Phillips Lytle LLP

Earth Matters

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AN ENVIRONMENT & ENERGY REPORT FROM PHILLIPS LYTLE

Making Solar Power More Affordable for New Yorkers

New York State continues to be a national leader in renewable energy initiatives, particularly in encouraging practical, everyday applications of solar power. Recently, Governor Andrew Cuomo, as part of his ongoing "NY-Sun" program intended to accelerate customer-sited solar electricity capacity in New York State, signed into law three bills to promote this renewable energy program. These newly enacted statutes:

- Exempt the sale and installation of commercial solar energy systems—defined as systems which convert solar radiation to energy for cooking, hot water or electricity—from State sales taxes, beginning January 1, 2013, and grant municipalities (counties and cities) the power to exempt these systems from local sales tax. New York's similar program for residential solar energy systems continues unchanged.
- Extend the existing 25% income tax credit for residential solar energy equipment expenditures to include payments for (1) leased solar energy systems under a lease of at least ten years duration and (2) purchase of power under a Power Purchase Agreement of at least ten years duration. It should be noted that the credit continues to apply to qualified expenditures directly related to construction.
- Extend the current four-year real property tax abatement in New York City for solar electric systems placed in service through the end of 2014, with the percentage of abatement for such systems changed to the lesser of (1) 2.5% of eligible expenses, (2) taxes payable in such tax year or (3) $62,500. Owners of most commercial and residential buildings, including cooperatives and condominium associations, are eligible for the tax abatement.

A typical development project utilizing renewable energy will utilize one or more of the above incentives with other targeted tax credits and New York State and federal incentives such as low-interest loans or direct grants. Phillips Lytle has the cross-disciplinary expertise necessary to help clients achieve the maximum benefit from these programs.

For more information, please call Donald T. Ross, Special Counsel in the Phillips Lytle Energy and Project Development Practices, at (518) 472-1224 or dross@phillipslytle.com. ■

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Fracking Moratorium Leads to Termination

In 2008, then-Governor David A. Paterson directed the New York State Department of Environmental Conservation (DEC) to supplement its environmental impact review of oil and gas exploration in New York to consider the potential environmental effects from increased use of horizontal drilling and high-volume hydraulic fracturing (or "fracking") to develop gas reservoirs located in deep underground shale formations that extend through Ohio, West Virginia, and Pennsylvania into the southern tier of New York. Pending that still-uncompleted environmental review, DEC refuses to issue any drilling permits that would use fracking technology in New York. A federal court in New York recently decided that this permit moratorium did not constitute a "force majeure" and, as a result, a number of oil and gas leases had expired at the end of their primary terms.

The lawsuit, *Aukema v. Chesapeake Appalachia LLC*, No. 3:11–CV–00489, 2012 WL 5522832 (N.D.N.Y. Nov. 15, 2012), involved challenges by landowners who entered into 31 oil and gas leases that eventually were acquired by defendant Chesapeake Appalachia LLC. Each of the leases had a fixed "primary term" and a clause, known as an "habendum clause," that provided that the leases would continue to operate following the end of the primary term for so long thereafter as gas exploration and production or certain other specified activities continued.

The leases also contained force majeure clauses or their equivalent that provided the leases would not terminate so long as the lessee had been prevented by law from complying with the leases' obligations (such as the gas exploration and production). The leases also contained delay rental clauses that required the lessee to make delay rental payments until such time as production commenced.

The parties did not dispute that, due to the 2008 Governor's Directive, DEC refused to issue fracking permits, there had occurred no operations, drilling, storage, or production of gas on the subject properties, and the lessees had not paid any royalties to the landowners. Instead, Chesapeake made delay rental payments to the landowners throughout the primary term and following its expiration.

REGULATORY UPDATE

Recently, New York State's proposed hydraulic fracturing ("fracking") regulations expired. New York State Department of Health Commissioner Dr. Nirav Shah stated that his agency required additional time to review the Supplemental Generic Environmental Impact Statement (SGEIS) health impact analysis because of the "complexity of the issues." Consequently, the New York State Department of Environmental Conservation (DEC) decided that it would not (1) publish its notice of completion for the Final SGEIS or (2) issue finalized fracking regulations, thereby allowing the proposed regulations to expire.

Further lengthy delays to issuing fracking permits, however, may be avoided. Although the expiration of the proposed regulations will cause the rule making process to restart, the SGEIS would not necessarily be affected, and upon its completion, DEC could process and issue permits with the proposed regulations included, as permit conditions. ■

# of Oil and Gas Leases

When the landowners filed suit in Federal Court seeking a declaration that the oil and gas leases had expired at the conclusion of the primary terms, Chesapeake argued that the leases had been extended because its failure to conduct operations was due to the 2008 Directive to DEC, and the agency's subsequent refusal to issue permits to allow drilling with fracking technology.

The Court concluded that the landowners had established that their oil and gas leases had terminated because there had occurred no operations during the primary term. The Court held that the Governor's 2008 Directive did not constitute a force majeure that excused compliance by Chesapeake. The purpose of a force majeure clause, according to the Court, was to relieve a party of contractual duties when performance was prevented by circumstances outside its control. Mere impracticability or unanticipated difficulty, however, was not enough in the Court's view to excuse performance. In the Court's view, the 2008 Directive did not prevent Chesapeake's performance because Chesapeake was still able to explore, drill, and produce gas reserves using traditional drilling technologies. In addition, as the drafter of the leases, Chesapeake (or its predecessors-in-interest) could have specified the specific technology to be used in developing the gas fields (such as fracking), but failed to do so.

Finally, the Court concluded that the delay rental payments negated an implied covenant that the lessee immediately begin to develop the gas reserves under the properties at the outset of the primary term, but Chesapeake could not use those delay rental payments to extend the primary term of the leases.

DEC's refusal to issue permits to allow the use of high-volume hydraulic fracturing technology for oil and gas drilling, until the Agency completes its overdue supplemental environmental review, likely will mean that more oil and gas leases like those involved in *Aukema* will expire before exploration or production can begin.

Those seeking more information about the fracking moratorium can contact Kevin M. Hogan, Partner and Team Leader of the Phillips Lytle Environment Practice at (716) 847-8331 or khogan@phillipslytle.com. ■

New Water Withdrawal Permit Requirements

Effective April 12, 2013, there are new regulations in New York governing entities that withdraw, or have the capability to withdraw, 100,000 gallons (or more) of water per day.

While water withdrawal for public use has long been monitored, large quantities of water withdrawn for non-public purposes historically has been unregulated. In August 2011, a new law was enacted that modified the Environmental Conservation Law that governs water withdrawal in New York State, and authorized the promulgation of new regulations to govern the use of water. The new law and the recently promulgated regulations will require permits for water withdrawals that meet or exceed a 100,000 gallon per day ("gpd") threshold, and expand existing water withdrawal permit requirements.

The new law and regulations are designed to ensure that the New York State Department of Environmental Conservation (DEC) has the ability to monitor and regulate the use of New York State's water resources. Under the Great Lakes Basin Compact, New York has agreed to regulate water withdrawals within the Great Lakes Basin, and the new regulations provide a process for doing so. The new regulations also make the permit process for similar withdrawals consistent across New York State.

The new permit requirements become effective April 12, 2013, with some permit applications due as soon as June 13, 2013. Those affected by the new regulations include users who withdraw water for purposes other than public water supply, for example commercial and manufacturing uses. However, the new law and regulations contain several exceptions. For example, water withdrawals of 100,000 gpd or more for public water supply are already regulated. Additionally, water withdrawals for agricultural uses that do not exceed 100,000 gpd based on a 30-day average may be exempt from the permit requirements (but some reporting requirements may still exist).

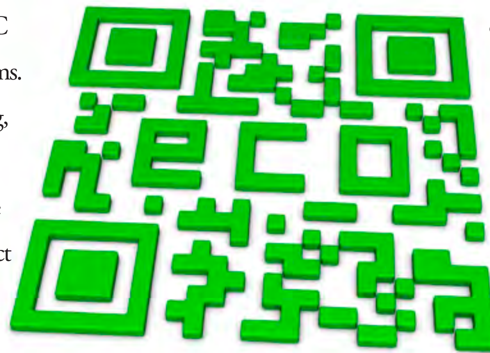
If your business is equipped to withdraw 100,000 gpd or more of water, you should analyze the applicability of these new regulations to your operations; a permit may be required.

If you have any questions or would like more information about the applicability of the new regulations, please contact Morgan Graham, Environment & Energy Partner, at (716) 847-7070 or mgraham@phillipslytle.com, or Jennifer Dougherty, Associate in the Environment Practice, at (716) 504-5789 or jdougherty@phillipslytle.com. ■

Update on Federal Trade Commission Guides for Green Marketing

In the August 2010 issue of the *Earth Matters* newsletter, we provided recommendations for incorporating transparency into "green" marketing efforts based on the "Guides for the Use of Environmental Marketing Claims" (the "Green Guides") issued by the Federal Trade Commission (FTC). In October 2012, the FTC issued updated Green Guides in order to clarify use of "green" certifications and seals, and to discourage broad claims of environmental benefits associated with products. The updated Green Guides also include new sections on carbon offsets, "free-of" claims, "non-toxic" claims, "made with renewable energy" claims, and "made with renewable materials" claims.

The Green Guides are not legislative rules or enforceable regulations, but provide guidance and examples of marketing practices to avoid liability under Section 5 of the FTC Act, which prohibits unfair or deceptive marketing practices and allows the FTC to take enforcement action against deceptive claims.



In the previous article on "green" marketing, we recommended that businesses "emphasize transparency by explaining and supporting the environmental attributes of a particular product at each stage, from production to distribution and use, in order to avoid claims of greenwashing or deceptive practices." The updated Green Guides include clear guidance on incorporating this transparency in marketing claims. The use of terms that imply a general environmental benefit, such as "green," "earth friendly," or "eco-friendly," would likely be considered deceptive if used without qualification because it is unlikely, and difficult to prove, that a product has the broad and far-reaching environmental benefits that are implied by such a general term. Instead, marketers should use clear and prominent qualifying language to convey that a general environmental claim refers only to a specific and limited environmental benefit. The Green Guides provide examples illustrating acceptable practices. An environmental benefit should not be advertised if it is negligible or if there are trade-offs that negate or offset that benefit.

Similarly, third-party environmental certifications or seals should not convey a general environmental benefit. The previous newsletter article discussed independent verification of the environmental attributes of a product from third-party certification organizations such as EcoLogo and Green Seal. According to the updated Green Guides, these certifications should indicate, with clear and prominent language, the specific and limited environmental benefits attributed to the product by the certification. For those seals or certifications that are based on comprehensive, multi-attribute standards, the updated Green Guides recommend including a qualification that refers the customer to a website or other resource that discusses the attributes evaluated for that product.

The updated Green Guides also contain new guidance on claims concerning carbon offsets, which refer to emissions of carbon dioxide or other greenhouse gases during the life-cycle of the product that are offset by reductions in emissions elsewhere. Carbon offset claims should be supported by reliable scientific evidence and appropriate accounting methods to ensure emission reductions are properly quantified. Carbon offset claims should not be made if such offsets are otherwise required by law.

Thus, for many "green" marketing claims, the updated Green Guides require analyzing a product's net environmental benefit through all stages of raw materials procurement, production, distribution and disposal of the product. Such a life cycle assessment would prevent deceptive advertising that touts an environmental benefit during one stage of the process, which may be offset by environmental detriment during another stage in the process. Rather than conducting life-cycle assessments on all products, however, businesses should carefully consider whether one is necessary depending on the environmental benefit attributed to a particular product.

In general, the goal of the updated Green Guides is to allow only those "green" claims that actually describe a specific net benefit to the environment, which may in turn produce economic benefits for the consumer through a lower cost product due to more efficient production and distribution. Thus, when possible, businesses should focus on making claims that tout the benefit to the consumer from a company's choices that are based on a product's impact to the environment, instead of merely engendering positive feelings about the purchase of a product from a purely altruistic point of view.

To learn more about "green" marketing, contact Environment and Energy Associate Susan M. Marriott at (716) 504-5778 or smarriott@phillipslytle.com. ■

Spotlight

PHILLIPS LYTLE LLP WELCOMES TWO NEW ATTORNEYS TO ITS ENVIRONMENTAL PRACTICE GROUP

Phillips Lytle is pleased to announce that Kimberly R. Barnashuk and Myriah V. Jaworski have joined the firm as associates in its Buffalo office.

Kimberly R. Barnashuk, a member of the National Brownfield Association and Women in Communications and Energy (WICE), focuses her practice at Phillips Lytle on regulatory compliance, environmental due diligence and transactional support. She also handles land use and zoning matters focusing on compliance with the State Environmental Quality Review Act (SEQRA).

Ms. Barnashuk received a J.D. from New York University School of Law in 2011 and a B.A., *magna cum laude*, from The George Washington University in 2008. In 2012, Ms. Barnashuk was accepted into the New York City Environmental Law Leadership Institute.

Myriah V. Jaworski joins Phillips Lytle after serving as an Honors Program Trial Attorney with the U.S. Department of Justice in the Environment and Natural Resources Division, in Washington, D.C.

At Phillips Lytle, Ms. Jaworski concentrates her practice on environmental law and business and commercial litigation focusing on affirmative litigation under the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and the Resource Conservation and Recovery Act (RCRA). She also has extensive motion practice, deposition and e-discovery experience.

Ms. Jaworski received a J.D., *magna cum laude*, from Syracuse University College of Law in 2009; a M.S., *cum laude*, from the State University of New York College of Environmental Science and Forestry in 2009; and a B.A., *cum laude*, from The George Washington University in 2006. Ms. Jaworski attended law school as a Chancellor's Scholar and was a member of the Justinian Honors Society. Additionally, in 2010 and again in 2011, she was the recipient of the Assistant Attorney General Special Recognition Award. Presently, Ms. Jaworski is an active member of the Environmental Law Section of the New York State Bar Association.

ENERGY BLOG

Renewable Energy Post

STAY UP-TO-DATE ON THE LATEST ENERGY NEWS.

Phillips Lytle is committed to keeping our clients and friends apprised of the latest energy-related legislation and topics of interest. Written by our attorneys in our Energy Practice, you can expect actionable guidance and commentary on a wide range of prominent developments related to renewable energy law. You can add our blog to your news feed or subscribe by e-mail.

Visit the Phillips Lytle Energy Practice at www.phillipslytle.com for more details.

Recent Decision Highlights Distinction Between Compliance With Multiple Environmental Programs

A recent New York Court of Appeals decision, *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, 20 N.Y.3d 148 (2012), highlighted the interplay between the compliance process for the State Environmental Quality Review Act (SEQRA) and the Brownfield Cleanup Program (BCP). Though much of the decision was procedurally-based, the court shed some light on this infrequently-explored area.

The case involved the construction of a campus containing four public schools by the New York City School Construction Authority (the "SCA"). The site is a former railroad yard located in the Mott Haven area of the Bronx, with a history of significant soil and groundwater contamination. The court examined whether the SCA violated SEQRA by failing to include in its Environmental Impact Statement ("EIS") a discussion of the methods it would adopt for long-term maintenance and monitoring of mitigation controls at the site.

The SCA was participating in the New York BCP simultaneously with its SEQRA review. The BCP required the SCA to submit several documents, including a Remedial Action Work Plan ("RAWP"), which contained a description of how the SCA proposed to remedy the contamination. The BCP regulations also required the SCA to include in the RAWP a description of any operation, maintenance and monitoring requirements, including methods to be used in the future to maintain and monitor such controls. At the time of the initial drafting of the RAWP (and during the EIS process), the SCA felt it was premature to make a choice regarding long-term maintenance and monitoring. The DEC conditionally approved the RAWP, stating that the SCA eventually would have to develop a site management plan to provide for long-term operation and maintenance of the remedy. The SCA then completed the SEQRA process prior to development of the site management plan.

The Bronx Committee for Toxic Free Schools brought a CPLR Article 78 proceeding challenging the SCA's SEQRA compliance because the SCA failed to "propose a long-term maintenance and monitoring protocol." The trial court ordered the SCA to prepare a supplemental EIS providing these details. As the matter moved through the courts, the SCA completed the site management plan for the BCP. When the plan was approved by the DEC, the SCA argued that the submission and approval of the site management plan negated the need for a supplemental EIS.

The Court of Appeals, however, ruled that the SCA was obligated to file a supplemental EIS. The Court noted that although a Lead Agency may use its reasonable judgment with respect to the requisite level of detail in an EIS, the SCA's argument that it did not need to include the long-term management details in a supplemental EIS because it adequately described them in its site management plan for the BCP was insufficient. The Court stated that, even if the SCA reasonably waited to consider its long-term maintenance program, the supplemental EIS is specifically meant to detail newly discovered information. Despite the fact that the information was provided as part of the BCP, the "Brownfield Program and SEQRA serve related but distinct purposes," and the site management plan was not a substitute for a supplemental EIS.

This decision highlights the distinction between the processes for both programs and the uncertainty with respect to proper compliance, especially when long-term monitoring measures may be difficult to determine at the early stages of a project when the SEQRA process is underway. The lesson to be learned is that SEQRA carries with it its own obligations that must be fulfilled separate and apart from other permitting and approval processes.

Phillips Lytle has an experienced SEQRA Practice Team. For more information, contact Adam S. Walters, Partner, at (716) 847-7023 or awalters@phillipslytle.com or Associate, Kimberly R. Barnashuk, at (716) 504-5784 or kbarnashuk@phillipslytle.com. ■

Cancelling EPA's Self Audit Policy Program?

Last Spring, the Office of Enforcement and Compliance Assurance (OECA) released its Fiscal Year 2013 National Program Manager Guidance ("FY 2013 Guidance"), which sets forth, among other things, the methods that the United States Environmental Protection Agency (EPA) should use to work with state and tribal governments to enforce environmental laws. The FY 2013 Guidance message is clear: aggressive enforcement of environmental laws will remain; but, implementation of EPA's enforcement strategy is shifting. As a result, the implications may be significant for at least one well known program – EPA's audit policy (the "Self-Audit Policy Program").

Since its inception in 1995, the Self-Audit Policy Program has provided incentives for regulated bodies to comply with the environmental laws and regulations. For a regulated body to collect Self-Audit Policy Program incentives, that body must voluntarily discover, promptly disclose, and expeditiously correct noncompliance with environmental laws and regulations; resulting incentives to the regulated body include, among other things, decreased or waived fines and/or penalties. In addition, EPA also benefited because the Self-Audit Policy Program reduced the need for the agency to perform formal investigations.

Despite the Self-Audit Policy's success, the FY 2013 Guidance suggests that, "since implementation of the Audit Policy began in 1995, EPA's enforcement program has increased its understanding of environmental compliance auditing, and believes that internal reviews of compliance have become more widely adopted by the regulated community, as part of good management." What is more, the FY 2013 Guidance states that "EPA has found that most violations disclosed under the Policy are not in the highest priority enforcement areas for protecting human health and the environment." As a result, EPA believes that it can reduce investment in the Self-Audit Policy Program without discouraging regulated bodies from still performing internal compliance reviews to locate and subsequently correct violations.

Whether there will continue to be any Self-Audit Policy Program, or if a new, similar program will be implemented in its place, remains unclear. In contrast to statements made in the FY 2013 Guidance, EPA officials and other commentators suggest that the Self-Audit Policy Program will cease to exist altogether. Should this occur, EPA will be required to rely on other, or possibly new, enforcement mechanisms. In fact, even the FY 2013 Guidance states that "EPA is considering several options, including a modified Audit Policy program that is self-implementing," but does not further elaborate on how or when such a modified program may be deployed.

In sum, despite the Self-Audit Policy Program's success over the last two decades, the FY 2013 Guidance suggests that the Self-Audit Policy Program will be dramatically cut back or possibly even eliminated in 2013. In that event, EPA will be forced to utilize existing (or develop new) enforcement mechanisms to incentivize regulated bodies to comply with environmental laws and regulations.

For more information about the EPA's enforcement of environmental laws, contact Patrick T. Fitzgerald, Associate in the Phillips Lytle Environment, Real Estate and Telecommunications Practices at (716) 847-8315 or pfitzgerald@phillipslytle.com. ■

Phillips Lytle is a national leader in environmental and energy law. Our extensive and successful history of representing a wide range of clients spans decades and includes *FORTUNE 200* companies that regularly rely on us for assistance with environmental issues. Our rich history of progressive environmental representation has enabled our Environment and Energy practices to evolve into some of the most sophisticated practices in the state and nation. Our environmental experience includes innovative brownfield redevelopment, comprehensive Environmental Impact Review, regulatory compliance and permit management, transactional advice and litigation in all courts and administrative proceedings.

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For additional information or advice, please contact one of our Environment and Energy attorneys listed below.

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