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Tackling Climate Change: Don't Forget Energy Efficency

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Tackling Climate Change: Don't Forget Energy Efficiency

By **Todd S. Aagaard** And **Joel B. Eisen**

On June 2, the Environmental Protection Agency (EPA) proposed its Clean Power Plan, a high-profile regulation to reduce greenhouse gas emissions from existing fossil fuel-fired power plants. The EPA's action has received considerable attention because it may reduce heat-trapping emissions from the power sector by as much as 30 percent by 2030.

EPA is proposing the Clean Power Plan under Section 111(d) of the Clean Air Act, 42 U.S.C. §7411(d), which directs the agency to establish standards of performance for certain existing sources of air pollution. States submit plans to the EPA that are designed to achieve these standards. Section 111 provides that the standards must limit emissions to the extent "achievable through the application of the best system of emission reduction." 42 U.S.C. §111(a)(1).

A cornerstone of the EPA's proposed rule is flexibility for the states in deciding how to reduce emissions. The Clean Power Plan establishes state-specific emissions goals that take into account the amount of emission reduction, technical feasibility, cost, and other factors. Each state's emissions goals are based on its particular circumstances, such as its existing mix of generation resources.

In deciding how to reach their emissions goals, states can choose the path that works best for them. Available measures include improving efficiency at existing power plants, shifting generation to cleaner power plants, or taking other means of reducing emissions.

Demand Response Strategies

One option available for states under the plan is relying on greater efficiency in energy usage and other demand-side strategies such as "demand response," which involves programs to reduce consumption at specific times of high electricity demand. An example of demand response includes programs in which residential customers agree to allow their utility to automatically cycle their central air conditioners on hot summer days. Large commercial and industrial users employ even more sophisticated demand response strategies, such as staggering the startup of equipment.

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Improving efficiency and deploying more demand response can substitute for additional power generation and offer other significant benefits. Often it costs less to reduce demand through more efficiency and demand response than it would to meet demand by generating additional power. During periods of peak electricity usage that push the power grid to its physical and economic limits, the appeal of demand-side measures that can be "turned on" in mere minutes is especially apparent.

Finally, demand response is an important part of the Smart Grid, in which smart meters and devices that communicate with one another and energy service providers can help reduce emissions and improve the aging electric power grid's efficiency, reliability, and environmental sustainability. Indeed, former Federal Energy Regulatory Commission (FERC) Chairman Jon Wellinghoff has called demand response the Smart Grid's "killer app."

More use of demand-side measures is also a significant innovation for energy and environmental policy. FERC, which oversees wholesale power markets in half the nation, has traditionally focused primarily on energy supply, relying on new generation to meet increasing energy demand. For its part, the EPA has focused on energy supply as well, for example, by requiring that new power plants use improved pollutant control technologies.

Order 745

Yet in another recent development that has received decidedly less attention than the EPA's new plan, a federal court cast a cloud over demand response's future. On May 23, a panel of the U.S. Court of Appeals for the D.C. Circuit invalidated FERC's Order 745, a pillar of the agency's demand response initiatives. *Elec. Power Supply Ass'n v. FERC*, No. 11-1486, 2014 WL 2142113 (D.C. Cir. May 23, 2014). Order 745 applies to Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), which administer the electric grid in half the nation and operate wholesale electricity markets. Order 745 directs RTOs and ISOs to establish rules that compensate demand response resources the same as electric power suppliers—at the wholesale market price.

Prior to Order 745, RTOs and ISOs chose their own methods of compensating demand response resources. FERC issued Order 745 out of concern that RTOs and ISOs were undercompensating demand response, inhibiting the development of demand response and undercutting its ability to compete in wholesale electricity markets.

A group of organizations affiliated with generators of electricity sued FERC, alleging that Order 745 had overstepped the agency's authority and that compensating demand response providers at the wholesale market price was unwarranted. A majority of the D.C. Circuit panel agreed, » Page 7

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NEWS IN BRIEF

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anything in the record to support its position, and generally did "nothing to assist the court" in making its determination.

"It is not this court's responsibility to do counsel's work for them by scouring the record to determine whether counsel's conclusory arguments hold water," Larimer wrote. "If the state is serious about the motion, it must make the necessary effort. Perhaps on a more thoroughly briefed and well-supported motion, summary judgment might be appropriate here."

The judge noted that the state included boilerplate language in its assertion for qualified immunity and said he "will not enter judgment based on what amounts to a 'throwaway' line in a brief." The judge did, however, dismiss claims against six individual defendants.

Larimer also said that Murray's "proof of retaliation is far from overwhelming." Yet he said Murray did raise "genuine issues of material fact" sufficient to overcome the attorney general's summary judgment motion, but not strong enough to grant summary judgment to the plaintiff.

Assistant Attorney General J. Richard Benitez represents the state. —John Caher

State High Court Seeks Input on Hate Crime Criteria

The Court of Appeals is asking for amicus curiae briefs from interested parties on the issues involved in an upcoming case, *People v. DeLee*, that hinges on criteria necessary for a conviction for first-degree manslaughter versus one for first-degree manslaughter as a hate crime.

The court will decide whether an Appellate Division, Fourth Department, panel erred in *People v. DeLee*, 108 AD3d 1145 (2013), when it found that a jury verdict convicting defendant Dwight DeLee of manslaughter as a hate crime but acquitting him of plain manslaughter was inconsistent.

In a notice to the bar, Court of Appeals clerk Andrew Klein said the court was inviting qualified opinions about whether the conflicting verdicts on the two charges are, in fact, inconsistent.

The court will hear oral arguments in the case on Oct. 15.

DeLee was convicted in Syracuse of shooting and killing Moses Cannon, a gay man dressed in woman's clothing, while making derogatory remarks about homosexuals in 2009 (NYLJ, July 23, 2013). —Joel Stashenko

Conviction in Shaken-Baby Case Reversed by Panel

A Brooklyn appeals panel has overturned the conviction of a mother accused of shaking her baby to the point of serious injury, saying the trial court did not properly establish she had the mens rea, or guilty mind, required to commit the crime.

A unanimous panel of the Appellate Division, Second Department, in *People v. Robinson*, 2012-61762, dismissed the indictment against Tina Robinson for endangering the welfare of a child.

After the prosecution finished offering its evidence, and the defense presented its first witness, the Brooklyn District Attorney's Office sought permission to bring in another witness, a maternity ward nurse, to testify she had warned Robinson that shaking the baby could cause injury. Kings County Supreme Court Acting Justice Danny Chun granted the motion over Robinson's objection, and a jury found her guilty.

The Second Department panel—consisting of justices Mark Dillon, L. Priscilla Hall, Sandra Sgroi and Betsy Barros—noted in an unsigned opinion that courts have discretion to permit parties to present evidence in rebuttal so long as it is not seriously contested and does not unduly prejudice the defense.

"Here, the missing element of the People's case was not a simple, uncontested fact, but instead was the mens rea of the subject offense," the justices wrote. "Indeed, the People's own evidence established that the defendant denied knowing that her actions could result in injury to the child."

The court also pointed out that the expert witnesses of the parties "hotly contested" whether shaking could cause the kinds of injuries the baby suffered or whether the mother knew the point at which rocking or shaking could cause injuries.

Robinson was represented in her appeal by attorney Mark Vorkink of Appellate Advocates. The district attorney's office was represented by Leonard Joblove and Ruth Ross. —Tanla Karas

Panel Tosses Results Of Bartering With Defendant

An upstate appeals court has ruled that a defendant was the victim of a coercive arrangement in which prosecutors forced him to abandon a constitutional speedy trial motion in exchange for a guilty plea to second-degree robbery.

The Appellate Division, Third Department, said the manner in which Terrance Wright pleaded guilty represented the kind of "prosecutorial bartering" that the state Court of Appeals expressly condemned in *People v. Blakley*, 34 NY2d 311 (1974).

Where prosecutors make a defendant give up a yet-to-be-decided speedy trial motion as a condition of a plea, "the integrity of the judicial process has been undermined," Justice Michael Lynch wrote for the court in *People v. Wright*, 105459.

"To make matters worse," Lynch continued, Broome County prosecutors said their offer to allow Wright to plead guilty to robbery would expire as soon as a hearing on his speedy motion was set to begin. He accepted the deal and pleaded to the charge, the court noted.

The appeals panel faulted the trial judge, Broome County Judge Martin Smith, for not stepping in to prevent the coercive situation.

"A trial court has a core obligation to recognize and prevent such an unfair tactic, but here the court simply reiterated the impermissible condition of the plea and waiver," Lynch wrote.

The court ordered Wright's guilty plea, for which Smith gave him eight years in prison as a second felony offender, to be vacated.

Justices Leslie Stein, William McCarthy, Elizabeth Garry and Eugene Devine joined in the ruling.

Police accused Wright of robbing a Binghamton cab driver in February 2008. He moved out of state and was not arraigned on the indictment until December 2011, giving rise to his speedy trial motion. —Joel Stashenko

Expert Analysis / Outside Counsel

Survey

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potential of accelerating the erosion...and had the potential to cause significant adverse impacts to the primary dune system, the beach and the wetlands adjoining the subject property." The court concluded that "[t]he Trustees by alleging potentially significant adverse impacts to the beaches that are under their control as part of 'the Commonlands' [near] the proposed revetment" had claimed sufficient distinct injury as to give them standing to pursue their suit. Thus the court denied the zoning board's motion to dismiss.[3]

Standing

Ten decisions dismissed cases because the plaintiffs were found to lack standing to sue. Plaintiffs alleging only economic injury included neighboring businesses that would suffer a competitive injury,[4] nearby property owners whose complaint was found to be about economic impact,[5] a business that would be harmed by a challenged regulation,[6] and labor unions that were unhappy about wages.[7] In seven of these decisions, the plaintiffs had only an economic injury. Since economic concerns do not fall within SEQRA's zone of interests, they are not sufficient to confer standing.

In three other cases, neighbors of the challenged projects sued but did not live close enough to establish a presumption of standing, and did not allege that they would suffer adverse environmental impacts different than those that would be suffered by the public at large.[8]

Segmentation

The theory of segmentation—improperly considering linked projects separately—succeeded in the Town of Blooming Grove case discussed above. It failed in two other cases. In *Campaign for Buffalo History, Architecture and Culture v. Buffalo and Fort Erie Public Bridge Authority*,[9] the demolition of several buildings was challenged. The demolition was associated with a number of potential projects related to a bridge.

The defendant agency acknowledged that there was a connection but argued that considering them separately was warranted, in part because the other projects were at much earlier stages and might never happen. The U.S. District Court for the Western District of New York was satisfied with this explanation and found the segmentation to be permissible. The decision was also significant because it found an international agency to be subject to SEQRA.

Demolition—this time of an historic house—was also at issue in *Saratoga Springs Preservation Foundation v. Boff*.[10] The structure was unsafe, and upon its demolition the site would merely be cleaned up and fenced. Any redevelopment of the site would require further governmental review. Separate consideration of the demolition and the redevelopment was found acceptable by the Appellate Division, Third Department.

Supplemental EIS

Three suits sought supplemental EIS statements on the grounds that the prior statements had become outdated and obsolete in view of new developments. All three suits failed.

South Bronx Unite! v. New York City Industrial Development Agency[11] involved the proposed construction of a corporate headquarters and distribution center for Fresh Direct. It would be located in the Harlem River Yards. An EIS had been prepared back in 1993 for development of the Yards. The Supreme Court, Bronx County, declared that "[t]he mere passage of time rarely warrants an order to update the information considered by an agency, since the [EIS] process necessarily ages data. A requirement of constant updating and further review would render the administrative process perpetual, and subvert its legitimate objectives." (In 2014, the Appellate Division, First Department, affirmed the court's conclusion that no supplemental EIS was required.[12])

The other two suits, with similar results, involved the 91st Street Marine Transfer Station, a controversial solid waste facility on the East River,[13] and the redevelopment of downtown Brooklyn.[14]

All three of these cases involved actions undertaken or approved by the City of New York. The city was also victorious in SEQRA challenges to three of its other undertakings: a pilot program to allow medallion cabs to arrange passenger pickups via smartphone applications;[15] the installation of bike share stations;[16] and the phaseout of No. 4 and No. 6 fuel oil in favor of cleaner-burning alternatives.[17]

Three suits sought supplemental environmental impact statements on the grounds that the prior statements had become outdated and obsolete in view of new developments. All three suits failed.

Speculative Impacts

Another high-profile project was at issue in *Entergy Nuclear Indian Point 2 v. Perales*.[18] The New York Department of State had designated a stretch of the Hudson River adjacent to the Indian Point nuclear power plant as a "significant coastal fish and wildlife habitat." The Supreme Court, Albany County, upheld the negative declaration for this designation. The court said that the designation was not a predetermination of whether the relicensing of the plant was consistent with federal and state coastal laws and policies and that the potential environmental consequences of impacts to Indian Point operations identified by petitioners, the owner of the power plant, therefore were speculative.

Applicability of SEQRA

In six cases, plaintiffs argued that certain actions were subject to SEQRA. Plaintiffs lost all six. SEQRA was found not to apply to a town's one-year moratorium on hydraulic fracturing (since land use moratoria of limited duration are generally found not to require environmental review);[19] a zoning board of appeals' interpretation of the local zoning code;[20] the release of covenants on property that restricted their development (two related cases);[21] a county's comprehensive plan that called for the development of a pedestrian and bicycle trail network (since this was merely a policy document and not a binding plan);[22] and a minor amendment to a previously granted variance.[23]

Procedural Issues

A town's approval of a wind energy farm had been annulled by the lower court because of violations of the Open Meetings Law, even though the court had found that the SEQRA negative declaration was valid. The Appellate Division, Third Department, found no Open Meetings Law violation; the location of a public hearing was permissibly moved because so many people showed up that a larger room was needed. However, the Appellate Division found that the county planning department had not been given adequate advance notice of the hearing. Moreover, the town had not provided adequate explanations of the project's compliance with various conditions of the local ordinance, so the special permit was annulled.[24]

A challenge was brought to the approval of a recreational complex in the Catskills—a casino, a horse racing track, a golf course, a hotel, a convention center and a condominium development. The parties submitted dueling expert reports about the project's environmental impacts. The Supreme Court, Sullivan County, declared, "Where expert testimony conflicts and differing analyses are presented under SEQRA, the agency has the discretion to make a choice[,] and as long as the decision is rationally and reasonably related to the evidence in the record, courts will not disturb the decision."[25]

Discovery is available in Article 78 proceedings (the procedural mechanism under which most SEQRA suits are brought) only upon motion to the court, and in practice discovery in these cases is rare. In two cases, discovery was sought; in both it was denied, in part because those seeking it had already obtained ample documents via the Freedom of Information Law and other methods.[26]

1. 103 A.D.3d 655, 959 N.Y.S.2d 265 (2d Dept.), leave to appeal denied, 21 N.Y.3d 857, 991 N.E.2d 217, 969 N.Y.S.2d 443 (N.Y. 2013).
2. *Develop Don't Destroy (Brooklyn) v. Empire State Development Corp.*, 41 Misc.3d 779, 971 N.Y.S.2d 682 (Sup.Ct. N.Y. Co. 2013).
3. *Trustees of the Freeholders of the Commonality of the Town of East Hampton v. Zoning Bd. of Appeals of the Town of East Hampton*, 2013 N.Y. Misc. Lexis 4648 (Sup. Ct. Suffolk Co., Oct. 2, 2013).
4. *Concerned Citizens of Armonk v. Town Bd. of Town of North Castle*, Index No. 4207/12 (Sup. Ct. Westchester Co. Apr. 4, 2014); *Gasoline Heaven at Commack v. Town of Smithtown Town Bd.*, 2013 N.Y. Misc. Lexis 5748 (Sup. Ct. Suffolk Co. Nov. 26, 2013); *Oyster Bay Assocs v. Town of Oyster Bay*, 2013 N.Y. Misc. Lexis 4888 (Sup. Ct. Suffolk Co. Oct. 9, 2013).
5. *Kampa v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1510 (Sup. Ct. Suffolk Co. April 1, 2013); *Rappaport v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1511 (Sup. Ct. Suffolk Co. April 1, 2013).
6. *County Oil Co. v. N.Y.C. Dept. of Envtl. Prot.*, 111 A.D.3d 718, 975 N.Y.S.2d 114 (2d Dept. 2013).
7. *Families United for Racial and Econ. Equality v. Bloomberg*, 980 N.Y.S.2d 275 (Sup. Ct. N.Y. Co. 2013).
8. *deZafra v. Town of Brookhaven*, 2013 N.Y. Misc. Lexis 3293 (Sup. Ct. N.Y. Co. July 3, 2013); *O'Brien v. N.Y. State Comm'r of Educ.*, 112 A.D.3d 188; 975 N.Y.S.2d 205 (3d Dept. 2013), appeal dismissed, 22 N.Y.3d 1125, 6 N.E.3d 603, 983 N.Y.S.2d 485 (2014), leave to appeal denied, 2014 N.Y. Lexis 1082 (N.Y. May 13, 2014); *Tuxedo Land Trust v. Town Board of Town of Tuxedo*, 112 A.D.3d 726, 977 N.Y.S.2d 272 (2d Dept. 2013).
9. 2013 U.S. Dist. Lexis 25390 (W.D.N.Y. Feb. 22, 2013).
10. 110 A.D.3d 1326, 973 N.Y.S.2d 835 (3d Dept. 2013).
11. Index No. 260462/2012 (Sup. Ct. Bronx Co. May 24, 2013).
12. 115 A.D.3d 607, 983 N.Y.S.2d 8 (1st Dept. 2014).
13. *Kellner v. City of N.Y. Dept. of Sanitation*, 107 A.D.3d 529, 967 N.Y.S.2d 356 (1st Dept. 2013).
14. *Families United for Racial and Economic Equality v. Bloomberg*, 980 N.Y.S.2d 275 (Sup. Ct. N.Y. Co. 2013).
15. *Black Car Assistance Corp. v. City of N.Y.*, 2013 N.Y. Misc. Lexis 1692 (Sup. Ct. N.Y. Co. April 23, 2013), aff'd, 110 A.D.3d 618, 973 N.Y.S.2d 627 (1st Dept. 2013).
16. *Cambridge Owners Corp. v. N.Y.C. Dept. of Transp.*, 2013 N.Y. Misc. Lexis 4998 (Sup. Ct. N.Y. Co. Oct. 28, 2013).
17. *County Oil Co. v. N.Y.C. Dept. of Envtl. Prot.*, 111 A.D.3d 718, 975 N.Y.S.2d 114 (2d Dept. 2013).
18. 41 Misc.3d 1237(A), 983 N.Y.S.2d 202 (Sup. Ct. Albany Co. 2013).
19. *Lenape Resources v. Town of Avon*, Index No. 1060-2012 (Sup. Ct. Livingston Co. Mar. 15, 2013).
20. *Chestnut Ridge v. 30 Sephar Lane*, Index No. 14674/10, NYLJ 1202610643586 (Sup. Ct. Rockland Co. June 17, 2013).
21. *Kampa v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1510 (Sup. Ct. Suffolk Co. Apr. 1, 2013); *Rappaport v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1511 (Sup. Ct. Suffolk Co. April 1, 2013).
22. *Schaefer v. Legislature of Rockland Cnty.*, 112 A.D.3d 642, 976 N.Y.S.2d 178 (2d Dept. 2013).
23. *Westwater v. N.Y.C. Bd. of Standards & Appeals*, 2013 N.Y. Misc. Lexis 4707 (Sup. Ct. N.Y. Co. Oct. 15, 2013).
24. *Frigault v. Town of Richfield Planning Bd.*, 107 A.D.3d 1347, 968 N.Y.S.2d 673 (3d Dept. 2013).
25. *Concord Assocs. v. Town of Thompson*, 41 Misc.3d 1208(A), 980 N.Y.S.2d 275 (Sup. Ct. Sullivan Co. 2013) (citations omitted).
26. *Weinstein v. Harvey*, 2013 N.Y. Misc. Lexis 1365 (Sup. Ct. N.Y. Co. April 2, 2013); *Entergy Nuclear Point 2 v. N.Y. State Dept. of State*, 39 Misc.3d 1223(A), 971 N.Y.S.2d 70 (Sup. Ct. Albany Co. May 6, 2013).

Climate

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holding that Order 745 exceeded FERC's jurisdiction over wholesale electricity markets under the Federal Power Act, 16 U.S.C. §824.

The D.C. Circuit panel's decision undermines FERC's efforts to promote demand response and makes it less likely that states will rely on more demand response in their plans to meet the requirements of EPA's Clean Power Plan. Some states may still find it prudent to implement demand response programs, but without the promise of full compensation at market prices, others may balk.

Looking Ahead

Both the Clean Power Plan and Order 745 reflect essential links between the energy sector and environmental concerns. The D.C. Circuit decision and the attacks on the EPA's Plan—many launched even before the agency released its proposal—signal that the legal basis for relying on demand-side measures will be hotly contested going forward.

In both situations, criticisms of the federal agencies' approaches employ a crabbed reading of their statutory authority that would unduly restrict the use of demand-side measures. The D.C. Circuit panel assumed that demand response is exclusively a retail market phenomenon, beyond the scope of FERC's authority over wholesale markets. The panel reached this conclusion even though FERC's Order 745 provided for compensating demand response services in wholesale—not retail—markets.

Opponents of EPA's proposal to include demand-side measures in its Clean Power Plan similarly assume that Clean Air Act section 111(d)'s "best system of emission reduction" standard for existing sources of air pollution necessarily allows only regulations aimed directly at power plants, not broader measures that result in lower emissions from power plants.

It remains to be seen whether FERC and EPA will prevail in their initiatives. The D.C. Circuit panel's decision invalidating Order 745 generated a strong dissent from Judge Harry Edwards, and the case may yet go before the full en banc court. EPA is taking public comments on its Clean Power Plan, and its opponents will almost certainly sue to block the finalized plan. Agencies have an obligation to abide by their statutory mandates, and courts appropriately invalidate regulations when agencies overstep their bounds. But, as long as they maintain fidelity to Congress' language, agencies should be applauded, rather than penalized, for taking innovative approaches to difficult problems. Achieving the Clean Power Plan's ambitious goals requires no less.