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Protecting the City's Environment

The city's population exceeds eight million and the number is growing. As the city grows and our density increases, it is critical that we manage our environment in a sustainable manner.

Addressing this need is high on the agenda of Mayor Michael R. Bloomberg and other city officials. The law department is doing its share to support the mayor and the City Council in this area by assisting in the drafting of environmental legislation and rules, bringing affirmative litigation to protect the city's environment and joining as an amicus in actions brought by New York and other states to preserve the region's air quality and to help address the threat of global warming.



Recent Environmental Legislation

The City Council has enacted significant legislation during the past several years aimed at restoring and protecting the city's environment. These measures seek to assure that goods and equipment are purchased and used in an environmentally responsible manner. For example, the Council has mandated standards for the use of products with recycled content by city agencies (Local Law No. 121 of 2005); for the use of ultra-low sulfur diesel fuel and best-available technology in city-owned vehicles (Local Law No. 39 of 2005); for the reduction of pesticides and other hazardous substances used by city agencies (Local Laws Nos. 37 and 120 of 2005); and for the reduction of greenhouse gas emissions from school buses (Local Law No. 42 of 2005). Another important initiative is the "Green Buildings Law," which requires adherence to "green buildings standards" in construction on city property and other city-funded construction projects to foster sustainable site planning, maximize efficiency in energy and water use and the use of renewable energy sources, conserve building materials, and improve indoor air quality (Local Law 86 of 2005).

Brownfields

A brownfield is any real property whose redevelopment or reuse may be affected by the presence or potential presence of a contaminant. The law department's environmental law division and other city agencies and entities, such as the Office of Environmental Coordination, Department of Environmental Protection, Department of Parks and Recreation, Department of Health and Mental Hygiene, Department of Housing Preservation and Development, and the Economic Development Corp., are engaged in investigating, remediating and redeveloping brownfields throughout the city. This challenging task is essential to improving the city's environment and creating new economic opportunities throughout the five boroughs.

In recent years, the environmental law division has provided legal advice during the investigation and remediation of economically important properties such as the Brooklyn Navy Yard and the Hunt's Point Terminal Market, assisted in drafting comments on important New York State brownfield statutes and regulations, and pursued parties that are responsible for polluting city property.

Safeguarding the Environment

In addition to defending the city in environmental lawsuits and regulatory actions, attorneys of the environmental law division pursue affirmative litigation to protect city resources or recover damages for actions deleterious to the environment. These actions include: *City of New York v. Robert J. Pozzi and Town of Carmel Town Board*, Putnam County Supreme Court, Index No. 957-05, in which the city is challenging the environmental review of a conversion of a steeply sloped area in the city's Watershed into an athletic field for failure to consider the significant adverse impacts of the construction debris and discharges on the city's

water supply; *City of New York v. Amerada Hess, et al.*, 04 CV 3417 (SDNY), in which the city is seeking in excess of \$300 million for treatment costs and other damages resulting from the petroleum industry's known contamination of the city's groundwater well system in Jamaica, Queens, with the gasoline additive methyl tertiary butyl ether (MTBE);¹ *City of New York v. Cross-Harbor Railroad, et al.*, 98 CV 7227 (EDNY), in which the city is seeking to recover \$750,000 it has spent to date in an investigation and cleanup of the Bush Terminal Railyard in Brooklyn; and *City of New York v. Argon*, Queens Supreme Court, Index No. 16089-03, in which the city is seeking cost recovery for one of three petroleum discharges that affected a water and sewer replacement project in Long Island City, following settlement of the litigation surrounding the other two discharges.

Protecting Our Air and Climate

The city is a participant, with New York State and other states and municipalities, in lawsuits aimed at protecting the quality of the air we breathe and addressing the long-term and wider threat of global warming. We have joined with New York State Attorney General Eliot Spitzer and his environmental team in litigation and amicus briefs in actions that seek remedies that would further the control of air pollution and climate change.

A. Anti-smog suits

A major public health concern in the city is the emission from power plants and other industrial polluters of certain pollutants, including carbon monoxide, particulates, ozone, and oxides of nitrogen and sulfur, which contribute directly to smog and related negative health effects such as asthma. As part of its effort to address this problem, the city joined in a lawsuit led by the state of New York against the Environmental Protection Agency (EPA) challenging the weakening of federal New Source Review (NSR) rules. *State of New York et al. v. EPA*, No. 03-1380 (consolidated) (D.C. Cir. 2003). These rules govern major modifications (i.e., changes other than routine maintenance) made to equipment at stationary sources of smog-inducing air emissions. The major modification transforms the equipment into a "new source," requiring the plant to comply with newer, more-stringent Clean Air Act emissions requirements.

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Replacement of Equipment

On Oct. 27, 2003, the EPA published a final rule governing replacement of equipment at existing facilities under the Clean Air Act. The 2003 Equipment Replacement Rule substantially expanded the exception for routine maintenance, and exempted from NSR the replacement of equipment at a cost up to 20 percent of the cost of the entire plant. Studies cited by petitioners showed that the exemption was so broad that it would encompass almost all equipment replacement activities. Petitioners contended that the Equipment Replacement Rule was contrary to the intent of the Clean Air Act, which envisioned that old plants grandfathered under the act would eventually either cease to operate or overhaul their equipment in order to stay on line. The NSR permitting process was intended to require that modern pollution control equipment be installed in such plants as part of their overhaul. In a decision issued March 17, 2006, the U.S. Court of Appeals for the District of Columbia Circuit ruled in favor of petitioners and vacated the Equipment Replacement Rule.

In a related matter, the city recently joined an amicus brief drafted by the state of Illinois as intervenor in an important U.S. Court of Appeals for the Seventh Circuit case interpreting the meaning of "emissions increase" under the NSR program. *United States v. Cinergy Corp. et al.*, No. 06-1224 (7th Cir. 2005). The case is an EPA enforcement action against a power plant operated by the Cinergy Corp. As power plants and other stationary sources of pollution expand their operations or introduce new equipment, they must comply with certain limits on the increase in smog-inducing pollutants resulting from such changes. At issue in *Cinergy* is how that increase is defined under the NSR program. The defendant power plant urges the court to interpret "emissions increase" in a way that, in the intervenors' view, would effectively negate the NSR requirements. In addition to the city's participation as an amicus, the states of New York, New Jersey and Connecticut have intervened as parties to encourage the court not to undermine the integrity of NSR.

B. Global warming litigation

Climate change is arguably the most pressing sustainability challenge confronting the planet. The city faces threats to its infrastructure, natural resources and energy supply from the predicted sea level rise and warming trends associated with global warming. In the absence of satisfactory progress on the federal regulatory level, the city, represented by the law department's environmental law division, has sought judicial assistance in addressing the problem.

The first court action that the city joined was *State of Massachusetts, et al. v. U.S. EPA*, Nos. 03-1361 to 03-1368 (D.C. Cir. 2003), a challenge filed in October 2003 by several U.S. states (including New York State) and environmental nonprofit organizations seeking judicial review of the determination of the EPA not to regulate the emission of carbon dioxide and other greenhouse gases released by motor vehicles that contribute to global warming, despite the clear mandate of §202 of the federal Clean Air Act. The city and other petitioners contend that §202 of the Clean Air Act clearly authorizes the EPA to regulate such emissions and requires the EPA to find that these greenhouse gases do not endanger public health and welfare before exercising its judgment not to regulate. The EPA claims that the

definition of pollutant in the Clean Air Act does not encompass these gases and, further, that the combination of economic hardships from regulating, scientific uncertainty, and impact on the president's international negotiations allow the EPA to omit a review and finding on endangerment before exercising its judgment not to regulate.

The District of Columbia Circuit, exercising original jurisdiction over an EPA rulemaking action under the Clean Air Act, ruled against the petitioners without answering any of the questions presented. 415 F3d 50 (D.C. Cir. 2005) Each appellate judge issued separate opinions on different grounds without any clear majority. As a result, the city and other petitioners are currently seeking a writ of certiorari from the U.S. Supreme Court. If certiorari is granted, significant questions may be answered, including whether the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions and whether the act requires the EPA to make a finding on endangerment in this matter.

In a companion case to the *Massachusetts* action, the city recently joined *State of New York, et al. v. U.S. EPA*, No. 06 - - (D.C. Cir. 2006). That petition asks the court to review a final rule of the EPA, published on Feb. 27, 2006, establishing performance standards for steam generating units operated by electric utilities and other industrial and commercial entities. Petitioners are challenging yet another decision of the EPA not to regulate the emission of greenhouse gases on grounds that the Clean Air Act (in this case §111) does not authorize such action.

Other Actions

The city has joined a climate change challenge to a rulemaking action of another federal agency in *People of the State of California ex rel Bill Lockyer, Attorney General, et al. v. National Highway Traffic Safety Administration*, No. 06-[72317] (9th Cir. 2006). Here, petitioners are challenging the final rule of the National Highway Traffic Safety Administration (NHTSA), published on April 6, 2006, establishing fuel economy standards for new vehicles classified as light trucks. Petitioners contend that NHTSA, acting pursuant to the National Environmental Policy Act, did not take the required "hard look" at the significant environmental impact of increased greenhouse gas emissions that will result from implementation of these new fuel economy standards and the projected increase in vehicle sales.

In addition to joining challenges directed at federal agencies, the city is a party along with California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin in *State of Connecticut, et al. v. AEP, et al*, Civ. No. 04-5669 (SDNY 2004), a public nuisance action seeking to enjoin the five largest U.S. power plant emitters of carbon dioxide from continuing to emit at current levels. Petitioners contend that these facilities, which are together responsible for 10 percent of all U.S. carbon dioxide emissions, must gradually reduce their emissions even in the absence of federally mandated standards. That case is currently on appeal to the U.S. Court of Appeals for the Second Circuit, following a decision in September 2005 dismissing the action as a political question that courts cannot resolve. Argument is scheduled for June 7, 2006.

Endnotes:

1. Currently, the city's case is a focus case among numerous other MBTE actions that comprise In re MTBE Products Liability Litigation, MDL 1358 before Judge Shira A. Scheindlin in the U.S. District Court for the Southern District of New York.

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