

Staying Ahead

with Saul Ewing

September 2007

Environmental Law

A Newsletter by the Saul Ewing Environmental Department

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Peter Yoon Joins Saul Ewing's Environmental Department

We are pleased to announce that Peter Yoon joined the Saul Ewing Environmental Department this August. Peter comes to Saul Ewing after a distinguished 14-year career as an Assistant Counsel in the Office of Chief Counsel at the Pennsylvania Department of Environmental Protection in the Southeast Region Norristown office.

Peter brings with him considerable litigation experience involving many Pennsylvania environmental statutes, including the Air Pollution Control Act and the Clean Streams Law. While at PADEP, Peter successfully litigated cases before the Environmental Hearing Board (EHB), prosecuted summary offenses in the magisterial districts and conducted hearings in Commonwealth Court related to contempt proceedings and the enforcement of administrative orders. He has also presented oral argument before Pennsylvania's appellate court as a result of EHB appeals. "I have appeared many times before the EHB and Pennsylvania courts representing DEP and look forward to using my knowledge and experience to assist private parties in working with DEP," Peter said.

"Peter has certainly distinguished himself as an Assistant Counsel for PADEP, and his experience in air and water issues will be a tremendous asset to Saul Ewing and our clients," said Joel Burcat, Chair of the Environmental Department.

In addition to being an environmental lawyer, Peter is also an engineer. He received a B.S. in Architectural Engineering from Drexel University in 1991, and a B.S. in Civil Engineering from Drexel University in 1994. He earned his law degree in 1994 from Temple University James E. Beasley School of Law. With his technical background and extensive PADEP experience, Peter will add value to our representation of clients in environmental matters.

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New Jersey Becomes 3rd State To Adopt Greenhouse Gas Reduction Law

By Pamela S. Goodwin, Esq.

On July 7, 2007, New Jersey became the third state in the nation to adopt a greenhouse gas reduction law, a law designed to address global warming.

New Jersey Governor Jon Corzine referred to the absence of federal greenhouse gas legislation as the reason why state action is required to address global warming. Scientists believe that global warming is caused by the greenhouse effect — the trapping of radiant energy by greenhouse gases in the atmosphere, thereby warming the earth's surface.

New Jersey's Global Warming Response Act mandates a 16% reduction in greenhouse gases by 2020 and an 80% reduction by 2050.

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The most commonly recognized greenhouse gases are water vapor, carbon dioxide (CO₂), methane (CH₄), ozone and nitrous oxide (N₂O).

How greenhouse gas reductions are to be achieved will need to be spelled out in regulations or subsequent legislation, using information to be gathered by the New Jersey Department of Environmental Protection, including:

- An Inventory of Greenhouse Gas Emissions
- A Monitoring and Reporting Program
- A Biennial Status Report
- A 2020 Recommendation Report
- A 2050 Recommendation Report
- An Independent Review of Recommendations
- An Attainment Study

In preparing the required recommendations, the NJDEP Commissioner must coordinate with the Board of Public Utilities, the Department of Transportation, the Department of Community Affairs and other stakeholders. The recommendations must address all sectors of the New Jersey economy, including transportation, housing and consumer products, and must identify any legislative or regulatory action necessary to meet the reduction limits within the stated timeframes.

Immediately impacted by the Global Warming Response Act are people and entities required to report their emissions to NJDEP, including:

- Manufacturers and Distributors of Fossil Fuels
- Electricity Generators in New Jersey
- Electricity Generators outside of New Jersey who deliver power for end use in New Jersey

- Gas Public Utilities
- Significant Emitters of greenhouse gases as determined by NJDEP

While other states have set standards in the form of executive orders and regulations, only two other states have enacted legislation – California and Hawaii. Because New Jersey mandates reductions rather than simply setting targets, it is believed to be the most stringent of all of state greenhouse gas enactments to date.



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Recent Decision Gives New Jersey Municipalities Guidance On Redevelopment Initiatives

By Jane Kozinski, Esq.

In June 2007, we reported on the New Jersey Supreme Court's decision in Gallenthin v. Borough of Paulsboro, a case that analyzed the standard for determining whether an area is "in need of redevelopment". See <http://njzoning.saulnews.com>. Since that Supreme Court decision, the Appellate Court has had an opportunity to further clarify the law. Citizens in Action v. Township of Mt. Holly, July 5, 2007 ("Mt. Holly Gardens").

The site at issue was Mt. Holly Gardens, a 31-acre garden apartment complex (327 housing units) built in the 1950s.

In 2002, the Mt. Holly Township Council determined that Gardens was an "area in need of redevelopment" pursuant to N.J.S.A. 40A:12A-1 *et seq.* This decision was based on the fact that

Mt. Holly Township is in an Urban Enterprise Zone, and on several characteristics of the development – i.e., overcrowding in the residential units (with resulting parking problems and crime), the presence of abandoned units, the lack of any common area, improper drainage of surface runoff due to lack of planning, 18% vacancy rate, and poor maintenance of buildings and yards. Mt. Holly proposed a redevelopment that would involve the demolition of 379 homes and building 180 new homes that were not affordable to the residents of the Gardens. Several residents of the Gardens challenged the decision as, among other things, arbitrary and capricious and discriminatory.

The Appellate Division held that there was substantial credible evidence to sup-

port the Township's conclusion that the Gardens was an "area in need of redevelopment". The Appellate Division was persuaded by the detailed expert testimony of the Township's planner who testified as to (1) unhealthy and unwholesome conditions at the Gardens that adversely impact the whole complex (accumulated trash; broken windows, fences, steps and roofs); and (2) the unproductive use of the property and features of the Gardens that are detrimental to the health, safety, morals or welfare of the community (e.g., the adverse affects of diversity of ownership and absentee landlords; decay of the buildings, streetscape and lighting; poor land utilization and concentration of crime). The Court also seemed persuaded by a photographic record of the dilapidated conditions at the Gardens.

The Supreme Court's decision in Gallenthin suggested that the courts would carefully scrutinize municipalities' redevelopment determinations and hold the municipalities to a high standard. Indeed, the Appellate Division in Mt. Holly Gardens did just that and concluded that the municipality's determination had met that high standard. Based on the Mt. Holly Gardens decision, New Jersey municipalities now have some guidance on how to create redevelopment designations and plans that will "stick" – i.e., factual details are paramount. Municipalities that are grappling with overpopulated, dilapidated apart-

ment complexes ought to be pleased with the Mt. Holly Gardens decision because this decision provides a helpful roadmap for advancing a redevelopment strategy.



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Selecting Experts to Testify at Trial

First in a series of articles on expert witnesses

By John F. Stoviak, Esq. and Cathleen M. Devlin, Esq.

When environmental cases go to trial, the outcome is often directly related to the effectiveness of each party's expert witnesses. Selecting an effective expert to testify at trial is a very different task than identifying capable environmental engineers and scientists to assist a client with an environmental problem. Indeed, expert witnesses for trial must not only be qualified in a technical sense, but also must have the communication and presentation skills to function as subtle, yet persuasive, advocates for your client at trial. A brilliant hydrogeologist with a mastery of groundwater flows and modeling and a myriad of published works on hydrogeology will not be an effective trial witness if she speaks in a language that can only be understood by fellow hydrogeologists, and her testimony is cluttered with a tangle of incomprehensible acronyms and multisyllabic technical terms.

An expert witness for use at trial must be an effective communicator who can break complex concepts down into simple components that will be digestible by non-scientist laypersons. Ideally,

the expert would be someone who feels comfortable in the role of teacher, able to impart knowledge in a clear and effective manner. Her priority should be for her audience to be able to learn from her and comprehend how her testimony supports your case, as opposed to trying to impress her audience with her expertise through unnecessarily hyper technical language. On an interpersonal level, the ideal expert witness for trial is engaging and poised in making a presentation, avoids responding to questions in a manner suggesting intellectual arrogance, and has the presence and charisma to effectively deflect aggressive questioning on cross-examination.

So how do you find an expert witness who will be effective at trial? First and foremost, counsel should consult their colleagues and others in the legal community with environmental trial experience for personal referrals. Particularly for highly-specialized subject areas, on-line expert directories

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SPEAKING OUT

Members of the Environmental Department regularly speak and write about issues impacting environmental law. Joel R. Burcat, Partner and Chair of the Environmental Department, was on the faculty for the Environmental Law Forum in Harrisburg, PA on April 11, 2007. His presentation was titled, "Deal or no Deal?: ASTM Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."

Mr. Burcat also presented at the Pennsylvania Aggregates and Concrete Association 25th anniversary summer meeting in Gettysburg, PA on June 13, 2007. The title of his presentation was, "The SRBC's New Regulations and Their Impact on the Mining Industry."

In November, members of Saul Ewing's Environmental Department will host a seminar for businesses in the concrete and mining industry in New Jersey. Jane Kozinski, Partner and Vice Chair of the Environmental Department, and Partners Henry L. Kent-Smith and Robert H. Louis, of the Real Estate and Personal Wealth, Estates and Trusts departments, respectively, will speak at the November 15 seminar.

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and CV databases can be consulted for additional ideas. Once you have developed a list of possible experts qualified in the appropriate area of expertise, information should be solicited from each expert on the list, including a complete CV providing the details of all prior testimony experience, references, as well as an inventory of all articles or other publications authored by the expert. Then, based upon your evaluation of this information, refine your list to approximately two to four experts and arrange to interview each in person. Meeting with multiple potential experts has the added benefit of creating a unique opportunity to discuss and identify new issues, angles and approaches to your case. Above all, however, the impor-

tance of taking the opportunity to interview your “short list” of potential experts face-to-face cannot be understated. In order to meaningfully assess the effectiveness of an expert as a trial witness, you need to experience firsthand how the expert presents herself and communicates, both verbally and non-verbally — how she listens, articulates her views, reacts to questions and the like.

This article is the first in a series designed to help you select effective expert witnesses to testify at your environmental trial. Future newsletters will address the process of retaining an expert, qualifying the expert and preparing him/her to testify at deposition and trial, and communicating with the expert given applicable

rules and cases governing disclosure requirements for such communications.



This article was written by John F. Stoviak and Cathleen M. Devlin, Partners in Saul Ewing's Litigation Department. Mr.

Stoviak, former Chair of the Environmental and Litigation departments, focuses his practice on handling and trying complex commercial litigation and environmental cases. Ms. Devlin focuses her practice on environmental matters, and has extensive experience representing corporate clients named as potentially responsible parties (PRPs) at sites throughout the north-eastern United States. If you would like to discuss the contents of this article, please contact John at 215.972.1095 or jstoviak@saul.com or Cathleen at 215.972.8562 or cdevlin@saul.com.

Pennsylvania Storage Tank Law Applies to Pre-Enactment Conditions per Federal District Court

By Carl B. Everett, Esq. and Peter J. Yoon, Esq.

Near the Penrose Avenue Bridge in South Philadelphia there is a plume of petroleum contamination underlying portions of the Sunoco refinery and the nearby federal Defense Supply Center Philadelphia. In 1996, the United States and Sunoco agreed to remediate the plume under a Consent Order and Agreement with the Pennsylvania Department of Environmental Protection (“PADEP”). The agreement fell apart, and PADEP ordered the United States to perform the remediation. The United States claims to have spent more than \$22 million on remediation to date and expects to incur additional expenses.

The United States sued Atlantic Richfield, the refinery's owner until 1985, and Sunoco under the Pennsylvania Storage Tank and Spill Protection Act (“Tank Act”), the Pennsylvania Uniform Contribution Among Tortfeasors Act (“UCATA”) and the federal Declaratory Judgment Act. *United States v. Sunoco Inc. E.D. Pa., No. 05-6336*. Sunoco was also sued under the Pennsylvania Clean

Streams Law. On August 8, 2007, U.S. District Judge Anita B. Brody issued an opinion addressing numerous issues raised by defendants.

Sunoco and Atlantic Richfield sought to dismiss the UCATA claims on the basis that a Tank Act violation does not constitute a tort. Judge Brody disagreed, noting that a Tank Act violation is defined in the Tank Act as a public nuisance and that Pennsylvania courts consider public nuisances to be a kind of tort. The defendants also argued that the United States failed to plead adequately that it and defendants were joint tortfeasors and that they were not in fact joint tortfeasors because their contributions to the plume were separate, not joint. Judge Brody found the government's pleading adequate because it acknowledged that at least 5% of the contamination was attributable to the United States and that cumulative additions to a common injury create joint tortfeasor status. Judge Brody also rejected Sunoco's argument that the United States must waive sovereign immunity under the

Federal Tort Claims Act to be a tortfeasor because the federal statute only applies to money damages; tortfeasor status in this case was based on public nuisance, for which abatement was sought.

Defendants argued that a liable party cannot use the Tank Act's private right of action. Since no such limitation appears in the statute, Judge Brody disagreed. The judge also rejected defendants' argument that the United States' claim was really based on implied contribution, not authorized by the Tank Act, since it was not seeking recovery of all response costs. Plaintiffs' position was likened to the now authorized cost recovery claims by liable parties under CERCLA.

The Tank Act contains a rebuttable presumption of liability for those owning or operating a storage tank within 2,500 feet of the pollution at issue. Judge Brody held that the presumption may be used by a liable party but only against the current owner, Sunoco, since the statutory text is written in the present tense. Former

owner Atlantic Richfield avoided the presumption although the facts suggest that proving liability against Atlantic Richfield will not be particularly difficult. Judge Brody also found that the actions by PADEP did not constitute diligent prosecution which would bar a claim under the Tank Act.

Most significantly, Judge Brody rejected Atlantic Richfield's argument that allowing suit against it under the Tank Act is disallowed by Pennsylvania's general prohibition against retroactive application of laws. Judge Brody found that the Tank Act regulates the condition of the land as it existed at the time of enactment, and not the conduct or the originating leak itself. Atlantic Richfield sold its interest in the property prior to the Tank Act's effective date, but Judge Brody ruled that it is not retroactive to apply the Tank Act to remedy petroleum contamination that may have originated in pre-enactment leaks. The Tank Act claims also provided

a basis for a UCATA claim by the United States as a joint tortfeasor, even though in this particular case the Tank Act claims themselves were time barred. Atlantic Richfield also failed in its argument that the definition of owner under the Tank Act, which includes those who owned a tank on November 8, 1984 or who owned a tank when regulated substances were removed prior to that date, was a legislative mistake which should be corrected by substituting the date when the Tank Act became effective in 1989.

Finally, the court allowed the United States' claim against Sunoco seeking compliance with the Clean Streams Law and abatement of discharges of petroleum hydrocarbons to proceed. Judge Brody did not find duplication between the United States' claim and a 2003 consent order between Sunoco and PADEP because the latter does not require Sunoco to limit continuing offsite migration of contamination.

The litigation among the parties continues. Any appeals may not be filed for some time. In the meantime, Judge Brody's holdings may present opportunities for those affected by contamination left by prior tank owners. Even if PADEP is foreclosed from pursuing remediation against former tank owners, it appears that a party can perform remediation and press a claim under the Tank Act and the UCATA against a prior owner who contributed to the condition of the property.



Carl B. Everett is a Partner in the Environmental Department. He has been practicing environmental law

for more than 30 years, focusing on CERCLA, regulatory compliance, enforcement matters brought under federal and state environmental statutes, and tort litigation. Peter J. Yoon is an Associate in the Environmental Department who concentrates his practice on litigation matters involving air and water issues.

Court of Appeals Decision May Impact Pennsylvania's Surface Coal Mining

By David J. Raphael, Esq. and Peter J. Yoon, Esq.

If a recent Third Circuit decision stands, it may become more expensive to conduct surface coal mining in Pennsylvania. The Third Circuit's recent decision in *Pennsylvania Federation of Sportsmen's Clubs v. Kempthorne*, 2007 WL 2199127 (3rd Cir. August 2, 2007)(No. 06-1780) may require Pennsylvania to amend its surface coal mining program's bonding requirements. Should this decision stand, Pennsylvania's current bonding program for surface mining will no longer comply with federal mining statutes. In short, Pennsylvania will need to do something to its regulatory program to comply with federal law. What that something is, and how that something will impact mine bonding in Pennsylvania, including per acre reclamation fees, is yet to be determined. The United States Interior

Department's Office of Surface Mining ("OSM") is weighing its legal options in the wake of this decision.

On August 7, 2007, the Third Circuit reversed the judgment of the U.S. District Court in favor of a coalition of nonprofit organizations. The ruling set aside a grant of summary judgment by the District Court sustaining actions of OSM to terminate requirements imposed on Pennsylvania to ensure adequate funding for mine discharge abatement and treatment at all surface coal mines. The court decision strictly interpreted the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1201, *et seq.*, which Congress enacted to ensure the reclamation and treatment of all post-SMCRA mining areas.

Specifically, the court set aside two actions taken by the OSM in 2003 that approved Pennsylvania's conversion from an alternative bond system ("ABS") to a conventional bond system, or "full cost" bonding system ("CBS"). From 1981 to 2001, Pennsylvania opted for an ABS which allowed owners of mines to post site-specific bonds set below the cost of reclamation and then pay into a statewide bond pool called the "Surface Mining Conservation and Reclamation Fund" ("PA SMCRA Fund"). By 1991, however, the ABS was deficient and left Pennsylvania with a reclamation fund insufficient to abate or permanently treat discharges from abandoned coal mines. As a result, the OSM notified Pennsylvania that its regulatory program

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was deficient and needed to be amended to meet minimum federal standards. OSM also required Pennsylvania to perform a comprehensive study to determine if a revised ABS could provide financial soundness. In response, Pennsylvania raised the fee of the one-time, non-refundable, per-acre reclamation fee paid by surface coal mine operators into the PA SCMRA Fund from \$50 per acre to \$100 per acre. Then in 2003, Pennsylvania abandoned the ABS as its bonding program and converted to a CBS.

The Third Circuit's decision made clear that Pennsylvania must ensure complete reclamation of sites that were originally bonded under the ABS and forfeited prior to the CBS conversion, and those additional sites whose reclamation costs

were not yet fully covered by CBS bonds. The court held that SMCRA was enacted to require complete reclamation of these abandoned mines and to assure that untreated mine discharges of these abandoned sites are abated. As a result, Pennsylvania must have "available sufficient money to complete the reclamation plan for any areas which may be in default at any time..." The court found that the words "any areas which may be in default at any time" indicated that the obligations were ongoing and apply at any time, so long as those mining areas originally bonded under ABS, and not yet converted to CBS bonds, still exist. Pennsylvania therefore must demonstrate adequate funding for the complete reclamation and treatment of all ABS forfeiture sites until such time when these sites are successfully reclaimed or adequate replacement bonds under the new CBS are in place.



David J. Raphael and Peter J. Yoon are Associates in Saul Ewing's Environmental Department. Mr.

Raphael concentrates his practice in administrative, civil, and criminal environmental matters, and commercial litigation, representing clients in federal and state enforcement actions concerning groundwater and surface water contamination, the regulation of hazardous and residual waste, storage tank compliance issues, and various regulatory issues related to the construction and petroleum industries. Mr. Yoon concentrates his practice in environmental litigation involving air and water issues. Prior to joining Saul Ewing, he was Assistant Counsel for the Pennsylvania Department of Environmental Protection, Office of Chief Counsel, where he represented the Department in litigation matters arising under the Pennsylvania Air Pollution Control Act and Clean Streams Law.

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