] trees have the potential to both remove large amount [sic] of pollution and prevent significant levels of ozone from forming."[22] As the environmental justice communities such the South Bronx increase their green infrastructure, the disproportionate health effects their residents suffer can decrease as well. In addition, green infrastructure can provide improved habitat and ecosystem services, such as nesting, migratory, and feeding habitat for a variety of birds, butterflies, bees and other insects.[23]

The current funding in New York City for stormwater mitigation, as discussed below, creates only limited green infrastructure on public property. A stormwater fee with strong and equitable credits and incentives for green infrastructure can reduce environmental harms and improve public health because private property owners throughout the city would be financially motivated to mitigate stormwater runoff.

Small additions to the green space in the South Bronx would likely bear immediate dividends to the surrounding block. Green infrastructure can be implemented faster, and on a smaller scale, than new parks and can bring much needed additional green space to the South Bronx—as well the jobs created to install and maintain that green infrastructure.

As discussed more below, making the communities of the South Bronx greener and healthier is an important goal of residents. As the authors of *Greening Hunts Point: A Community Forestry Management Plan* from *PlaNYC 2030*'s MillionTreesNYC initiative observed: "greening on private property and future undeveloped parklands as well as public health issues including air quality monitoring and asthma treatment" were important areas of interest to the community that the MillionTreesNYC initiative could not alone address. [24] A stormwater fee with strong and equitable incentives for green infrastructure could.

II. Legal and Political Considerations Regarding the Implementation of a Stormwater Fee

A. The Existing Approach to Stormwater Mitigation in New York City

1. The 2012 Modified Consent Order Requiring the Mitigation of Stormwater Runoff

New York City's waterways are in perpetual violation of the Clean Water Act due to the frequency and the amounts of untreated discharges from 400-plus CSOs during rain events. As a consequence of those violations, the City has settled with the New York State Department of Environmental Conservation (NYS DEC) by paying fines and by implementing measures to reduce future violations. Over the years, several consent orders have been entered between NYC DEP and NYS DEC regarding the City's violations of the Clean Water Act. The most recent modification to the Consent Order was approved on March 8, 2012 (2012 Consent Order).

The 2012 Consent Order, for the first time, specifically includes green infrastructure as a technique to mitigate CSO discharges. The goal of the 2012 Consent Order is to "decrease CSO volumes and improve water quality not only by capturing more combined sewage within the sewer system, but also by using green infrastructure and other source controls to prevent or delay stormwater from entering the sewer system."[25]

The 2012 Consent Order requires that NYC DEP allocate $187 million to green infrastructure to meet its first milestones in 2015. The first milestone is to place green infrastructure

[20] *See* PAULA J. PEPER ET AL., CENTER FOR URBAN FOREST RESEARCH, USDA FOREST SERVICE, NEW YORK CITY, NEW YORK: MUNICIPAL FOREST RESOURCE ANALYSIS 2 (Mar. 2007), http://www.milliontreesnyc.org/downloads/pdf/nyc_mfra.pdf.

[21] Emily Badger, *Where New Yorkers Run Up the Biggest Power Bills*, THE ATL. CITIES, Aug. 26, 2013 http://www.theatlanticcities.com/housing/2013/08/where-new-yorkers-run-biggest-power-bills/6654/ (quoting source as saying that energy costs are "effectively a 7 percent regressive tax on the people of Hunts Point and Mott Haven").

[22] GREENING HUNTS POINT, *supra* note 19, at 9, 11–12. For additional data on tree cover and impacts on community health, GREENING HUNTS POINT, *supra* note 19, at 9, 10–20.

[23] *See* 2013 OGI Presentation, *supra* note 19, at 58. NYC DEP's Office of Green Infrastructure also assesses the co-benefits of green infrastructure.

[24] GREENING HUNTS POINT, *supra* note 19, at 5.

[25] NYC DEP Letter to NYS DEC 1 (Oct. 19, 2011), http://www.dec.ny.gov/docs/water_pdf/csowp2011.pdf. This letter contains a discussion of prior consent orders and a comparison of the 2005 Consent Order against the 2011 Consent Order. *See also* NYS DEC, Presentation on 2011 Modification to the 2005 CSO Consent Order 3–6 (Nov. 9, 2011), http://www.dec.ny.gov/docs/water_pdf/csomod2011.pdf.

on 1.5 percent of impervious surfaces in designated drainage basins.[26] The Consent Order also requires that additional funds be spent on Environmental Benefits Projects for CSO mitigation, such as large-scale demonstration projects, the Green Infrastructure Grant program, and the development and implementation of drainage basin-specific Long-Term Control Plans (LTCPs).[27]

2. The New York City Department of Environmental Protection's Office of Green Infrastructure

NYC DEP's Office of Green Infrastructure focuses on the building of green infrastructure on rights-of-way and other publicly owned land. NYC DEP is also in charge of building the grey infrastructure for the city, including 14 wastewater treatment plants, numerous retention tanks and other capital-intensive projects to handle stormwater overflow. This grey infrastructure, of course, costs hundreds of millions of dollars to build and operate. NYC DEP funds its stormwater management through the same financing system of government funding as other City infrastructure, through bond levies, debt, grants and moneys from the general NYC DEP funds for capital and operations, including from existing water and sewer charges.[28] NYC DEP's capital expenditures constitute a large component of the City's debt,[29] and servicing that debt is very expensive.

NYC DEP's Office of Green Infrastructure has prioritized the installation of green infrastructure on publicly owned land near waterways with the most CSO outfalls, such as the Gowanus Canal, Newtown Creek and Jamaica Bay.[30] NYC DEP has budgeted $192 million for green infrastructure through 2015, focused mostly on bioswale installation on City-owned rights-of-way (*i.e.*, sidewalks).[31] Another program, the Green Infrastructure Grant Program, allots money for installation of green infrastructure on private property.[32] In 2011, $3.4 million was budgeted to the Green Infrastructure Grant Program, $4.2 million was budgeted in 2012, and $6 million was committed for the year 2013.[33]

The rights-of-way bioswale program works commendably toward the goal of reducing CSO events in the city, and is making progress towards compliance with the 2012 Consent Order and meeting Clean Water Act standards and *PlaNYC 2030* Green Infrastructure Plan goals.[34] The Green Infrastructure Plan's goals are to capture "the first inch of rain on 1.5 percent of impervious surfaces by 2015, an additional 2.5 percent by 2020, an additional 3 percent by 2025 and the remaining 3 percent by 2030."[35] However, compared to the 72 percent of land in the city covered by impervious surfaces,[36] this does not seem sufficient to address almost weekly CSO events at over 400 outfalls around the city. More importantly, these efforts are only made on City-owned unbuilt property, whereas the vast majority of property in the city is privately owned.

The scale of the Green Infrastructure Grant Program also appears insufficient to address the significant amounts of stormwater generated by private property in the city.[37] In its current form, the Green Infrastructure Grant Program does not seem to be assisting average residents. To apply for a grant, a property owner must have significant financial and operational resources.[38] The 2011 and 2012 grant winners were almost all

[26] Order on Consent (CSO Order Modification to CO2-20000107-8) at 9, In re City of New York, DEC Case No. C02-20110512-25 (Mar. 8, 2012), *available at* http://www.dec.ny.gov/docs/water_pdf/csomod2012.pdf.

[27] Order on Consent (CSO Order Modification to CO2-20000107-8) at 4–5, In re City of New York, DEC Case No. C02-20110512-25 (Mar. 8, 2012), *available at* http://www.dec.ny.gov/docs/water_pdf/csomod2012.pdf.

[28] The source of this information is June 19, 2012 correspondence with the Office of Green Infrastructure. For an overview of the budget for the Office of Green Infrastructure, see N.Y.C. MAYOR'S OFFICE OF LONG-TERM PLANNING & SUSTAINABILITY, PLANYC 2030: 2012 GREEN INFRASTRUCTURE ANNUAL REPORT 20 (June 24, 2013), http://www.nyc.gov/html/dep/pdf/green_infrastructure/gi_annual_report_2013.pdf [hereinafter 2012 OGI ANNUAL REPORT] and 2010 WATER AND SEWER RATE STUDY, *supra* note 2.

[29] N.Y.C. INDEP. BUDGET OFFICE, A GUIDE TO THE CAPITAL BUDGET 5 (June 2013), http://www.ibo.nyc.ny.us/iboreports/IBOCBG.pdf.

[30] 2012 OGI ANNUAL REPORT, *supra* note 28, at 12–13. NYC DEP's Office of Green Infrastructure has focused its technological efforts on mitigation for rain events of less than one inch, which constitutes approximately 90 percent of the rain events in the city. *Id.* at 18.

[31] NYC DEP, Presentation on Green Infrastructure Program (Jan. 3, 2013), http://parkslopeciviccouncil.org/wp-content/uploads/2013/01/010313-ParkSlopeCivicCouncil-DEP-presntation-I.pdf.

[32] NYC DEP, Presentation on Green Infrastructure Program (Jan. 3, 2013), http://parkslopeciviccouncil.org/wp-content/uploads/2013/01/010313-ParkSlopeCivicCouncil-DEP-presntation-I.pdf.

[33] NYC DEP, Presentation on Green Infrastructure Program (Jan. 3, 2013), http://parkslopeciviccouncil.org/wp-content/uploads/2013/01/010313-ParkSlopeCivicCouncil-DEP-presntation-I.pdf. For context, the $6 million dedicated to green infrastructure grants equates to approximately .003 percent of the NYC DEP budget for 2013. *See Agency Budget & Projections, Actual Expenditures and Forecast, NYC DEP*, N.Y.C. OFFICE OF MGMT. & BUDGET, http://www.nyc.gov/html/omb/html/publications/projections.shtml?39 (updated June 27, 2013).

[34] 2012 OGI ANNUAL REPORT, *supra* note 28, at 1.

[35] Press Release, NYC DEP, DEP Launches Parking Lot Stormwater Pilot Program: Initiative Will Require Parking-Lot Owners to Pay for Wastewater Services (Jan. 28, 2011), http://www.nyc.gov/html/dep/html/press_releases/11-04pr.shtml.

[36] 2013 OGI Presentation, *supra* note 7, at 4.

[37] *New York City Land Use*, N.Y.C. DEPT. OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/landusefacts/landusefactshome.shtml (last visited Nov. 12, 2013).

[38] *Grant Program for Private Property Owners*, NYC DEP, http://www.nyc.gov/html/dep/html/stormwater/nyc_green_infrastructure_grant_program.shtml (last visited Nov. 12, 2013) (describing technical workshops for applicants, e.g., with stormwater calculations).

institutional property owners or property owners of means, with consultants and others to assist with the application process and the development and installation of projects.[39] Furthermore, just 11 grants were awarded in 2011 and eight in 2012.[40] In a city of nearly nine million residents,[41] more than a handful of grants would be required to incentivize private property owners to install green infrastructure.

Similarly, the City's tax incentive for green roofs has not incentivized anywhere near the amount of green roofs needed to address stormwater runoff. In the first three years of the program, just four property owners have taken advantage of the tax abatement.[42]

Of course, the City is promoting green infrastructure in other ways, through zoning,[43] building standards for new construction,[44] and stormwater retention standards for large developments,[45] among others. However, much of the City's current approach addresses future construction and not the hundreds of thousands of acres of already-built land. A stormwater fee, in contrast, would impact nearly every piece of property in the city and would significantly incentivize the installation of green infrastructure throughout the five boroughs.

3. The New York City Water Board

NYC DEP, in conjunction with the Water Board, would be responsible for the development and implementation of a stormwater fee. The Water Board is an independent office of the City that currently sets the water and sewer rates for city properties.[46]

The Water Board completed a water rate study in December 2009 that evaluated stormwater expenditures, revenue sources and rate structures. A primary goal of the study was to research possible structures that could be implemented in New York City to enhance revenue stability, equity for customers and resource conservation.[47] As discussed, a stormwater fee was discussed in the Rate Study, and the stormwater fee pilot project for parking lots was a first step in that direction. The parking lot pilot is overseen by the Water Board and NYC DEP.[48]

It is unclear whether the Water Board and NYC DEP have the existing authority to impose a stormwater fee or whether additional approvals are required, such as explicit enabling City Council or state legislation. However, it is probable that the Water Board and NYC DEP have the authority to implement a stormwater fee through their existing authority to levy water and

[39] Press Release, NYC DEP, DEP Awards $3.8 Million in Grants for Community-Based Green Infrastructure Program Projects: 15 Awardees Selected for Innovative Methods to Manage Stormwater Runoff (Jun. 9, 2011), http://www.nyc.gov/html/dep/html/press_releases/11-46pr.shtml.

[40] 2012 OGI ANNUAL REPORT, *supra* note 28, at 3, 19; *see also* Press Release, NYC DEP, Mayor Bloomberg and Environmental Protection Commissioner Strickland Award $4.6 Million to Projects That Will Protect New York Waterways (Apr. 21, 2012), http://tinyurl.com/7jxrq8a (reporting 15 grantees in 2011 and 11 grantees in 2012).

[41] *New York City Land Use*, N.Y.C. DEPT. OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/landusefacts/landusefactshome.shtml (last visited Nov. 12, 2013).

[42] Robert J. Crauderueff et al., *The New York City Green Roof Tax Abatement: Policy Lessons*, *in* CITIESALIVE!: 10TH ANNUAL GREEN ROOF AND WALL CONFERENCE, 2012 CONFERENCE PROCEEDINGS (Chicago, Oct. 17–20, 2012), http://static.squarespace.com/static/51057256e4b0d2690e9be7c2/t/5105ee61e4b08ef8a15fd4be/1359343201758/Crauderueff%20et%20al_GRHC_final.pdf. The 2012 OGI Annual Report states that five property owners had received the tax abatement. *See* 2012 OGI ANNUAL REPORT, *supra* note 28, at 7. For a description of the tax abatement, see N.Y.C. Dept. of Buildings, NYC Green Roof Property Tax Abatement Program (Jan. 2010), http://www.nyc.gov/html/dob/downloads/pdf/green_roof_tax_abatement_info.pdf. The abatement expired in early 2013. Efforts have been made to extend, and in the process, improve the tax abatement. As of the writing of this article, the bill had passed the State Senate and Assembly (A.7058), but had not been delivered to the Governor. *See 2013 RPT Related Bills of Interest - Passed Both Houses*, N.Y. STATE DEPT. OF TAXATION & FINANCE, http://www.tax.ny.gov/research/property/legal/legis/13bills.htm (updated Nov. 1, 2013).

[43] *Zoning Tools: Streetscape Improvements*, N.Y.C. DEPT. OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/zone/zh_ztools_streetscape.shtml (last visited Nov. 12, 2013).

[44] *See, e.g.*, Zone Green (enacted by City Council Apr. 30, 2012), http://www.nyc.gov/html/dcp/pdf/greenbuildings/adopted_text_amendment.pdf; N.Y.C. Dept. of City Planning, Zone Green Text Amendment (not dated), http://www.nyc.gov/html/dcp/pdf/greenbuildings/handout.pdf; *see also* Robert J. Crauderueff & Eric Dalski, *Improving Tax Abatement: Green Roof Policy in New York City*, LIVING ARCHITECTURE MONITOR, Summer 2012, at 27, http://www.nxtbook.com/dawson/greenroofs/lam_2012summer/#/30.

[45] 2012 OGI ANNUAL REPORT, *supra* note 28, at 7; *see also Standards for Stormwater Release Rates*, NYC DEP, http://www.nyc.gov/html/dep/html/environmental_reviews/stormwater_release_rates.shtml (last visited Nov. 12, 2013); NYC DEP, Notice of Adoption of Final Rule, Department of Environmental Protection Promulgation of Chapter 31 of Title 15 Of the Rules of the City of New York Governing House/Site Connections to the Sewer System, CITY RECORD (Jan. 4, 2012), at 15, *available at* http://www.nyc.gov/html/dcas/downloads/pdf/cityrecord/cityrecord-1-4-12.pdf.

[46] N.Y. PUB. AUTH. LAW § 1045-j; *see also* N.Y.C. WATER BOARD, www.nyc.gov/html/nycwaterboard/html/home/home.shtml (last visited Nov. 12, 2013); *Rates & Regulations*, N.Y.C. WATER BOARD, http://www.nyc.gov/html/nycwaterboard/html/rate_schedule/index.shtml (last visited Nov. 12, 2013).

[47] N.Y.C. MAYOR'S OFFICE OF LONG-TERM PLANNING & SUSTAINABILITY, PLANYC 2030: SUSTAINABLE STORMWATER MANAGEMENT PLAN, PROGRESS REPORT 10 (Oct. 2012), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/sustainable_stormwater_mgmt_plan_progress_report_october_2012.pdf [hereinafter 2012 STORMWATER PROGRESS REPORT].

[48] N.Y.C. Water Board, Administrative Guideline for Approval of Stormwater Management Practices (Jan. 28, 2011), http://www.nyc.gov/html/nycwaterboard/pdf/regulations/approval_of_stormwater_management_practices.pdf.

sewer fees and to prohibit certain discharges into sewers and local waterways.[49] The existence of this authority is buttressed by New York State's strong home rule powers.[50] However, this lack of clarity may be the reason there are not any stormwater fees in place in New York State. In contrast, there are over 100 stormwater fee programs each in Texas, Florida, Ohio, Wisconsin, Minnesota and Washington.[51]

B. Legal Challenges to Stormwater Fees in Other Municipalities

The availability of stormwater fee credits for green infrastructure is essential for environmental and economic reasons, as discussed throughout this paper. However, credits to the stormwater fee are also required for the legal defensibility of a stormwater fee program.

Stormwater fees in other municipalities have faced legal challenges from fee-payers. A well-designed fee program can minimize any legal challenges.[52]

The majority of the court challenges to stormwater fee programs have been made by tax-exempt organizations who have argued that stormwater fees are impermissibly assessed taxes. Not-for-profit institutions, such as universities, churches and hospitals, and the federal and state governments are normally exempt from local property taxes.[53] However, both government-owned and non-profit-owned properties often have large areas of impervious surfaces on their roofs and lots, which means practically that they are both a significant amount of revenue for a municipality as well as opportunities for large-scale installations of green infrastructure. In many municipalities' programs, very few property owners are exempt from paying the fee. In other words, many property owners who are exempt from other assessments by a local government, including the federal and state governments and not-for-profit organizations, must also pay a stormwater fee for the runoff those properties generate.

When a stormwater fee program includes credits available to property owners to mitigate or eliminate that fee, most courts have found the stormwater fee not to be an impermissible tax but a user fee that is rationally related to the property's impact on stormwater runoff.[54] Another factor in the user fee versus tax analysis is how the municipality uses the revenue collected from the stormwater fee. Stormwater fees have been struck down by the courts if the revenues raised by the municipality are not dedicated to stormwater management expenditures. For example, where the monies are used for trash collection, courts have found that the fee was not rationally related to the public

[49] *See, e.g.*, N.Y. PUB. AUTH. LAW art. 5, tit. 2-A; N.Y.C. Charter, ch. 57, § 1403(a), (b); N.Y.C. ADMIN. CODE §§ 24-501–24-528. Although NYC DEP and the Water Board already assess sewer and water fees, they may need to consider whether a stormwater fee would implicate the separation of powers doctrine. *See* Boreali v. Axelrod, 71 N.Y.2d 1, 6, 523 N.Y.S.2d 464, 466, 517 N.E.2d 1350, 1351 (1987) (holding that State Public Health Council "overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public" because "[w]hile the Legislature has given the Council broad authority to promulgate regulations on matters concerning the public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body"); Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, ___ N.Y.2d ___, 972 N.Y.S.2d 513, 518–20, ___ N.E.2d ___ (Sup. Ct. N.Y. Co. 2013) (invalidating New York City's "Taxi of Tomorrow" rules and noting that "City Council has not delegated to the Taxi and Limousine Commission (TLC)] the authority to contract with a third party vendor to manufacture a vehicle that would be the exclusive taxi for the City of New York for the next ten years and medallion owners would be mandated to purchase the same at a pre-determined MSRP" and that "[t]his exercise of discretion does not come within the ambit of the TLC's typical administrative 'interstitial' rule-making function which had historically entailed setting standards for the technical composition of the taxicab and the medallion owners' resulting responsibility to meet such standards in the selection of their vehicles").

[50] The New York State Constitution grants local governments fairly broad home rule powers to adopt local laws. N.Y. CONST. art. IX; N.Y. MUN. HOME RULE LAW art. 2; *see also* NRDC, *Funding and Gaining Support for Stormwater Programs*, *in* STORMWATER STRATEGIES: COMMUNITY RESPONSES TO RUNOFF POLLUTION (May 1999), http://www.nrdc.org/water/pollution/storm/chap4.asp; N.Y. STATE DEPT. OF STATE, ADOPTING LOCAL LAWS IN NEW YORK STATE (2012), http://www.dos.ny.gov/lg/publications/Adopting_Local_Laws_in_New_York_State.pdf.

[51] WKU STORMWATER UTILITY SURVEY, *supra* note 1, at 3.

[52] Nonjudicial challenges to stormwater fees have included repeals of legislation, opinions of state attorneys general, and amendments to state constitutions. WKU STORMWATER UTILITY SURVEY, *supra* note 1, at 1.

[53] Federal law now states that stormwater fees are not taxes and must be paid by federal agencies. Pub. L. No. 111-378 (2011), 33 U.S.C. § 1323; *see also* NRDC, *Funding and Gaining Support for Stormwater Programs*, *in* STORMWATER STRATEGIES: COMMUNITY RESPONSES TO RUNOFF POLLUTION (May 1999), http://www.nrdc.org/water/pollution/storm/chap4.asp; WKU STORMWATER UTILITY SURVEY, *supra* note 1, at 10.

[54] *See, e.g.*, City of Gainesville v. State, 863 So. 2d 138, 146 (Fla. 2003) (upholding the stormwater fee as valid user fee pursuant to a state statute and not an improper tax because property owners can be exempted by not developing the property or by controlling runoff); Twietmeyer v. City of Hampton, 255 Va. 387, 497 S.E.2d 858, 860 (1998) (holding that a stormwater fee charging residential property one rate and commercial property another rate bore a rational correlation to the amounts of stormwater runoff each produced as required by state code); City of Lewiston v. Gladu, 2012 ME 42, ¶ 12, 40 A.3d 964 (upholding stormwater fee as user fee validly enacted under a city ordinance and not improper tax after balancing (1) whether the fee's purpose was to raise revenue or to provide a regulatory purpose, (2) the relationship between the amount of the assessment and the benefit conferred, (3) whether one can opt out of the assessment (*e.g.*, via a system of credits), and (4) whether the assessment represents a "fair approximation between the cost to the government and the benefit to the individual").

purpose for which the fee was enacted, *i.e.*, mitigation of harmful stormwater runoff.[55]

An additional legal consideration is equity. For important policy and fairness reasons, as discussed further elsewhere, when designing the stormwater and credit program, New York City should consider the equitable distribution of green infrastructure across the city's neighborhoods and boroughs. However, the Fair Share criteria in the New York City Charter would likely not require that the impacts or benefits of stormwater fees be fairly dispersed. In a nutshell, the Fair Share criteria would require only that NYC DEP consider the impact of a physical facility on a neighborhood.[56] In other words, the Fair Share criteria would likely only come into play with a stormwater fee, if at all, if and when the City used revenue collected through the stormwater fee to build a City-owned grey infrastructure facility such as a wastewater treatment facility.[57] Even then, the protections of the Fair Share criteria are weak.

In sum, in order to withstand judicial scrutiny to mitigate litigation risks, a stormwater fee in New York City would need to: (a) be rationally related to the amount of stormwater runoff a piece of property generates, which can be met through a charge per square foot of impervious surface, combined with a credit system that decreases the fee based on efforts to reduce the stormwater runoff from that parcel; and (b) the revenue generated from a stormwater fee should be used only for stormwater-related expenditures in order for it to be rationally related to the regulation. Additional consideration will also need to be given to whether additional state authority is required for the implementation of a stormwater fee program, and to the Fair Share criteria.

III. Case Studies

Two case studies are briefly examined here: New York City's Pilot Project for Stormwater Charges on Parking Lots, and the City of Philadelphia's Stormwater Charge. The first is an example of a promising pilot project already operating in the city, a test-case for a city-wide stormwater fee. In sum, the experience from the pilot's first two years offers lessons on how to better design effective economic incentives for green infrastructure. The second case study is an example of a city with an aging stormwater infrastructure similar to New York City's, with a comparable population profile.[58] Mid-way through its four-year phase-in of its parcel-based stormwater charge, many components of the Philadelphia stormwater charge can be replicated in New York City.[59]

Discussion of these two case studies is followed by consideration of affordability programs in several cities. Without affordability and incentive programs for low-income property owners, stormwater fees operate as a regressive means of funding a public utility. Credits for green infrastructure and other incentive programs can be and should designed to mitigate the disparate effect on low-income communities in New York City.

A. New York City's Stormwater Fee Pilot Project For Parking Lots

In 2009, NYC DEP developed a stormwater parking lot pilot project, which required stand-alone parking lots that did not already pay water or sewer fees to pay $0.05 per square foot of

[55] *See, e.g.*, Smith Chapel Baptist Church v. City of Durham, 350 N.C. 805, 812 (N.C. 1999) (invalidating stormwater fee because the City used the revenues generated from the stormwater fee to fund non-stormwater related programs in violation of a state statute barring municipalities from charging more than the cost of implementation for such programs); Lewiston Ind. Sch. Dist. No. 1 v. City of Lewiston, 151 Idaho 800, 801–02, 264 P.3d 907 (2011) (stormwater fee violated a state constitution as a tax because it required authorization by the legislature where revenues were not separated from other City funds and were used for purposes such as street repair; and where the fee's purpose was to raise revenue rather than meet a regulatory purpose). Courts in other home rule states, such as Maryland and Florida, have upheld stormwater fees. However, Maryland and Florida have specific enabling legislation permitting municipalities to impose a stormwater fee. *See generally* FLA. STAT. § 403.0893, MD. CODE ANN. § 24-407. Strong home rule states like New York, even without enabling legislation, often delegate water and sewer resources decisions to the municipalities. *See* NRDC, *Funding and Gaining Support for Stormwater Programs*, *in* STORMWATER STRATEGIES: COMMUNITY RESPONSES TO RUNOFF POLLUTION (May 1999), http://www.nrdc.org/water/pollution/storm/chap4.asp.

[56] N.Y.C. CHARTER, ch. 8, § 203. *See, e.g.*, Cmty. Planning Bd. No. 4 v. Homes for the Homeless, 158 Misc. 2d 184, 191, 600 N.Y.S.2d 619 (Sup. Ct. N.Y. Co. 1993) (holding that Fair Share is more a guide than a regulation dictating procedures for City agencies); *see also* N.Y.C. DEPT. OF CITY PLANNING, "FAIR SHARE" CRITERIA: A GUIDE FOR CITY AGENCIES, NYC DCP 98-06 (Spr. 1998), http://www.nyc.gov/html/dcp/pdf/pub/fair_share_guide.pdf.

[57] For the Fair Share Criteria to apply, the project must be "a facility used or occupied or to be used or occupied to meet city needs that is located on real property owned or leased by the city or is operated by the city or pursuant to a written agreement on behalf of the city." *See* N.Y.C. CHARTER, ch. 8, § 203; Cmty. Planning Bd. No. 4 v. Homes for the Homeless, 158 Misc. 2d 184, 191, 600 N.Y.S.2d 619 (Sup. Ct. N.Y. Co. 1993) (holding that a privately owned and operated homeless shelter serving residents of New York City was not subject to the Fair Share Criteria, and that even if it were so subject, the shelter complied with the criteria, as Fair Share is more a guide than a regulation dictating procedures for City agencies). Further, while green infrastructure would likely be found to serve a City need, private green infrastructure would be owned, operated and located on property not owned by the City. *See also* Tribeca Cmty. Ass'n. v. N.Y.C. Dept. of Sanitation, 2010 N.Y. Misc. LEXIS 1235, at *36–*37 (Sup. Ct. N.Y. Co. Jan. 11, 2010), *aff'd*, 83 A.D.3d 513 (1st Dept. 2011) (denying a motion to prohibit the City from opening a new sanitation garage); Ocean Hill Residents Ass'n v. City of N.Y., 33 Misc. 3d 1230(A), 943 N.Y.S.2d 793 (Sup. Ct. Kings Co. 2011) (affirming *Homes for the Homeless* and denying a motion for a preliminary injunction to prevent the City from opening a shelter). Also of note, underground systems, including sewer easements and water tunnel shafts, are not considered to fall within the Fair Share Criteria. N.Y.C. DEPT. OF CITY PLANNING, "FAIR SHARE" CRITERIA: A GUIDE FOR CITY AGENCIES, NYC DCP 98-06, at 3 (Spring 1998), http://www.nyc.gov/html/dcp/pdf/pub/fair_share_guide.pdf.

[58] NRDC, FINANCING STORMWATER RETROFITS IN PHILADELPHIA AND BEYOND, 2 (Feb. 2012), http://www.nrdc.org/water/files/StormwaterFinancing-report.pdf [hereinafter FINANCING STORMWATER RETROFITS].

[59] A recent case study comparison of several cities was performed by US EPA. *See* National Stormwater Calculator Presentation, *supra* note 4.

impervious surface as a stormwater charge. Parking lots are a significant source of stormwater runoff: "[p]arking lots constitute 6 percent of New York City's impervious area, and during a one-inch storm, one acre of impervious surface generates roughly 27,000 gallons of stormwater runoff."[60] The pilot allows parking lot owners that incorporate green, blue or grey methods to capture stormwater (porous asphalt, catch basins, bioswales, subsurface detention systems, etc.) to apply for a credit to decrease the charge, based on the amount of runoff prevented.

Since its implementation in 2011, the pilot has billed 364 parking lot accounts a stormwater fee.[61] However, since the pilot's inception, not one of the participating parking lot owners has installed stormwater capture infrastructure.[62] Many believe that the charge was simply too low to provide an incentive to implement mitigation measures.[63] Also, no incentives or funding exist to assist parking lot owners to install the green, blue or grey infrastructure to qualify for a credit.[64]

PlaNYC 2030 stated that the goals for the pilot project were to:

- Launch and assess a limited pilot of sewer charges for stormwater for parking lots;
- Analyze its capital and operating budgets to isolate stormwater-related costs;
- Adopt a new billing system that will include capacity for sewer charges for stormwater; and
- Map impervious surfaces throughout the City to provide a basis for sewer charges based on impervious area.[65]

Meeting the latter two goals is imperative to a city-wide stormwater fee. It is unclear how far along NYC DEP and Water Board have come in meeting these goals.[66]

B. Philadelphia's Stormwater Charge

In 2010, Philadelphia instituted a "Stormwater Management Service Charge," to be implemented over a four-year period on residential and commercial properties.[67] For residential property, Philadelphia uses an average gross area and an average impervious area to calculate the fee.[68] For commercial properties, the stormwater charge is based on the ratio of impervious surface to total property area.[69] For both residential and commercial properties, the stormwater charge is not an additional charge, and it is revenue neutral for the city as it adjusts its water meter charges.[70] Prior to the stormwater charge, a property owner's fee was based only on the property's metered water usage, with no correlation to the stormwater runoff generated by a given parcel.[71] As the implementation continues over time, the property owner pays less of the fee from meter-based water use and more from the parcel-based stormwater runoff.

Philadelphia offers credits for green and blue infrastructure including rain gardens, green roofs, basins and ponds, wetlands, swales, underground projects, downspout planters, rainwater harvesting, porous pavement and other techniques.[72] Technical and financial assistance is available to property owners to install stormwater mitigation techniques.[73]

Philadelphia's stormwater charge has not faced a legal challenge. The City designed the program to ensure that the fee is based on a measurement of the impervious surface area per lot and that revenues are dedicated to water department uses.[74] As such, the fee imposed is rationally related to the amount of stormwater runoff caused by a property's development and is not a tax, but a user fee.

To address some affordability concerns, Philadelphia charges reduced stormwater user fees for low-income seniors.[75] Furthermore, under its own consent order for violations of the Clean

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[60] Press Release, NYC DEP, DEP Launches Parking Lot Stormwater Pilot Program: Initiative Will Require Parking-Lot Owners to Pay for Wastewater Services (Jan. 28, 2011), http://www.nyc.gov/html/dep/html/press_releases/11-04pr.shtml.

[61] 2012 OGI ANNUAL REPORT, *supra* note 28, at 7; *see also* 2012 STORMWATER PROGRESS REPORT, *supra* note 47, at 10. For 2012, revenues were $188,000. 2012 OGI ANNUAL REPORT, *supra* note 28, at 7.

[62] 2012 STORMWATER PROGRESS REPORT, *supra* note 47, at 10.

[63] Correspondence with Deputy Director, NYC DEP, Bureau of Envt'l Planning & Analysis, Wet Weather Planning & Water Quality Policy (June 12, 2013). The charge is anticipated to increase in response. The charge is now 6 cents per square foot. *Id.*

[64] Correspondence with Deputy Director, NYC DEP, Bureau of Envt'l Planning & Analysis, Wet Weather Planning & Water Quality Policy (June 12, 2013). Incentives are being considered. *Id.*

[65] GREEN INFRASTRUCTURE PLAN, *supra* note 10, at 59.

[66] Correspondence with Deputy Director, NYC DEP, Bureau of Envt'l Planning & Analysis, Wet Weather Planning & Water Quality Policy (June 12, 2013). Neither the 2010 nor the 2012 OGI Annual Reports have referenced them.

[67] Phila. Water Dept. Regulation, Section 304.2, at 49, http://www.phila.gov/waterrev/pdfs/Water_Department_Reg.pdf.

[68] Phila. Water Dept. Regulation, Section 304.2, at 49, http://www.phila.gov/waterrev/pdfs/Water_Department_Reg.pdf.

[69] Phila. Water Dept. Regulation, Section 304.3, at 49–51, http://www.phila.gov/waterrev/pdfs/Water_Department_Reg.pdf.

[70] Correspondence with Phila. Water Dept. (July 12, 2013).

[71] FINANCING STORMWATER RETROFITS, *supra* note 58, at 6.

[72] *Reduce Your Stormwater Fees*, PHILA. WATER DEPT., http://www.phillywatersheds.org/whats_in_it_for_you/reduce-your-stormwater-fees (last visited Nov. 12, 2013); *Residents*, PHILA. WATER DEPT., http://www.phillywatersheds.org/residents (last visited Nov. 12, 2013).

[73] *See Residents*, PHILA. WATER DEPT., http://www.phillywatersheds.org/residents (last visited Nov. 12, 2013).

[74] Correspondence with Phila. Water Dept. (July 12, 2013).

[75] Phila. Water Dept. Regulations, Section 305.2, at 56, http://www.phila.gov/waterrev/pdfs/Water_Department_Reg.pdf.

Water Act, the Philadelphia Water Department has pledged to build green infrastructure equally throughout all neighborhoods of the City.[76]

Like New York, Philadelphia also has an aging combined sewer system, and a large and diverse population. By all accounts, it is a successful, well-run and equitable program that could serve as a model for New York City.

C. Affordability Assistance Programs In Other Cities

Seeking to grant relief to those less able to pay a stormwater fee, many municipalities have established programs to exempt, reduce the rates of or otherwise financially assist low-income property owners.

Jacksonville, Florida exempts property owners with an income of less than 150 percent of the federal poverty line from the stormwater user fee.[77] Baltimore, Maryland recently adopted an ordinance to institute a program providing a hardship exception to the stormwater user fees for low-income residents.[78] Washington, D.C. is also in the process of developing a stormwater fee discount program.[79]

To be equitable, a stormwater fee should provide some form of affordability relief for low-income residents. Additional consideration must be given to low-income renters and to the options available to alleviate fears of rent increases and resulting displacement that a stormwater fee could possibly generate. In the South Bronx, renter-occupied housing is over 90 percent, so such concerns are particularly relevant.[80]

However, to create as much green infrastructure in low-income neighborhoods as higher-income neighborhoods—such that the environmental and public health co-benefits of the green infrastructure discussed above are equally disbursed throughout the city, affordability provisions should be structured (unlike the above examples) to incentivize the installation and maintenance of green infrastructure, for example through rebates or grant assistance for such projects. Subsidized green infrastructure projects would then mitigate the stormwater fee for properties going forward, as long as they are maintained.

IV. Communities of the South Bronx

To further explain why the implementation of a stormwater fee should include strong and equitable credits for green infrastructure, it is useful to consider why environmental justice communities may especially benefit from additional green infrastructure.

A. The Lack of Green Space in Community Boards 1 and 2

Environmental justice communities, in addition to bearing significant environmental harms, often have less than their fair share of access to parks.[81] The South Bronx is no exception to this unfortunate pattern. While the northern Bronx contains large amounts of park land, including gems like Van Cortlandt Park, Crotona Park, Bronx Park and Pelham Bay Park, the residents of the South Bronx lack access to nearby green space. Green infrastructure that is implemented as a result of a stormwater fee credit program could bring much needed green space to the area in a fairly short time period.

B. Land Use and Socioeconomic Realities in Community Boards 1 and 2

Community Board 1 encompasses the southwest sections of the Bronx closest to Manhattan, abutting the Harlem River. It includes the neighborhoods of Port Morris, Mott Haven and Melrose.[82] Community Board 2 covers the Hunts Point Peninsula further to the east, and includes the neighborhoods of Hunts Point, Longwood and part of Morissania.[83] A comparison of the land uses and other socioeconomic data in these two

[76] Correspondence with Phila. Water Dept. (July 12, 2013).

[77] City of Jacksonville, Fla., Ord. 2008-129, § 754.109, *available at* http://cityclts.coj.net/docs/2008-0129%5COriginal%20Text/2008-129.doc.

[78] City of Baltimore, Md., Ord. 13-143 (Stormwater Remediation Fees) (June 27, 2013), http://www.cleanwateraction.org/files/publications/Balitimore%20City%20Stormwater%20Utility%20Fee%20-%20Article%2027.pdf.

[79] *See Changes to the District's Stormwater Fee*, D.C. DIST. DEPT. OF THE ENV'T, http://ddoe.dc.gov/service/changes-districts-stormwater-fee (last visited Nov. 12, 2013).

[80] N.Y.C. DEPT. OF CITY PLANNING, COMMUNITY DISTRICT NEEDS, FISCAL YEAR 2013, FOR THE BOROUGH OF THE BRONX 11, 36 (2012), http://www.nyc.gov/html/dcp/pdf/pub/bxneeds_2013.pdf [hereinafter COMMUNITY DISTRICT NEEDS]; *see also Bytes of the Big Apple*, N.Y.C. DEPT. OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/bytes/applbyte.shtml (PLUTO data from Community Boards 1 & 2, with Guidebook) [hereinafter PLUTO data]. PLUTO is a collection of New York City land use and geographic data at the tax lot level. PLUTO data spreadsheets and calculations are on file with the author.

[81] For more reading on the distribution of park land and green space in environmental justice communities, see, e.g., Wen et al., *Spatial Disparities in the Distribution of Parks and Green Spaces in the USA* (Jan. 19, 2013), http://www.activelivingresearch.org/files/ABM2013_Wen.pdf; *see also* McPhearson et al., *Urban Ecosystem Services in New York City: A Social-Ecological Multi-Criteria Approach* (June 2012), http://www.isecoeco.org/conferences/isee2012/pdf/1151.pdf.

[82] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 17.

[83] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 42.

community districts, as compared to the city as a whole, is illustrative:[84]

Table 1: Land use Data in City as a Whole and Community Boards 1 and 2[85]

	City As Whole[86]	CB 1[87]	CB 2[88]
1 - 2 Family Residential	27.3%	6.5%	4.0%
Multi-Family Residential	12.2%	23.4%	8.3%
Mixed Residential/ Commercial	3.0%	6.2%	3.1%
Commercial/Office	4.0%	6.0%	3.0%
Industrial	3.6%	20.4%	19.1%
Transportation/ Utility	7.3%	5.2%	19.9%
Public Facilities and Institutions	7.0%	11.5%	4.3%
Open Space/Recreation	26.8%	6.9%	7.1%
Parking Facilities	1.3%	5.9%	2.3%
Vacant Land	5.8%	3.8%	12.0%
Miscellaneous	1.8%	4.1%	16.8%

Table 2: Selected Socioeconomic Data in City as a Whole and Community Boards 1 and 2[89]

	City As Whole[90]	CB 1[91]	CB 2[92]
Renter-Occupied Housing Units	69%[93]	93.2%[94]	91.8%[95]
Population Receiving Income Support	35.6%	60.4%	57.5%
Non-white population	66.6%[96]	98.7%[97]	98.7%[98]

Based on calculations using Department of City Planning data, it is estimated that approximately 34 percent of the land on individual lots in Community Boards 1 and 2 is built.[99] GIS data would be needed to verify this rough calculation, but it indicates a significant amount of surfaces for possible green infrastructure in the South Bronx. Combined with the data on the lack of park land in Community Boards 1 and 2, this information could be an effective tool for communication and advocacy.

1. Community Boards 1 and 2's Desire for Green Space, Healthier Communities and Local Jobs

Residents of the South Bronx seek greener and healthier communities. Community Board 1 has expressed its desire to "[i]ncrease the funding for street and park tree planting and pruning" and to "[c]ontinue collaborations with organizations such as the Trust For Public Land that have helped expand and improve open space in the district through the creation of land trust organizations."[100]

As the Community Board's Statement of Needs goes on to state:

> We are part of the East Harlem-Southern Bronx "asthma corridor". . . . Our residents' failing respiratory health is exacerbated by the totality of the dispersal of emissions and odors from the various waste transfer facilities, rail yards, and four power plants that are alleged to be operated under ideal conditions in Port Morris. In addition, the proximity of the district to the rings of major arterial ingress and egress - the Bruckner Expressway, Interstate 87 and our major thoroughfares creates air quality issues from vehicle emissions and congestion.[101]

[84] For a borough by borough analysis, see N.Y. City Dep't of City Planning, *2010 Primary Land Use Tables* (2010), http://www.nyc.gov/html/dcp/pdf/landusefacts/landuse_tables.pdf (hereinafter "*2010 Land Use Tables*").

[85] *Id.* COMMUNITY DISTRICT NEEDS, *supra* note 80, at 17.

[86] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 3.

[87] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 8.

[88] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 33.

[89] *2010 Land Use Tables*; COMMUNITY DISTRICT NEEDS, *supra* note 80, at 17.

[90] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 3.

[91] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 8.

[92] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 33.

[93] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 4.

[94] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 11; *see also* PLUTO data, *supra* note 80.

[95] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 36; *see also* PLUTO data, *supra* note 80.

[96] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 4.

[97] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 17.

[98] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 36.

[99] This figure was arrived at by dividing PLUTO's Lot Area Front data by Building Area Front data, and separately dividing Lot Area Depth by Building Area Depth, for every property in Community Boards 1 and 2. This data was averaged. As noted above, *see supra* note 80, PLUTO data spreadsheets and calculations are on file with the author. Other data reviewed and analyzed included Lot Area as compared to Building Area and Built FAR to Maximum Allowed FAR.

[100] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 21.

[101] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 30.

A stormwater fee with strong incentives for green infrastructure, due to the environmental co-benefits of green infrastructure, could begin to address these community needs.

Community Board 2 also has stated its concerns about the community's lack of green space: "[u]fortunately, Bronx Community Board 2 has the least amount of park acreage in the borough both in number and per capita."[102] Like Community Board 1, Community Board 2 also hosts a disproportionate number of the city's undesirable facilities that cause environmental harms, [103] and has also expressed its concerns about the asthma rates in its neighborhoods:

> Hunts Point, a peninsula bordered by two rivers and two expressways, is plagued with some of the highest asthma related hospitalization rates in the country. . . . The residential neighborhood is surrounded by industry including automotive repair shops, a fertilizer company and the largest food distribution center in the country. According to the New York City Economic Development Corporation over 10,000 trucks and over 5,000 passenger vehicles travel in and out of Hunts Point on a typical day.[104]

Community Board 2 also has the highest poverty rate in the City, is located within the nation's poorest congressional district, and has unemployment rates are among the highest nationwide. [105]

V. A Stormwater Fee Could Benefit Environmental Justice Communities Such as the South Bronx

The implementation of a stormwater fee, if structured with robust and effective incentives for green infrastructure, could bring a myriad of benefits to the city as a whole and to environmental justice communities as well. Increased green infrastructure can make the South Bronx a greener community with cleaner air and water, and can create local jobs for green-collar workers.[106] Residents of environmental justice communities may see that the benefits of a equitably designed stormwater fee outweigh any drawbacks.

A. Now Is the Time: City Priorities for Green Infrastructure Are at an All-Time High

The local, state and federal governments support green infrastructure now more than ever before. As discussed above, the 2012 Consent Order requires that $187 million be spent on green infrastructure to mitigate CSO events during the years 2012 to 2015, and has validated green infrastructure as a measurable and effective tool for stormwater management from a federal and state government perspective.

PlaNYC 2030's Green Infrastructure and Sustainable Stormwater Management Plans have set city-wide goals for stormwater mitigation efforts. The programs and budgetary dollars newly dedicated to green infrastructure have made it a very visible component of the City's arsenal to manage stormwater.

This recent emphasis by the City on green infrastructure is a gateway for environmental justice communities to advocate for a stormwater fee (and other initiatives) to incentivize green infrastructure on private property, and to ensure that any stormwater fee program benefits all communities.

B. Local Green Space Can Increase, Improving Community Health

As discussed above, the environmental benefits of green infrastructure are highly localized. The air quality and water quality improvements, as well as decreased urban heat island effect and energy costs, would be felt on the block on which the green infrastructure is installed. This could reduce adverse health impacts, such as asthma hospitalizations.

Additionally, small-scale green infrastructure like trees and bioswales can be installed relatively quickly, at least compared to creating new parks. As cited above, just seven percent of the land in Community Boards 1 and 2 consists of open space and recreation (which is not the same as green space), whereas almost 27 percent of the city as a whole is land used for open space and recreation. Green infrastructure, if built throughout the South Bronx, has the potential to improve the immediate environment in a short timeframe.

C. With A Stormwater Fee, Local Jobs For Local Workers May Increase

As a general proposition, additional green infrastructure installed throughout the city as a result of a stormwater fee should mean more green-collar jobs for the installation and maintenance of those projects. Green infrastructure-related jobs can include installation and design (*e.g.*, landscape architects, engineers, plumbers, contractors, construction workers, urban

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[102] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 48.
[103] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 49.
[104] GREENING HUNTS POINT, *supra* note 19, at 3.
[105] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 45; GREENING HUNTS POINT, *supra* note 19, at 7.
[106] Green-collar jobs are those "of, relating to, or involving actions for protecting the natural environment." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/green-collar (last visited Nov. 12, 2013); *see also The BLS Green Jobs Definition*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/green/#definition (last visited Nov. 12, 2013) ("Green jobs are either: Jobs in businesses that produce goods or provide services that benefit the environment or conserve natural resources[or] [j]obs in which workers' duties involve making their establishment's production processes more environmentally friendly or use fewer natural resources."); Steven Greenhouse, *Millions of Jobs of a Different Collar*, N.Y. TIMES, Mar. 26, 2008, http://www.nytimes.com/2008/03/26/business/businessspecial2/26collar.html.

planners), operations and maintenance (*e.g.*, landscapers), and supply chain work (*e.g.*, nursery and greenhouse workers, truck drivers).[107]

On a nation-wide scale, it has been projected that "covering even 1 percent of large buildings in America's medium-to large-sized cities with vegetated roofs could create over 190,000 jobs and provide billions in revenue to suppliers and manufacturers that produce or distribute green-roof related materials."[108] As such, a stormwater fee with a strong incentive for green infrastructure could mean thousands of jobs in New York City alone.

Both Community Boards 1 and 2 have indicated a desire for more local jobs. For example, Community Board 2 stated that it seeks the "means to connect local employees with local housing . . . [to f]oster a healthier, more reliable local work force for area employers,"[109] and it "would encourage the hiring of local residents and locally based companies on construction and renovation sites in the district." Community Board 2 has also stated:

> CB2 is also in a unique position to build a bridge between area employers and agencies working in the arena of job training. That bridge could connect under-employed residents to appropriate training and ultimately to jobs close to home. . . . Local laborers and contractors would take and encourage enduring pride in community improvements. Employers would gain a local labor pool with more reliable attendance and specific training. Resident employees would have steady employment accessible to affordable housing without high commut[ing] expenses. The community would gain residential and industrial stability that generates more retail commerce for existing businesses and attracts new retailers.[110]

Increased green infrastructure in environmental justice communities such as the South Bronx via a stormwater fee could potentially bring those desired local jobs. Green infrastructure projects throughout the city would also include jobs located just a bus or train ride away.

There are plenty of potential green-collar workers in the South Bronx.[111] For example, last year, Sustainable South Bronx (SSBx) had 364 applicants for its Bronx Environmental Stewardship (BEST) Academy class of 39 students.[112] However, the small scale of existing small-scale City green infrastructure programs are not employing green-collar workers in significant numbers. The Office of Green Infrastructure rights-of-way bioswale program employs existing employees of the Department of Parks and Recreation. The small number of Green Infrastructure Grant recipients does not create much in the way of jobs, and the handful of green roof tax abatement beneficiaries also are not likely to have contributed significantly to the green-collar job market. With the implementation of a stormwater fee with green infrastructure credits, construction and maintenance of green infrastructure on private property could be a significant opportunity for job creation.

Other cities have attempted to quantify the number of green-collar jobs created from their stormwater fee and green infrastructure programs. For example, calculations indicate that "Philadelphia's $1.6 billion investment in stormwater infrastructure has the potential to generate 15,266 green collar direct jobs and nearly $7.4 billion in sales through the green stormwater infrastructure supply chain."[113] In Montgomery County, Maryland, the government expected to employ 3,300 workers over three years building its new network of green stormwater controls.[114]

In 2008, *PlaNYC 2030* anticipated the creation of 266 jobs from investing $23 million in green roofs, and 1,446 jobs from a $346 million investment in watershed protection programs.[115] These *PlaNYC 2030* numbers could balloon if a stormwater fee with effective green infrastructure credits and incentive programs was instituted, because of the large quantity of private property that could be affected. For example, it has been estimated that

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[107] GREEN FOR ALL, USING A JOBS FRAME TO PROMOTE THE USE OF GREEN INFRASTRUCTURE, URBAN WATER SUSTAINABILITY LEADERSHIP CONFERENCE (Oct. 17, 2012), http://greenforall.org/wordpress/wp-content/uploads/2012/10/Green-Stormwater-Jobs-.pdf (citing GSP CONSULTING & ECOLIBRIUM GROUP, CAPTURING THE STORM: PROFITS, JOBS, & TRAINING IN PHILADELPHIA'S STORMWATER INDUSTRY (2010), http://www.sbnphiladelphia.org/images/uploads/Capturing%20the%20Storm%20-%20BUC%20Needs%20Assessment.pdf).

[108] AM. RIVERS ET AL., BANKING ON GREEN: A LOOK AT HOW GREEN INFRASTRUCTURE CAN SAVE MUNICIPALITIES MONEY AND PROVIDE ECONOMIC BENEFITS COMMUNITY-WIDE 18 (2012), http://www.asla.org/uploadedFiles/CMS/Government_Affairs/Federal_Government_Affairs/Banking%20on%20Green%20High Res.pdf.

[109] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 47.

[110] COMMUNITY DISTRICT NEEDS, *supra* note 80, at 47.

[111] *See, e.g., About Us*, GREEN WORKER COOPERATIVES, http://www.greenworker.coop/about-us/ (last visited Nov. 12, 2013); *Bronx Environmental Stewardship Academy (BEST)*, SSBx, http://www.ssbx.org/best-academy/ (last visited Nov. 12, 2013).

[112] *Newest BEST Grads Ready for Work*, SSBx, http://www.ssbx.org/newsfeed/newest-best-grads-ready-for-work/ (last visited Nov. 12, 2013).

[113] GREEN FOR ALL, WATER WORKS: REBUILDING INFRASTRUCTURE, CREATING JOBS, GREENING THE ENVIRONMENT 27 (2011), http://www.pacinst.org/wp-content/uploads/2013/02/water_works3.pdf.

[114] For example, for every $100 million invested in stormwater construction, the following local jobs were estimated: In Lynchburg, VA, 1,411 green-collar jobs; in Anne Arundel County, Md., 776 jobs and in Baltimore, MD, 344 jobs. CHESAPEAKE BAY FOUND., DEBUNKING THE "JOB KILLER" MYTH: HOW POLLUTION LIMITS ENCOURAGE JOBS IN THE CHESAPEAKE BAY REGION 12 (Dec. 2011), http://www.cbf.org/document.doc?id=1023.

[115] LOUIS BERGER GROUP, INC., ANALYSIS OF JOB CREATION IN PLANYC FINAL REPORT 17–20 (Mar. 2008), http://www.nyc.gov/html/om/pdf/2008/pr110_planyc_job_creation_analysis.pdf.

installing green roofs on just five percent of Chicago's buildings would create 7,934 jobs.[116] Estimates from other cities are also encouraging. In Los Angeles, 74 percent of the $165 million invested in stormwater projects was spent locally—73 percent of workers involved in the Los Angeles stormwater projects were employed by businesses located within the county, and many of the most frequently hired occupations employed a higher percentage of county residents.[117] Other cities have had similar experiences.[118]

VI. Potential Focal Points For Increased Green Infrastructure And Increased Green-Collar Jobs In Environmental Justice Communities

A stormwater fee that includes strong incentives and effective credits for the installation of green infrastructure would benefit the residents of environmental justice communities such as the South Bronx. Residents could receive the health benefits of increased local green infrastructure, as discussed above, and benefit from employment opportunities for green-collar workers from the area.

A. Installation and Maintenance of Large-Scale Green Infrastructure Projects on Industrial and Government-Owned Properties

With a stormwater fee, locally trained green-collar workers could find substantial local work installing and maintaining large-scale green infrastructure projects on industrial and government-owned properties in environmental justice communities such as the South Bronx.

Due to the high percentage of industrial and government-owned land in most environmental justice communities, including the South Bronx, and the high percentage of impervious surfaces on those parcels, local green-collar workers can bring expertise on installation and maintenance to local businesses for large-scale projects such as green roofs, permeable pavers for parking lots and other projects. As noted above, industrial land (*i.e.*, warehouses and factories) constitutes 20.4 percent of Community Board 1 and 19.1 percent of Community Board 2, as compared to just 3.6 percent for the city as a whole.[119] Land used for transportation and utilities (*i.e.*, train yards, sewage treatment facilities and power plants)[120] constitutes 19.9 percent of land use in Community Board 2, and land owned used for public facilities and institutions (*i.e.*, schools, hospitals, nursing homes, churches, police stations and fire houses, courts and detention centers)[121] constitutes 11.5 percent of land use in Community Board 1. The government-owned property used for transportation, utilities and public facilities—a large percentage of the land in the South Bronx—would be ideal spaces to reduce stormwater fee assessments via credits or other incentive programs for green infrastructure. These green-collar projects would be visible to the community and the jobs would be local.

Moreover, locally trained green-collar workers already have experience with large-scale green infrastructure installation. For example, SSBx's BEST Academy graduates have installed a 10,000-square-foot green roof atop a South Bronx warehouse, installed green infrastructure at a local high school, and planted tidal wetlands on the South Bronx waterfront.[122] With much of the property in the South Bronx owned by the government or by industrial entities,[123] experience with large-scale projects will be valuable for the green-collar jobs of the future.

B. Installation and Maintenance of Small-Scale Green Infrastructure Projects for Local Multi-Family Residences and Small Business Owners

For community greening and buy-in from local residents and businesses, locally trained green-collar workers can provide green infrastructure installation and maintenance expertise to local residents and local small businesses. Many of the local industrial and government-owned facilities, at least in Hunts Point, do not directly abut residential properties or small businesses serving those residents. For more visibility and for more opportunities for education and participation, low-cost green infrastructure demonstration projects could be planned in

[116] AM. RIVERS & ALLIANCE FOR WATER EFFICIENCY, CREATING JOBS AND STIMULATING THE ECONOMY THROUGH INVESTMENT IN GREEN WATER INFRASTRUCTURE 7 (2008), http://www.allianceforwaterefficiency.org/uploadedfiles/news/newsarticles/newsarticleresources/american_rivers_and_awe-green_infrastructure_stimulus_white_paper_final_2008.pdf.

[117] PATRICK BURNS & DANIEL FLAMING, WATER USE EFFICIENCY & JOBS (Dec. 2011), http://www.economicrt.org/summaries/Water_Use_Efficiency_and_Jobs_Study.html.

[118] UNIV. OF MD. ENVT'L FIN. CTR., STORMWATER FIN. ECON, IMPACT ASSESSMENT: ANNE ARUNDEL COUNTY, MD., BALTIMORE, MD., AND LYNCHBURG, VA. 13 (2013), http://www.mde.state.md.us/programs/Marylander/Documents/EFC_Report%20on%20SW%20financing_6feb2013_1.pdf.

[119] *New York City Land Use*, N.Y.C. DEPT. OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/landusefacts/landusefactshome.shtml (last visited Nov. 12, 2013).

[120] *New York City Land Use*, N.Y.C. DEPT. OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/landusefacts/landusefactshome.shtml (last visited Nov. 12, 2013).

[121] *New York City Land Use*, N.Y.C. DEPT. OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/landusefacts/landusefactshome.shtml (last visited Nov. 12, 2013).

[122] *SmartRoofs: SSBx's Social Enterprise Helps NYC Go Green*, SSBx, http://www.ssbx.org/smart-roofs/ (last visited Nov. 12, 2013); *BEST Academy Graduates: Green Job Training in Action*, SSBx, http://www.ssbx.org/best-grad-profiles/ (last visited Nov. 12, 2013).

[123] *See, e.g., South Bronx Greenway*, N.Y.C. ECON. DEV. CORP., http://www.nycedc.com/project/south-bronx-greenway (last visited Nov. 12, 2013).

proximity to residential communities and located in high pedestrian-traffic areas.

Locally trained and locally employed green-collar workers can provide information about the ecological benefits of green infrastructure, as well the how-tos of installing and maintaining green infrastructure to local residents and business by installing demonstration projects and by conducting hands-on trainings in schools and with local groups. Moreover, a local organization and its trainees can serve as effective communicators and educators—potentially increasing community buy-in in environmental justice communities. Locally trained and locally employed green-collar workers, informed by their own experiences in the community, are often best situated to effectively communicate the benefits and how-tos of green infrastructure.

For small-scale projects, locally trained green-collar workers can show local property owners and businesses cost-effective methods to capture rainwater. For example, rain barrels can be extremely cost-effective in multi-family residences, and could be installed and maintained easily. Locally trained green-collar workers also have experience with small-scale green infrastructure projects. For example, SSBx's BEST Academy graduates installed a green roof at a Hunts Point-based nonprofit organization, and assisted Bronx property owners with energy-efficiency retrofits, energy assessments, assistance with low-cost financing for energy upgrades and technical support through partnerships with state and local government agencies.[124]

VII. Conclusion

Both environmental justice communities and the city as a whole could benefit if a stormwater fee was implemented in New York City. Although a stormwater fee can potentially operate as a regressive means of utility assessment, it does not need to. If a stormwater fee program includes effective credits and affordability programs to incentivize equitably distributed green infrastructure, communities such as the South Bronx can receive the environmental and public health benefits of green infrastructure—not just suffer additional burdens—from an additional payment to the city.

The reality today is that the existing programs for green infrastructure in the city do not reach enough private property, and do not focus on the equitable distribution of green infrastructure throughout all neighborhoods in the five boroughs. Existing city programs have shown how inadequate incentives fail to develop the sufficient green infrastructure needed to mitigate the environmental harms of stormwater runoff.

However, a stormwater fee with effective and equitable credits for green infrastructure can increase much needed green space in environmental justice communities because it will require all property, public and private, to mitigate stormwater runoff through green infrastructure. That additional green infrastructure can bring immediate health benefits to residents. The construction and maintenance of green infrastructure can also bring much-needed jobs to green-collar workers in environmental justice communities such as the South Bronx. With thoughtful planning and input from environmental justice communities, a stormwater fee can be an effective tool to improve New York City's environment and community health, throughout all its neighborhoods.

Mandy DeRoche is a litigation associate at Seward & Kissel LLP. The author wishes to thank Pratt Institute's Urban Environmental Systems Management program's Jaime Stein and Alec Appelbaum, Sustainable South Bronx's Angela Tovar and Michael Brotchner, the New York City Environmental Law Leadership Institute (NYCELLI), Arnold & Porter LLP's Margaret Barry, and Seward & Kissel LLP for their assistance.

LEGAL DEVELOPMENTS

ASBESTOS

In Case Concerning Demolition Permit and Stop Work Order, Federal Court Remanded Property Owner's State Law Claims Against Town

Plaintiff obtained a permit from the Code Enforcement Office in the Town of Schroeppel to demolish the building that formerly housed her bowling alley business. Plaintiff had contracted for the demolition of the building, including the recycling or sale of any building materials capable of being recycled or sold. Plaintiff had also contracted to sell the property for development; the contract required that the site be cleared of the bowling alley building. The day after plaintiff commenced demolition, the Town's Code Enforcement Officer issued a stop work order on the grounds that plaintiff had not conducted an asbestos survey in accordance with New York State Department of Labor regulations prior to issuance of the demolition permit. As a consequence of this failure, all material was assumed to be contaminated with asbestos. Both of plaintiff's contracts subsequently fell through, and she commenced an action against the Town and Town officials in state court seeking a declaratory judgment as to (1) the validity of the Town's local law that provided that a building permit conforming to the requirements of the New York State Uniform Fire Prevention and Building Code was a prerequisite for issuance of any demolition permit and (2) whether the local law was negligently administered. Plaintiff also sought damages under 42 U.S.C. § 1983. Defendants removed the action to federal district court for the Northern District of New York, and plaintiff moved to remand. The district court rejected her arguments that the removal was procedurally defective, but held that while it could not remand plaintiff's federal claims, it would not exercise supplemental jurisdiction

[124] *SSBx Helps More Homeowners Save*, SSBx, http://www.ssbx.org/newsfeed/ssbx-helps-more-homeowners-save/ (last visited Nov. 11, 2013); *Bronx Energy Efficiency*, SSBx, http://www.ssbx.org/energy-efficiency/ (last visited Nov. 11, 2013).

over the state law claim. The court found two grounds for refusing to hear the state law claim. First, the state law claim in the case was "precisely the type of novel and complex state law issue which federal courts should avoid deciding, especially on a matter of first impression" because the allegations "go to the very heart of the interplay between local and state law, as it pertains to building codes, labor law, and proper administration of both." The court also found that the federal issues in the case were ancillary to the "core" state law issue, and that the state law claim had to be resolved before any court could reach the federal claim. The district court therefore remanded the state law claim to state court; the court retained jurisdiction over the federal claim but stayed the case pending the resolution of the state law claim. *Riano v. Town of Schroeppel*, 2013 U.S. Dist. LEXIS 149848 (N.D.N.Y. Oct. 18, 2013).

Appellate Division Reversed Workers' Compensation Board's Finding of Inadequate Service

Claimant Lawrence Dow filed an application for workers' compensation benefits in 2005. He asserted that his exposure to asbestos while employed by Silver Construction Corporation (Silver), among others, caused him to develop a lung condition. The Workers' Compensation Law Judge concluded that Dow suffered from a compensable occupational disease and that he had suffered an injurious exposure while employed by Silver. Silver applied to the Workers' Compensation Board for review, but the Board denied the application based on Silver's failure to place all necessary parties on notice of the application. On appeal, the Appellate Division, Third Department reversed, finding that Silver had served the carriers for certain interested parties for whom all prior attempts to serve notice had been returned as undeliverable. The court also noted that another party had previously disputed that it was an interested party and expressly indicated it was not expecting notice of further proceedings. Under these circumstances, the Third Department concluded that the Board had erred in determining that the application was not served upon all parties of interest. The court also concluded that it could not review the merits of Silver's challenge on this appeal. *Matter of Dow v. Silver Construction Corp.*, 2013 N.Y. App. Div. LEXIS 6700 (3d Dept. Oct. 17, 2013). [*Editor's Note:* This case was previously covered in the August 2011 edition of *Environmental Law in New York*.]

ENERGY

Federal Court Ruled That Federal Law Preempted Noise Requirements in Town's Permit for Compressor Station

Plaintiff obtained a Certificate of Public Convenience (Certificate) from the Federal Energy Regulatory Commission (FERC) to construct a compressor station in the Town of Wales. After plaintiff submitted a special use permit application to the Town, the Town issued a permit that plaintiff contended contained provisions concerning noise levels that were inconsistent with the Certificate. Plaintiff commenced an action in the federal district court for the Western District of New York seeking a declaration that portions of the Town permit were inconsistent with the Certificate and a permanent injunction on the ground that pursuant to the Natural Gas Act federal law preempted local regulations. On plaintiff's motion for summary judgment, the district court found that the Town permit was "plainly inconsistent and in conflict with" the Certificate. FERC had directly regulated noise levels and had required plaintiff "to make all reasonable efforts" to maintain predicted noise levels. The Certificate provided for an "outer limit" of 55 dBA that, if exceeded, triggered a requirement for plaintiff to file a report regarding changes needed to meet the 55 dBA limit and to install the necessary noise controls. The Town permit, on the other hand, required plaintiff to stay within 3 dBA of background ambient noise, required plaintiff to ensure predicted noise levels were not exceeded, and threatened suspension or revocation of the permit for violations of these requirements. The court rejected the Town's argument that plaintiff had waived, or should be estopped from asserting, its preemption argument. The court said that the Town had not identified any representations by plaintiffs that it would not rely on preemption principles; moreover, it was doubtful whether preemption claims could be waived at all. The court did not, however, grant a permanent injunction, finding that since there was no evidence that the Town would seek to enforce the Town permit in light of the court's decision, plaintiff had not shown that it would suffer irreparable harm or that there was a threat of a continuing violation. *National Fuel Gas Supply Corp. v. Town of Wales*, 2013 U.S. Dist. LEXIS 151916 (W.D.N.Y. Oct. 21, 2013). [*Editor's Note:* This case was previously covered in the February 2013 issue of *Environmental Law in New York*.]

HAZARDOUS SUBSTANCES

Second Circuit Revived State's Response Costs Action by Ruling That Actions Taken to Address Drinking Water Contamination Were "Removal" Actions

In 2006, the State of New York commenced an action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to recover costs incurred to investigate and address groundwater contamination in the Town of Hempstead that emanated from the New Cassel Industrial Area (NCIA). The Town had installed a granulated activated carbon (GAC) adsorption system at the site of two of its water supply wells in 1990 to eliminate contaminants in the groundwater and between 1995 and 1997 installed an air stripper tower to supplement the GAC system to address rising contaminant concentrations. The New York State Department of Environmental Conservation (DEC) began its remedial investigation of the NCIA in 1995, and in 2000 DEC agreed to reimburse the

Town for the cost of constructing and installing the air stripper tower. In 2003, DEC issued a final record of decision selecting a permanent remedy that incorporated the existing GAC system and air stripper tower. The federal district court for the Eastern District of New York dismissed the State's response costs action as barred by CERCLA's six-year statute of limitations to recover costs for remedial actions. On appeal, the Second Circuit reversed, holding that the actions taken to address the groundwater contamination were removal actions subject to a three-year statute of limitations triggered by the completion of the removal action. The Second Circuit held that both the GAC system and the air stripper tower "were installed in response to an imminent public health hazard, a defining characteristic of removal actions." Moreover, the Second Circuit noted that both systems were "designed as measures to address water contamination at the endpoint—the wells—and not to permanently remediate the problem" by preventing or minimizing releases from the underlying source of contamination. The court therefore held that the GAC system and air stripper tower constituted removal actions at least until the State finalized the remediation plan that incorporated them in 2003. The court rejected defendants' arguments that the long duration and high cost of the measures, and the use by the State of the generic term "remedial" to describe them, made the actions "remedial actions" under CERCLA. *State of New York v. Next Millennium Realty, LLC*, 732 F.3d 117 (2d Cir. 2013).

Federal Court Ruled That Beauty Product Company Was Liable for Arranging for Disposal of Returned Products and Obsolete Inventory

Plaintiff W.R. Grace & Co.–Conn. (Grace) was the owner of a five-acre parcel of land on Brewer Road in Waterloo, New York that had been purchased by its former owner, Evans Chemetics, Inc. (ECI), in 1950 for use as dumping ground for a nearby production facility. The production facility was used by Zotos International, Inc. (Zotos) and ECI for formulating and packaging hair care and beauty products and initially was owned by Zotos. During the time period in which ECI used the Brewer Road site as a dumping ground, Zotos and ECI entered into various agreements concerning the formulation and packaging of cosmetic products, including leases and other agreements concerning operations at the production facility. Zotos eventually sold the facility to ECI, and ECI continued to formulate and package products for Zotos. In 1988, Grace entered into a consent order with DEC to investigate and, if necessary, remediate the dumping ground site. In 1998, Grace commenced an action in the federal district court for the Western District of New York against Zotos under CERCLA seeking to recover the costs of investigating and remediating contamination at the dumping ground. On September 30, 2013, the court issued its rulings on various evidentiary issues raised at trial as well as findings of fact and conclusions of law on the issue of Zotos's liability. The court found that ECI transported at least some Zotos waste to the dumping ground. Grace had argued that the evidence showed that Zotos products containing hazardous substances identified at the waste site were disposed of at the dumping ground in the 1950s. While the court found the evidence insufficient to draw this conclusion for a number of the substances, the court did find sufficient evidence to conclude that Zotos plastic containers at the waste site contained phthalates and that Zotos products containing benzoic acid were disposed of at the site. The court held that Zotos was liable as an arranger for returned products because "[a]t every step preceding actual disposal, Zotos owned and was responsible for returned product, set policies governing returns, and made all decisions relative to the ultimate fate of returned goods," which provided "more than sufficient" evidence of Zotos's intent to dispose of hazardous wastes. Likewise, the evidence was sufficient to show that Zotos owned and was financially responsible for outdated and obsolete products in the inventory maintained at the production facility, and that Zotos intended to arrange for the disposal of such products. The court indicated that questions of necessary response costs and allocation of damages between Grace and Zotos would be addressed in future proceedings. *W.R. Grace & Co.–Conn. v. Zotos International, Inc.*, 2013 U.S. Dist. LEXIS 141028 (W.D.N.Y. Sept. 26, 2013). [*Editor's Note:* This case was previously covered in the July 2009 and December 2012 issues of *Environmental Law in New York*.]

INSURANCE

Appellate Division Affirmed That Insurance Policy Did Not Cover Asbestos Remediation Costs for Rental Property Damaged in Fire

Plaintiff owned a rental property in Oneida County that was damaged by a fire. Because plaster was disturbed while the fire was being extinguished, state regulations required that an asbestos survey be completed before any action was taken with respect to the building. The survey indicated the presence of asbestos, and plaintiff submitted a claim to defendant insurer for the costs of removing the asbestos. Defendant denied coverage for the asbestos removal costs, citing an exclusion in the plaintiff's policy for losses or increased costs resulting directly or indirectly from "enforcement of any code, ordinance or law regulating the . . . repair . . . of a building," irrespective of "any other cause or event that contributes concurrently or in any sequence to the loss." Plaintiff challenged the denial of coverage for asbestos remediation in the Supreme Court, Oneida County, which granted summary judgment to defendant and dismissed the action. The Appellate Division, Fourth Department affirmed, holding that the plain and ordinary meaning of the "unambiguous terms" of the insurance contract established that the policy did not provide coverage for the increased costs for which plaintiff sought coverage. *Conley & Tibbitts Properties, LLC v. Leatherstocking Cooperative Insurance Co.*, 109 A.D.3d 1198, 971 N.Y.S.2d 776 (4th Dept. 2013).

LAND USE

Federal Court Denied Town's Motion for Summary Judgment in Action Seeking Damages for Equal Protection Violations on Basis of National Origin

Two plaintiffs—an individual born in Italy and a corporation currently owned by the individual's children—commenced a 42 U.S.C. § 1983 claim against the Town of Southeast and its former zoning enforcement officer. Plaintiffs sought monetary damages on the basis of alleged violations of their Fourteenth Amendment right to equal protection under the law in connection with their use of commercial property in the Town for towing, car sales and car storage. Plaintiffs alleged that the zoning enforcement officer had in 2009 told the individual plaintiff, "You Guineas think you can get away with anything," while the officer was on the property to serve a cease and desist order to prevent installation of a sign. This alleged comment was made after the officer had issued a series of informations alleging zoning code violations. The district court for the Southern District of New York denied defendants' motion for summary judgment. The court found that defendants had not demonstrated that the officer was not motivated by discriminatory animus toward Italians in his enforcement of facially neutral zoning laws or that the officer would have decided to enforce the zoning code against plaintiffs in the absence of a discriminatory motive. The court also found that there were issues of fact concerning the selectivity of the officer's enforcement, given that plaintiffs had identified a similarly situated neighboring property used as an automobile dealership that was not subject to enforcement. The court also rejected the zoning enforcement officer's claim of qualified immunity. *Savino v. Town of Southeast*, 2013 U.S. Dist. LEXIS 151712 (S.D.N.Y. Oct. 21, 2013).

Appellate Division Ruled That Town Did Not Have Jurisdiction to Deny Approval of Dock

Petitioner owned property with approximately 200 feet of shorefront on Lake George in the Town of Lake George. In 2008, the Lake George Park Commission granted a permit to the petitioner for construction of a new dock that used portions of the existing dock, including the existing shorefront concrete bulkhead, which would not be altered. Petitioner also applied for site plan approval from the Lake George Town Planning Board. After the Planning Board denied the application, petitioner commenced an Article 78 proceeding seeking to annul the denial on the ground that the Planning Board lacked jurisdiction to review or deny the proposed site plan. The Appellate Division, Third Department affirmed the decision of the Supreme Court, Warren County annulling the Planning Board's determination. As preliminary matters, the Third Department ruled (1) that petitioner's claims were not moot despite the completion of the dock's construction since respondents had timely moved for injunctive relief and (2) that petitioner had not waived its jurisdictional challenge by submitting the site plan for the Planning Board's review. The Third Department then ruled that the Planning Board lacked jurisdiction because the State of New York held title to the lands under Lake George in its sovereign capacity and its exclusive authority therefore preempted local land use laws. The court noted that all of the new construction was located entirely within the lake's navigable waters. The court also rejected the Town respondents' contention that the State had delegated authority to regulate docks in Lake George to the Town. *Matter of The Hart Family, LLC v. Town of Lake George*, 110 A.D.3d 1278 (3d Dept. 2013).

Appellate Division Affirmed Denial of Variance for Second-Floor Deck Extension

The Zoning Board of Appeals (ZBA) of the Town of Brookhaven denied petitioner's application for a variance for a second-story deck extension and the relocation of a staircase to accommodate the deck extension. The ZBA found that granting the variance "would result in a detriment to a neighboring property owner, that the requested variance was substantial, and that the petitioner's claimed hardship was self-created." Petitioner challenged the denial in an Article 78 proceeding in the Supreme Court, Suffolk County, which dismissed the proceeding. The Appellate Division, Second Department affirmed. The Second Department concluded that the denial of the variance was not arbitrary and capricious or an abuse of discretion in light of the ZBA's findings. Moreover, the ZBA was reasonable in determining that the circumstances of prior variances it had granted were distinguishable from the circumstances presented by the instant variance application, and the ZBA was therefore not bound by its previous determinations. *Matter of Chynn v. DeChance*, 110 A.D.3d 993, 973 N.Y.S.2d 328 (2d Dept. 2013).

State Supreme Court Rejected Challenge to Location of Bike Share Station in Park

In April 2013, New York City installed a bike share station in a portion of Lieutenant Joseph Petrosino Square Park, which is located at the intersection of the Manhattan neighborhoods of SoHo, Little Italy, NoHo and Chinatown. Petitioners commenced an Article 78 proceeding seeking a preliminary injunction to stop City respondents from maintaining the bike share station. Petitioners argued that the placement of the bike share station in the park violated the public trust doctrine, which prohibits the alienation of or substantial intrusion in dedicated parkland for non-park purposes without the approval of the New York State Legislature. The Supreme Court, New York County denied the injunctive relief and dismissed the petition. The court found that the park was impliedly dedicated parkland on the basis of its having been held out by the City, and used and enjoyed by the public, as a park. The court noted the presence of signage in and around the park bearing the name and logos of the Department of Parks and Recreation and describing the park as "public space" and "park," as well as the presence of City officials at park-related ceremonies. The court concluded, however, that the placement of a bike share station was a proper park purpose because it has "a direct connection to the important park

purpose of bicycle recreation and allows easy access to and further encourages the use of parkland by the public." In reaching its conclusion, the court rejected a battery of arguments from petitioners, including that the bike share program was a "purely commuter-transit program," that the station was an improper park use because the bike share program charges a fee, that the station was an improper park use because one could not bicycle within the park due to its small size, and that the placement of the station in a location dedicated as an art installation space rendered the station an improper park use. The court also found that the City respondents' determination to locate the station within the park was rational since it was sited in accordance with the bike share program's siting guidelines, was based on technical considerations, and was the result of "an extensive public input process." *Matter of Friends of Petrosino Square v. Sadik-Khan*, 2013 N.Y. Misc. LEXIS 4908 (Sup. Ct. N.Y. Co. Oct. 23, 2013).

State Supreme Court Rejected Bans on Smoking in State Parks

Petitioner New York City Citizens Lobbying Against Smoker Harassment (NYC C.L.A.S.H.) commenced an Article 78 proceeding to challenge a regulation promulgated by the New York State Office of Parks, Recreation & Historic Preservation (OPHRP) that authorized the establishment of outdoor no-smoking areas in certain parks, historic sites and recreational facilities and banned outdoor smoking entirely in State parks within New York City. The Supreme Court, Albany County held that the regulation violated the separation of powers doctrine. The court cited the types of circumstances that triggered the separation of powers doctrine in *Boreali v. Axelrod* in which the Court of Appeals invalidated the Public Health Council's indoor smoking ban and concluded that in the instant case the *Boreali* factors, "viewed in combination," also weighed in favor of invalidating the regulation. The court noted the absence of legislative policy on outdoor tobacco use and concluded that the "broad language" of the Parks, Recreation and Historic Preservation Law did not "empower [OPHRP] to promulgate rules regulating conduct bearing any tenuous relationship to park patrons' health or welfare," and that the outdoor smoking regulation "extended [OPHRP's] reach beyond interstitial rule-making and into the realm of legislating." The court also cited numerous failed legislative attempts to restrict smoking in public parks. *Matter of NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation & Historic Preservation*, 2013 N.Y. Misc. LEXIS 4596 (Sup. Ct. Albany Co. Oct. 8, 2013).

SEQRA/NEPA

Appellate Division Affirmed Issuance of Demolition Permit for Historic House

The Saratoga Springs Design Review Commission (DRC) approved an application for a permit to demolish the Winans-Crippen House, which was listed on the National Register of Historic Places and on the City of Saratoga Springs list of landmarks and historic structures. The DRC took this action after conducting a review under the State Environmental Quality Review Act (SEQRA). The review included the acceptance of a final environmental impact statement for the proposed demolition, which was categorized as a Type I action. Petitioners challenged the DRC's actions and sought to enjoin demolition of the house. The Appellate Division, Third Department affirmed the dismissal of the Article 78 petition by the Supreme Court, Saratoga County. The Third Department upheld the DRC's determination that the demolition permit applicant had complied with the City Code requirement that he include post-demolition development plans in his permit application by indicating that his plan was to grade the lot, plant grass and maintain the property. The court found that the absence of more extensive development plans was reasonable given the uncertain economic climate and the deteriorated condition of the building. The court also noted that the DRC had pointed out that future construction plans at the site would require DRC review and approval. For similar reasons, the court concluded that the SEQRA review was not impermissibly segmented. The court also upheld the DRC's findings that the structure was unsafe and could not be preserved, finding that it was not arbitrary and capricious for the DRC to rely on public employees' assessments of the unsafe condition of the structure even in the face of conflicting reports from an outside engineer and architect. The court also ruled that a commissioner was not required to disqualify himself after he learned of a business relationship with the applicant that had ended more than two years prior to any votes the commissioner took on the demolition project after learning of the relationship. *Matter of Saratoga Springs Preservation Foundation v. Boff*, 2013 N.Y. App. Div. LEXIS 6892 (3d Dept. Oct. 24, 2013).

State Supreme Court Affirmed BSA Determination That Minor Amendment to a Variance Did Not Require Environmental Review

Petitioners challenged the approval by the New York City Board of Standards and Appeals (BSA) of an amendment to a variance granted in 1982 for a property near Houston Street and the Bowery in Manhattan. The owner intended to develop a 25-story hotel/residential building at the property; the new building would substantially displace an existing landscaped open space and play area. Petitioners alleged that the new building also would block natural light into a gallery owned by petitioners and cast shadows on a nearby park. The application for the amendment was submitted to the BSA as a "minor amendment," and it was placed on the "Special Order Calendar" (SOC) so that no direct notice was provided to neighboring property owners; nor was any environmental review conducted. The Supreme Court, New York County rejected petitioners' claim that the BSA violated SEQRA and City Environmental Quality Review (CEQR) requirements by failing to undertake or to require the developer to undertake an environmental review of the action. The court found that substantial evidence supported the BSA's

classification of the action as a "minor amendment" and that substantial evidence also supported the BSA's determination that the action was a Type II action because it was "of a ministerial nature involving not exercise of discretion." The court noted that the amendment to the variance did not change any of the height and setback conditions of the 1982 variance, that construction of the building would not create any noncompliance with zoning requirements, and that maintaining the open space was not a condition of the 1982 variance. The court also rejected petitioners' contention that the BSA violated the Open Meetings Law, finding that the BSA had properly placed the application on the SOC calendar and that the BSA had given the public an opportunity to participate in the proceedings. The court further ruled that petitioners had not shown good cause to invalidate the BSA determination even if the BSA had made its determination by conferring in non-public meetings. *Matter of Westwater v. New York City Board of Standards and Appeals*, 2013 N.Y. Misc. LEXIS 4707 (Sup. Ct. N.Y. Co. Oct. 15, 2013).

State Supreme Court Ruled That Town Complied with SEQRA in Approving Catskills Resort Development

Concord Associates L.P. (CALP) challenged decisions of the Town of Thompson and its planning board and town board that approved respondent EPT Concord, II, LLC's (EPT's) proposal for the phased development of a 1,500-acre Planned Recreational Development (PRD) adjacent to CALP's approximately 140-acre property. CALP had previously owned the 1,500-acre property as well, and, prior to transferring the 1,500 acres to EPT, CALP had obtained approval for a Planned Resort Development for the 1,700-acre site. CALP alleged that the Town's approval of EPT's project violated SEQRA and Town law. The Supreme Court, Sullivan County rejected CALP's claim that the Town's entertainment of EPT's applications without CALP's participation violated the "master developer" language in the Town's zoning law. The court held that the Town acted reasonably in determining that the Town's amendment of this language in 2013 did not implicate SEQRA, did not violate the Town's law or deprive CALP of any rights, and was in the best interest of the Town. The court found that CALP had no basis for retaining control over a property it did not own. The court also rejected plaintiff's claim that the Town's SEQRA review of EPT's PRD proposal was a sham and that the planning board's adoption of the town board's SEQRA findings was a "rubber stamp." The court also found that the Town's consideration of economic impacts, vehicle and pedestrian traffic, and water, sewage and stormwater issues, as well as the impact of the project on CALP's future development of its property was adequate (though the court was skeptical of the value of the economic analysis, stating that "all projections of success are, at best, wishful thinking and there is little which can be done to assure the Town that the estimates comport with reality"). The court was persuaded that some issues such as stormwater runoff and impacts on CALP's future development did not have to be addressed in the final generic environmental impact statement but could be considered in subsequent reviews of site plans and future SEQRA reviews. *Matter of Concord Associates, L.P. v. Town of Thompson*, 44 Misc. 3d 1208(A) (Sup. Ct. Sullivan Co. 2013).

SOLID WASTE

DEC Commissioner Ordered Individual Owner and Operator Liable to Pay Fine and Submit Annual Report for Solid Waste Facility

DEC staff alleged that respondents Kara Fibers RHRF and Bonnie L. Silvernail violated the Environmental Conservation Law (ECL) and the Part 360 regulations by failing to file an annual report for 2010 for operations at a solid waste recyclables handling and recovery facility in Fort Edward, New York. Adopting the hearing report of the administrative law judge (ALJ) as his decision, the DEC Commissioner found that liability had not been established for Kara Fibers RHRF, as to which there was no evidence that it was a legal entity. Moreover, the ALJ had noted that the regulatory requirement at issue applied to the "owner or operator" of a facility, not to the facility itself. In this case, respondent Silvernail had identified herself as the facility owner and operator and site owner on the facility registration form. The DEC Commissioner granted the motion for a default judgment against Silvernail and also found based on record evidence that she had violated the annual reporting requirement. The Commissioner ordered payment of a $5,000 civil penalty and the submission of the annual report. *In re Kara Fibers RHRF*, DEC Case No. CO 5-20111215-28 (Sept. 23, 2013).

TOXIC TORTS

Second Circuit Found That Testimony of Lead Paint Plaintiff's Expert Did Not Establish General Causation

Plaintiffs brought an action in the federal district court for the Southern District of New York against the owners and management company of their apartment building on behalf of their minor children. Plaintiffs asserted that defendants' failure to remedy lead paint in plaintiffs' apartment caused their daughter's alleged neuropsychological impairments. The district court granted summary judgment to defendants on plaintiffs' state law claims of constructive eviction, breach of the warranty of habitability and negligence. In a summary order, the Second Circuit affirmed the district court's decisions on the warranty of habitability and constructive eviction claims on the ground that plaintiffs had presented no evidence that there was exposed lead paint in their apartment or in common areas of the apartment building during the pertinent time period. The Second Circuit also found that plaintiffs had failed to raise in their negligence claim a material question of fact as to whether

their daughter suffered injuries as a result of lead poisoning. In particular, the Second Circuit found that the district court had not erred in finding that the testimony of the plaintiffs' expert was not sufficiently reliable to establish general causation. The expert had not provided reliable evidence that the daughter's alleged impairments could have been caused by blood concentrations as low as 7 micrograms per deciliter, and the approximately 30 scientific articles cited by the expert did not support his claims, given that many were not peer-reviewed, discussed injuries not diagnosed in plaintiffs' daughter, or discussed "only loose associations or correlations between low blood levels of lead and certain cognitive deficits rather than any evidence of causation." The Second Circuit indicated that its decisions did not imply that a plaintiff would never be able to prove that a relatively low lead concentration caused neurological injuries, but merely that the district court in this case had not erred in finding that plaintiffs' expert had not provided sufficient scientific evidence to support such a claim. *Szewczuk v. Stellar 117 Garth, LLC*, 2013 U.S. App. LEXIS 19984 (2d Cir. Oct. 1, 2013).

Appellate Division Affirmed Dismissal of Legionnaire's Disease Action Against Dubai Hotel Owner on Forum Non Conveniens Grounds

In 2009, plaintiffs Thomas Boyle, a resident of the United Kingdom, and Elodie Nogues, a resident of France, allegedly contracted Legionnaire's disease during separate stays at the Westin Dubai located in Dubai, United Arab Emirates (UAE). They commenced an action against the owner of the hotel in the Supreme Court, Westchester County, asserting claims for damages under breach of contract and negligence theories. The hotel's owner—a Maryland corporation alleged to have its principal place of business in White Plains, New York—moved to dismiss on the ground of forum non conveniens. The Appellate Division, Second Department affirmed the Supreme Court's dismissal of the action, but conditioned the dismissal on the defendant's stipulating to accept service of process in any new actions commenced in the United Kingdom, France and/or UAE, and to waive any defenses, including statute of limitation defenses, not available in New York at the time of the commencement of the instant action. The Second Department found that the Supreme Court had considered "all of the relevant and appropriate factors" and had "providently exercised its discretion." Justice Leonard B. Austin dissented, expressing his view that the Supreme Court had "improvidently" weighed the relevant factors. The dissenting opinion stated that two of the alternate forums—the United Kingdom and France—would not be amenable to entertaining jurisdiction of the action, and that it was "highly questionable whether the remaining potential alternate forum, the UAE, could adequately and fairly adjudicate the plaintiffs' claims," given the absence of procedural and substantive features available in the U.S. legal system that were unavailable there, and given a U.S. Department of State analysis of the UAE court system that suggested the courts were not independent. The dissent also stated that defendant was headquartered in New York and "cannot claim surprise that it would be sued in our courts." *Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 2013 N.Y. App. Div. LEXIS 6768 (2d Dept. Oct. 23, 2013).

TRANSPORTATION

State Supreme Court Invalidated New York City's Revised "Taxi of Tomorrow" Rules

Plaintiffs challenged the New York City Taxi and Limousine Commission's revised regulations designating the Nissan NV200 as the New York City Official Taxicab Vehicle, i.e., the "Taxi of Tomorrow." In 2012, TLC had promulgated the original rules requiring unrestricted medallion owners to purchase the Taxi of Tomorrow, and the City had also negotiated a contract with Nissan for the NV200 to be the official taxicab for 10 years. TLC revised the regulations after a court ruled that the Taxi of Tomorrow rules did not comply with the New York City Administrative Code requirement that TLC approve at least one hybrid vehicle model for use as a taxicab. The revised regulations provided an option for unrestricted medallion owners to purchase hybrid vehicles until Nissan developed a hybrid version of the NV200. In the instant proceeding, the Supreme Court, New York County ruled that TLC exceeded the authority delegated to it by the City Charter to regulate and establish standards for the taxi industry. The court stated that the power to contract with a manufacturer and to compel medallion owners to purchase a certain vehicle from that manufacturer did not exist in the Charter and that the Taxi of Tomorrow requirements were "not a form of regulation, but a binding and enforceable obligation" imposed without input from the medallion owners. The court further ruled that the revised Taxi of Tomorrow rules would violate the separation of powers doctrine because the City Council may not delegate its policy-making authority to TLC, and TLC may not exercise its rulemaking authority to impinge on the City Council's policy-making authority. The court stated that "[t]he notion that New York City should have one exclusive 'iconic' New York City taxicab is a policy decision that is reserved for the City Council." *Greater New York Taxi Ass'n v. New York City Taxi & Limousine Comm'n*, 972 N.Y.S.2d 513 (Sup. Ct. N.Y. Co. 2013). [*Editor's Note*: A related proceeding was covered in the September 2013 issue of *Environmental Law in New York*.]

WATERS

Citing Shortened Statute of Limitations, State Supreme Court Dismissed Challenge to DEC Commissioner Determination Under Article 15 of the ECL

On June 17, 2013, the DEC Commissioner issued a decision and order in which he determined that petitioners David and Jody Cook (as well as respondents Robert and Karen Berger) were the

owners of the Honk Falls Dam in the Town of Wawarsing and that the Cooks and the Bergers had violated section 15-0507(1) of the ECL by failing to operate and maintain the dam in a safe condition between July 27, 1999 and April 27, 2007. The Commissioner directed them to perform remedial activities and imposed fines. On August 21, 2013, petitioners commenced an Article 78 proceeding in the Supreme Court, Albany County to challenge the decision and order. The court granted DEC's motion to dismiss on the ground that the proceeding was time barred pursuant to ECL § 15-0905, which establishes a shortened 60-day limitations period for review of DEC decisions made pursuant to article 15 of the ECL. The court found that DEC had established that it mailed the decision and order to petitioners' counsel on June 18, 2013 and that petitioners' counsel received the final determination on June 20, 2013. Because the Cooks commenced the proceeding two days after the expiration of the 60-day statute of limitations, the proceeding was time barred. The court rejected petitioners' argument that the 60-day statute of limitations applied only to decisions on permit applications, noting that the Third Department had applied ECL § 15-0905 in an enforcement proceeding. The court also rejected petitioners' contentions that the limitations period should have begun to run when petitioners—rather than their counsel—received the final determination, and that the statute of limitations should not apply because they had never filed a notice of appearance with DEC. *Matter of Cook v. New York State Department of Environmental Conservation*, Index No. 4689-2013 (Sup. Ct. Albany Co. Oct. 18, 2013). [*Editor's Note:* A related proceeding was covered in the January 2008 issue of *Environmental Law in New York*.]

WETLANDS

City Criminal Court Allowed Case to Proceed Against Defendant Charged With Constructing a Dock in a Wetland Without a Permit

Defendant was charged with Conducting a Regulated Activity in a Tidal Wetland Without a Permit from DEC after a DEC officer allegedly saw the defendant constructing a dock in a tidal wetland in Queens County. The New York City Criminal Court, Queens County denied defendant's motion to dismiss the simplified information as defective. The court held that the simplified information was sufficient on its face despite not containing any facts establishing that the wetland area was substantially impaired or altered by the dock's construction. The court noted that the statute under which defendant was charged plainly required a permit for the erection of a structure such as a dock in a tidal wetland regardless of whether the structure impaired or altered the wetland. The court also rejected defendant's contention that the simplified information did not provide the requisite notice of defendant's right to request a supporting deposition. The court stated that the absence of such notice did not render the simplified information facially insufficient, but merely extended defendant's time to make a timely request for the supporting deposition. The court further noted that in this case the simplified information contained detailed factual allegations to support the charges, thereby giving defendant adequate notice to prepare a defense and to prevent defendant from being charged twice for the same defense. *People v. Gounden*, 2013 N.Y. Misc. LEXIS 4907 (N.Y. Crim. Ct. Queens Co. Oct. 21, 2013).

WILDLIFE AND NATURAL RESOURCES

State Supreme Court Vacated Long-Term Lease for Shellfish Harvesting

A trade association of hard clam diggers and five individual hard clam diggers brought an action in the Supreme Court, Nassau County challenging long-term leases of underwater lands between the Town of Oyster Bay and Frank M. Flower & Sons, Inc. (Flower), the company to whom the Town had leased a significant portion of its underwater land within the Oyster Bay/Cold Spring Harbor Complex since at least 1937. The leases had last been renewed for a 30-year term in 1994, and Flower had exclusive rights to harvest shellfish on the leased lands. Local law provided that underwater lands could not be leased where there was "an indicated presence of shellfish in sufficient quantity and quality ... as to support significant hand raking and/or tonging and harvesting." The Town had not conducted a survey of the presence of shellfish on the underwater lands leased to Flower since 1994, but a January 2012 survey that included the other underwater lands owned by the Town showed significant increases in clam density. In July 2013, the court held a hearing to consider whether the Town's finding that there was not a sufficient presence of shellfish to support manual harvesting was arbitrary and capricious based on the conditions in the four months (i.e., the length of the statute of limitations for Article 78 proceedings) preceding the commencement of the plaintiffs' action. Noting that "the power to monitor the presence of shellfish in the Bay is clearly a non-delegable governmental function," the court ruled that the Town could not issue a long-term lease of underwater lands without reserving the right to cancel the lease should clam density increase. Given the significant increases in clam density in the surrounding area, the court held that the Town's failure to conduct a survey on the lands leased to Flower rendered the continuation of the 30-year lease arbitrary. The court vacated the 1994 lease renewal and remanded the matter to the Town to conduct the survey and to make findings as to the quantity and quality of shellfish upon the lands. *North Oyster Bay Baymen's Association v. Town of Oyster Bay*, 40 Misc. 3d 1243(A) (Sup. Ct. Nassau Co. 2013). [*Editor's Note:* This proceeding was previously covered in the April 2013 issue of *Environmental Law in New York*.]

NEW YORK NEWSNOTES

New "Pre-Application" Requirements for Land Use Applications in New York City Went into Effect

On October 31, 2013, the New York City Department of City Planning's (DCP's) new rules went into effect that establish pre-application requirements that must be complied with prior to filing a land use application or application for environmental review. The rules, which are codified in a new Chapter 10 of Title 62 of the Rules of the City of New York, formalize the process by which DCP provides advice to applicants regarding land use applications and environmental documents and are intended to assist in the identification of environmental and land use issues related to proposed projects and to assist DCP in allocating its resources. The rules require applicants to schedule Informational Meetings with the DCP prior to submitting an application, after which they must submit Pre-Application Statements (PASs). An Interdivisional Meeting may be required after the PAS is submitted if the proposed project requires more than one division of DCP to review the land use application or application for environmental review. An applicant whose project is classified as Type I or Unlisted for SEQRA purposes must also submit a Reasonable Worst Case Development Scenario (RWCDS) Memorandum that sets forth a description of, and the basis for, "a conservative projection of the development that may occur pursuant to a discretionary action." After DCP completes its review of the RWCDS Memorandum, the applicant may then be required to submit a Draft CEQR Short/Full Form and/or a Draft Land Use Application (in cases where a high degree of technical expertise is necessary to produce land use application materials). The new rules set forth the procedures and timelines governing these pre-application requirements.

DEC Made "EAF Mapper" Available for Automating Completion of Location-Based EAF Questions

SEQRA practitioners can now use DEC's EAF Mapper Application, a geographic information system (GIS) program designed to assist in the completion of certain place-based questions on the Short and Full Environmental Assessment Forms (EAFs). The EAF Mapper is located at http://www.dec.ny.gov/eafmapper/. The EAF Mapper will provide its results directly in Part 1 of an electronically fillable Short EAF or Full EAF. The DEC website (http://www.dec.ny.gov/permits/90201.html) identifies the EAF questions that can be answered using the EAF Mapper and provides instructions for using the Mapper.

EPA Finalized Its Plan for First Phase of Cleanup of Eighteen Mile Creek Superfund Site in Lockport

On October 29, 2013, the United States Environmental Protection Agency (EPA) announced its final plan for the first phase of the cleanup of the Eighteen Mile Creek Superfund Site, which was placed on the National Priorities List in 2012. The first phase focuses primarily on nine residential sites contaminated with polychlorinated biphenyls (PCBs) and other contaminants, including lead and chromium. EPA will acquire six of the residential properties and permanently relocate five families who live at these properties, after which it will demolish the five homes and excavate contaminated soil from all nine properties. An old industrial building will also be demolished in the first phase of cleanup. EPA indicated that the second phase of the cleanup would address contaminated creek sediment and soil at several industrial and commercial properties in Lockport (the Creek Corridor), and that the third phase would address contaminated sediment in the creek north of the Creek Corridor, from Lockport to the creek's discharge location into Lake Ontario.

Invasive Species Regulations Are Proposed

DEC and the Department of Agriculture and Markets jointly published proposed new regulations to control invasive species in the October 23, 2013 edition of the *NYS Register.* The proposed rule would add a new Part 575 to DEC regulations. The new regulations would establish requirements for the sale, importation, purchase, transportation or introduction of invasive species. They identify "prohibited invasive species" that no person may sell, import, purchase, transport, introduce or propagate, and "regulated invasive species" that may not knowingly be introduced into a "free-living state," i.e., unconfined and outside the control of a person. Labeling and other requirements would apply to the sale of regulated invasive species.

DEC Issued General Permits for Temporary Stream Crossings Used by Loggers

DEC announced on October 23, 2013 that it had issued two general permits to provide expedited approvals of temporary stream crossings for timber harvesting. DEC Commissioner Joe Martens stated that the permits "will provide time and work savings to both loggers and DEC," and that "[t]he temporary bridges and culverts authorized by these general permits present only minimal potential impacts to the stream, and routinely get a DEC permit." General Permit GP-0-13-002 covers temporary bridges of a maximum length of 30 feet and temporary culverts in streams no more than four feet wide. General Permit GP-0-13-004 covers temporary bridges of a maximum length of 50 feet and temporary culverts in streams no more than eight feet wide. The permits are only available where the distance between crossings is at least 1,000 feet. The permits and instructions for completing them are available at http://www.dec.ny.gov/permits/93482.html.

EPA Reached Settlement to Resolve Violations of TSCA Notification Requirements

EPA announced on October 23, 2013 that it had reached an agreement with Blaser Swisslube, Inc. (Blaser), a company in Goshen, New York that produces high-end coolants for tools, concerning violations of regulations issued under the Toxic

Substances Control Act (TSCA). Blaser failed to notify EPA before importing a chemical it had been using to inhibit corrosion in one of its products. TSCA regulations require that a company bringing a new chemical to the United States notify EPA 90 days prior to importation and certify that it meets all rules and regulations. Blaser had been using the chemical for more than two years between 2008 and 2010 without notifying EPA. The company will pay a $150,000 penalty.

EPA Ordered the City of Middletown to Implement Industrial Pretreatment Program

EPA also announced on October 23, 2013 that it had ordered the City of Middletown, New York to establish an industrial pretreatment program for the Middletown Sewage Treatment Plant to bring the City into compliance with the Clean Water Act's requirements for reducing pollutants in wastewater from industrial facilities prior to the wastewater reaching a treatment plant. When EPA requested that the City provide details of its pretreatment program earlier this year, the City's response revealed that it did not have a pretreatment program in place that met federal requirements. The City must submit a final plan for the pretreatment program to EPA by June 16, 2014.

New York Enacted Law Restricting Eurasian Boars

In other invasive species news, on October 21, 2013, Governor Andrew M. Cuomo signed a law prohibiting the importation, breeding or introduction into the wild of Eurasian boars, effective immediately. Starting September 1, 2015, the law will also bar the possession, sale, offer for sale, distribution, transportation or other marketing or trading of live Eurasian boars.

DEC Issued Final Version of New Audit Policy

On October 16, 2013, DEC issued the final version of its new Environmental Audit Incentive Policy (CP-59). The policy became effective on November 18, 2013. The policy calls for DEC to reduce or waive the majority of civil penalties for violations that are discovered and disclosed voluntarily, or discovered in the course of pollution prevention or compliance assistance, and expeditiously corrected. Additional incentives are available to regulated entities that perform environmental audits, practice systematic environmental management or add pollution prevention to their operations, with the highest level of incentives made available to entities that enter into an audit agreement and make a formal, long-term commitment to environmental management and pollution prevention by entering DEC's New York Environmental Leaders program. Regulated entities with a history of non-compliance and failure to cooperate with DEC in the past five years are not eligible for the policy's incentives, and the policy excludes certain types of violations entirely, including violations that may have presented an imminent and substantial endangerment to human health or the environment. The policy is available at http://www.dec.ny.gov/docs/legal_protection_pdf/cp59.pdf. [*Editor's Note*: The October 2013 issue of *Environmental Law in New York* included a lead article about the audit policy.]

DEC Revised Atlantic Menhaden Regulations to Implement Fishery Management Plan

DEC published notice in the October 16, 2013 *Environmental Notice Bulletin* of its adoption of amendments to its Atlantic menhaden regulations. The changes to 6 N.Y.C.R.R. § 40.1 establish Atlantic menhaden commercial quota management, as well as reporting requirements and a recreational possession limit. The new regulations implement Amendment 2 of the Atlantic States Marine Fisheries Commission Atlantic menhaden Fishery Management Plan (FMP) to reduce harvest by 20 percent in order to end overfishing on the stock and remain in compliance with the FMP.

Fishermen Charged with Felonies After Being Caught with Speared Striped Bass

Commissioner Martens announced on October 15, 2013 that four fishermen faced felony charges after DEC officers caught them in late August 2013 with 74 striped bass they had allegedly speared illegally in Block Island Sound. The New York State Environmental Conservation Law forbids the taking of striped bass for commercial purposes by spear. In announcing the charges, DEC indicated that spearing is prohibited because there is a slot size limit that is hard to determine until the fish are actually in hand. The total unlawfully harvested striped bass from the August 2013 incident weighed 926.5 pounds, valued at $4,632. DEC indicated that one of the defendants had subsequently been caught in October 2013 with three speared striped bass weighing approximately 100 pounds hidden on his boat.

New York City Planning Commission Proposed 13 New Categories of Type II Actions

The New York City Planning Commission has proposed rules that would establish 13 new categories of Type II actions that would not require environmental review under SEQRA and CEQR. The Planning Commission issued a negative declaration for the proposed rule finding that the designation of the 13 actions as Type II would not have a significant adverse environmental impact. The 13 actions proposed as Type II actions include special permits for a number of types of projects: physical culture or health establishments of up to 20,000 gross square feet (gsf), radio and television towers, ambulatory diagnostic or treatment health care facilities, buildings or other structures that exceed height regulations around airports, enlargement of buildings containing residential uses by up to 10 units, eating and drinking establishments of up to 2,500 gsf with accessory drive-through facilities, accessory off-street parking facilities that do not increase parking capacity by more than 85 spaces and do not involve incremental ground disturbance, and public parking facilities that do not increase parking capacity by more than 85 spaces or involve incremental ground

disturbance. The proposed Type II actions also include acquisition or disposition of real property by the City not involving a change of use, change in bulk or ground disturbance; construction or expansion of primary or accessory/appurtenant park structures or facilities involving less than 10,000 square feet of gross floor area; park mapping, site selection or acquisition of less than 10 acres of existing open space or natural areas; and authorizations for limited increases in the number of parking spaces for existing buildings. DCP reviewed the history of environmental reviews for these 13 categories of actions and found that with only a few exceptions their environmental reviews resulted in negative declarations. The proposed rule is available at http://www.nyc.gov/html/nycrules/downloads/rules/P_DCP_10_21_13_A.PDF. Public comments on the proposed rule were due on November 20, 2013.

Urban Land Institute Made 23 Recommendations for Promoting Regional Resilience

The Urban Land Institute published a report on October 9, 2013 that describes 23 recommendations for the long-term resilience and preparedness of the New York-New Jersey region. The recommendations fall into four categories: (a) land use and development; (b) infrastructure, technology, and capacity; (c) finance, investment, and insurance; and (d) leadership and governance. The recommendations emphasize the importance of local government implementation and regional coordination. Recommendations include the undertaking of an assessment of land use typologies and land resources, with the results of the assessment subjected to a cost-benefit analysis to identify less vulnerable "value zones" for investment. Other recommendations include the use of "soft" infrastructure design that incorporates natural and landscape systems, the creation by states of resiliency funding authorities, the accurate pricing of climate risk into property values and insurance, and directing resources to the lowest level of government (e.g., village, township or city) that has the capacity to direct the funds to resilience projects and programs. The report, entitled *After Sandy: Advancing Strategies for Long-Term Resilience and Adaptability*, is available at http://www.uli.org/wp-content/uploads/ULI-Documents/AfterSandy.pdf.

Agreement Was Reached to Direct Environmental Penalties to Green Infrastructure Projects to Benefit Onondaga Lake

On October 8, 2013, the New York State Attorney General announced an agreement with DEC, the Atlantic States Legal Foundation and Onondaga County to direct environmental penalties paid by the County pursuant to a 1996 settlement in *Atlantic States Legal Foundation v. Onondaga County Department of Drainage and Sanitation*, 233 F. Supp. 2d 335 (N.D.N.Y. 2002), to fund two green infrastructure projects intended to reduce sewage overflows and improve water quality in Onondaga Lake and its tributaries. The 1996 settlement, which resolved water quality violations at the Metropolitan Syracuse Wastewater Treatment Facility, required the County to pay a penalty of $189,000 that was to be directed to environmental benefits projects related to Onondaga Lake. The penalty was deposited in an interest-bearing account, and the resulting $326,000 will now go to the Green Infrastructure Demonstration Project in the Near Westside neighborhood of Syracuse and to the Village of Solvay Erosion and Sediment Control Project.

Tighter Requirements Are Proposed for Coastal Cleanups in City's Brownfield Program

The New York City Office of Environmental Remediation (OER) proposed to amend the regulations for the City's brownfield program in response to flooding and coastal erosion concerns brought to the forefront after Hurricane Sandy. The proposed amendments to the rules would require the compiling of information on natural factors that could mobilize contaminants, and would tighten cleanup standards for certain coastal properties that are to be redeveloped for industrial uses. The proposed amendments would also make a number of changes not related to Sandy. Among other things, they would allow property owners to certify to OER that a physical barrier or cover used as part of a site remedy will function as an effective barrier to residual contamination. They would also provide for the recording of notices of completion in a public repository on the OER website rather than recording in a borough's property recording office. The proposed rules would also authorize OER to issue "acceptance letters" indicating that sites have no more than minimal contamination and do not require further action. The acceptance letters would be intended to reassure parties to real estate transactions. OER would charge a $3,500 fee for an acceptance letter and would review site contaminant data and the owner's plans for the site and conduct a site inspection prior to issuing the letter.

Mayor Bloomberg Signed Climate Resilience Bills

On October 2, 2013, Mayor Michael R. Bloomberg signed six bills intended to improve the ability of New York City's built environment to withstand and rebound from severe weather events and the impacts of climate change. The five bills that emerged from the recommendations of the Building Resiliency Task Force established by Mayor Bloomberg and Council Speaker Christine Quinn after Hurricane Sandy require at least one bathroom in a dwelling unit to contain toilets and sinks that can operate without external electrical power (Local Law 79); require the undertaking of a study and pilot program on the possible use of permeable materials on roadways and sidewalks (Local Law 80); require the undertaking of a study of the effects of winds on buildings with a resulting report to include recommendations for revisions to the City's building code (Local Law 81); require the City to publish a manual on flood construction and protection requirements and standards (Local Law 82); and require installation of backwater valves in buildings in special

flood hazard areas and impose backwater valve and other requirements for plumbing and sanitary systems to prevent overflow from the public sewer system or sewage discharges into floodwaters (Local Law 83). A sixth bill (Local Law 84) amends the City Charter to add the resiliency of critical infrastructure, the built environment, coastal protection and communities to the portfolio of the City's Office of Long-Term Planning and Sustainability. Updates to the City's long-term sustainability plan must include a list of policies, programs and actions to achieve resiliency goals.

New York City Law Establishing Organic Waste Collection Pilot Programs Is Enacted

On October 2, 2013, Mayor Bloomberg also signed Local Law 77, which provides for the establishment of pilot programs for the collection of organic waste. The law requires the immediate creation of a voluntary residential organic waste curbside collection pilot program that will provide collection services to at least 1,000 households in the selected collection area for the program. By mid-2014, the voluntary program must be expanded to four collection areas, each in a different borough, with the goal of reaching 100,000 households by that date. A pilot program for schools must also be created that initially includes at least 300 schools located in at least three boroughs and expands to at least 400 schools, with participating schools located in all five boroughs. The law provides that organic waste collection services shall be provided to apartment buildings with at least nine units that volunteer for the program and that are along the collection routes for the school programs.

EPA Announced $500-Million Cleanup Plan for the Gowanus Canal

EPA announced on September 30, 2013 that it had approved a final cleanup plan for the Gowanus Canal Superfund site in Brooklyn. The sediment of the canal was found to be contaminated with high levels of polycyclic aromatic hydrocarbons (PAHs) (associated with the incomplete burning of coal, oil, gas, wood, garbage or other organic substances), PCBs and heavy metals. PAHs and heavy metals were also found in the canal water. The final plan requires dredging of approximately 587,000 cubic yards of highly contaminated sediment. EPA chose to require disposal of the sediment, even the least contaminated sediment, to treatment facilities outside the area. A multilayer cap will be installed in the dredged areas. The cap will include an "active" layer composed of an absorbent material that will remove PAH contamination that could well up from below; an "isolation" layer of sand and gravel to prevent exposure of the contaminants; an "armor" layer of heavier gravel and stone to prevent erosion; and clean sand over the armor layer to promote the redevelopment of the canal bottom as habitat. The cleanup plan also requires controls to reduce the flow of contaminated sewage solids from combined sewer overflows into the canal. These requirements will be in addition to upgrades New York City is currently making to the sewer system. The estimated cost of the cleanup is $506 million. EPA noted that DEC was addressing contaminated land sites along the canal in coordination with EPA and also indicated that EPA is continuing its efforts to identify potentially responsible parties.

Department of Health Issued New Guideline for PERC

In a move that will affect cleanup standards at contaminated sites and landlord disclosure obligations, the New York State Department of Health (DOH) reduced the guideline for tetrachloroethene (PERC) in air to 30 micrograms per cubic meter (mcg/m^3), which is lower than EPA's 2012 reference concentration of 40 mcg/m^3. DOH indicated that new toxicity studies since the former 100 mcg/m^3 guideline was set in 1997, including the risk assessment performed by EPA, required re-evaluation of the health protectiveness of the old guideline. DOH published a fact sheet in September 2013 to answer questions about PERC exposure and the new guideline. The fact sheet is available at http://www.health.ny.gov/environmental/chemicals/tetrachloroethene/docs/perc.pdf.

Sag Harbor and Oneonta Became First Municipalities to Offer Property Tax Exemption for Green Buildings

In September 2013, the Village of Sag Harbor and the City of Oneonta became the first local governments to adopt laws creating property tax exemptions for improvements to real property that increase the value of the property and meet green building certification standards. State legislation enacted in 2012 and codified in section 470 of the New York State Real Property Tax Law authorized municipalities to provide for such exemptions. Depending on whether the construction or reconstruction is certified as LEED Silver, Gold or Platinum, the tax exemption ranges from a 100-percent exemption for three years that phases out after seven years (for LEED Silver construction) to a 100-percent exemption for six years that phases out after 10 years (for LEED Platinum construction). The Sag Harbor law provides for a maximum exemption of $1,000,000 of full value assessment.

WORTH READING

Laura Bomyea, *Does the State Constitution Bar Electric Car Charging Stations on Public Land?*, The N.Y. Envtl. Lawyer, Spring/Summer 2013, at 5.

Kim Diana Connolly, *Do Good to Get Barred: The New Empire State Pro Bono Requirement and Its Potential Impact on Environmental Law Practitioners*, The N.Y. Envtl. Lawyer, Spring/Summer 2013, at 34.

Christine A. Fazio & Ethan I. Strell, *Will Greenhouse Gas Rules Prohibit New Coal Power Plants?*, N.Y.L.J., at 3 (Oct. 23, 2013).

Charles Gottlieb, Keith H. Hirokawa & Kristin Keehan, *Testing the Waters of New York*, The N.Y. Envtl. Lawyer, Spring/Summer 2013, at 40.

Michael Gruen & Juan Rivero, *East Midtown Rezoning: Looking For Extra Zoning Rights? They're for Sale*, CityLand (Oct. 16, 2013), *available at* http://www.citylandnyc.org/east-midtown-rezoning-looking-for-extra-zoning-rights-theyre-for-sale/.

Angelina Lian, *Shedding Light: The Role of Public Utility Commissions in Encouraging Adoption of Energy Efficient Lighting by Low-income Households*, 38 Colum. J. Envtl. L. 333 (2013).

Thomas W. Merrill, *Four Questions About Fracking*, 63 Case W. Res. L. Rev. 971 (2013).

John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 Case W. Res. L. Rev. 995 (2013).

Jessica Owley, *What Exactly Are Exactions?*, The N.Y. Envtl. Lawyer, Spring/Summer 2013, at 30.

Jeremy Peterson & Katherine Ghilain, *Recent Pa. Fracking Charges May Set a New Trend*, Law360.com (Oct. 15, 2013), *available at* http://www.law360.com/articles/478402.

Patrick Siler, *Creatures of the State: A Hard Look at the Supersession of Municipal Power in New York's Mineral Resources Law*, The N.Y. Envtl. Lawyer, Spring/Summer 2013, at 46.

TOM WILBER, UNDER THE SURFACE: FRACKING, FORTUNES, AND THE FATE OF THE MARCELLUS SHALE (2012).

UPCOMING EVENTS

January 24, 2014

"Climate Change: Adaptation & Building Resiliency in our Communities," Union College, College Park Hall, Schenectady, New York. For details, see https://muse.union.edu/climate change/, or contact Meghan Haley-Quigley, haleyqum@union.edu.

January 30, 2014

New Partners for Community Revitalization, 6th Annual Brownfields Forum in NYC, 1 Metro Tech Center, Brooklyn, New York. For details, see http://npcr.net/pages/events.html.

January 31, 2014

New York State Bar Association, Environmental Law Section Annual Meeting, New York City. For details, see http://www.nysba.org/Environmental/.

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 details, 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 details, see http://www.energy21symposium.org/.

Mathew Bender & Co., Inc.

Dennis Schneider — Director, Research Information
Linda J. Folkman — Legal Editor

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

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

Arnold & Porter LLP

Environmental Practice Group

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

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

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

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

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

Partners and Counsel
Blake A. Biles
Daniel A. Cantor
Lawrence Culleen
Michael Daneker
Kerry Dziubek
Michael B. Gerrard
Joel Gross
Matthew T. Heartney
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Jonathan Martel
Thomas H. Milch
Karen J. Nardi
Peggy Otum
Allison B. Rumsey
Thomas Stoever
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