



NEW YORK CITY BAR

COMMITTEE ON ENVIRONMENTAL LAW

KATHY ROBB

CHAIR

Hunton & Williams LLP
200 Park Avenue
NEW YORK, NY 10166-0136
Phone: (212) 309-1128
Fax: (212) 309-1100
krobb@hunton.com

Statement to Energy and Natural Resources Transition Team Regarding Environmental Law Issues

The Association of the Bar of the City of New York Environmental Law Committee

December 2008

ANDREW E. SKROBACK

SECRETARY

Stroock & Stroock & Lavan, LLP
180 Maiden Lane
NEW YORK, NY 10038
Phone: (212) 806-6446
Fax: (212) 806-6006
askroback@stroock.com

The Association of the Bar of the City of New York’s¹ Environmental Law Committee (the “Committee”) would like to highlight for the new administration certain environmental issues that have particular resonance for New York City. Given NYC’s location on the coast, we are mindful of the tremendous challenge posed by atmospheric carbon buildup that is causing climate change and increasing the risks of coastal flooding. While we agree that effective carbon regulation requires putting a price on fossil fuel carbon (such as a carbon tax or a cap and trade program) and have explored the merits of each in a recent symposium sponsored by our Committee, we leave further discussion of this particular topic to others. We highlight instead certain NYC environmental initiatives that deserve federal attention, and certain issues affecting the quality of our local environment for which we discern a useful federal role. They are summarized below. We would be happy to provide additional detail on these suggested initiatives, if desired.

1. *Office of Sustainability:* We agree with those who suggest the need for a senior federal office with a climate change and sustainability portfolio. NYC reached a similar conclusion at the local level: Mayor Michael Bloomberg realized that local government’s sustainability efforts require an appropriate bureaucratic home, and created an Office for Sustainability within the Office of the Mayor to advise him on the range of issues associated with these over-arching and cross-cutting issues. Issues like climate change and use of water resources transcend political jurisdictions and executive agency mandates. Likewise, the issues surrounding the financial markets transcend corporate governance to include social performance and environmental factors. Recognition of the importance of sustainability is particularly essential now, as measures are being devised to address the economic challenges facing our country and planet. To that end, sustainability deserves a highly visible Executive Branch office, which is consistent with the new administration’s designation of Carol Browner to oversee efforts to address

¹ The Association, founded in 1870, has over 23,000 members. While most practice in the New York area, the Association’s membership includes lawyers from around the nation and in 50 foreign countries. The Association reports on legislative and regulatory issues on a local, state and national level.



climate change. One possibility would be to expand the mandate of the Council on Environmental Quality in the White House and rename it the Council on Sustainability.

2. *Recognize Benefits of Urban Density and Mass Transit:* NYC's extensive investment in mass transit-- together with zoning that permits relatively high density -- enables NYC to be a model for energy-efficient urban living. Capitalizing on our excellent rail, subway, bus and ferry network, the City has been promoting transit-oriented development through rezoning so as to avoid the problems associated with increased suburban sprawl. The Obama Administration should consider what the right balance is between providing funds for highways versus funds for mass transit to create "smart growth" urban centers. There is a federal role in highlighting best practices or noteworthy projects. For example, NYC received a National Award for Smart Growth Achievement from USEPA last year for Equitable Development for a project that revitalized an area in Harlem and enhanced access to mass transit. Such recognition efforts can be broadened to include land use regulations by municipalities to target growth in areas served by mass transit, and regional planning efforts that enhance sustainability, possibly including local decisions to merge political jurisdictions and coordinate transportation planning where feasible and appropriate (as NYC did in combining Manhattan with Brooklyn and the other boroughs in 1898). More tangibly, federal infrastructure spending to address the current financial crisis should include mass transit projects in the NYC region and nationwide.

3. *Showcase Sustainable Building Technology:* "Green Building" technology has been gaining a foothold in the market, helped in part by local ordinances such as NYC's Local Law 86 of 2005 (imposing energy efficiency and other environmentally beneficial standards on new City-controlled buildings and facilities). Despite the availability of tax credits for items such as solar thermal hot water heaters, one barrier to wider adoption of this and other cost-effective green technology at home and in the workplace has been the public's unfamiliarity with such new technology. Accordingly, we envision a useful federal role by supporting the establishment of green building demonstration centers to showcase sustainable building technologies. New York City, a hub for major media businesses, the center of a metropolitan region of 18 million residents and a city that attracts millions of visitors each year, would be a natural choice for such a center designed to maximize its impact. We believe that NYC should be included in any federal effort to establish such centers across the nation.

4. *Cleaner Vehicles and Green Taxis:* New York City and New York State have made hard-won progress in cleaning up our air, despite the fact that long-distance transport of ozone and other pollutants into our State and City from points west continues to account in part for our failure to achieve certain health-based air quality standards set forth in the Clean Air Act ("CAA"). The Committee strongly encourages the new administration to establish more stringent fleet-wide (corporate average) fuel economy ("CAFE") standards for vehicle manufacturers under the Energy Policy and Conservation Act of 1975 ("EPCA") and mobile source emission requirements under the CAA. The federal government's leadership role in this area is critical as the nation strives to reduce its fossil fuel dependency and improve air quality, particularly in densely populated areas such as NYC. In this regard, we understand that President-Elect Obama's plan to cut greenhouse gas emissions by 80% by 2050 would in effect require the elimination of fossil fuel in transport, home heating and energy generation.



More immediately, the Committee seeks the new administration's endorsement of federal legislation that will allow local municipalities like NYC to adopt "Green Taxi" programs without fear of being preempted by existing federal law. In 2007, the City's Taxi & Limousine Commission adopted rules to implement a Green Taxi program requiring most new taxis to meet certain fuel efficiency standards that reflect hybrid models already available for sale in the NYC market. These rules were incorporated into the City's existing taxi retirement mandate, which promotes public safety and results in an entirely new taxi fleet every three to five years. However, as evidenced by a recent federal district court ruling,² at present it is extremely difficult to create and implement a Green Taxi program without running afoul of preemption provisions of the EPCA and CAA.

New York City's taxicab fleet currently consists of about 13,000 vehicles with comparatively high annual mileage and, in many cases, virtually round the clock use, contributing to local air quality impacts. NYC is currently classified under the CAA as being in "nonattainment" for fine particulates and ground level ozone. Allowing New York to implement a Green Taxi program would achieve tangible improvements in air quality, and not be inconsistent with and, in fact, would help achieve the goals of both the EPCA and CAA by creating a reliable market for approximately 13,000 new, fuel efficient, low emission vehicles every three to five years. The importance of creating dependable markets for these vehicles cannot be overstated as the new administration seeks to create "green jobs" as a centerpiece of its economic recovery plan. Further, with NYC's existing taxi retirement mandate requiring new cars to be purchased regularly, and increasingly competitive pricing and lower operating costs for hybrid models, NYC's Green Taxi program would not impose significant additional costs on regulated entities or customers, yet the benefits would be substantial. NYC's Green Taxi program would be reasonable and implementable. The Committee therefore asks the new administration to support federal legislation that follows this model, permitting Green Taxi programs that are consistent with -- but do not themselves drive -- vehicle manufacturer innovations in air emissions and fuel mileage

5. *Cash for Clunkers.* One local-level air quality initiative that has been found elsewhere to be especially cost-effective is buying and scrapping old cars, trucks and vans still in service that have lawful but comparatively high levels of pollution due to outdated technology. We believe Federal financial assistance is warranted for such an initiative in NYC, particularly as we are prevented by federal laws from setting our own emission standards for new motor vehicles.

6. *Environmental Benefits of Maritime Freight Transport:* NYC and its great port bear witness to the many benefits of waterborne shipping, which is especially energy efficient for the transport of bulk goods, requiring only 10 to 20 percent of the energy required by truck or railway transportation. Ships emit just one-tenth of the greenhouse gas of trucks and one-half that of trains per ton-mile of freight. Any eventual federal carbon control program will likely serve to make maritime freight transport more competitive, presenting an opportunity for the revitalization of NYC and other many port cities throughout the United States that have experienced long-term declines in shipping tonnage. More immediately, we urge that infrastructure initiatives chosen for the expected federal economic stimulus package give

² See *Metropolitan Taxicab Bd. of Trade, et al. v. City of New York, et al.*, No. 08 Civ. 7837 (SDNY Oct. 31, 2008) (opinion and order granting preliminary injunction).



appropriate weight to measures such as port improvements that are aimed to maximize the environmental and social benefits of maritime transport.

7. *Cleaner Ocean-Going Marine Diesels:* Despite its relative efficiency, shipping can impose environmental costs that need regulation. New marine diesels and their fuel sold in the US must get significantly cleaner under federal rules that take effect in a few years, but foreign vessels are not covered. We believe there is a role for the federal government to negotiate further reductions in air pollution from international shipping, which especially affects NYC. Recent studies by the Port Authority of New York & New Jersey have documented the significant contribution to local airsheds from large ocean-going marine diesel engines. Accordingly, we urge the administration to work with the International Maritime Organization (IMO) to seek more stringent global limits on sulfur content in marine diesel fuels and on NOx emissions from such foreign-flag marine diesels within the framework of the MARPOL 73/78 Convention, Annex VI.³ In particular, we support adoption of the IMO Marine Environmental Protection Committee's recent proposal to amend Annex VI regulations so as to gradually reduce such sulfur content from the current cap of 4.5% to no more than 0.5% by 2020, although we would favor even greater reductions. In this regard, we favor designation of the U.S. Eastern Seaboard as a "SOx Emission Control Areas" as provided by the Annex VI procedure to set stricter sulfur limits in certain areas.

8. *Discharges from Vessels:* Similarly, efforts should continue to develop federal programs to establish new water quality discharge programs to protect aquatic life. Without strong federal standards, the states have begun to develop a patchwork of different programs that results in inconsistent and confusing state regulations. As ships call at ports such as NYC and throughout the United States and worldwide, it is vital that the federal government establish strict federal standards quickly so as to avoid the adoption of inconsistent state programs.

9. *Noise Abatement and Control:* Although compact land use development and density offer numerous environmental benefits, from preserving regional open space and biodiversity to reducing carbon emission from transport and heating, one unwelcome byproduct of urban density is noise. Noise complaints typically outnumber other issues in calls to NYC's 311 government assistance help line. Of course, much noise management must necessarily be handled at the local level. To this end, NYC has recently overhauled its Noise Code, which might serve as a model for other communities. Yet, there is a proper federal role in research and development and in setting standards. We therefore request that the statutory Federal Office of Noise Abatement and Control be reconstituted within the USEPA and funded at a reasonable level.⁴ In particular, we would welcome a research and development effort to abate noise from heavy duty diesel transport trucks, as they can be a nuisance in our urban area, given the limited rail freight capacity in NYC. Quieter cities are more livable cities, generating a virtuous circle in terms of overall sustainability in regional land use patterns.

³ Annex VI – Prevention of Air Pollution from Ships is the 1997 Protocol relating to the International Convention on the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol Relating Thereto (MARPOL 73/78).

⁴ One such effort that failed to become law in the 109th Congress was the proposed Quiet Communities Act of 2005, H.R. 2895.



10. *Energy/Climate Change: Energy Audits and Retrofits.* Buildings account for a large share of our energy needs, many of which are met by fossil fuels. Energy audits and off-the-shelf energy efficiency measures present tremendous opportunities to lower energy costs and reduce carbon emissions. In recognition of this fact, New York State has determined that certain funds it receives from the Regional Greenhouse Gas Initiative auctions of carbon emission permits to utilities will be used to help reduce demand for energy in households and businesses. This will have the added benefit of helping to create “green collar” jobs and reducing operating costs for homes and businesses, savings that in many cases can be passed on to the occupant. We commend this approach to the Federal government and to other states and believe that such energy audits and retrofits have a key role to play in our nation’s energy future. In particular, opportunities should be sought to institute suitable sub-metering for energy use in new construction and renovation of multi-unit housing, which provides strong market incentives for energy-saving behavior.

11. *Sustainable Waste Management.* NYC has had recent experience in preparing a new comprehensive solid waste management plan. We learned from this experience that there is a need for public information on sustainable waste management practices and on policy tools such as life-cycle analysis of alternatives with respect to emissions, energy use, etc. There is considerable misunderstanding of the current state of the art in deriving energy from waste responsibly. Most other cities will soon be required to prepare or update their own solid waste management plans. Accordingly, the USEPA should provide guidance to communities -- such as a handbook and interactive planning tools available on the Internet -- in evaluating waste management options and understanding what is at stake in each option from an environmental perspective over the long term, with particular attention to net carbon emissions.

12. *Sustainable Fisheries:* NYC was first inhabited largely for its abundant seafood. NYC is now highly urbanized, yet with its 512 miles of shoreline the sea wilderness remains close at hand. Fish and shellfish from that wilderness are brought to the NYC Fish Market, the largest such market on the eastern seaboard, from which they are sent to food processors, stores and restaurants. Other seafood is flown to area airports from abroad. Consumers of these products typically do not know whether they are harvested in a sustainable manner, or whether they are from a fishery in crisis or harvested in an environmentally destructive manner. Labeling requirements and/or a USEPA/NOAA sustainability seal of approval with a verification regime would be a modest but potentially effective step to help inform consumers of the consequences of their seafood choices and help drive demand for sustainable fisheries. Such an approach would be consistent with federal policy to reduce overfishing and end destructive fishing practices as expressed in the Magnuson-Stevens Reauthorization Act of 2006. A useful model might be the Marine Stewardship Council program.