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From the Editor

The Environmental Law Section is presently undergoing what I think of as a 20-year review. We've now had two separate Fall meetings celebrating the completion of two decades of existence, accompanied by worthy backward glances, but our Section leaders are enthusiastically examining how to move forward. This entails, in part, a re-structuring of the Section, a close attention to how we perform our mission and a fresh look at how we can better achieve that goal. In furtherance of that effort, the "Committee on Committees" was formed last year and has now met several times to closely examine the committee structure, where many of our ideas and efforts are generated and the bulk of our production occurs. The supra-committee is chaired by Virginia Roberts. A Fall retreat was held in October in the Arden House in the vicinity of Harriman State Park, where several attendees had several opportunities to meet together, identify the issues the Section will likely face, and to brainstorm—or at least to begin the process (note to attendees: I went negative on the SUV). Ginny's article on the retreat will be forthcoming. As a result of the retreat, Phil Dixon, in consultation with several others, has started the process of drafting a Chair manual for purposes of guiding committees and their Chairs in enhancing committee potential. This remains a work in progress, along with proposed revisions to the bylaws, and readers will be kept informed.

In this issue, Kenneth Kamlet submits a comprehensive and thoughtful article on brownfields regulation in New York—where it's been and where he thinks it's going. Here, too, efforts to evaluate the past, but also move forward, are commendable. Ken represents developers, but also has been on the regulatory side and he even started out with the National Wildlife Federation. I'm sure that this article will generate a lot of discussion. As always, responses to articles are welcomed by the *Journal*. Joseph LaValley submits an article on local land use and its connection with environmental matters. His article, which placed first in the Section's Environmental Essay Competition, analyzes the formation of new municipalities as a means of resolving land use disputes, specifically addressing the Rensselaer County Village of East Nassau, as distinct from the erstwhile unified Town of Nassau. Elizabeth Vail, from St. John's Law School, has again shepherded the student case summaries. In the interim, though, one decision, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* (145 F. Supp. 2d 505 (D.N.J. 2001)) has been reversed (274 F.3d 771 (3d Cir. 2001)), so a summary of the Circuit Court ruling should be included in the next issue.

Kevin Anthony Reilly

Inside

Brownfields Regulation in New York State: A Disappointing Report Card

By Kenneth S. Kamlet

"Brownfields" are

> abandoned, idled, or under-used properties where expansion or redevelopment is complicated by real or perceived environmental contamination. They typically are former industrial or commercial properties where operations may have resulted in environmental contamination. Brownfields often pose not only environmental, but also legal and financial burdens on communities. Left vacant, contaminated sites can diminish the property value of surrounding sites and threaten the economic viability of adjoining properties.[1]

Brownfield sites generally differ in both degree and kind from other contaminated sites. They differ in degree of contamination because they exclude the most heavily contaminated sites—for example, those on the federal National Priorities List, those subject to RCRA corrective action, those subject to active federal or state enforcement and those classified in New York State's Registry of inactive hazardous waste disposal sites (pursuant to N.Y. Environmental Conservation Law (ECL) § 27-1305) as "Class 1" (presenting an imminent danger of causing irreversible or irreparable damage to public health or the environment)[2] or "Class 2" (significant threat to public health or the environment—action required).[3] They also include sites (often considered to represent the bulk of "brownfield" sites) that are merely "perceived" to be contaminated—where the stigma or fear of contamination operates to discourage beneficial use or reuse of the property. "The majority of contaminated sites cleaned up under the Voluntary Cleanup Program [do] not present the complexities found at State Superfund sites."[4]

Brownfield sites also differ in kind from other contaminated sites. Not only do they generally not pose significant risks to public health and the environment, but they tend to be associated with urban decay; tending to be located primarily in older cities, often in economically disadvantaged areas. Ironically, they are both the product of the departure of major industrial employers (i.e., lost jobs result in higher unemployment and reduced productivity) and a cause of a continued decline in property values (i.e., the deteriorated condition of many of these properties reduces the value and desirability of surrounding properties, causing the spread of urban blight).

While the cleanup of more heavily contaminated properties is driven by the need to abate a hazard to public health and the environment, brownfield sites will generally be cleaned up only if incentives are provided to encourage their reuse and redevelopment.[5] Failure to provide these incentives will primarily hurt the economically disadvantaged and racial minorities who cannot afford to move to the suburbs or chase after higher-paying jobs. It will also hurt the state's older cities, towns and villages which are already straining to maintain aging infrastructure and more costly community services in the face of a rapidly declining tax base.

If the right incentives are not provided to stimulate the cleanup and reuse of brownfields, it will not hurt the wealthy or land developers. They will simply go to the suburbs or to "greenfield" areas not yet marred by urban decay or pollution. This will require more public resources to be spent on costly infrastructure (new roads, public water and public sewer) and new community services—leaving even less for older urban areas.[6]

The "Brownfields Coalition" in New York[7] likewise recognized that eliminating the barriers to the cleanup and redevelopment of brownfield sites is important for reasons going beyond eliminating threats to public health and the environment. It acknowledged[8] the importance of the following additional goals:

- "Preserving the maximum number of greenfield sites in New York State, preventing continued sprawl[9] and environmental degradation and supporting sustainable development and smart growth for the state's cities, suburbs and rural areas; [and]
- "Promoting the physical, economic and social revitalization of communities affected by brownfields. . . ."

It took 15 years of experience using the rigid and punitive "strict, joint and several, and retroactive" liability approach of CERCLA[10] and parallel state Superfund laws for it to dawn on government regulators that this was a no-win, counterproductive situation. The Superfund "atomic bomb" approach was preventing rather than stimulating the cleanup of lesser-contaminated brownfield sites and was contributing to the economic decay of cities throughout the country. Owners and operators of such properties were keeping them off the market to avoid calling them to the attention of regulators—so that the risk of being forced to carry out an expensive cleanup would not materialize.

Beginning in 1995, and continuing thereafter, the EPA launched a series of brownfields initiatives designed to stimulate voluntary site clean ups and promote economic revitalization. What had been a trickle of similar state programs (beginning with Minnesota in 1988) became a torrent of state brownfield reforms. By early 1997, there were at least 39 state brownfield programs. Today, virtually every U.S. state and territory has a brownfields program.

Unfortunately, New York State remains one of the small handful of states lacking a statutory voluntary cleanup program for brownfields. Indeed, the New York program is not even grounded in formal regulations or published guidance. Although this unhappy circumstance may be remedied in the near future, there are significant underlying problems with the structure and philosophy of the New York program that show no signs of changing for the better.[11]

This article will outline and illustrate some of the problems with New York's brownfields/voluntary cleanup program and with pending reform proposals. It will point the way toward some possible improvements. I wrote it from the vantage point of a native New Yorker (CCNY, B.S. 1966) who returned to New York State in 1998 after spending 26 years in the Maryland suburbs of D.C. observing how things are done in the rest of the country.

New York State Background

In 1996, Governor Pataki addressed the Business Council of New York State.[12] He praised reforms that led New York to be ranked for the first time by *Site Selection Magazine* as being "among the top ten sites in the country to locate new industrial sites or expand existing facilities." He boasted of putting state government "on a strict diet of less spending, less regulating, and a lot less taxing." In a brief reference to environmental issues, he affirmed, "We've already proven that economic development and environmental protection go hand in hand." He trumpeted the "good news" that "today, victims of bureaucracy no longer have to tolerate the intolerable" and pledged that "when this government is not acting as it should," let us know "and it will be fixed." "You can count on it. . . ." "Case by case," he said, "we're replacing the slow and cynical attitude of the past with a new attitude that embraces change, rises to new challenges and moves with us on the road to renewal."

In localities across the state, the Governor and his environmental conservation commissioner have endorsed the state's brownfields program as a way of turning abandoned or underused properties "into community assets, creating jobs and revenues for local residents," and as "providing a successful mechanism for environmental renewal and economic opportunity."[13]

On a statewide basis, the Governor has pressed for legislation to refinance and improve New York's Superfund program, endorsing, among many other points, a recommendation by the 1999 Superfund Working Group that state law should "[f]ocus liability on true polluters and free innocent purchasers from liability, while ensuring that actual polluters are not relieved of any financial or legal responsibilities."[14] Unfortunately, some of the Governor's other proposals may have counterproductive consequences. For example, the Governor has proposed to maintain "the most stringent environmental and public health standards in the nation,"[15] and to apply to the voluntary cleanup program "the same goal as set forth in the State Superfund Program."[16] Establishing "one cleanup objective for the State Superfund Program, Voluntary Cleanup Program, and remediations which do not constitute an immediate response cleanup under the Oil Spill Program" (a unified program approach) is justified as a way to "provide certainty, predictability and consistency among the State's many cleanup programs. . . ."[17] The bill provides that the common "cleanup goal be protection of the public health and environment and, at a minimum, elimination or mitigation of all significant threats to the public health and environment."[18]

A cynic might wonder whether the overriding goal of a unified program may not really be "to get more sites cleaned up more quickly with private dollars . . . [which will] reduce the burden on New York taxpayers and businesses for the costs of the state share on cleanups."[19] A better way to reduce costs and create positive cash flows—as the state has recognized in its commendable Empire Zone program—is to incentivize the cleanup and redevelopment of festering brownfield sites so that they start generating meaningful property, sales and income taxes.

A results-oriented cleanup goal, related to health and environmental risk, is clearly preferable to the arbitrary goal of restoring all contaminated sites "to predisposal conditions."[20] However, there is cause for concern that, in the interest of "certainty, predictability and consistency," cleanup volunteers who did not cause or contribute to contamination of low-risk brownfield sites will be held (both under the Governor's Superfund reform program and under most of the other reform proposals put forward by other political leaders) to the same procedural and/or substantive standards as recalcitrant polluters responsible for creating high-risk Superfund sites. Indeed, even if brownfield volunteers were ultimately subjected to lesser cleanup obligations (based on lower risks), if they were forced to carry out steadily expanding monitoring for many years to prove

to the satisfaction of DEC and DOH that their site did not present a significant risk, the deterrent effect on volunteers might be similar.[21]

Although I view some elements of the Governor's reform legislation as problematic (while other features are clearly meritorious),[22] most of the other Superfund reauthorization proposals (offered by various legislators) raise similar or even more significant concerns.

Under current law (article 27, title 13), DEC has authority to order "responsible parties"[23] to remediate inactive hazardous waste disposal sites that pose a significant threat to the environment. Under proposed reform legislation, cleanup volunteers would be held to the same standards as responsible parties—even at sites that are not inactive waste disposal sites and which do not present a significant threat to the environment. That hardly sounds like focusing liability on true polluters and freeing innocent purchasers from liability. Nor does it sound like a lessening of intolerable bureaucracy or a way to attract new employers to New York State.

New York's Current (Administrative) Voluntary Cleanup Program

Whoever penned the aphorism "no good deed goes unpunished" could have had New York's Voluntary Cleanup Program (VCP) in mind. Indeed, DEC sometimes appears to apply more energy and attention to exacting the last ounce of clean up or monitoring from well-intentioned volunteers than it does to ferreting out and bringing to justice unrepentant polluters.

Although doubtless established with the best of intentions, the VCP has mutated into a bureaucratic quagmire from which, once entered, there is no painless escape. Indeed, sophisticated property owners, developers, environmental professionals and municipal officials in New York State have come to recognize that, for most brownfield sites, it is vastly quicker, easier, less expensive and less risky to proceed (based on the advice of their own environmental professionals) without involving DEC than to try to obtain a liability release under the VCP. There is unfortunately little to suggest that proposed new regulations or legislation will change matters significantly for the better. Indeed, in some important respects, the proposed reforms may make matters worse.

The DEC launched the VCP in October 1994 pursuant to the general grant of authority under ECL § 3-301. Administrative guidance, seen by few outsiders, can be found in Organization and Delegation Memo # 94-32, Policy: Voluntary Cleanup Program.[24] The only "published" guidance (undated, but not issued until long after the program was initiated) is contained in a 3-page Division of Environmental Remediation Fact Sheet (Voluntary Cleanup Program Web site, which can be found at <http://www.dec.state.ny.us/website/der/vcp/vcps.html>).

In the early years of the program, written guidance to prospective VCP applicants largely consisted of reprints of a speech by Charles E. Sullivan, Jr., then Chief of the Inactive Hazardous Waste Site Enforcement Bureau of DEC's Division of Environmental Enforcement.[25] (Larry Schnapf has aptly referred to this as "rulemaking by speechmaking.") Among other things, this document included the following assertions:

> Dealing head-on with developer concern over potentially unlimited remedial liability when involved with contaminated parcels, this program provides a definite end point to the developer's remedial commitment by establishing pre-determined cleanup objectives that, once reached will trigger the Department's provision of qualified past contamination remediation liability releases. (p. 2).
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> The volunteer will investigate the site to gather information needed to determine the appropriate cleanup level, which will be a level consistent with the safe use of the property for the purpose to which the volunteer intends the property to be used and the document will identify the cleanup level to be attained or the process to be used to determine that level. . . . As can be seen, then, *risk-based assessments determine cleanup levels* [emphasis added]. However, while the ARAR concept does not automatically drive cleanup levels—as it does under CERCLA, State standards certainly must be accounted for in the risk-based assessment decision-making; how they are accounted for is determined on a site-specific basis. This being said, though, we continue to evaluate how to apply the risk-based assessment methodology to contaminated groundwater situations; at this point it does not appear clear how [it] would apply risk-based determinations any differently than what presently is done for non-volunteer sites, *viz*, groundwater standards are considered, as are the potential for use, discharge to surface water, and the practicability of cleaning up to standards. (p. 5).
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> Volunteers who are not PRPs [Potentially Responsible Parties] and volunteers who are PRPs solely by reason of site ownership must remediate on-site contamination to agreed-upon levels and must eliminate sources of onsite contamination that cause offsite impacts. (p. 5).

To aid attorneys in the negotiation of Voluntary Cleanup Agreements (VCAs), the Hazardous Site Remediation Committee of the NYSBA's Environmental Law Section formed a Brownfields Subcommittee to review the agreements issued by DEC and to prepare periodic reports summarizing these agreements and analyzing certain features and trends in these agreements. The first such report was published in *The New York Environmental Lawyer*, Vol. 16, No. 4, pp. 17–28 (Fall 1996). (It covered agreements Nos. 1–31 and 34 issued through September 20, 1996.) The twelfth and final report (covering agreements Nos. 95–97) was published in the Spring/Summer 2000 issue (Vol. 20, No. 2).[26]

The first report by NYSBA's Brownfields Subcommittee included a useful summary of the "Elements of the Voluntary Cleanup Program," at least as reflected in the first 30-plus VCAs. One observation in this report (p. 19) is worth highlighting. The report states: "For cleanups under the ECL, the DEC has taken the intended site use into account when developing cleanup standards for the voluntary cleanup program, *but it does not appear that the cleanup standards for non-residential uses are any less stringent than for non-residential property cleanups under the traditional ECL program*" [emphasis added]. No mantra is recited more frequently in the context of the VCP than that sites are to be cleaned up consistent with their present and anticipated uses. However, no guiding principle seems to be more casually disregarded. This is unfortunate because use-based (or risk-based) cleanups are *the* fundamental underpinning of successful voluntary cleanup programs throughout the U.S.

A note by Larry Schnapf in the Fall 2000 issue of *The New York Environmental Lawyer* (Vol. 20, No. 3) announced that the Brownfields Subcommittee would "no longer be reviewing prior VCP agreements" in light of DEC's plans to change "the form VCP agreement to one that does not undergo negotiation." The note also referred to consideration being given by DEC to issuance of "a new informal technical guidance document which would be designed to expedite the investigation and remediation process." As of the beginning of 2002, neither of these guidance documents had been formally promulgated.

Although establishing non-negotiable VCA forms and standard site characterization and remediation procedures can be a good thing—from the standpoint of reducing transaction costs and enhancing certainty and predictability—it is not an unmixed blessing. An immutable form of agreement suggests a rigid, one-size-fits-all philosophy that may not always make sense and may serve to further inhibit volunteerism. And standardization of procedures, while a convenience for bureaucrats, may smother the ability to expedite sign-offs on low-risk sites. This is in no way meant to downplay the importance of clearly stated, predictable, upfront "rules" that define the procedures by which the "game" will be played and the goals by which the outcome will be evaluated. Certainly, written rules are better than no rules, or rules that are available only to the umpires, but not to the players.[27] Unfortunately, DEC has been known to disregard the rules in the past (e.g., as set forth in mutually binding VCAs) and to change the rules in the middle of the game. It is not clear that merely issuing another "playbook" will necessarily improve matters in this regard.

How the DEC Program Departs from Accepted Brownfields/VCP Principles

These principles are based on the established approaches of the U.S. Environmental Protection Agency and the vast majority of U.S. states and territories. Indeed, while many DEC and other New York State officials (as well as various N.Y.S. working groups, task forces and coalitions) may claim to support some or all of these principles in concept, the practical reality has often been very different. Unfortunately, in order for the brownfields/voluntary cleanup program in New York State to accomplish its complementary environmental cleanup and economic development objectives, would-be private sector (and/or municipal) participants must have reason to believe (a) that there is some benefit to participating in the program (as opposed to proceeding on their own or finding a less risky greenfield site), and (b) that in setting rules and procedures, DEC says what it means and means what it says.

1. Program Procedures, Standards and Objectives Must Be Written, Clear, Enforceable and Stable

In New York currently, the voluntary cleanup program has no explicit statutory or regulatory authority. Program objectives have been primarily set forth in speeches and press releases rather than in written guidance. The emphasis and requirements of the program have changed with changes in responsible DEC personnel. The DEC professionals (i.e., in field offices and at the regional level) who primarily deal with cleanup volunteers, have little autonomy to make decisions or provide reliable guidance because they can be (and often are) overruled by headquarters officials. What written guidance that has been developed is often unpublished and withheld from the public.[28]

What is needed—the voluntary cleanup program must be given specific legislative authorization, backed up by duly promulgated rules, and in accordance with published guidance and procedures. Superfund reform legislation proposed by the Governor and others would give the voluntary cleanup program a statutory basis. (This is good in principle—although an unworkable statutory program is no better than an unworkable administrative one.) If such legislation is not enacted shortly, however, DEC should move forward with the establishment of formal VCP regulations, following notice-and-comment rule-making.

2. The Program Must Provide Certainty and Predictability

Currently, the only certain and predictable feature of the DEC program is its *lack* of certainty and predictability. Voluntary cleanup agreements will often establish performance objectives (e.g., removal of contamination sources, avoidance of adverse impacts on human health or the environment). However, DEC will typically require extensive monitoring—to verify that sources have been removed, then to ensure that trends are in the right direction, then to answer questions about how quickly levels will decline, and finally just for the sake of operation and maintenance. If levels in soil, groundwater or indoor (or outdoor) air are considered "too high" at any stage by anyone in the decision-making framework, engineering controls may be required—even if natural attenuation would quickly yield the same result. (Even if presumptive remedies are implemented early on, this will usually not be viewed as reducing the need for extensive investigation or continued monitoring.) If groundwater is contaminated, monitoring and cleanup requirements are likely to be extensive and protracted. This is true regardless of whether nearby groundwater is used as a drinking water source, and even if nearby drinking water supplies are shown not to be threatened. It is especially true if the groundwater contaminants are known or suspected carcinogens (even if the actual cancer risk is vanishingly small).[29]

What is needed—upfront certainty and predictability (while permitting appropriate site-specific flexibility). Cleanup volunteers must be able to rely on the immutability and inviolability of the obligations set forth in the Voluntary Cleanup Agreement they signed onto.

The Governor's Superfund reform bill proposes to provide predictability by providing "one cleanup objective" (i.e., a very stringent one) for the State Superfund Program, the Voluntary Cleanup Program and certain Oil Spill cleanups. While this may provide "certainty, predictability and consistency" among all of the state's cleanup programs, it is likely to eliminate any incentive for a volunteer to step forward. Unless the site is very valuable, a prospective purchaser or developer will simply go to another site that won't require a costly DEC cleanup, while existing site owners or operators who may be forced to clean up if DEC gets on their trail will be tempted to "hide in the weeds" and hope that DEC will never get around to them. Trying to force consistency among very different cleanup programs will be counterproductive. What is needed are fast-track procedures for low-risk brownfield sites and more deliberative requirements for higher-risk sites. Instead of requiring all residents to wear size 9 shoes for the sake of uniformity (assuming the state played a role in regulating shoes, which it doesn't), it would be better to ensure that shoe sizes have a consistent meaning from one part of the state to another and that resources are not being misallocated by making shoes larger than they need to be. (I apologize for the shoe metaphor, but if the shoe fits. . . .)

3. The Voluntary Cleanup Program Needs to Have Cleanup Standards[30] That Are Risk-Based, if Volunteers Are to Have an Incentive to Participate

If a volunteer at a low-risk brownfield site is forced to clean the site up to pre-disposal pristine conditions, or if a volunteer who wants to use the site for a factory must clean it up to the same standards as a playground or nursing home, fewer and fewer volunteers will come forward.

What is needed—the cleanup remedy must be geared, both in concept and in reality, to current, intended and reasonably anticipated future land uses at the site. Adjacent property uses should also be taken into account, but only where there is a plausible risk that such properties may be significantly impacted (e.g., are in the down-gradient path of a rapidly moving contaminant plume). Merely *saying* that the remedy is geared to present and future land uses does no good if the same stringent procedures and cleanup standards end up being applied in practice without regard to the land use.

4. The Program Must Not Treat Volunteer, Non-Contributory Owners and Prospective Purchasers and Developers the Same as Culpable Responsible Parties

The DEC has great leverage over responsible parties at Class 2 inactive hazardous waste (state Superfund) sites, especially if they directly contributed to the contamination. If such PRPs do not cooperate, DEC can take enforcement action against them. (Legislative reforms, such as those advocated by the Governor to enhance DEC's power to issue administrative orders and pursue treble damage penalties against recalcitrant PRPs, are—if appropriately structured—necessary, reasonable and even desirable.)

Although DEC may also find itself with great leverage over non-contributory cleanup volunteers, it is critical that DEC resist the temptation to treat the innocent volunteer as either an evildoer deserving of punishment, or as a deep pocket ripe for the plucking. Volunteers, who often have no existing connection to the brownfield site in question, typically come forward because they'd like to do something with the site that may be beneficial both to them and the community, but are concerned about real or perceived contamination (usually of unknown severity). If they can obtain assurances from DEC that they are not opening themselves up to never-ending cleanup liability, they may be willing to embark upon a voluntary cleanup—if the rules are explained clearly, upfront; if the process has a clear beginning and end; and if closure can be achieved relatively expeditiously. Nothing could be more destructive to the volunteer's willingness to participate than to be treated like the enemy by DEC.

If cleanup volunteers are treated like polluters—for the sake of consistency, or otherwise—the supply of volunteers will quickly dry up. There are alarming signs that this is already occurring. (*According to DEC data,*[31] *12 VCP investigations and 14 remediations were completed between March 31, 1998, and March 31, 1999, but those numbers dropped to 6 investigations and 9 remediations during the following fiscal year, and to only 2 investigations and 4 remediations during the fiscal year ending March 31, 2001.* This rapid downward trend should signal decision makers that "something is rotten in the State of Denmark.") Since innocent volunteers cannot be forced to volunteer or to stay in the program through the threat of enforcement, ill-treatment of volunteers will either force volunteers to gravitate to less risky sites (generally further removed from the urban core), or induce them to rehabilitate sites on their own without involving DEC.

The former outcome is undesirable in the long run from the standpoint of both environmental management and socioeconomics. The latter outcome is probably the most sensible in most cases (given the realities of the DEC program), but could be risky to the volunteer if a serious environmental problem was present but was not detected.

A capital punishment metaphor may be appropriate in this context. It is better for society that the system allows 1 guilty person out of 100 to go free, than it is to have a system that is willing to execute 1 innocent person out of 100 in order to ensure that no guilty person goes unpunished. In the voluntary cleanup program context, a program that gives volunteers the benefit of the doubt and facilitates accelerated cleanups will clean up many more sites, more quickly, than a program entwined in red tape that suspects everyone and scrutinizes every detail for fear of allowing an unclean site to be redeveloped. In fact, the latter type of program may succeed only in losing all its volunteers and in cleaning up nothing.

What is needed—an approach that recognizes and acknowledges the crucial differences between volunteers and responsible parties, and between brownfields and Superfund Sites; one that does not blindly worship consistency or exalt means over ends. In my humble opinion, this is the biggest problem with most of the so-called reform proposals. True, the overriding objective in all cases is to protect human health and the environment. However, the *means* by which that objective is achieved must vary with the circumstances of each case (or, at least, each broad category of cases).

Instead of abusing cleanup volunteers, DEC should be helping them—for example, (ideally) by conducting or paying for initial site characterization (to remove uncertainty and fear of open-ended liability) and then holding the volunteers harmless for all pre-existing contamination.

5. The Program Must Provide a Broad Liability Release in Return for a Voluntary Cleanup

As many of the reform proposals would do, any liability release received for a voluntary cleanup should be binding on the state as a whole and not just on DEC. (If this reform is to be of any benefit, the *quid pro quo* cannot be still more onerous cleanup demands before state signoff will be provided.) Broad releases should be available not only for extensive cleanups, but for low risks. Just because the desired release is broad (or the volunteer's pockets are deep) is no reason to demand a more extensive or protracted cleanup than is warranted and required by the site-specific risk. Indeed, even if the site-specific risk is significant due to ubiquitous contamination of nearby properties, or to other factors not caused or contributed to by the cleanup volunteer, liability releases should be freely issued—as long as present and proposed site users can be protected.

What is needed—an approach that resists the need to punish the innocent just because contamination may be present. If more cleanup is needed than it is fair to impose on the volunteer, DEC (i.e., the taxpayer) should pay for it—if those responsible for the problem cannot be made to pay. (If DEC foots the bill, cost-recovery should be pursued against those responsible—plus a sizable penalty if the responsible parties are uncooperative and recalcitrant.) Volunteers must be given the incentive to come forward with the prospect of a broad release from liability in return for their volunteerism. Only fraud or newly discovered hazards (to the extent of such hazards) should generally be the basis for reopeners.

6. The Program Must Provide an Accelerated Process for Meeting Voluntary Cleanup Commitments

Just as "justice delayed is justice denied," real estate deals that must be put on hold until a sluggish bureaucracy uses up all its red tape are deals that won't go forward and will seldom be repeated. They are truly lost opportunities.

What is needed—a lean and mean program that rewards decisiveness, creativity and speed over consistency, timidity and bureaucracy. A program that creates a clear path to "Yes!"—not a maze in which all paths lead to "No!"

7. Financial Incentives Should Be Made Available to Private as Well as Local Government Volunteers to Encourage Voluntary Cleanups

Taxpayers' money should be husbanded and expended wisely and sparingly. However, the use of public funds to rehabilitate brownfield sites and promote their reuse should be viewed, not as a cost, but as an investment that enriches the tax base. Bond Act funding for municipally owned brownfields is viewed in this light—much to the state's credit. (Proposed reform legislation to enhance the attractiveness of such funding, while further limiting liability for municipally owned sites, is a good step or two in the right direction.)

The state needs to recognize that the same logic would apply to providing financial incentives to *privately* owned brownfield sites. Indeed, the state *does* recognize this in the context of Empire Zones (which are often dominated by brownfield sites). Unfortunately, in the voluntary cleanup program context (where one is dealing with privately-owned brownfield sites), the state's emphasis seems to be on (1) getting volunteers to reimburse the state's oversight and administration costs; and (2) getting volunteers to spend as much private money as possible on cleanups, so that the possibility that public funds will ever need to be expended is minimized. That is penny-wise and pound-foolish. And it sets up externalities under which cost-effectiveness only matters to DEC as long as it is public money being saved. (It is like a cash-strapped student who would rather charge $50 to Dad's credit card on a day's worth of restaurant food than spend her last $10 bill on several days' worth of groceries.)

Even worse, it creates a counterproductive risk-aversiveness that promotes more investigation and cleanup than necessary, and a more protracted process than desirable—all in an effort to stretch scarce program dollars and avoid unbudgeted program expenditures as much as possible. If the same philosophy had been applied in the early days of this country, the pioneer colonists would have never made it west of West Virginia.

It is true that public funds should not be casually distributed to a private profit-making enterprise without provision for profit sharing, or at least for a return of the initial public investment. There are a host of such mechanisms in place in jurisdictions throughout the country (and, indeed, even in New York State). Examples are Tax Increment Financing (where a local government or taxing authority helps fund a brownfields cleanup or redevelopment project by floating bonds which are eventually repaid by the increased tax revenues that result from the new development)[32] and Revolving Loan Funds (which provide bridge financing to move a project forward; when the successful project repays its loan, new financing is available to fund the next project).

What is needed—an attitude change on the part of state regulators (and legislators), that begins to recognize that the *more attractive* the voluntary cleanup program is made to prospective volunteers, the more the state and state taxpayers will benefit. It is not "us" versus "them." "They" *is* "us." (Nobody benefits from a bureaucratic program that lumbers forward slowly and cautiously to avoid making mistakes, but which does nothing to inspire or attract the volunteers who are the "engine" that must drive this "machine" forward.)

If the VCP were revamped so that each element was scrutinized from the standpoint of "will this make the program more or less attractive to cleanup volunteers?," the result would be a vastly better program. More volunteers would participate. More decaying sites would be rehabilitated. More neighborhoods would be revitalized. And, yes, more contamination would be cleaned up.

8. The Program Should Afford Reasonable Opportunities for Review and Comment by Interested and Affected Members of the Public, But the Degree of Public Participation Should Be Commensurate With the Degree of Risk Realistically Presented

Programs that try to please everyone end up pleasing no one. There is no such thing as "zero risk." And voluntary cleanups, brownfields and acceptable risks for scary-sounding chemicals are likely to be complex and mysterious concepts for most people. However, the reason we pay government regulators the "big bucks" is to have them make some difficult decisions on our behalf and, in other cases (where the risks to the public are significant and public concern is strong) to help explain the risks and give the public an opportunity to get their questions answered and to give voice to their fears and concerns.

Public participation is basic to our democratic process. But that doesn't mean that all decisions must be made by a consensus of the public. Ours is a representative democracy. We must rely on our elected and appointed public officials to safeguard our interests.

In the case of most brownfield/voluntary cleanup program sites, a notice in the *Environmental Notice Bulletin* of the proposed finalization of a Voluntary Cleanup Agreement, with an opportunity for public comment, is appropriate and sufficient. In higher-risk situations, where public concern is more pronounced, more elaborate procedures for both notice and comment are appropriate. In some cases (e.g., where volunteer experts are not available from a local university), taxpayer-funded technical assistance grants may be necessary and appropriate to allow concerned residents to come to grips with the issues and alternatives. This is most often justified where federal or state Superfund sites are involved.

What is needed—there does not appear to be a problem currently in most cases. What needs to be guarded against is either too little opportunity for public involvement at one extreme (where there is significant risk and a real basis for concern), or too much participation which merely adds to red tape and delay at the other extreme (where there is a low-risk site and a need to move quickly).

9. A Separate Voluntary Cleanup Program Coordinator Should Be Designated Under the Deputy Commissioner for Water Quality and Environmental Remediation, but Outside the Division of Environmental Remediation

The alarming slide in recent years in the number of completed voluntary cleanup program investigations and remediations suggests that there is something seriously wrong with the program that requires immediate attention. The fact that there has not yet been a parallel drop in new VCP agreements should be small comfort. Is it likely that new volunteers will continue to come forward to enter the VCP program, if it takes longer and longer to complete the work called for by DEC and to receive DEC signoffs?

I believe that a big part of the problem is that VCP requirements have been getting more and more onerous and have become more and more difficult to differentiate from those of DEC's more heavy-duty remediation programs. A major thrust of the Governor's (and others') reform proposals would be to formalize and accelerate this trend (in the name of consistency). This would be a serious mistake, in my opinion.

What is needed—the Voluntary Cleanup and brownfield programs need to be removed from the Division of Environmental Remediation and placed under a brownfields "czar" (still reporting to the Deputy Commissioner for Water Quality and Environmental Remediation) whose primary mission is to clean up and redevelop underutilized brownfield sites—rather than to look for more "handcuffs" and "leg irons" to borrow from the Superfund and Oil Spill programs administered by the Division of Environmental Remediation. (This is not intended as a personal criticism of any DEC official or employee.)

10. Even Within the Voluntary Cleanup Program, Statewide Consistency Should Not Be Viewed as an End in Itself, Where There Are Plausible Reasons for Site-Specific or Region-Specific Variability

One cannot fault the underlying principles that (a) all contaminated sites should be regulated consistent with protecting public health and the environment, and (b) the polluter should pay. However, applying these principles to different types of sites requires different tools and procedures.

Just as it is *not* appropriate to apply to low-risk brownfield sites being cleaned up by innocent volunteers the same stringent and punitive procedures and standards that are needed and justified at high-risk Superfund sites where responsible parties refuse to cooperate, it does not make sense to apply a one-size-fits-all approach to all brownfield sites—regardless of site-specific or geographic differences.

Not only will the extent of contamination and potential for off-site exposure vary from site to site, but so will such factors as the cost-effectiveness of a full cleanup (e.g., in light of the value of the cleaned-up property and the contemplated site use); the financial viability and accessibility of those who caused or contributed to the contamination; the willingness and ability of the would-be cleanup volunteer to expend the time, effort and resources necessary to accomplish a full cleanup; the logistics of the business deal (e.g., is there a narrow time window within which the transaction must be completed?); and the importance ascribed by the local community to redeveloping the particular site (in relation to plans for the surrounding area).

It is dangerous and wrong for Albany to try to dictate to field staff how every brownfield site in the state must be handled in every conceivable circumstance. It is even more wrong-headed to apply a lowest-common-denominator approach by which every site is regulated as though it were the worst site. Yet this is the inevitable impact, stripped of its rhetorical camouflage, of attempting to impose statewide consistency.

What is needed—more flexible guidance from Albany and more autonomy for field staff to make appropriate site-specific judgments.

Counter-Productive Internal Procedures

DEC's unpublished "Voluntary Cleanup Program Internal Procedures" (the "Procedures") were most recently revised on November 30, 1999. (The precipitous decline in VCP completions dates to about the same time frame.) I don't know when the Procedures were first established, except that it was well after the initiation of the Voluntary Cleanup Program in 1994.

A primary focus of the Procedures appears to be "to promote statewide consistency in the program." (p. 1.) To this end, elaborate procedural steps and paper-trail requirements are established to ensure that the project manager coordinates with the regional project attorney, the regional engineer and "all other regulatory programs in the Region (e.g., Air, Water, Solid and Hazardous Materials, Fish and Wildlife)" before a given cleanup volunteer and site are considered eligible to participate in the program. Before the draft VCA can be approved, consistency reviews must also be conducted by the project attorney's supervisor, by the central office legal coordinator, by the central office voluntary cleanup program coordinator (to verify that the technical requirements of both the agreement and the work plans are consistent with similar projects across the state), and by the project manager's supervisor. In addition, the Procedures require "written concurrence" from the state Department of Health at every significant stage of the process: before the draft VCA is approved; on remediation work plans; and prior to final sign-off on Investigation and/or Remediation approvals.

The unconditional requirement of *written DOH concurrence* is objectionable for multiple reasons:

(1) Not being a party to VCAs, DOH does not consider itself bound by the terms and conditions of the Agreements. Thus, cleanup volunteers, having entered into a good faith agreement with DEC with finite obligations, may find themselves suddenly subject to new, unbargained-for requirements as the price of DOH concurrence.

(2) Although VCAs typically require DEC to respond to submittals within a set period of time and to provide reasons where a submittal is not accepted, no such constraint limits DOH. DOH can take as long as it wants and/or be as arbitrary as it wants, knowing that no approval can be given without its written concurrence.

(3) If DOH got involved on its own with a voluntary cleanup program site, its authority would be limited to that conferred by the state legislature under the Public Health Law. That authority would be nil for a site not even classified as an inactive hazardous waste disposal site. (Under PHL § 1389-b, DOH is given certain authority to respond to "a condition dangerous to life or health resulting from an inactive hazardous waste disposal site.") However, by virtue of the power conferred by DEC for it to withhold its concurrence, DOH need not worry about such technicalities. I am waiting for someone to explain how DEC can confer on DOH more power to act *indirectly* than the state legislature has given DOH to act *directly*.

Since the DEC Procedures are internal mandates from DEC higher-ups with the power to reward and punish subordinate officials, the requirement of numerous *signoffs by multiple levels of DEC's own bureaucracy* can also be a way of inducing lower-echelon employees to succumb to "suggestions" that lack technical merit or legal authority, and to bludgeon battle-weary volunteers to agree to "one or two more requirements" (beyond the last departure from what was agreed to in the VCA) as a way of shaking loose a needed DEC approval. This is in the highest tradition of car dealerships that require a "manager" to sign off on deals negotiated by a salesman before they become final.

Moreover, the very premise of *statewide consistency* is faulty—or at least untested by the rigors of a public rule-making proceeding. It is far from self-evident that a cleanup remedy which can be justified as cost-effective in Scarsdale, where land may be worth $5 million an acre, or on Long Island where groundwater is used extensively as a drinking water source (and land is also expensive), should be applied for the sake of consistency to such places as Binghamton or Utica, where neither land values nor groundwater dependency provide comparable imperatives.

The Procedures also require remediation agreements to "include requirements for *appropriate engineering and/or institutional controls* (e.g., deed restrictions) that may be deemed necessary to allow for the contemplated use of the site. . . ." This seems like overkill, especially where the same stringent remedy is commonly imposed on non-residential land uses as would be applied if a residential use were contemplated. Deed restrictions (especially where not justified from an exposure assessment standpoint) may be enough to quash a commercial real estate deal, where the buyer is not willing to purchase encumbered land. Deed restrictions and other institutional controls have a legitimate role in a properly designed and functioning program.

Some states have established by statute that brownfields (or VCP) cleanups must be approved by "licensed environmental professionals."[33] Very few, if any, are restrictive to the point of requiring *sign off by a registered professional engineer*. Yet, the Procedures impose this requirement (p. 4). Not only is there no statutory foundation for rejecting the findings and results of environmental professionals who are not registered P.E.s, but this requirement goes beyond the obligations contained

in most, if not all, voluntary cleanup agreements.[34] The requirement is therefore not only arbitrary and *ultra vires*, but *ex post facto*.

The Procedures inexplicably (p. 10) specify that projects completed under an *investigation-only agreement* cannot receive an *assignable release* from DEC "even if the Department concludes that no remediation is necessary." (Instead, they must content themselves with a "Satisfactory Completion" letter from the project manager.) By contrast, when work is done under a combination investigation-remediation agreement but the investigation shows that no remediation is necessary, the volunteer *is* eligible for an assignable release and covenant not to sue issued by the Central Office Legal Coordinator. Quibbling about these distinctions may be more an exercise in sophistry than of practical import, since it is hard to envision DEC under the present program *ever* concluding that no remediation is necessary.

Finally, not only must the cleanup volunteer obtain an engineering certification he didn't bargain for, but that certification must address the seven *remedy selection "factors* given in 6 NYCRR 375-1.10(c)." The problem is that these factors were intended to apply only to state and federal Superfund sites. They include conformity with New York State Standards, Criteria and Guidelines (SCGs, which are similar to federal ARARs)[35]—which as already discussed are extraordinarily stringent in New York State. (Not only would the Governor's Superfund Reform Legislation give this requirement the force of law for all of the state's contaminated sites programs, even for non-registry sites, but it would add two additional—albeit not necessarily objectionable—factors that would have to be considered. One of these is current, future or reasonable anticipated land uses of a site and surrounding properties. The other creates a presumption that any soil contamination will be cleaned up to residential levels at certain Class 1 or Class 2 sites.)[36]

A Not-So-Hypothetical Case Study

The concerns raised throughout this article are real and growing worse. Brownfield seminars across New York State have become somber events that have increasingly devolved into forums for exchanging horror stories and venting frustrations. There is no sign of the pumped-up public and private sector professionals who, in other parts of the country, reinvigorate themselves by working together to convert blighted brownfields into productive and non-polluting landmarks to teamwork and progress. The mood here is dramatically different from that in other jurisdictions—where federal and state brownfield officials and practitioners are full of energy and enthusiasm because they feel that they are doing something meaningful and socially beneficial.

I won't try to explain (because I can't) the political and social dynamics that have led the New York brownfields program to go so horribly awry and that continue to take it two steps back for every forward step. However, I will attempt to give the New York Brownfields and Voluntary Cleanup Program enough concreteness, through a case study, to allow the reality of the problem to seep through. Hopefully, it will make the path to a solution clearer as well.

The problem with the voluntary cleanup program is all of the things the reform-minded Governor Pataki enumerated several years ago—and promised to root out of New York State (except where anyone thought it might compromise public health or the environment): too much regulating, intolerable bureaucracy, slow cynical attitudes of the past, government not acting as it should, etc., etc. The solution, as so many other states have learned, is a more streamlined and accelerated cleanup program, where volunteerism is rewarded not penalized, where the goal is incremental improvement not unerring perfection, and where government leaders strive to empower their subordinates to do good and achieve results rather than placing them on leashes and enshrouding them in red tape to avoid the possibility of error or criticism.

The following case study is true, and the essential details have been preserved without embellishment or distortion. Names have been changed and details have been obscured—hopefully enough to avoid retaliation. The issues are serious, but the tone is light-hearted with an occasional dose of good-natured sarcasm (Jonathan Swift was always easier to read than Richard Nixon).

In 1995, three successful businessmen (who were also brothers) considered buying an expensive (by local standards) 10-acre piece of developed commercial property ("the Site") on the outskirts of a medium-sized city in upstate New York. The three brothers—named Placido, Luciano and Jose—called their real estate business "PLJ Realty, LLC" (PLJ). The Site, known as "Dilapidated Plaza," contained a deteriorating, partially vacant, 65,000-square foot strip shopping center building. The building was rectangular, with the front of its longer face directed across a large parking lot toward a north-south State Road (SR 666). Along Route 666, which connects to the Interstate about a quarter of a mile to the north and carries commuters to the nearby city to the south, were other shopping centers, used car lots, fast food restaurants, individual stores, offices, banks and motels.

Behind Dilapidated Plaza to the east was a fast-moving, interstate stream, the Swanee River. To the south was a creek of more modest and variable dimensions, known as Fortress Creek. Fortress Creek, while

usually carrying limited but ample volumes of water into the Swanee River, would go through periodic cycles of raging intensity after heavy rains and snowmelts. Along Quandary Road to the north, and overlooking the Plaza from a ridge, were a handful of single-family homes, the nearest of which approached within 100 to 150 feet of the shopping center building. No playgrounds, nurseries, old age homes, hospitals, elementary schools or sanitariums were present within at least a mile radius in any direction.

The site had been a farm until 1944. Dilapidated Plaza was built in 1962 or 1963 following a period of occupation by a number of homes and small businesses. Agent Orange herbicide and PCB capacitors—or other heavy duty and long-lived industrial toxicants—were never manufactured or disposed of on the site. Unfortunately, as would become apparent, a far more insidious environmental hazard was present: a succession of dry-cleaning stores had occupied a few thousand square feet in the central area of the shopping plaza building between the early 1960s and the late 1990s. Until 1989, when the shopping center was connected to a municipal sanitary sewer, sanitary wastes and other effluents from the center were discharged (with DEC approval under SPDES permits) into three generations of septic systems, including tanks and leach fields, in the eastern part of the site (between the building and the River).

The U.S. Geological Survey, in a 1982 report, identified the direction of groundwater flow at the site as being to the south and east. PLJ's environmental consultant, Impeccable Environmental Experts, Inc. (IEE), confirmed this result in 1998, after extensive monitoring of water table levels showing that the flow gradient was to the southeast, toward the confluence of Fortress Creek and the Swanee River.

PLJ wasn't exactly sure what it would do with Dilapidated Plaza, which was not in the best condition and had a number of vacancies, but since it owned another shopping center nearby, it figured it could more easily manage the Plaza than its current absentee owners, Deadwood Realty Corp. If PLJ could keep the Plaza fairly well-tenanted, the investment hopefully would hold its own. And, who knew, perhaps the real estate would be worth enough in the future to allow PLJ to resell it and make a modest profit.

So, PLJ entered into a Purchase and Sale Agreement with Deadwood in mid-1995, contingent on the results of various environmental and geotechnical investigations. PLJ retained IEE to perform an Environmental Site Assessment. A Phase I ESA was completed in February 1996. This report flagged as a Recognized Environmental Condition the presence of Ralph's Cleaners, which currently used and stored the common dry-cleaning solvent, perchloroethene (PERC),[37] also known as tetrachloroethene or tetrachloroethylene, at the site. It noted that other dry cleaners/laundries had previously occupied the site, that Dilapidated Plaza formerly held a SPDES permit to discharge waste to an on-site septic system, and that dry cleaning solvents may have been discharged to the septic system.

Included as an attachment to the Phase I report was a September 1995 letter from a groundwater management specialist on the staff of the local Old County Health Department. The letter indicated that the surrounding area had been served by public water utilities dating back several decades, but that there were still some commercial, institutional and industrial facilities that maintained dual water supply systems. In such cases, while potable water usually came from the municipal system, on-site wells might supply process or air conditioning water. The letter commented, citing the 1982 USGS study, that "the site lies within the calculated cone of depression formed by the North Forty Municipal well, the closest active public water supply"—located about 1,100 feet to the southwest of the Site (south of Fortress Creek). The letter described the Site as being within the boundaries of a Sole-Source Aquifer (meaning that development might be subject to review by the EPA if federal dollars were involved—which they weren't), within the limits of "a NYSDEC-designated primary aquifer," and as being subject to strict regulation of chemical storage practices under the town of North Fork's aquifer protection ordinance.

Based on the results of the Phase I ESA, PLJ asked IEE to conduct a limited Phase II study. Six of seven attempted probe holes were successfully advanced to groundwater. Five (P-1, and P-4 through P-7, at groundwater depths of approximately 12 feet below grade) were placed within the area of former leach fields. The sixth (P-2, at groundwater depth of about 17 feet below grade) was placed behind the building unit occupied by Ralph's Dry Cleaners. High part-per-billion concentrations of PERC were found in the probe holes behind the Dry Cleaners (356 ug/l at P-2) and in the leach field immediately down gradient of the Dry Cleaners (49.9 ug/l at P-1). Low (1 to 3.1 ug/l) or undetectable levels of PERC were found in the other probe holes.

When these results were submitted to Sam Suave of DEC (local field office) on March 8, 1996, he suggested that PLJ consider entering into the Voluntary Cleanup Program, which "would eliminate exposure to potential future open-ended cleanup costs, set pre-determined cleanup objectives and give assurance to financial institutions regarding their own lack of liability." Since PLJ would be considered a non-PRP (given its prospective purchaser status), it would be responsible only for remediating on-site contamination to pre-determined levels and eliminating sources of on-site contamination that could cause off-site impacts.

Also at Mr. Suave's suggestion, and in an attempt to further identify the extent of contamination associated with the dry cleaning operations, the scope of the limited Phase II was expanded to include locating and sampling two septic tanks depicted on a 1985 site survey plan.

Liquid from 5,000-gallon Septic Tank #1 was found to contain trace levels (below 5 ug/l) of three volatile organic compounds (VOCs), but sludge from this tank contained part-per-million levels of two PERC degradation products (cis-1, 2-Dichloroethene at 44,400 ug/l and vinyl chloride at 2,780 ug/l). Septic Tank #2 (2,500-gals) and an accompanying concrete siphon chamber were located. The tank contained no liquid and only about 2 inches of sediment, had no staining along its inside walls and appeared never to have been used. It was therefore not sampled.

IEE surmised that chlorinated residues in other septic tanks "are . . . likely to be limited in quantity and localized in their distribution with one exception." That exception was a possible PERC-containing septic tank located between the building and Septic Tank #1. (Such a tank would later be identified and referred to as Septic Tank #3.)

In a March 1996 letter to PLJ, IEE explained to its client the potential financial implications if PLJ decided to complete the purchase of Dilapidated Plaza. It was estimated that disposing of the septic tanks and their contents would cost in the range of $16,000 (if deemed non-hazardous—as was considered likely). IEE was confident that the septic tank contents would not be considered a "listed" hazardous waste under 6 N.Y.C.R.R. Part 371. (However, limited amounts of stockpiled soils associated with the excavation of Septic Tank #3 had to be disposed of as "characteristic" hazardous waste because leachable PERC exceeded TCLP regulatory limits by an order of magnitude.) IEE also noted that, because elevated concentrations of chlorinated solvents had been detected in the Site's groundwater—at levels in excess of DEC's 5 ug/l regulatory limit for groundwater used as a drinking water source,[38] it was possible that DEC might classify it as an inactive hazardous waste site.

Although neither of the worst-case scenarios envisioned in 1996 ever materialized, the ever-escalating demands of DEC, spurred ever upward by DOH, would soon result in a staggering increase in PLJ's costs. (Not including construction-related costs or attorney's fees, investigation and remediation costs arising out of the Dilapidated Plaza VCA will total close to a-quarter-of-a-million dollars—a sum more than 1,400% higher than originally anticipated by PLJ and its consultants.)

Around mid-March, PLJ decided to bring in an outside environmental attorney knowledgeable in brownfields matters, Ken Cavalier, to advise it on environmental legal matters and negotiate a voluntary cleanup agreement with DEC, if that seemed appropriate. And by the way, PLJ advised their new attorney that the closing was scheduled for April 1st (April Fool's Day seemed a fitting—albeit rapidly approaching—date). This date was later extended somewhat in conjunction with the bankruptcy proceedings in which Deadwood Realty was now involved.

Mr. Cavalier contacted Mr. Suave and was assured that this Site was "a good candidate for a VCP agreement." He was told there were two key things DEC required. First, the volunteer must clean up any source that is causing an off-site impact. (There was no evidence, and it seemed little possibility, of such an impact—provided it could be shown that the North Forks municipal well was not being impacted.) And, second, the cleanup volunteer would need to clean up the site for whatever its intended purpose was. He saw "no indoor air problem," and viewed the required cleanup as consisting primarily of "pumping out the septic tanks" and maybe putting in some "passive vent tubes." It would also be necessary to confirm that the current dry cleaners was on the municipal sewer system (it was) and to dye-test the floor drain, if any (there were two—both connected to the municipal sewer). A potential Work Plan would need to be prepared to incorporate in the Agreement. He said he felt "real comfortable with the technical end of this" and encouraged Mr. Cavlier to contact DEC's regional attorney, Thomas Truehart in Lakota, NY, and DEC's "head attorney" in Albany, Chauncey O'Shaughnessy. Mr. Suave indicated that an Agreement could probably be concluded in about 60 days—allowing 30 days to negotiate it and another 30 days for public comment.

After filling out and submitting a VCA application form and conducting initial conversations, attorneys Cavalier and Truehart were able to negotiate a mutually satisfactory Agreement in about 15 days. This Agreement was signed by brother Luciano of PLJ on April 29, 1996 (or thereabouts). Mr. Suave hand-carried it to Albany where it was signed a day or two later by DEC Commissioner Gepetto. Notice of the Agreement was published in the *Environmental Notice Bulletin* and public comments were solicited through June 8, 1996. As of June 21st, no comments had been received.

[Author's aside: Under new VCA procedures expected to be promulgated by DEC in early 2002, voluntary cleanup agreements will no longer be negotiable, but will be available only on a take-it or leave-it basis. Also, since at least 1999, under DEC's unpublished internal procedures, a VCA applicant might not even be notified of its eligibility to participate in the program for up to 45 days after submitting an application. Although the time required to negotiate an agreement would be cut to zero once the take-it or leave-it form of agreement

is adopted by DEC, it will still be necessary to develop a Work Plan to incorporate in the agreement. Separate Work Plans may be needed for VCAs that include both Investigation and Remediation. By the time internal and external "consistency reviews" are completed to ensure that no stray thoughts or unauthorized ideas are allowed to intrude—but at the same time allowing senior officials to insert their own favorite research topics—any time savings gained by eliminating frivolous input from the cleanup volunteer will have been more than offset by the surfeit of wisdom elicited from a long list of clever DEC and DOH bureaucrats, scientists and philosophers. The Governor's reform legislation proposes to allow 60 days for DEC to review the applicant's eligibility and to require DEC to make a "best effort" to review the proposed Agreement within 60 days.]

The 1996 VCA for Dilapidated Plaza was fairly typical of the several dozen VCAs finalized during the first few years of the Voluntary Cleanup Program. It set forth as one of its goals, to "release the Volunteer and its successors and assigns, under the conditions set forth in [the] Agreement, from any and all claims, actions, suits, and proceedings . . . by the Department . . . , which may arise under any applicable law as a result of the Existing Contamination." Notwithstanding the presence of this Existing Contamination, DEC determined that the response action agreed upon under the VCA "will be in compliance with the ECL and will not . . . expose the public health or the environment to a significantly increased threat of harm or damage."

The VCA expressly contemplated that PLJ "intend[ed] to purchase the Dilapidated Plaza, including the Site and implement a two-phased cleanup ("Response Program"), in preparation for and in conjunction with the renovation (and possible demolition) of the existing structures on the property for continued commercial use." The Department-Approved Work Plan (set forth as Exhibit B to the VCA) called for two phases of response action. "Phase I," consisting of locating and removing contaminated soils and structures behind the shopping plaza building, was to begin immediately. "Phase II" was to come into play "[i]f the laundry/dry cleaning building is to be demolished. . . ." It was to include appropriate disposition of in-building tanks and piping and of underground structures not readily accessible while the building was in place. (These work plan "phases" are referred to herein in quote marks to clearly differentiate them from Phase I and II Environmental Site Assessments or stages of construction or development.)

Once DEC was satisfied that the Response Program was completed in compliance with the Work Plan and Department-approved design, it was *required* to provide ["*shall provide*"]

> Volunteer (for each Phase of the Response Program, upon its completion) with a separate written "*clean site notification" letter* that is attached to this Agreement and incorporated in this Agreement as Exhibit "C" agreeing . . . to release, covenant not to sue, and forbear from bringing any action, proceeding, or suit against the current or future owners of the Site or any person having any interest in the Site, including Volunteer, for the further investigation and remediation of the Site based upon the release or threatened release of any Existing Contamination.

The Agreement specifically reserved DEC's right to pursue legal action against "parties that were responsible under law before the effective date of this Agreement to address the Existing Contamination."

DEC was given the authority to revise the agreed-upon Exhibit B Work Plan in two (and only two) circumstances. The first circumstance was if, during the public comment period on the proposed Agreement, DEC received information indicating that the Response Program was "*not sufficiently protective of human health* for the reasonably anticipated commercial uses of the Site. . . ." DEC could then seek to renegotiate the Work Plan with the Volunteer. (In this case, no such information was received during or after the comment period.)

The second circumstance ("reopeners") related to changed environmental conditions or new information (or to fraud by the Volunteer or the Volunteer's failure to implement the Agreement to DEC's satisfaction). In such cases, DEC reserved the right to require further investigation or remedial action—but only if the changed conditions or new information indicated that Site conditions or the Response Program is "*not sufficiently protective of human health* for the reasonably anticipated commercial uses of the Site. . . ." Note that there was no reopener for new DEC rules or procedures adopted after the fact.

The DEC-approved Work Plan (VCA Exhibit B) contemplated that additional remediation might be required in two (and only two) circumstances. Under ¶ A.3.b. of the "Phase I" Work Plan, where a release from a hazardous substance-containing tank was determined to have occurred, "appropriate soil sampling beneath and adjacent to the tank" would be required "to determine if a 'Source Area'. . . [was] present." If a "Source Area" were found, it would have to be "remediated." Similarly, under ¶ A.7. of the Phase I Work Plan, if soil gas readings of VOCs at locations behind the shopping plaza building and in the former septic leach fields identified any "Source Areas," they would have to be "reme-

diated." "Source Area" (as used in Exhibit B) was defined, for the specific purposes of the VCA, as "*any focal point of known oil or hazardous substance contamination at levels which currently, or reasonabl[y] have the potential to, adversely affect human health or cause any significant off-Site impact, as determined by the Department*" (emphasis added). The concept of "significant threat to the environment" has been defined by DEC in the context of inactive hazardous waste sites at 6 N.Y.C.R.R. § 375-1.4. "The mere presence of hazardous waste at a site or in the environment is not a sufficient basis for a finding that hazardous waste disposed of at a site constitutes a significant threat to the environment."[39]

Paragraph III.A. of the VCA specified that DEC was to review reports and other submittals by the Volunteer "to determine whether [the report] was prepared, and whether the work done to generate the data and other information in the submittal was done, *in accordance with this Agreement and generally accepted technical and scientific principles*" [emphasis added]. Although DEC "[might] request Volunteer to modify or expand the submittal," it could do so only to the extent that "the matters to be addressed by such modification or expansion *are within the specific scope of work as described in the Work Plan*"[40] (emphasis added). Any disapproval of a submittal by DEC had to be communicated to the Volunteer in writing (*within 30 days* of receipt of the submittal, except for the final environmental report and certification where the response time was *60 days*), and DEC had to "specify the reasons for its disapproval." The Volunteer was entitled to regard a submittal as approved if "no notification or reasonable request for extension is received from the Department within the indicated timeframes. . . ."

The only reference to the New York State Department of Health (DOH) in the 1996 VCA was a requirement (p. 11) that copies of required communications and submittals be sent to the Director of the DOH Bureau of Environmental Exposure Investigation in Albany, in addition to required copies to DEC. DOH was not a party to the Agreement. And nothing in the Agreement expanded the terms of the required Work Plan to include additional requirements imposed by DOH. Although it is true that, not being a party to the VCA, DOH was not bound by the terms of the VCA, it *was* presumably limited to the authority conferred by its enabling legislation.

PLJ, although it had no way of knowing it at the time, was off on a wild ride for the next seven-and-a-half years (ultimately to extend to June 2003) in the course of which the VCA was virtually ignored and DEC and DOH officials seemed to be in competition with one another to add to PLJ's investigation and cleanup burdens.

During the period that PLJ continued to operate Dilapidated Plaza's existing shopping center building ("Phase I"), a period which extended until the spring of 2001, it had submitted to six obligations[41] under the DEC-approved VCA Work Plan. Three of these were quickly carried out: (1) copies of all existing environmental assessment reports had already been turned over to Mr. Suave; (2) contaminated sediment/sludge and liquid in Septic Tank #1 was remediated by removal and appropriate off-site disposal; and (3) the connection of Ralph's Dry Cleaners to the municipal sewer system and the absence of any floor drains still connected to the septic system were verified.

A fourth requirement—that the dry cleaning/laundry building tenant be required to institute improved housekeeping measures to minimize the probability of spillage from the in-building solvent tank (and to enhance the ability to observe any spillage)—was implemented in several steps (after PLJ confirmed its legal options under the carryover lease with Ralph's Dry Cleaners). Initially, Ralph's was required to discontinue dry cleaning operations entirely. Later, when its current lease term expired, the lease was not renewed.

The remaining two requirements were more elaborate. PLJ had to attempt to locate, access, characterize and remediate the contents of any underground tanks that might be located behind the shopping plaza building. It was to do this with the aid of Old County Health Department records (which had already been shown to be less than fully accurate for this Site). If, in the course of this investigation, DEC determined that a release of oil or hazardous substances may have occurred from a tank, appropriate soil sampling beneath and adjacent to the tank would be performed with any necessary removal of soils (contaminated to the point of meeting the VCA's definition of a "source area"—i.e., to levels "which currently, or reasonabl[y] have the potential to, *adversely affect* human health or cause any *significant* off-Site impact, as determined by the Department") taking place in accordance with a Department-approved work plan.

Under the other detailed requirement, PLJ was to take 10–12 soil gas readings (using appropriate soil gas probes) at locations behind the shopping plaza building and in the former septic leach fields to more fully characterize the distribution of VOCs in subsurface soils. If, as a result of such soil gas readings, any "source areas" (as defined in the VCA) were identified, PLJ would remediate such areas in accordance with a DEC-approved work plan. (Extensive soil gas readings were actually taken by IEE in early 1996, as part of a Phase II Environmental Site Assessment, even before PLJ signed the Voluntary Cleanup Agreement in April 1996.)

By December, 1996—as documented in four progress reports by IEE—these requirements had been largely satisfied. However, a Target Compound List analysis of soils stockpiled during the removal of Septic Tank #3 (the one located closest to the Dry Cleaners) revealed that PERC was present in excess of Toxicity Characteristic Leachate Procedure (TCLP) regulatory limits (8.97 mg/l versus 0.7 mg/l), consequently requiring disposal as a characteristic hazardous waste. Instead of contenting itself with requiring PLJ to remove and dispose of this isolated hotspot of contaminated soils (as contemplated in the VCA), DEC (through Mr. Suave) persuaded IEE to conduct a soil vapor extraction (SVE) pilot study. While verbally acknowledging that, under the terms of the VCA, implementing an SVE response action was not really something PLJ was required to do, Mr. Suave suggested that PLJ might still want to pursue this approach as a way to avoid "the possibility" and the associated stigma that the site *could* be listed as an inactive hazardous waste site. (In reality, as Mr. Suave and DEC were well aware, this Site could never have been listed as a "Class 2" [significant threat] site, and if listed at all, which was doubtful, would have qualified as no more than a low-risk "Class 3" or "Class 4" site.)

While a series of SVE wells was put in place, including one through the floor slab of the Dry Cleaning store, extensive groundwater monitoring was also occurring to confirm the direction of groundwater flow and determine if any risk was being posed to the North Forks Municipal Well (or to the adjacent Swanee River).

On September 2, 1997, IEE reported to DEC that tests on an initial SVE well indicated that DEC Air Guide-1 limits (governing the need for stack emission controls) were being fully complied with (i.e., no such controls were required), and proposed to install two additional SVE wells (to ensure full coverage of potentially contaminated areas around Septic Tank #3) to complete a year-long monitoring program.

On January 1, 1998, IEE reported to DEC that the direction of groundwater flow from the Site was "southeasterly toward the general direction of the Fortress-Creek-Swanee River confluence" and does "not indicate a [south]westerly flow toward the North Forks municipal well." Although PERC and two of its transformation products were detected in MW-1 (closest to the former source area—Septic Tank #3), none of these volatiles were detected above the method detection limit (of 1 ug/l) in samples from the two wells located between the former source area and the municipal well.

With uncharacteristic speed, DEC responded on February 11, 1998, agreeing with IEE that the January report had "clearly demonstrated that the municipal well located at North Forks will not be impacted by the groundwater contamination identified at this site."

Unfortunately, DEC's insatiable appetite for information was not to be so easily assuaged.

Without missing a beat, DEC requested additional groundwater investigation work because the wells (deployed with DEC oversight and direction) were "inconclusive" as to whether an off-site impact "has or could occur" due to the release of PERC to the groundwater. (IEE dutifully offered to collect another year's worth of quarterly groundwater samples from the furthest down gradient wells to demonstrate the lack of any increasing concentration trend or the risk of off-site migration.) A supplemental work plan was requested to determine "if the PERC in the site soils could cause a potential health exposure based on the contemplated use of the site" (in which case remedial measures would be necessary to reduce that risk). These additional requests were made despite the consistent results of prior groundwater monitoring, which showed buildups of PERC only in the immediate vicinity and down gradient of the source area and undetectable or at trace levels anywhere else. And they were made despite previous DEC assurances that PLJ would not have to worry about air quality within the Dilapidated Plaza building. (Could it be that DOH, having been ceded an expanding role by DEC, was now flexing its muscles?) These requests were also made without obvious regard to the limited investigation and remediation measures called for in the 1996 VCA.

To add insult to injury, the February 1998 DEC letter went on to assure PLJ that, even if DEC decided to list the Site as an inactive hazardous waste site, PLJ "would not be required to perform any additional investigative/remedial work other than what is required" under the terms of the VCA. This assurance had a hollow ring because (a) DEC had *already* required PLJ to perform far more investigative/remedial work than what the VCA required, and (b) DEC was more and more treating the Site as though it *were* a Class 2 hazardous waste site and PLJ as though it were a culpable responsible party (and not a completely innocent non-PRP prospective purchaser and cleanup volunteer).

On August 24, 1998, a revised work plan meeting all of DEC's new requirements was finally submitted by IEE. It proposed to install two additional 2-inch diameter SVE wells (and one 2-inch diameter monitoring well) behind Ralph's Dry Cleaners. To address concerns about possible contamination beneath the floor slab at Ralph's, a core would be drilled through the slab and a solid PVC pipe would be embedded and connected (similar to the other SVE wells) to an extraction blower. Soil samples from borings would be collected and subjected to PID screening. After system start-up, PID readings would be taken (and a vapor sample collected) from each SVE well monthly for three months to verify the effectiveness of the SVE system and that emissions were

within DEC Air Guide limits. After collecting the baseline data, monthly sampling would be changed to quarterly (expected to continue for a year). Quarterly samples would also be taken from a suite of groundwater monitoring wells (paired to collect samples at shallow and deeper depths). Graphs would be prepared depicting contaminant concentrations over time, with remedial activities terminating when results (i.e., asymptotic conditions) indicated that little additional benefit would be realized from continued operation. At this point, soil samples would be taken to evaluate residual contamination levels.

The point of diminishing returns had long since been reached.

Finally, a full four months later (on December 18, 1998), DEC approved IEE's August work plan.

After another year-and-a-half of data collection by IEE, PLJ unveiled plans to demolish the existing Dilapidated Plaza building and construct a new big-box Bright and Shiny Hardware Store at the Site. Ken Cavalier was again brought into the process to secure needed Town of North Forks approvals. Site sketches and engineering plans were developed to portray the new and improved shopping center and meetings and public hearings were scheduled (including SEQRA review—involving a long-form EAF and negative declaration), beginning in October 2000, before the Town of North Forks, which was delighted that a prestigious national retailer was interested in locating there. Town officials and members of the community welcomed the revitalization of Dilapidated Plaza, which would yield not only much-needed tax revenues and jobs, but would boost business for surrounding retailers and would stimulate the rejuvenation of the whole North Forks/Route 666 commercial zone. Final site plan approval by the North Forks Planning Board came on December 11, 2000.

As the Dilapidated Plaza site was poised to enter "Phase II" under the VCA, IEE and DEC were still bogged down in a labyrinth of questionable "Phase I" monitoring and research.

While the new development project was pending before the Town of North Forks, IEE was instructed by PLJ, as soon as the last tenant had vacated the Dilapidate Plaza building, to move forward (with DEC approval and oversight) with removing any remaining accessible remnants of the septic system and leach field. Most of these components were previously identified, but could not be removed until all tenants had vacated because of utility lines that could not be disconnected. In addition to the previously excavated Septic Tanks #1, #2, and #3, two additional metal septic tanks (#4 and #5), discovered in a 1996 magnetometer survey, were removed from the site. (Contaminated soils associated with Septic Tank #3 had also been previously excavated and properly disposed of off-site.) An additional "tank" #6 (actually a grease trap installed in the sewer line to intercept heavy grease loads from any restaurant tenants) was found and removed during demolition of the Dilapidated Plaza building.

In October 2000, IEE submitted a Remedial Action Plan (RAP) to DEC on behalf of PLJ to address the steps to be taken pursuant to "Phase II" of the VCA. (The "Phase II" work plan consisted of two straightforward requirements:[42] (1) demolish the dry cleaning store, appropriately drain and dispose of the in-building solvent tank and recycling system, and their contents; and (2) remove and appropriately dispose of, after sampling and testing, any underground septic tanks, underground storage tanks and associated piping, and their contents, prior to demolition or other earth-moving or construction likely to disturb them.)

The RAP set forth the procedures to be used to complete the removal of identified source areas. Because of the planned excavation of all contamination source areas, the demolition of the shopping plaza building (and associated utility lines), and the construction of a new, large-footprint retail building, it was proposed to remove and dismantle the existing SVE and groundwater wells. Since the objective of "Phase II" was to complete the removal of identified source areas, no engineering controls were proposed. Although it is difficult to imagine how, with all of the source areas removed and the entire Site capped beneath impervious layers of pavement or concrete, any additional remedial action might be needed or further monitoring required, IEE nevertheless proposed (in response to DEC prodding) to install new groundwater monitoring wells to replace those abandoned prior to site redevelopment. (IEE proposed to specify the locations and depths of these wells at a later time, after test results were available for post-excavation subsurface soil quality samples.) IEE even agreed to entertain the need for post-development remedial action based on the contaminant levels remaining in the subsurface and the final location and elevation of the new building.

Although the initiation of "Phase II" source removal should have been viewed as superseding any previously initiated palliatives (source reduction and monitoring) under "Phase I," DEC (and DOH) weren't about to allow their cleanup volunteer to escape their grasp quite so easily. After all, PLJ wasn't some recalcitrant polluter that would be a lot of trouble to take on; it was an innocent volunteer with deep pockets that had always shown a willingness to cooperate and had readily agreed to almost anything DEC asked for. This was certainly no time to be letting PLJ off the hook.

Two-and-a-half months later (December 12, 2000), DEC responded to the proposed RAP. IEE's plan did not go far enough. PLJ would need to install the portion of a

new SVE system that would reside in the source area, beneath the new building prior to construction—so that if excavation did not obtain the proposed soil cleanup objectives, an SVE system could be operated to remove the remaining contamination. An SVE system would also be necessary "in the event that a possible source area was not identified and that [it] could result in an unacceptable impact to indoor air quality." (There was no explanation of how any unidentified source area could remain with the old building removed and the subsurface soils and former leachfields thoroughly screened by earth-moving equipment. Nor was it explained how an SVE system, if it could not be required under the VCA in "Phase I," could be imposed during "Phase II," with even fewer traces of remaining VOCs. Or why indoor air quality was suddenly a concern, despite previous assurances to the contrary, and despite the removal of source areas.)

In the design of the SVE system, although DEC required a soil gas vapor barrier beneath the concrete floor slab only in areas of known PERC contamination, PLJ and the management of Bright and Shiny decided to extend such a barrier beneath the slab of the entire massive Bright and Shiny building. (Any hope that DEC or DOH would find this reassuring, causing them to moderate their insistence on extended stack gas monitoring, was misplaced.)

IEE tried again. A new Remedial Action Work Plan was submitted in January 2001. This Plan included updated monitoring results. It showed continued declines in groundwater concentrations and dramatic reductions in SVE stack emissions (even before building demolition). The RAP proposed to excavate and remove soils from below the building and the remaining septic structures to the point that soil cleanup objectives (1.4 mg/kg for PERC—as set forth in DEC TAGM # 4046)[43] were achieved. If soil cleanup objectives were not met in the area of the new building footprint, new SVE piping would be installed in the area(s) of elevated concentrations. New monitoring wells would be installed at locations to be based on the extent and location of soil contamination.

After another two-and-a-half months (and barely in time to avoid scuttling the new development project and real estate deal), DEC on March 26, 2001 approved the Remedial Action Work Plan of January 2001, subject to various conditions. (These included DEC's insistence on installing SVE piping at all locations where the new building would rest over soils contaminated by the former dry cleaning process, and the need to perform a full Target Compound Analyte List analysis on one soil sample and one down-gradient groundwater sample obtained from the area of highest contamination.)

IEE submitted an updated Remedial Action Plan in April 2001 (quantifying the relatively small extent of soil contamination within the building footprint that might exceed DEC regulatory limits). An updated Remedial Action Report was submitted on June 18, 2001, followed in August by the installation of new groundwater monitoring wells.

In the meantime, the real estate deal was concluded between PLJ and Bright and Shiny Hardware, with ownership passing to the latter. (An Escrow Agreement entered into on March 27, 2001 established a $165,000 Environmental Escrow Fund to ensure Bright and Shiny that any remaining cleanup work would be done and that an assignable liability release would be issued by DEC.)

On September 10th, DEC issued a letter stating that the Remedial Action Report submitted three months earlier could not be approved "without first determining if a complete soil vapor extraction (SVE) system is needed at this site." It also indicated that the separate letter report from IEE on post-development monitoring well installations and sampling, including frequency of sampling events, "must be submitted prior to receiving final [RAP] approval." By this time, the new retail store was fully constructed and would shortly open for business. An electric-powered continuous SVE system with two fan-driven SVE vents (SVE-East and SVE-West) had been installed—from beneath the building slab and venting from the building roof. These new SVE units—which were also equipped with wind-driven turbines—replaced the pre-demolition (non-electric-powered) wind-driven SVE extraction wells.

IEE submitted another Remedial Action Report on October 25, 2001. This Report took issue with DEC's insistence (at the urging of DOH) that SVE stack emissions, having already been shown to easily meet DEC Air Guide limits, continue to be measured at quarterly intervals for at least a year, with no indication of how much PERC in the stack emissions would be considered too much and no finite duration to the continuation of such monitoring. Also, IEE was concerned that DOH might unjustifiably seek to apply to SVE stack emission levels its 1999 DOH "guidelines for PERC in air."[44]

That guideline states: "NYSDOH recommends that the average air level *in a residential community* not exceed 0.1 milligrams of PERC per cubic meter of air (0.1 mg/m^3),[45] *considering continuous lifetime exposure and sensitive people*." It is not applicable or relevant to the Dilapidated Plaza situation for several reasons. In the first place, the inside of a commercial building should not be judged by a guideline designed for a "residential community." In the second place, PERC levels in the stacks of an SVE system, which was designed to extract PERC

from subsurface soils and groundwater, have no public health significance (as long as DEC stack emission limits are not exceeded) other than that the *more* PERC that shows up in the stacks, the less is left behind in the ground. (A cleanup volunteer should not be penalized because it is employing a pollution control device that works.) In the third place, no one is likely to come in contact with concentrated stack emissions on the roof of a commercial building, 25 feet off the ground. In the fourth place, even if the PERC levels measured in the SVE stacks were actually found inside the commercial building, the workers likely to inhale it would have far lower exposure levels over far shorter periods of time than the populations addressed by the DOH guideline.[46] And, in the fifth place, an indoor air standard for the protection of workers has been set by the federal government (OSHA). That standard—689 milligrams per cubic meter of air (689 mg/m^3), or 100 parts per million—is considerably less stringent than the DOH residential guideline.

On November 15, 2001, DEC issued its response to the October 2001 RAP, requesting that the RAP be resubmitted for approval after IEE addressed yet another set of comments. Comments included: the need to articulate the rationale (already provided previously) "of why treatment of the emissions are [sic] not necessary" (response: because they were shown to be far below DEC Air Guide-1 limits, which define when emission treatment is required); and a requirement that the report be certified by a registered professional engineer (see previous discussion of this subject). The letter also reiterated the insistence by the regional DOH representative, Robinson Crusader (no doubt, responding to directives from Albany), that the SVE system "must be operated and monitored for a minimum of one year, with emissions from each system sampled at least monthly, a record [maintained] documenting any interruptions of the electric powered fan, and documentation that the building has remained under positive pressure as designed for the duration of the monitoring period." (An October 25, 2001 letter from Bright and Shiny's electro-mechanical engineers had explained that, at all times the building is occupied, 15,600 cubic feet per minute [CFM] of outdoor air is pumped into the building through rooftop units. Two exhaust fans remove 1,200 CFM from the building, leaving 14,400 CFM of positive pressure.)

In the meantime, new groundwater monitoring results showed no target VOC compounds at detectable concentrations in any of the samples from the four down-gradient monitoring wells, with the exception of new MW-2—located directly down-gradient of the former source area beneath the former Dry Cleaners. (It contained PERC at 33 ug/l.)

Everyone on the PLJ team felt like they had fallen through the looking glass. Not only was DEC totally disregarding the letter and intent of the 1996 VCA, but it was generally taking two or three months (rather than the 30 days specified in the Agreement) to respond to submittals, and it was withholding approvals because of unexplained and inconsistent demands by DOH which was not even a party to the original Agreement.

Moreover, at this point—six-and-a-half years after entering into the VCA—PLJ no longer even owned the property but it had a large sum of money sitting in an escrow account that couldn't be accessed until DEC issued a liability release.[47]

Back on the scene comes Ken Cavalier. He advises IEE to hold off a bit on responding to DEC's latest letter and recommends that indoor air samples be taken inside the Bright and Shiny building. This is done on November 20, 2001, using passive diffusion PERC monitors (badges) left in place for eight hours at breathing height at three locations in the store (two are on pillars near where the SVE pipes pass through the building; the third is near the front of the building at a cashier's station[48]). The results come back. No PERC is found in the checkout area (at the detection limit of 2.1 ug/m^3). Barely detectable concentrations are found (2.8 and 2.9 ug/m^3) at the other two locations. The highest levels are more than 200,000 times below OSHA worker safety levels. Vindication at last?

Cavalier requests a meeting with the DEC regional director and relevant staff professionals. The meeting occurs on December 18, 2001 at DEC's office in Lakota. One of the regional office participants is the DEC attorney who represented the Department in negotiating the VCA in 1996 for Dilapidated Plaza. By the end of the meeting two hours later, the four DEC meeting participants have no trouble agreeing in principle that PLJ should receive a Liability Release as soon as possible, conditioned only on the conduct of one more groundwater sample at new MW-2 (to confirm the accuracy of the August result) and a year's worth of indoor air monitoring. Regional Director Truehart cautioned, however, that concurrence still needed to be obtained from DEC headquarters and from DOH.

True to form, DEC headquarters and DOH were soon heard from. In response, PLJ reluctantly agreed to adding two long-range groundwater samples (in June 2002 and June 2003) at the sentinel monitoring well (new MW-2) to provide assurance that earth-moving activities had not somehow mobilized a slug of not-yet-seen PERC contamination. PLJ also yielded to DOH's insistence that SVE stack emissions be monitored on a quarterly basis in parallel with indoor air monitoring—so the subsurface behavior of VOCs could be tracked in relation to what was occurring inside the building. (This

is perhaps nice to know, but not anything PLJ should be required to monitor at its expense.)

On December 31, 2001, Ken Cavalier embodied the updated monitoring plan in a letter to DEC, and IEE collected the last (regular) groundwater sample at new MW-2 (PERC levels were virtually the same as in the previous sample). IEE also shut down the electric fans serving the SVE system—so that quarterly indoor sampling can occur under worst-case (intermittent wind-driven rather than continuous electric-driven) SVE operating conditions. (At DOH's request, the fans will be turned back on briefly just before SVE stack samples are taken—to make conditions as uniform as possible from one sampling event to the next.)

At this writing (a week later), PLJ awaits word of its (conditional) Liability Release from DEC—although no one on the PLJ team would be very surprised at this point if one or more of the concurring multitudes at DEC or DOH seek to inject still further conditions or requirements before closure can be achieved.

Conclusion and Disclaimers

With regard to the never-ending saga of Dilapidated Plaza, I hope there *is* one (a "Conclusion" that is).

As far as New York State's voluntary cleanup program is concerned, I hope it lives long and prospers.

I am very concerned, however, that if cleanup volunteers continue to be misled and mishandled (not intentionally or maliciously, of course) as PLJ was in the Dilapidated Plaza case, there will be fewer and fewer of them willing to come forward. This would be truly unfortunate. There is no reason New York's program(s) for promoting the cleanup and rehabilitation of private- or public-held brownfields has to be more dysfunctional than anybody else's. In fact, I would hope it could be better than anybody else's.

New Yorkers have strong and varied opinions on most things. Why should brownfields be different? The views expressed in this article are strictly my own. And, if they are sometimes forcefully presented, and if other views are dismissed a little too sarcastically or offhandedly, it is not because mine is the only legitimate opinion and everyone else is stupid or misguided. It is only because I care deeply about the issue and I see brownfields as perhaps the one area where the interests of the environmental community, businesspeople and low-income urban residents largely coincide.

The accelerated cleanup and beneficial reuse of brownfield sites has the potential to do so much good for both the environment and the economy that it literally pains me to see this potential squandered by otherwise intelligent public servants and social activists in furtherance of their individual agendas.

My purpose in this essay is not to offend but to inform; to provoke thought, not anger. My ire and frustration, where they bubble to the surface, are directed not at individuals (who are hard-working and try their best), but at institutions and procedures (which often stifle creativity and initiative and exalt form over substance). If, despite my efforts to avoid it, my words have caused hurt or umbrage to any individual, I apologize. Please let me know (I may have been more cavalier than I meant to be). Perhaps I can buy a glass of wine to make amends.

Endnotes

1. *Recommendations to Reform and Finance New York's Remedial Programs*, Superfund Working Group, June 2, 1999, p. 12. ("*Superfund Working Group Report*.") Although New York State has created an artificial distinction between municipally owned sites cleaned up under the 1996 Clean Water/Clean Air Bond Act's Environmental Restoration Program (known as the "Brownfields Program"), and privately owned sites addressed voluntarily with private resources (under what is known as the "Voluntary Cleanup Program"), for purposes of this article "brownfields" is used broadly to encompass both publicly and privately owned sites that meet the commonly accepted definition.
2. No sites have ever been listed in this category. *New York State Inactive Hazardous Waste Disposal Site Remedial Plan—2001 Report*, p. 2 (Table 1).
3. Non-contributory responsible parties (i.e., those who did not cause or contribute to contamination) have been allowed to participate in the VCP even where a Class 2 hazardous waste site is involved.
4. *Superfund Working Group Report*, p. 45.
5. Federal and state funds even to remediate significant hazard sites are finite and usually insufficient. Less problematic brownfield sites will be cleaned up only with the infusion of large amounts of private funding.
6. There are some exceptions to this generalization. There are some urban areas (e.g., parts of New York City) with good demographics that are considered desirable places to live and work, where real estate values remain high. In such areas, the value of the real estate provides enough of an incentive to undertake even costly cleanups, without the need for government assistance or encouragement. Unfortunately, such areas are relatively rare—especially in upstate New York.
7. The Brownfields Coalition is a roundtable initiative (made up of a diverse array of interest groups) coordinated by the New York City Partnership and built upon the Pocantico Roundtable for Consensus on Brownfields (itself consisting of representatives of environmental and environmental justice organizations, community groups, municipalities, business organizations and real estate, banking and utility interests). It issued the *Brownfields Coalition Final Report* on June 3, 1999. That report was reprinted in the NYSBA *The New York Environmental Lawyer*, Vol. 19, No. 3, Summer 1999, pp. 23–67.
8. *Coalition Report*, *supra*, n. 7, pp. 24–25.
9. *See also* Philip Weinberg, *Control of Suburban Sprawl Requires Regional Coordination Not Provided by Local Zoning Laws*, NYSBA New York State Bar Journal, Vol. 72, No. 8 (October 2000).
10. The Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980—more commonly known as "Superfund."

11. Proposed state Superfund reform legislation advanced by Governor Pataki and other political leaders *would* correct or partially correct certain deficiencies in the current voluntary cleanup program. However, these "reform" proposals would leave many of the issues and problems identified in this article uncorrected—and, in a few cases, would actually make the problems worse.

12. Remarks of Governor George E. Pataki to the Annual Meeting of the Business Council of New York State, The Sagamore, Bolton Landing, September 25, 1996.

13. *Governor Pataki Announces $918,466 to Restore Brownfields*, Press Release, May 17, 2001.

14. *Governor Pataki Calls for Immediate Passage of Superfund Reform*, Press Release, April 18, 2001.

15. *Id*. The *1999 Superfund Working Group* also recommended (p. 23) that

> the cleanup goal of the State Superfund Program, the Oil Spill Program for long-term remediations, and the Voluntary Cleanup Program [should] be the protection of public health and the environment and at a minimum, must eliminate or mitigate all significant threats to public health and the environment presented by the hazardous wastes, hazardous substances, or petroleum at the sites through proper application of scientific and engineering principles.

However, it recommended (p. 27) that the selection of remedies "consider the current, intended, and reasonably anticipated future land uses at a site and surrounding properties. . . ." And it recommended (p. 30) that "non-responsible parties conducting a cleanup under the Voluntary Cleanup Program . . . be required to clean up [only] on-site contamination," but that the state should "require the responsible party or parties to conduct [any] off-site remediation" or should seek cost recovery against such parties if public funds are used to conduct such remediation." *Superfund Working Group Report*. The Executive Committee of the New York State Bar Association's Environmental Law Section transmitted to the Governor (on February 14, 2000) the recommendations of its Ad Hoc Task Force. *See Report of the Ad Hoc Task Force on Superfund Reform* (as amended—October 3, 1999), New York Environmental Lawyer, Vol. 20, No. 1 (Winter 2000) pp. 30-32.

16. *Memorandum in Support of Governor's Superfund Reform Bill* (can be found on the state of New York Web site at: <http://www.state.ny.us/dob/pubs/executive/0102articleviibills/healthmhec_memo.html>).

17. *Memorandum in Support*, p. 20 of 45.

18. *Id.*

19. *Brownfields Coalition Final Report*, pp. 39–40.

20. *Similarity of DEC and Sierra Club Approaches*: The Sierra Club in New York State has adopted the unabashed policy on brownfield sites of driving cleanups to predisposal conditions. (Mr. John Stouffer, Legislative Director, Sierra Club Atlantic Chapter, Albany, NY, personal communication.) Although doubtless well-intentioned, such an approach would produce many undesirable and unintended consequences. It would create a strong disincentive against volunteering to do cleanups—except at the most desirable, high-value brownfield sites. Less posh sites, including the areas most in need of revitalization, would be left to rot and leach their pollution. New development would gravitate to outlying suburbs, contributing to sprawl. Unfortunately, New York State's approach to brownfields more closely resembles that of the Sierra Club than that of most other U.S. states. Under current law (ECL § 27-1313(5)(d)), the goal of the state Superfund Program "shall be a complete cleanup of the site through the elimination of the significant threat to the environment posed by the disposal of hazardous wastes at the site and of the imminent danger of irreversible or irreparable damage to the environment caused by such disposal." The DEC, by regulation (6 N.Y.C.R.R. 375-1.10(b)), has translated this goal into language that could almost have been written by the Sierra Club: "[T]he goal of the program for a specific site is to restore that site to pre-disposal conditions, to the extent feasible and authorized by law." It goes on to state: "At a minimum, the remedy selected shall eliminate or mitigate all significant threats to the public health and to the environment presented by hazardous waste disposed of at the site through the proper application of scientific and engineering principles."

21. One especially troublesome provision in the Governor's bill (proposed ECL § 27-1313(1)(b)) would require DEC to consider a list of factors in selecting a remedy—including "conformance to standards and criteria that are generally applicable, consistently applied, and officially promulgated, that are either directly applicable, or that are not directly applicable but are relevant and appropriate, unless good cause exists why conformity should be dispensed with. . . ." This "conformance to standards, criteria, and guidelines" (SCG) factor is based upon the so-called "ARAR" (applicable or relevant and appropriate) approach under federal Superfund, which basically allows regulators to impose cleanups capable of meeting the most stringent numerical standards relevant to the environmental medium (or media) found to be contaminated (or threatened). In New York State, where all (non-saline) groundwater is designated as drinking water, and acceptable risks for potential carcinogens have been set up to 100 times lower (more stringent) than those set by the U.S. Environmental Protection Agency, and the Governor boasts of having "the most stringent environmental and public health standards in the nation," would-be cleanup volunteers at non-Superfund sites would have to be very foolish to agree to such a conformity requirement in most instances.

    The bill also proposes (new § 27-1316) to require the DEC commissioner to establish a technical advisory panel to recommend soil cleanup levels that will provide for a multi-category approach to contaminated sites, where the more complete the cleanup, the fewer the restrictions on allowable site uses. While this may help avoid wildly excessive soil cleanup requirements, it may leave sites with even low-level groundwater contamination (especially if the contaminant is a known or suspected carcinogen) with cleanup burdens so onerous that only the very wealthy or very foolish will be willing to undertake them.

22. At the request of DEC, for example, I participated (as a representative of the business community) in a May 3, 2001 Press Conference in Binghamton with Commissioner Erin M. Crotty to support Governor Pataki's Superfund refinancing and reform package. However, I agreed to participate only if I could share two one-page lists with DEC. The first was a list of "Positive Features of [the] Governor's Superfund Reform Bill." These were the points I emphasized at the press conference. The second was a list of what I viewed to be the "Less Positive Features of [the] Governor's Superfund Reform Bill." These points I kept to myself.

23. Under both federal and state Superfund laws, "responsible parties" include current owners of contaminated sites, even if they did not cause or contribute to the contamination. However, for much of the past decade, EPA and most states have been willing to exercise their enforcement discretion to not hold innocent or non-contributory owners (who are willing voluntarily to perform partial site cleanups) to the same standard of liability as true polluters. There is, thus, no legal imperative requiring DEC or the state to pursue non-contributory current owners who agree to

cooperate with the same prosecutorial zeal as those who actually caused or contributed to the contamination. Moreover, many cleanup volunteers at brownfield sites are not even non-contributory "owners." They enter into voluntary cleanup agreements as prospective purchasers, prior to assuming ownership of the property. There is no standard or theory of liability under which would-be buyers not yet in possession could be forced to clean up a site—much less subject to the same remedial objectives as responsible parties.

24. Cited in *Superfund Working Group Report*, p. 15. This DEC Memo, *inter alia,* delegated the responsibility for developing and managing the Voluntary Cleanup Program to staff in the Divisions of Environmental Remediation and Environmental Enforcement.

25. The New York State Department of Environmental Conservation's Voluntary Remedial Program, March 6, 1966.

26. *Number of Voluntary Agreements Signed*: As of March 31, 1998, voluntary cleanup agreements had been signed to address *119* properties around the state. *Superfund Working Group Report*, p. 14. By the end of March 2000, approximately 134 VCP agreements (covering *164* sites) had been signed by DEC. Another 136 applications/agreements were "in the administrative pipeline" awaiting approval or signature. Larry Schnapf, *Summary of New York State Voluntary Cleanup Agreements*, NYSBA The Environmental Lawyer, Vol. 20, No. 2 (Spring/Summer 2000), p. 4. Through FY 2000–2001, 196 agreements had been executed between volunteers and DEC to address *255* projects. *New York State Inactive Hazardous Waste Disposal Site Remedial Plan—2001 Report*, p. 22.

27. *DEC Internal Procedures*: DEC has established "*Voluntary Cleanup Program Internal Procedures*," that set forth in about 13 pages of fine print how DEC will implement the program. Although these Procedures affect far more than an internal allocation of responsibilities among DEC staff and can have a major bearing on when and whether a cleanup volunteer can hope to receive a liability release, they have never gone through formal notice and comment rule-making as required by law. A request by the author for a copy pursuant to the Freedom of Information Law has so far been stonewalled by DEC.

28. *Structure and intent of DEC Policy and Guidance Documents*: DEC provides a remarkably candid insight on its Web site into the structure and intent of its various policy pronouncements and guidance documents. Under a new Policy System for development of department guidance documents, adopted in 1997, only guidance that "affect[s] outside constituents (the public, regulated community, consultants and others) will become Program Policy," while "[g]uidance directed to staff that addresses primarily internal procedures for [the Division of Environmental Remediation's] programs will become Internal Guidance Procedures." However, even outwardly directed guidance clearly intended to affect the public—such as TAGMs and STARS directives, which "are used to ensure compliance with statutory and regulatory requirements, including case law interpretations, and to provide consistent treatment of similar situations"—are not to be considered "a fixed rule under the State Administrative Procedure Act section 102(2)(a)(i)," and "do not create any enforceable rights for the benefit of any party." Not only that, but staff is free to "vary[ ] from this guidance as the specific facts and circumstances may dictate. . . ." <http://www.dec.state.ny.us/website/der/tagms/plcyappl.html> and <http://www.dec.state.ny.us/website/der/tagms/plcystru.html. In other words, the public has no right to rely on (or, in some cases, even know about) the rules and procedures being followed by DEC. And these rules may be freely established, and changed, without notice, comment or accountability.

29. *See, e.g.,* 6 N.Y.C.R.R. § 702.2(c) (standards or guidance values based on oncogenic effects). Also, while EPA attempts to protect against cancer risks in the range of 10-4 to 10-7 (1 in 10,000 to 1 in 10,000,000), New York State seeks to protect uniformly against cancer risks in the range of 1 in 1,000,000 (10-6).

30. *Soil and Groundwater Guidance*: When contaminated soil is found at a site, DEC and DOH use TAGM #4046 issued by DEC for sites being remediated under the state Superfund Program as the cleanup objective for the specific contaminant of concern contained in the soil. (*Superfund Working Group Report*, p. 19). However, as discussed in footnote 43 *infra*, DEC tends to automatically apply TAGM soil cleanup objectives to non-Superfund voluntary cleanup program sites—even in cases (e.g., a capped site) where the TAGM lacks even theoretical relevance or validity.

    Cleanup objectives for groundwater are a little more complicated to divine. For non-saline (Class GA) groundwaters, waste discharges may not impair the best usage of the receiving water, which is "as a source of potable water supply." 6 N.Y.C.R.R. §§ 701.1, 701.15. This classification is assigned to all (non-saline) groundwaters of New York State. 6 N.Y.C.R.R. § 701.18(a). Standards and guidance values for protection of human health and sources of potable water supplies, "Health (Water Source) values," are to be "the most stringent of the values derived" using the procedures referenced in 6 N.Y.C.R.R. § 702.2(b). Where a specific MCL (maximum contaminant level) has been specified, the standard or guidance value is to be equal to the MCL (unless based solely on aesthetic considerations). For substances (such as the dry-cleaning solvent tetrachloroethylene) that belong to a "principal organic contaminant class" and for which there is no Specific MCL, "*the standard or guidance value shall be 5 ug/L* [or a less stringent value set by DOH]." 6 N.Y.C.R.R. § 702.3. DEC is given broad authority to require "any person responsible for a discharge" to submit information to enable the department to "evaluate the short- and long-term effect the discharge may have on groundwaters of the State or for the purpose of [setting certain effluent limitations]," and to "require the installation and operation of monitoring facilities in order to assure compliance with effluent limitations or to evaluate the effect of the discharge on the quality of the groundwater." Specific monitoring requirements are to be established by DEC "on a case-by-case basis." 6 N.Y.C.R.R. § 702.20. Stringent effluent limitations for discharges to Class GA groundwaters "are not applicable," however, to certain "sewage" discharges where the "subsurface sewage disposal system [was] designed, constructed and maintained in accordance with guidelines and standards satisfactory to the department." 6 N.Y.C.R.R. §702.21(a)(1). For substances (such as tetrachloroethylene) that do not have groundwater effluent limitations listed in Table 3 of § 703.6(e), the effluent limitation "shall be equal to the guidance value"—except that "a modified effluent limitation" may be substituted where factors such as analytical detectability and treatability indicate that achieving the stricter limit "would be clearly unreasonable." 6 N.Y.C.R.R. § 702.16(c).

31. New York State Department of Environmental Conservation, Division of Environmental Remediation, *New York State Inactive Hazardous Waste Disposal Site Remedial Plan—2001 Report*, p. 23, Figure 12.

32. TIFs are most effective in large metropolitan areas and for high value-added projects. It is doubtful that many of the quarter-acre brownfield sites that abound in New York State's smaller cities, towns and villages would support the use of this financing mechanism.

33. *Who Signs Off On Voluntary Cleanups In Other States?*: Examples: Connecticut ("licensed environmental professionals"); Massachusetts ("Licensed Site Professionals"); Nevada ("Certified Environmental Managers"); North Carolina (private contractors—pursuant to specified criteria); Ohio ("Certified Professionals"); West Virginia ("licensed remediation specialists").

34. *Requirement of Certification by Licensed New York State Professional Engineer*: As is true for many of the cleanup programs administered by the Division of Environmental Remediation, the requirement of having a New York state licensed professional engineer's stamp for remedial action plans under the voluntary cleanup program originated in the State Superfund program, was then exported to the 1996 Clean Water/Clean Air Bond Act "Brownfields Program" applicable to municipalities, and ultimately was carried over to the VCP. Thus DEC's "Brownfields Procedures Handbook—Brownfields Program," TAGM #4058 (Section 3) states: "While the site investigation does not require a professional engineering firm to perform the work, the remedial alternatives report, remedial design, and construction oversight/final engineering certification report all require a New York State licensed professional engineer's stamp before the Department will approve them." Even if such a certification were warranted for engineering designs in the case of a Bond Act project being funded by the state, they would not be warranted for privately-funded voluntary cleanup projects—especially where complex engineering remedies are not being proposed. The same section of the Handbook itself suggests a less arbitrary and restrictive approach: either use a consultant "on DEC's Qualified Remedial Consultants (QRC) List," or include "a description of the consultant's experience in investigating environmental contamination." The description "must document that the firm employs a sufficient number of staff with experience of sufficient duration, diversity, and expertise to complete the proposed project."

35. *See* TAGM #4030 ("Selection of Remedial Actions at Inactive Hazardous Waste Sites"), May 15, 1990.

36. These additions are not necessarily problematic in their own right. Indeed, requiring that present and future land uses be considered in all cases is a good thing, because it injects needed site-specific flexibility into the process. What *is* problematic is all the new procedural baggage being placed on the back of the voluntary cleanup program. If the VCP doesn't promote accelerated cleanups and reduced red tape, people won't use it.

37. *Properties and Toxicity of Tetrachloroethylene (PERC)*: PERC is a nonflammable, colorless liquid at room temperature. It readily evaporates into air and has an ether-like odor. It is a manufactured chemical that is widely used in the dry-cleaning of fabrics, for degreasing metal parts and in manufacturing other chemicals. It is found in a number of consumer products, including some paint, glues and spot removers. When people breathe air containing PERC, it is taken into the body through the lungs and passed into the blood, which carries it to other organs. A large fraction of this PERC is breathed out, unchanged, into the air. Some is stored in the body (e.g., in fat, liver and brain) and some is broken down in the liver into other compounds and eliminated in urine. Once exposure stops, most of the PERC and its breakdown products leave the body in several days (full elimination may take several weeks). The potency of PERC to cause health effects is low, but breathing air with high PERC levels can damage many parts of the body. Dry-cleaning workers exposed for 9 to 20 years to high workplace levels of PERC had reduced scores on behavioral tests and showed biochemical changes in blood and urine. The effects were mild and hard to detect. Long-term exposure of healthy adults living (for 10.6 years on average) in apartments near dry-cleaning shops yielded small effects, with average test scores slightly lower than those of unexposed individuals. Short-term exposure (for 8 hours or less) of volunteers to high doses of PERC resulted in central nervous system symptoms such as dizziness, headache, sleepiness, lightheadedness and poor balance. But these effects were mild and disappeared soon after exposure ended. Some studies suggest (but do not prove) that PERC may cause a slightly increased risk of cancer and reproductive effects among exposed workers. However, workplace levels are often considerably higher than those found in outdoor air or indoor air of homes or apartments. DOH Info. for Consumers, "Tetrachloroethene (PERC) in Indoor and Outdoor Air" (rev. Aug. 1999). Available on the N.Y.S. DOH Web site.

    The Agency for Toxic Substances and Disease Registry (ATSDR) within the Federal Department of Health and Human Services has pointed out, however, that "some of the highest environmental levels of tetrachloroethylene ever recorded (at waste disposal sites, for example) were still 150 times smaller than the concentrations shown to produce symptoms of toxicity in animals after repeated exposure." Drinking or eating the equivalent of approximately 60 to 80 mg. of undiluted PERC per kilogram of body weight has produced effects similar to drinking alcohol. (PERC was once used as a medicine to eliminate worms in humans.) Harm to the liver has been produced in animals at doses of approximately 100 mg/kg/day, but "these levels of exposure are more than 1,000 times higher than would be expected even if humans ingested the most contaminated drinking water ever reported." ATSDR, "Toxicological Profile for Tetrachloroethene" (Jan. 1990), U.S. Public Health Service.

    Most people can smell PERC when it is present in the air at a level of 1 part per million or more. Much of the PERC that gets into water or soil evaporates into the air. Microorganisms can break down some of the PERC in soil or underground water. In the air, PERC is broken down by sunlight into other chemicals or brought back to the soil and water by rain. It does not appear to collect in fish or other animals that live in water. ATSDR, "Tox-FAQs for Tetrachloroethylene (PERC)," Sept. 1997. <http://www.atsdr.cdc.gov/tfacts18.html>.

    In a Health Consultation at a Federal Superfund Site in Atlanta, ATSDR made the following comments regarding PERC-related health hazards:

    > Though contaminant levels may be present above reportable quantities, a public health hazard only exists if there was an actual exposure to the chemical and at high enough doses to result in adverse health effects. . . . Because someone would have to be very close to the small area where volatile organics were detected, the likelihood that anyone would be exposed to levels high enough to cause adverse health effects is very small.

    ATSDR, "Health Consultation—Former Rally's Restaurant and Briarcliff Station, Atlanta, Dekalb County, Georgia," undated. <http:www.atsdr.cdc.gov/HAC/PHA/rally/frr_p2.html>.

38. See footnote 29, *supra*.

39. 6 N.Y.C.R.R. § 375-1.4(c).

40. ¶ III.A.2.a.

41. A seventh requirement had to do with asbestos-containing materials. It was fully carried out, but is not discussed here in the interest of space.

42. A third requirement, not pertinent here, dealt with proper disposition of asbestos-containing materials.

43. Technical and Administrative Guidance Memorandum #4046 (Jan. 24, 1994) provides a procedure for determining soil cleanup levels "at individual Federal Superfund, State Superfund, 1986 EQBA Title 3 and Responsible Party (RP) sites, when the Director of the [Division of Hazardous Waste Remediation] determines that cleanup of a site to predisposal conditions is not possible or feasible." Not only is the Dilapidated Plaza site not among the above-listed types of sites to which TAGM #4046 purports to apply, but the soil cleanup levels it specifies [e.g., 1.4 mg/kg as the recommended soil cleanup objective for PERC] are derived

by predicting how much contamination will leave the contaminated soil as leachate and eventually reach and disperse into groundwater. With an impervious shopping center sitting atop any remaining hot spots of contaminated soil, there is no longer any opportunity for contaminants to leach from soil into groundwater—except where they are in direct contact.

44. New York State Department of Health, Bureau of Toxic Substance Assessment, 1999 (rev.). "Tetrachloroethene (PERC) in Indoor and Outdoor Air" (Info. for Consumers). Available on the DOH Web site.

45. This is equivalent to 15 parts per billion.

46. The DOH guideline assumed "continuous lifetime exposure and sensitive people." Retail workers are unlikely to be exposed 24 hours a day, 7 days a week, over a 70-year lifetime. *See* Gary Gartano, "Factors Influencing Tetrachloroethylene Concentrations in Residences above Dry-Cleaning Establishments," *Archives of Environmental Health*, Jan. 2000, p. 18 of 22. Eight hours a day, 5 days a week, over a 10-year employment cycle would be a more realistic exposure scenario. Retail workers are also less likely to include the most sensitive human receptors—infants, children, pregnant women, the very old and those with serious illnesses. Also, a large, well-ventilated commercial building, built on grade (with no basement or crawl space to collect vapors), and containing a soil gas vapor barrier, is less likely to accumulate high levels of PERC than a relatively small house or apartment which is less well ventilated and lacks a vapor barrier.

47. The VCA commits DEC to issuing the release letter (the text of which is attached to the VCA as an exhibit) as soon as the specified work plan has been carried out to DEC's satisfaction.

48. If PERC were to accumulate throughout the store as a result of subsurface seepage, cashiers would be at least as heavily affected as other store employees because they stay in one place for much of the day. On the other hand, if PERC were to accumulate in isolated locations due to the storage or use of PERC-containing solvents (unrelated to subsurface activities), other workers would be exposed to higher levels than the cashiers.

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Case Study: The Village of East Nassau and the Snake Mountain Mine Dispute: The Formation of New Local Governments to Resolve Land Use Issues

By Joseph C. LaValley, III

I. Introduction

"Local land-use control," while something of a political shibboleth, is an issue that nonetheless remains in the forefront of New York State politics. Recently, residents of the Rensselaer County Town of Nassau fought bitterly with a large corporation, with one another and with the New York State Department of Environmental Conservation (NYSDEC) over a local land use issue.[1] The "bone of contention" was whether a Connecticut corporation would be permitted to open a hard-rock quarry in the Town of Nassau despite the objections of a majority of Nassau residents who would be adversely affected by the environmental effects of the mine.[2] In addition to the contest over the mine itself, these citizens faced another issue that came to equally define their struggle: whether to form a new local government—the Village of East Nassau—when they perceive that their existing local government body—the Town of Nassau—no longer seemed willing to address their concerns.

The case in question is *In re Lane Construction Company's Application for a Mined Land Use Permit, and Other Required Permits for Operation of a Hard Rock Mine in the Town of Nassau, Rensselaer County, New York*.[3] Beneath this awkward title lies a story some might view as a "David and Goliath" tale of local citizens successfully resisting what they believed would be an unacceptable change in the essential character of their community. However, others will view the story differently—as evidence to support the view that New York State's industrial peak lies in the past rather than the future. This article will explore both sides of the Snake Mountain Mine dispute, and will focus in particular on the events surrounding the incorporation of the Village of East Nassau, in Rensselaer County, New York.

Part II will discuss the background of the dispute over the Lane Corporation's Snake Mountain mining permit application and will present an overview of the adjudicatory hearings and decisions associated with this application.[4] Part III will explore the founding of the Village of East Nassau, and will discuss the ways that its founders used village incorporation as a political tool in their opposition to an unwanted land use.[5] Part IV will discuss the specific reasons for the NYSDEC's denial of the Snake Mountain mining application.[6] Finally, Part V will discuss the possibility of a resurgence of village incorporations in New York State after the East Nassau/Snake Mountain Mine dispute.[7]

II. Background

Citizens of New York State are subject to at least four layers of government: federal; state; county; and town, village or city.[8] In fact, there are at least "131 layers of government" in New York's Capital Region alone.[9] A monolithic state government and the literally thousands of municipal entities in New York intermesh in what must sometimes seem like a Byzantine maze to citizens—especially those seeking to petition "their government" for control over local land-use issues.[10] Typically, these issues arise when businesses seek to develop new landfills, shopping malls, cellular telephone towers or mines. These and other controversial—sometimes (at least in the case of landfills and mines) described as "noxious"—uses often trigger the "NIMBY"[11] phenomenon, whereby citizens resist the placement of these facilities in their "backyards," regardless of the value of having new businesses in their communities.

Finding political strength in numbers, citizens often achieve power through organization. During the Snake Mountain mine dispute, some residents of nearby Columbia County and of the Rensselaer County hamlets of Brainard, East Nassau and Hoag's Corners formed citizen groups that played a key role in the mining permit dispute over the mine. These groups included the Nassau Union of Concerned Citizens (NUCC) and Citizens Against Lane Mine (CALM).[12] Other citizens intervened individually, opposing the permit application as *pro se* litigants.[13] All told, eight petitioners opposing the mine were allowed to intervene in the Snake Mountain Mine adjudicative hearings,[14] including three local governments, NUCC, CALM and several private individuals.[15]

In order for the citizen groups to achieve intervenor status, they first had to attain "party status" to participate in the Lane Mine permit hearings in any capacity.[16] The individuals and groups that actually attained party status were quite diverse, both in the scope of their interests and in the range of their respective legal sophistication.[17] However, they all had a common mission—their opposition to mining on Snake Mountain—and a common adversary in the Lane Corporation. Thus, the intervenors were allies—if only by virtue of the concept that "the enemy of my enemy is my friend."

To the Lane Corporation, several factors made Snake Mountain seem ideal for mining and thus worth the struggle with the citizen groups and others that opposed

the mine.[18] Lane's geologists had identified vast quantities of Rensselaer Graywacke—a hard rock with substantial commercial value—on Lane's Snake Mountain property.[19] In fact, Lane purchased the property over 50 years ago, planning to tap the site's hard rock reserves at some point, as economic and other conditions warranted.[20] Lane apparently found enough accessible hard rock on the Snake Mountain property to support a mining operation there for 100–150 years.[21] Having invested in such long-term planning, Lane appeared willing to battle political and administrative firestorms for at least a decade if necessary to open the mine.

Lane also believed that the amount of construction in nearby communities would create a market for crushed stone from the Snake Mountain mine.[22] Lane planned to use the crushed stone to make blacktop in Massachusetts and would have sold the stone in New York for various commercial and residential construction projects.[23] According to Lane, there is a high demand in these areas for "high-quality . . . crushed stone aggregates."[24] To support this contention, Lane cited in the Snake Mountain mining permit application a 1990 study addressing the relatively poor condition of New York State's roads and bridges.[25] Lane believed, too, that a lack of competing mines near Snake Mountain made it an ideal location for a hard rock quarry.[26] Crushed stone is rather expensive to transport because of its high density and weight.[27] Thus, opening a hard rock mine farther than approximately 20 miles from the end user's point-of-delivery raises the cost of crushed stone prohibitively.[28] For all these economic reasons, Lane saw Snake Mountain as an ideal location to open a hard rock mine.[29]

In addition, there were a number of practical considerations driving the Lane Corporation. Obviously, there are a finite number of places where a company might conceivably open a 100-year hard rock mine. Lane happened to own the Snake Mountain site, which appeared nearly ideal for mining.[30] When choosing a mining site, one must consider various factors, including access to highways, the quality and quantity of stone available at the site and the relative ease of extraction of the stone from the site.[31] Lane's geologists scored Snake Mountain very high on all of these factors, especially with regard to the distribution of extractable rock at the site of the proposed mine.[32] Lane's geologists determined that "geological processes over the past several hundred million years" fortuitously had placed large quantities of usable stone close to the surface on Snake Mountain and readily accessible at several open rock faces, making mining economically feasible there.[33] Understandably, Lane wished to take advantage of the geologically beneficial features of its Snake Mountain property. Moreover, because of the inherently noisy and dusty nature of hard rock extraction and transportation, residents *anywhere* Lane might have selected for a mine would be unlikely to welcome its placement in *their* "backyards." Thus, Lane's persistence over the Snake Mountain mining proposal was reasonable, given the low population density and undeveloped character of the surrounding area.[34]

Finally, Lane apparently was fixated on the Snake Mountain site mostly because of what Lane perceived as the relatively high "permittability" of opening a mining operation there.[35] In addition to securing a permit for the mine, Lane had to contend with local zoning restrictions.[36] Lane would probably not have secured approval from the local zoning board for a new Snake Mountain mine under a "grandfather" provision as a non-conforming use,[37] even though Lane's proposed mine would not have been the first mine located on Snake Mountain.[38] In the early part of the twentieth century another company had operated a small mine on Snake Mountain—albeit relatively insignificant compared to the scale of Lane's proposed mining operation.[39]

Regardless of the actual probability of Lane's Snake Mountain mine actually being grandfathered, the mere possibility of this was enough to concern the members of NUCC and CALM and the other intervenors,[40] who sought to block every conceivable avenue that Lane could take to open (or re-open) the Snake Mountain mine.[41] Another possibility that concerned the mine's opponents was the chance—however slim—that the Town of Nassau would relax its zoning restrictions.[42]

Zoning ordinances—a classic manifestation of the NIMBY phenomenon—are enacted to restrict various unwanted land uses.[43] The zoning power is the primary means available to local governments in New York to control local land use.[44] However, New York State Environmental Conservation Law (ECL)[45] allows mining permit applications to be processed even for mines that actually are precluded by local zoning ordinances.[46] A mining permit applicant is required to include with its application a statement—or "certification"—that the proposed mine complies with local zoning ordinances, if it does so comply.[47] However, in the case of a mining permit application that does not comply with local ordinances, the applicant is required to include a statement to that effect, along with an acknowledgment that the applicant is aware that the issuance of a NYSDEC permit does not relieve the permittee from compliance with local zoning ordinances.[48] Further, in a case wherein an applicant asserts putative compliance but the local officials dispute this, NYSDEC policy states that any permit issued will, if necessary, "contain . . . special conditions regarding local prohibition."[49] The policy is based on NYSDEC's belief that disregarding zoning issues streamlines the permitting process and narrows the scope of issues to be addressed therein.[50] Thus, NYSDEC intends for mining applicants to address zoning issues at the local level.[51] However, the Snake Mountain intervenors

perceived the government's underlying policy—keeping the NYSDEC out of local zoning disputes[52]—to be a procedural "loophole" in the application process.

In the case of the Snake Mountain mine, local restrictions would certainly have presented an obstacle to the proposed mine.[53] Yet Lane referred in its Draft Environmental Impact Statement (DEIS) to the "permittability" of the proposed Snake Mountain mine due to the "long history of mining" on the site.[54] The mine's opponents objected to the possibility that the NYSDEC would issue a permit for the Snake Mountain mine when the project would be prohibited by local ordinances.[55] The intervenors perceived the NYSDEC policy as an abdication of local control and viewed the question of zoning approval as an essential issue in the Lane dispute.[56]

Members of NUCC and CALM and the other intervenors were concerned that the issuance of a permit from NYSDEC would give the proposed mine a degree of legitimacy, thereby increasing the chance that Lane would be allowed by the Nassau Town Zoning Board to go forward with the mine.[57] The intervenors also argued that the NYSDEC should not consider an application for a mine that in fact would be precluded by local zoning, since such consideration—both time-consuming and expensive—would waste the DEC's resources.[58] Rejecting these arguments, an Administrative Law Judge (ALJ) upheld the NYSDEC policy, ruling that the mining permit application process would continue despite the objections of the intervening citizen groups and local governments.[59] Contrary to the intervenor's reservations, the NYSDEC's stated policy is "to incorporate the local government's reasonable requests" in the mining permit process, at least with regard to technical considerations.[60] Certainly, the ALJ in the Snake Mountain case was not about to deviate from this policy.[61] Stepping out of the fray, the DEC left Lane and the local governments to wrangle over the zoning issue amongst themselves.[62]

Lane was not entirely unaware of the potential zoning issues, as evidenced by the fact that Lane went so far as to acknowledge in its DEIS that "the [proposed Snake Mountain mine] project may be incompatible with existing land use in the vicinity if improperly implemented."[63] However, throughout the mining permit process, Lane denied that local zoning would preclude the mine and asserted that the project was certainly " permittable."[64] In retrospect, it seems apparent that Lane underestimated the intractability of the neighboring landowners' adherence to the NIMBY "attitude."

III. Birth of a Village

"In this country's federal system, consisting of the national, state and local governments, local government is the point of delivery for many governmental services and is the level of government most accessible to and familiar with residents. It is often referred to as the grassroots level of government."[65]

Before embarking on the somewhat revolutionary course of forming a new government, the opponents of the proposed Snake Mountain mine first sought help from their existing local government, the Town Board of Nassau.[66] When the members of NUCC and CALM and other opponents of the mine found the Town Board less receptive than expected, the citizens persevered and solved their problem creatively.[67] They initiated a grassroots movement in the Rensselaer County hamlets of Brainard, East Nassau and Hoag's Corners to form a new village government that would be more receptive to their specific concerns, especially regarding Snake Mountain.[68] These citizens, in the face of vehement opposition, succeeded in calling for an election to incorporate the three hamlets into a new village.[69] Passing the election and defying a decades-long trend toward the consolidation of local government services,[70] the Village of East Nassau became the first newly incorporated village in New York's Capital Region since 1969.[71]

Under the Home Rule Provision of the New York State Constitution, local municipalities are empowered to act as arms of the state government and are recognized as having a degree of sovereignty in their own right.[72] Indeed, local governments have a great deal of power over local issues such as zoning and land use.[73] However, if a local government is not receptive to the needs of its citizens, New York State law provides for the formation of new government entities, the most basic of which is a village.[74]

During the battle over the proposed Snake Mountain mine, many citizens who would be impacted by the mine grew dissatisfied with the Nassau Town Board's treatment of the issue.[75] While the Town's residents were reported as being evenly split on the issue of hard rock mining,[76] most supporters of the proposed mine lived a substantial distance from where the mining activities would actually occur.[77] Residents near Snake Mountain were outraged over the prospect of having to cope with the effects of the proposed mine—noise, dust, truck traffic, etc.—for the next 100 to 150 years.[78]

Residents of the hamlets of Brainard, Hoag's Corners and East Nassau also felt that their interests on town issues had been generally underrepresented on the Town Board.[79] For instance, when some of the hamlets' residents ran for town office, they "'[won] big' in their own hamlets only to lose the election in the more populated village of Nassau, where the Town Hall is located."[80] The hamlets' residents also felt that their opinions on zoning issues had not been adequately addressed by the Town Board.[81] For example, the hamlet residents showed up in large numbers at a town meeting to protest a major change in a local zoning ordinance.[82] "'No one appeared

as proponents . . . [but] the Town Board made the changes anyway.'"[83] The hamlet residents came to believe that their interests were being outweighed on the Town Board by the interests of town residents who lived far enough from Snake Mountain to avoid most of the environmental impact of the proposed mining activity, yet close enough to reap the mine's economic benefit to the town.

As the hamlet residents grew generally more dissatisfied with their representation on the Town Board, they began to consider forming a new village.[84] The boundaries of the proposed Village of East Nassau were drawn to encompass the hamlets of Brainard, East Nassau and Hoag's Corners—the areas most at risk of environmental impact from the proposed mine and also farthest from the village of Nassau, the town seat.[85] The proposed village's residents totaled 560 persons,[86] just over the minimum of 500 needed to incorporate.[87] In April 1997, the would-be villagers secured 106 names on a petition for the incorporation of the proposed Village of East Nassau and submitted the petition to the Town Board of Nassau[88] as required by state law.[89] The Town, appearing reluctant to relinquish control of the three hamlets, rejected the petition—ostensibly for technical reasons.[90] Nassau Town Supervisor William Knight claimed that the petition "failed to detail accurately . . . the proposed village's boundaries and was not verified as to the authenticity of signatures."[91] This was the second petition that the would-be villagers submitted, only to have it rejected by the Town Board and Supervisor Knight.[92] The rejected petitions cost the petitioners—in general, ordinary people of modest means—a total of $2,000 in non-refundable fees.[93]

Perceiving the Town's rejection as unlawful, the frustrated petitioners successfully appealed the Town's ruling in court and won the right to hold an election for the village incorporation.[94] With 310 registered voters within the boundaries of the proposed village, the assent of a simple majority of 156 voters was required to elect incorporation.[95] Two hundred seventy-four voters, almost 90 percent of those eligible, showed up at the polls to vote on the village election.[96] On December 29, 1997, the election to incorporate the village passed "by a vote of 168 to 106," and East Nassau became the first new village incorporated in New York's Capital Region since 1969.[97]

The incorporation of the Village of East Nassau is especially remarkable viewed against the general political backdrop of local government in New York State.[98] New York in recent years has experienced "an era of downsizing government."[99] Like the commercial and industrial segments of American society, many local governments have used the concept of "economies of scale."[100] For example, many local governments have regionalized such traditionally municipal services as "highway maintenance and data processing," in efforts to save residents' tax dollars.[101] Thus, the formation of a new layer of government is remarkable both politically and sociologically, in light of the modern trend in New York toward consolidation and regionalization.[102]

One reason for the relative stability of the landscape of local government in New York State over the last century is a desire for control of the organs of local government.[103] From the smallest villages to the largest cities in New York, local government officials and residents alike "are reluctant to lose their independence and control."[104] Obviously, when residents of a town carve out a section of it and incorporate a new village, the town loses control. The residents of a newly incorporated village must elect a mayor, board of trustees and other officials within a short time after incorporation.[105] Immediately after being sworn in, the new officials may then appoint a village attorney and a zoning board.[106] These officials will be selected to promote the interests of the villagers, as opposed to the interests of town residents outside the village.

Understandably, money is also a critically important local government issue—specifically, where and how to get the funding needed to run a local government. Beginning the calendar year following the completion of village incorporation, the town (or towns) in which a new village is located ceases to receive *per capita* revenue sharing from New York State.[107] That money instead goes to the new village.[108] Residents of the towns are understandably reluctant to give up this source of funding. Conversely, residents of a village must pay both town and village property taxes and often are forced to pay for services, such as the maintenance of highway equipment and snow removal, in both the village and the town.[109] Those who oppose village formation generally fear that their property taxes will increase substantially with the formation of a new layer of government, and that revenue sharing will not cover the tax increase.[110]

In East Nassau, the residents of the new village addressed the money issue in a way common throughout New York State: by making most of the new village offices either unpaid positions or positions with only nominal salaries.[111] Obviously, officers' salaries are not the only cost to a local government. However, as noted above, New York State law does provide for village funding by *per capita* revenue sharing and by allowing villages to collect special use fees in addition to property taxes.[112] Thus, it is possible for a carefully balanced budget plan to provide for village operations without a substantial net tax increase to the village residents.[113]

Clearly, the twin issues of money and control go to the heart of why new villages are not formed very often. In the case of formation of the Village of East Nassau, the

primary objections were over money, but the primary objective was greater control of local land use, especially over the disputed Snake Mountain mine.[114] In East Nassau, the citizens desiring greater control won the day over those who feared it would cost too much—just as, eventually, the villagers won their battle over the mine itself, when the NYSDEC Deputy Commissioner uncharacteristically[115] rejected the ALJ's recommendation to permit the mine.

IV. "Application Denied"

The NYSDEC Deputy Commissioner denied the mining permit due to the intrusive nature the Snake Mountain mine would have on "the character of the local community."[116] The Deputy Commissioner found that the project would involve significant environmental impacts that could not be mitigated, including noise and "adverse visual impacts." The Deputy Commissioner's decision specifically addressed the issue of the leveling of Snake Mountain, stating that this irreversible destruction of such a local landmark would be an unacceptable change in the character of the community.[117]

Perhaps the tenacity local residents exhibited by fighting to keep the Lane Corporation's mine out of their "backyards" made the value of the particular character of their community more evident than it otherwise would have been. Certainly, local media attention to the incorporation of the Village of East Nassau served to increase awareness of the Snake Mountain mine dispute and the environmental issues upon which it was based. The media attention also highlighted the remarkable fact that opponents of the mine were willing to go to the substantial effort of creating a new layer of local government, if necessary, to maintain control of local land use.

That the Deputy Commissioner denied Lane's Snake Mountain permit because of the adverse visual impact the proposed mine would have on the community[118] is even more remarkable, in light of the fact that the NYSDEC had no official standards for assessing visual impacts at the time of the decision.[119] However, the NYSDEC did issue a visual impact standard recently, which, among other things, distinguishes the types of visual and aesthetic impacts that rise to the level of "State regulatory concerns" from those impacts that are "merely" of local concern.[120] The NYSDEC clearly states that its policy of "State versus local" visual and aesthetic impacts does not diminish permit applicants' responsibilities for complying with local regulations, including zoning ordinances.[121]

The visual impact of greatest concern to the intervenors was the leveling of Snake Mountain itself.[122] Obviously, this impact would be unmitigable in the literal sense; one cannot put a mountain back once it is gone.[123] However, Lane argued that—since the leveling of the mountain would take place over 100–150 years—no single individual or family would be impacted by the gradual leveling.[124] The New York State Office of Parks, Recreation and Historic Preservation (OPRHP)[125] found this argument unpersuasive, and advised the ALJ accordingly.[126] However, the ALJ apparently discounted the OPRHP's advisory opinion[127] because of the fact that NYSDEC, by 1998, had issued no official standards for assessing visual impacts.[128] The ALJ found that the "[adverse] visual impacts . . . would be mitigated to the maximum extent practicable."[129] This is all the law requires in order to issue a mining permit.[130]

Implicit in the ALJ's recommendation is the conclusion that Lane's interest in the mining project outweighed the resident's interest in maintaining the aesthetic integrity of their community. This implication is evident from the ALJ's recommendation that the Snake Mountain mining project be permitted[131] despite the fact that the project could not go forward without substantially and irreversibly reducing the elevation of the countryside.[132] However, the Deputy Commissioner balanced the competing interests differently, and found in favor of the "character of the community."[133] It is worth noting that this decision was consistent with the scope of the New York State Environmental Quality Review Act (SEQRA), which requires agencies "to weigh and balance relevant environmental impacts with social, economic and other considerations."[134] In his decision, the Deputy Commissioner stated that "the project's impacts on the historic and scenic character of the community . . . cannot be sufficiently mitigated and will not be acceptable."[135] There is an undeniable and significant difference between a requirement that impacts be mitigated "to the maximum extent practical" and a requirement that impacts be "sufficiently" mitigated to the point of "acceptability to the character of the community." The latter standard is far more subjective and, thus, more difficult to meet.

The Lane Corporation believed this standard so subjective that applying it amounted to an "arbitrary and capricious" decision by the Deputy Commissioner.[136] Lane also believed the agency had exercised unfettered discretion by assessing the visual impacts of a proposed mining project without any published standards to aid in the assessment.[137] However, on appeal, the Third Department upheld the Deputy Commissioner's decision, and held that the NYSDEC was not required to enact "detailed regulations . . . [on] visual or sound impacts" before assessing their bearing on a mining permit application.[138] Further, the court ruled that the Deputy Commissioner had taken the requisite "'hard look'" at the mining proposal and had made a "'reasoned elaboration' for the basis" of the agency's decision to deny the Snake Mountain mining application.[139] The court was also cognizant of the balancing of interests required by the NYS-

DEC in deciding on a mining permit: the public interest in promoting the mining industry versus the environmental considerations laid out in SEQRA, including aesthetics.[140] The court found that the Deputy Commissioner had "appropriately balanced" these concerns in arriving at his decision to deny the mining permit.[141]

V. Conclusions

One probable consequence of the Lane mine dispute is that other New York State residents involved in a future battle over local land use may follow the example set by the villagers of East Nassau. The trend in New York State for at least the past century has been toward greater regionalization and consolidation of local government services.[142] While the incorporation of the Village of East Nassau is only the most recent example of "balkanization" at the local government level, this incorporation may mark the beginning of a new trend toward greater local autonomy through the creation of smaller, more "personalized" governments. Clearly, concerned citizens embroiled in a land-use dispute will go to great lengths and employ aggressive political tactics to maintain control of local land use.[143] It is easy to foresee some such citizens deciding that greater control over these issues outweighs the burden of an additional layer of government. With this in mind, town governments would be wise to be more sensitive to those inevitable "micro-issues" that concern small pockets of residents. Otherwise, recalcitrant town leaders may see dissatisfied citizens carving out vital chunks of existing towns to use as raw material to build new villages.

Finally, it seems clear that citizens seeking to maintain control of local land uses—especially those that require permits from the NYSDEC, such as mining—need to be actively involved in the SEQRA permitting process, if that process is not to be a mere "paper tiger." In the Snake Mountain case, the NYSDEC Deputy Commissioner's decision to reject the ALJ's recommendation and to deny the mining permit was based on the unacceptable intrusion of the proposed Snake Mountain mine "on the character of the local community."[144] The appellate court, analyzing this decision, found it was based squarely on SEQRA's underlying policy: preserving communities' environmental integrity.[145] Arguably, had local citizens opposing the mine not intervened so actively and persistently in the permitting process, it is unlikely that an issue as elusive and subjective as the "character of the local community" would have emerged from the cold record of a permit application or an Environmental Impact Statement to dominate the permitting decision. Let this be a lesson to all those who value the character of their own community and who are facing such a struggle: in matters of local land use, *involvement* plus *commitment* equals *control*.

Endnotes

1. *See In re Lane Constr. Co.*, 1998 WL 389019, at *1 (Decision) (N.Y. Dep't of Env. Conserv. 1998) (chronicling with masterful understatement the "considerable public interest and concern [that was] expressed about the [Snake Mountain Mine] project" after Lane's permit application was "declared complete . . . in January 1995").
2. *See* Post-Hearing Brief of Nassau Union of Concerned Citizens, Inc., at 1, *In re Lane Constr. Co.* (Dec. 18, 1997) (summarizing the procedural posture of the case and explaining that Lane had applied "for a Mined Land Reclamation Permit and other related permits to operate a 119-acre hard rock surface mine for 100–150 years on its property in Brainard, New York").
3. *In re Lane Constr. Co.*, 1998 WL 389019, at *1.
4. *See infra*, Part II. See generally N.Y. Comp. Codes R. & Regs. (N.Y.C.R.R.) tit. 6, § 624 (2000) which provides rules for

   > the public hearing process . . . sometimes necessary to make a determination on permit applications submitted to the . . . [NYSDEC] on which agreement among parties involved cannot be reached otherwise. [These hearings] may involve a legislative hearing session on a draft environmental impact statement or an adjudicatory hearing session with sworn testimony and cross-examination

   as in the *Lane* case.
5. *See infra,* Part III.
6. *See infra,* Part IV.
7. *See infra,* Part V.
8. *See* N.Y. Const. art. IX, § 1 (Detailing the role of local governments in N.Y. State); *see also* N.Y. State Dep't of State, *Local Government Home Rule Power*, in Local Government Handbook, *on* CD-ROM, at 1–2 (5th ed. 2000) (NYSDOS, Home Rule) (discussing the various units and sub-units of local government in New York).
9. Joe Picchi, *It Takes A Village, Residents Say*, Times Union (Albany, N.Y.), Dec. 16, 1997, at B1.
10. *See* Office of the N.Y. State Comptroller, *Special Report on Municipal Affairs*, *available at* <http://nysosc3.osc.state.ny.us/ localgov/muni/specrep/intro.htm> (1998) (reporting that in 1997 there were "approximately 10,529 local governmental units in the State—57 counties, . . . 62 cities, 932 towns, 553 villages, 707 school districts, 858 fire districts, 132 county or part-county districts, 6,374 town special improvement districts, and approximately 854 special purpose units").
11. *See The Acronym Finder*, *at* <http://www.acronymfinder.com/af-query.asp?Acronym=NIMBY> (last accessed on Dec. 23, 2000) (defining NIMBY as "Not In My Back Yard").
12. *See In re Lane Constr. Co.*, 1998 WL 389019, at *1 (Decision) (noting that the citizen groups NUCC and CALM comprised "residents concerned about the [Snake Mountain] mine's environmental impacts").
13. *See In re Lane Constr. Co.*, 1996 WL 566273, at *2 (Second Interim Decision) (N.Y. Dep't of Env. Conserv. 1996) (noting that one intervenor, Robert L. Henrickson, objected to being consolidated as a party with NUCC, of which he was the president; and that another intervenor, Alice Impastato, was granted "individual party status").
14. *See* 6 N.Y.C.R.R § 624.5 (2000) (describing the rules for "hearing participation").

15. *See In re Lane Constr. Co.*, 1998 WL 389019, at *9-11 (Decision) (summarizing the litigants' positions). Parties opposing the mine included NUCC, CALM, the Rensselaer County Environmental Management Council (RCEMC), the Town of Chatham (from neighboring Columbia County), the New Lebanon Central School District Board of Education, Robert L. Henrickson, and Alice M. and Leonard T. Impastato. *Id*.

16. *See* 6 N.Y.C.R.R. § 624.5 (2000) (defining the steps required to attain "party status").

17. *See supra*, notes 12–13 and accompanying text (listing the intervenors).

18. George L. Marshall Eng'g Geologists, Excavation of Consolidated Bedrock from Approximately 119 Acres of a 136 Acre Parcel in the Town of Nassau, Rensselaer County, Requested by the Lane Constr. Corp., Meriden Conn., (Jan. 24, 1995) (Lane's Draft Environmental Impact Statement (DEIS)) (Lane DEIS), at 131 (stating that Lane purchased the Snake Mountain property, then known as "the Rensselaer Sand & Stone Quarry," sometime in the 1940s); *see In re Lane Constr. Co.*, 1998 WL 389019, at *15 (Decision) (acknowledging that "a significant portion of the [136-acre] property . . . [has been] in Lane's ownership for over fifty years"). Snake Mountain is the only property owned by Lane of comparable intrinsic value as a mining site in the Capital District region. *Id*. at 131.

19. *See* Lane DEIS, *supra* note 18, at 18 (discussing the mineral composition of the bedrock that was to have been "quarried from the [Snake Mountain] project site by . . . drilling and blasting").

20. *See id*. at 131 (stating that Lane had purchased the Snake Mountain property with an eye toward exploiting its "high quality . . . stone [reserves] . . . well into the future").

21. *See id*. at 19, 22 (predicting that the Snake Mountain Mine would produce "approximately twenty-two million cubic yards of rock[, enough for a] . . . 100 to 150 year or more supply of crushed stone aggregates").

22. *See id*. at 20 (projecting, under the heading "Public Need for the Project," that the Snake Mountain Mine would have been a "valuable source of . . . stone . . . in Rensselaer and Columbia Counties in New York State and Berkshire County in Massachusetts").

23. *See In re Lane Constr. Co.*, 1998 WL 389019, at *17 (Decision) (noting that Lane would have "used the crushed stone aggregate . . . in . . . [Lane's] Western Massachusetts blacktop operation . . . [and sold it] to local contractors, governments, and consumers").

24. *See* Lane DEIS, *supra* note 18, at 18–20 (stating that the United States per capita consumption of crushed stone is approximately four-and-one-half tons per year, with most of it going to build "roads, bridges, and structures").

25. *See id*. at 22 (citing a 1990 "Crisis Program" study reporting that "44.3 percent of New York's most heavily traveled main roads . . . [are in] poor to fair condition and are in need of major resurfacing or reconstruction"). The Crisis Program is "an . . . advocacy group [based in Albany, New York,] working to educate the public about the state of roads and bridges in New York." David Troester, *On the Rocky Road to Ruin? Critics Charge That New York's Roads Need to be Fixed Better and Faster*, Buffalo Business First, Nov. 3, 1997, (reprinted on-line *at* <http://www.bizjournals.com/buffalo/stories/1997/11/03/ focus1.html>).

26. Lane DEIS, *supra* note 18, at 21, 23 (listing the area's competing mining operations with comparative distances to Snake Mountain and concluding that the proposed Snake Mountain Mine's "proximity" to several communities would insure them a steady supply of low-cost crushed stone).

27. *See id*. at 21 (asserting that because "crushed stone has a low cost to weight ratio . . . the further the material is transported the greater the cost to the buyer[; a] . . . haul of . . . [20] miles roughly doubles the cost of crushed stone aggregate").

28. *Id*. at 21, 23.

29. *See id*. at 23 (stating that the proposed [would] "ensure . . . a competitive crushed stone aggregate industry and lower aggregate costs for . . . [many of the towns in Rensselaer County and for] . . . the cities of Albany, Troy, and Pittsfield").

30. *See id*. (stating that at the time of the permit application Lane owned no other comparably situated or geologically endowed property).

31. *Id*.

32. *Id*. at 130–31.

33. *Id*.

34. *See* Post-Hearing Brief of Nassau Union of Concerned Citizens, Inc., at 22, *In re Lane Constr. Co.* (Dec. 18, 1997) (numbering the population of the entire Town of Nassau at about 5,000 persons); *see also* Lane DEIS, *supra* note 18, at 131, 134 (stating that another reason the Snake Mountain site was attractive for mining was because of the site's topographical unsuitability for agricultural use or any other form of development).

35. *See* Lane DEIS, *supra* note 18, at 131 (noting that a key factor in having selected the Snake Mountain site for a mine location is the site's high degree of "'permittability'" in light of the fact that the site had historically been used for mining).

36. *See* Lane DEIS, *supra* note 18, at 18 (addressing the fact that Lane would probably require a "zoning change or variance" to operate the mine). *But c.f. id*. at 101, 131 (implying that because the Town of Nassau had no comprehensive zoning or land-use plan and because of the Snake Mountain site's history of mining, Lane's mine should be relatively easy to permit).

37. *See Khan v. Zoning Bd. of Appeals of Village of Irvington*, 87 N.Y.2d 344, 639 N.Y.S. 2d 302, 662 N.E.2d 782, 785 (1996) (describing the workings of a "'grandfather-clause' type provision" for non-conforming uses in the context of lot size (citing 1 Anderson, New York Zoning Law and Practice § 9.43, 472-79 (3d Ed.)). *See generally* N.Y. Village Law § 7-712(b) (2000) (describing provisions for area and use variances in cases where extinguishing a non-conforming use would result in "unnecessary hardship" to the landowner).

38. *See* Lane DEIS, *supra* note 18, at 39 (noting that the "[Snake Mountain] property has a long history of mining activity").

39. *See In re Lane Constr. Co.*, 1998 WL 389019, at *15 (Decision) (noting that, ending with the Great Depression, "the Rensselaer Stone Company [had previously] operated a stone quarry on the property"). Lane purchased the Snake Mountain property, then known as "the Rensselaer Sand & Stone Quarry," over 50 years ago. Lane DEIS, *supra* note 18, at 131.

40. *See* Fred LeBrun, *East Nassau May Do Best to Go It Alone*, Times Union (Albany, N.Y.), Mar. 31, 1997, at B1 (quoting mine opponent and Nassau resident Michael Springer's concern that the Town of Nassau could either grandfather the mine or "enact some . . . awful zoning option opening the door to Lane").

41. *See supra*, notes 12–17 and accompanying text (explaining the intervenor's concerns).

42. *See id. See generally supra* note 37 and accompanying text (explaining the grandfather provision of the zoning laws).

43. *See* N.Y. State Dep't of State, *Guide to Planning and Zoning Laws of New York State*, *from* The James A. Coon Local Government Technical Series, *on* CD-ROM, at 3 (5th ed. 2000) (NYSDOS, Zoning Laws) (quoting N.Y. Gen. City Law § 20, which authorizes municipalities to use zoning regulations to

> regulate and . . . to prescribe . . . the trades and industries that shall be excluded or subjected to special regulation[, so long as such] . . . regulations shall be . . . made with reasonable consideration . . . to the character of the district . . . the conservation of property values and the direction of building development, in accord with a well considered plan.

44. *See* Staff's Reply Brief at 11, *In re Lane Constr. Co.* (stating that "land use decisions" are properly made by local governments via zoning regulations). *See generally* N.Y. Town Law, Art. 16; N.Y. Village Law, Art. 7; N.Y. Gen. City Law, Art. 5. New York State's zoning-enabling statutes are spread throughout the statutory codes.

45. N.Y. Env. Conserv. Law, Art. 23, Ch. 43-B, T. 27 (West 2000).

46. *See In re Lane Constr. Co.*, 1995 WL 775043, at *1 (Interim Decision) (N.Y. Dep't of Env. Conserv. 1995) (explaining and affirming the NYSDEC's practice under "Technical Guidance Memorandum MLR 92-2 (the 'TGM') whereby the [NYSDEC processes mining applications, except in the case of mining proposals on Long Island,] . . . even though a local government disputes a permit applicant's assertion that mining is not prohibited"). *See, e.g., In re Valley Realty Development Co., Inc., v. Jorling*, 217 A.D.2d 349, 352-54, 634 N.Y.S.2d 899 (4th Dep't. 1995) (explaining NYSDEC's TGM MLR-92-2).

47. *See* 1995 WL 775043, at *2 (Interim Decision) (stating that "[u]nder the 1991 Amendments, an application . . . must contain 'a statement by the applicant that mining is not prohibited at that location'" (quoting ECL § 23-2711(c)(2) (2000))); *Valley Realty,* 217 A.D.2d at 352–54. *See generally* Joan Leary Matthews, *Siting Mining Operations in New York—The Mined Land Reclamation Law Supersession Provision*, 4 Alb. L. Evntl. Outlook 9, 15 (Spring 1999) (discussing the NYSDEC policy on consideration of local zoning issues).

48. *See id*. at 2–3 (describing the NYSDEC's policy on this, which stems from a 1992 Technical Guidance Memorandum, "TGM 92-2").

49. *Id*.

50. *Id*.

51. *Id*.

52. *See id*. at 3, 5 (describing the regulation as a "well-considered, prudent and lawful policy").

53. *See* Lane DEIS, *supra* note 18, at 39 (stating that the "project site is zoned Rural Residential . . . [and so would require] . . . a Special Use Permit . . . [and] Site Plan Approval" from the Town of Nassau).

54. *Id*. at 39.

55. *See* 1995 WL 775043, at *3 (Interim Decision) (summarizing "Movant's Arguments" and describing the mine's opponents' intent to block the Snake Mountain mine permit review process in light of the fact that the mine would be prohibited by local restrictions).

56. *Id*.

57. *See* Matthews, *supra* note 47 (noting that, when the NYSDEC grants a mining permit, "the mining operator will use the . . . permit as leverage before a town board"). *See also* 1995 WL 775043, at *3, *5 (Interim Decision) (observing "that [mining] applicants are generally reluctant to undertake to seek . . . [a mining] permit, with its attendant effort, time, and cost, absent a genuine belief . . . that they will also be able to obtain requisite local approvals").

58. *Lane Constr. Co.*, 1995 WL 775043, at *5.

59. *See id*. (confirming the NYSDEC's determination to continue processing the Snake Mountain mine application).

60. *See id.* at *2 (Interim Decision) (stating that NYSDEC will consider local suggestions with regard to "setbacks, barriers, operating hours, dust control, and hours of operation" but will not stop a mining permit application altogether over a zoning dispute); *Valley Realty Development Co., Inc. v. Jorling*, 217 A.D.2d 349, 355, 634 N.Y.S.2d 899 (4th Dep't 1995) (noting that "DEC may not make zoning a condition of [a mining permit application and] . . . zoning [is] not an appropriate matter for consideration by DEC").

61. *See id*. at *5 (concluding that NYSDEC's policy on avoiding local zoning issues "reflects a well considered, prudent and lawful policy").

62. *See id*. (noting the ALJ's determination not to suspend the permit proceedings over zoning issues.)

63. Lane DEIS, *supra* note 18, at 131.

64. *Id*.

65. NYSDOS, Home Rule, *supra* note 8, at 1.

66. *See* Joe Picchi, *Hamlet Residents Petition to Form Village*, Times Union (Albany, N.Y.), Nov. 24, 1997, at B4 (reporting that "[h]omeowners of three rural Nassau hamlets have grown tired of showing up at Town Board meetings, complaining about issues and being turned away without getting satisfaction or making an impact").

67. *Id*.

68. *See* LeBrun, *supra* note 40, at B1 (stating that a key issue that led to the village incorporation was the Snake Mountain mine dispute).

69. *See* Picchi, *supra* note 66, at B4 (describing the procedural steps the residents had to take before calling for the village election).

70. *See* N.Y. Dep't of State, *Village Government*, *from* The N.Y. State Local Gov't Handbook, *on* CD-ROM, at 11, (5th ed. 2000) (NYSDOS, Village Gov't) (examining the recent trend in New York State toward "local government cooperation . . . [and] . . . intermunicipal agreements").

71. Joe Picchi, *Three Nassau Hamlets Vote to Form Village*, Times Union, Dec. 30, 1997, at B1 (noting that the proponents of village incorporation won "by a vote of 168 to 106"). The Village of Round Lake (in 1969) was the last village to be incorporated in the Capital Region. *Id*.

72. *See* NYSDOS, Village Gov't, *supra* note 8, (explaining that the "Home Rule" provision in Article IX of the N.Y. Constitution "provides both an affirmative grant of power to local governments . . . and restricts the power of the State . . . in relation [to] a local government's . . . affairs").

73. *See supra* notes 35–39, 42–43 and accompanying text (discussing the zoning power). *But c.f.* John R. Nolon, *The Erosion Of Home Rule Through The Emergence Of State-Interests In Land Use Control*, 10 Pace Envtl. L. Rev. 497 (1993) (stating that local governments have less power than in previous years as a result of the state legislature using its power to restrict the definition of "local issues").

74. *See* NYSDOS, Village Gov't, *supra* note 70, at 3–4 (explaining what a village is and describing the village incorporation process).

75. Picchi, *supra* note 66, at B4.

76. *See* LeBrun, *supra* note 40, at B1 (quoting Nassau Town Supervisor William Knight, who estimated the percentage of townspeople for, and percentage against, the Snake Mountain mine "at about . . . [fifty-fifty]").

77. Picchi, *supra* note 66, at B4.

78. *Id*. *See* Lane DEIS, *supra* note 18, at 136 (estimating the life of the Snake Mountain mine to be "100 to 150 or more years depending on market demand and sales").

79. *See* Picchi, *supra* note 66, at B4 (reporting that the would-be villagers thought the village incorporation would be "a new approach" to addressing their land use concerns).

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id*.

84. *Id*.

85. *See* Fred LeBrun, *A Vocal Minority is Now a Majority*, Times Union (Albany, N.Y.), Jan. 3, 1998 (noting that proponents of the village and opponents of the mine all lived relatively far from the Town Seat, and that supporters of the mine on the Town Board were all too "far from the action" of the Lane dispute to appreciate the needs of the would-be villagers). *See generally* Frances Ingraham, *Brainard a Hamlet with a Quiet, Rural Nature*, Times Union (Albany, N.Y.), Apr. 21, 1996, at H1 (stating that "Snake Mountain, . . . is located between the hamlet[s of Brainard] and East Nassau").

86. Picchi, *supra* note 66, at B4.

87. *Id*. *See* NYSDOS, Village Gov't, *supra* note 70, at 3–4 (describing the village incorporation process (citing N.Y. Village Law, Art. 2, § 2-200)).

88. Picchi, *supra* note 66, at B4.

89. NYSDOS, Village Gov't, *supra* note 70, at 3–5.

90. Picchi, *supra* note 66, at B4.

91. *Id*.

92. *Id*.

93. *Id*.

94. *Id*.

95. *Id*. *See* NYSDOS, Village Gov't, *supra* note 70, at 3–4 (describing the village incorporation process (citing N.Y. Village Law, Art. 2, § 2-200)).

96. Picchi, *supra* note 71, at B1.

97. *Id*.

98. *See id*. (discussing the relative rarity of village incorporation); *see generally* Joseph P. Viteritti, *Municipal Home Rule And The Conditions Of Justifiable Secession*, 23 Fordham Urb. L.J. 1, 40–45 (1995). Viteritti, presenting a cogent analysis of both the phenomenon of local separatism and the arguments both for and against it, suggests that "[s]ecession should not be understood as a normal political option for any group or temporary alliance dissatisfied with the outcome of a particular contest or controversy." *Id*.

99. Joe Picchi, *Three Hamlets Ponder Future*, Times Union (Albany, N.Y.), Dec. 26, 1997, at B1.

100. *See* NYSDOS, Village Gov't, *supra* note 70, at 9 (illustrating that many more villages in New York were dissolved than incorporated during the twentieth century).

101. *Id*.

102. *See* LeBrun, *supra* note 40, at B1 (describing "regionalism . . . [as] all the rage," and describing various efforts currently underway to consolidate fire and police services in the Capital Region communities of Schenectady, Cohoes, Watervliet and Green Island).

103. *See* Picchi, *supra* note 71, at B1 (noting the low frequency of either incorporation or dissolution of New York State villages in the twentieth century).

104. *See* Picchi, *supra* note 9, at B1 (noting that "[a]lthough [New York's] . . . Capital Region has 131 levels of government, local officials and residents . . . [are] vehemently opposed to seeing any of them abolished").

105. *See* NYSDOS, Village Gov't, *supra* note 70, at 3–4 (describing the post-election village incorporation process (citing N.Y. Village Law, Art. 2)).

106. *Id.*

107. *See id.* at 8–11 (presenting an overview of village financing (citing N.Y. Tax Law § 261(3))).

108. *Id*.

109. *Id*. (Villagers do not actually pay for highway maintenance, but do pay a share of the upkeep of the town's equipment.) *Id*.

110. *See* Bechetta Jackson, *New Village Gets First Town Clerk*, Times Union (Albany, N.Y.), Feb. 5, 1998 (discussing the start-up hurdles involved with a new village government); *see also* NYDOS, Village Gov't, *supra* note 70, at 8 (reporting that villages rely on "the real property tax . . . for nearly 47 percent of total village revenues in New York State . . . [and that] State and federal aid provide[s only about] . . . eight percent of village revenue").

111. *See* LeBrun, *supra* note 85, at B1 (noting that "the mayor and four trustees will serve without pay, which is common in [New York State]" and that the highest paid officer would be the village clerk, at $5,000 per year). *But c.f.* Picchi, *supra* note 9, at B1 (reporting that some of the new village residents feared that the village officers' salaries would increase dramatically in the future).

112. *See* NYSDOS, Village Gov't, *supra* note 70, at 8–11 (discussing village financing).

113. *See* Picchi, *supra* note 9, at B1 (presenting the hypothesis that by minimizing services and eliminating the costs of highway maintenance on town roads, the new village government could net the villagers a decrease in their taxes).

114. *See* Joe Picchi, *East Nassau Elects its First Mayor*, Times Union (Albany, N.Y.), Apr. 7, 1998, at B4 (noting that the mayor and other supporters of the new village had "vowed" to use the village as a vehicle in their opposition to Lane's proposed Snake Mountain mine).

115. *See* Matthews, *supra* note 47, at 15 (observing that "[t]he DEC very rarely denies mining permit applications"). *See also* Fred LeBrun, *The DEC: Department of Easy Cash*, Times Union (Albany, N.Y.), Jan. 23, 1997, at B1 (reporting an anecdote in which a NYSDEC attorney supposedly claimed to have approved 499 out of the 500 mining permit applications he had handled in his career; with the one denial only because "it turned out the guy didn't own the land he wanted to mine"). *See generally In re Lane Constr. Co.*, 1995 WL 775043, at *3, (Interim Decision) (declaring the New York Legislature's policy of fostering and encouraging the mining industry).

116. *See In re Lane Constr. Co.*, 1998 WL 389019, at *2–3 (Decision) (denying Lane's mining permit application due to the project's unmitigable environmental impacts).

117. *Id*.

118. *Id*.

119. *See* NYSDEC, Program Policy: Assessing and Mitigating Visual Impacts, (July 31, 2000). This standard, published two years after the Lane Decision, stated for the first time the NYSDEC's official policy on visual impacts. *Id*.

120. *Id*. at 2. The NYSDEC provides a "generic listing of all aesthetic resources of statewide significance [which serves as] . . . the template [of] aesthetic issues of State concern[, as] . . . distinguished from local issues." *Id*. Among the aesthetic resources that the

NYSDEC lists as state concerns are state and urban parks, historic properties, national landmarks and wildlife refuges, scenic areas (a broad heading under which there are various subheadings), vistas, preserves and trails. *Id*. at 3–4.

121. *Id*. at 1.

122. *See* Fred LeBrun, *All the Same, but Maybe a Tad Smaller*, Times Union (Albany, N.Y.), Apr. 4, 1998, at B1 (reporting on the "decade-old fight to keep Lane from blasting away the local geography's principal feature, Snake Mountain"). *See also In re Lane Constr. Co.*, 1998 WL 389019 (Decision), at 3–4 (stating that the "long-term effect of leveling Snake Mountain would be a significant adverse visual on the character of the community"). *See generally id*. at 20 (discussing the ALJ's finding as to the adverse visual impacts that would accompany the mining operation). Specifically, the ALJ described the leveling of Snake Mountain in detail, with elevations of the final excavation as provided by Lane in its mining proposal. *Id*.

123. One environmentalist (who wished to remain anonymous herein) commented ironically that she was surprised—in light of Lane's apparent disregard for the visual impact issue (*see infra,* note 124)—that Lane never proposed any alternative plans for "putting the mountain back."

> "For instance," she quipped, "would there not be other uses for a large hole in the ground, such as would be left behind once the mine's resources were exhausted? Perhaps it would have made a good spot for a landfill, and could have been gradually filled back up with garbage so that—decades later—local residents would have their mountain back."

Perhaps not surprisingly, Lane never suggested this alternative "mitigation plan."

124. *See* Lane DEIS, *supra* note 18, at 103 (stating that "it would be virtually impossible for any one individual to experience the full alteration over the course of their lifetime"). Clearly, a person born near the mine and living there for her entire life—perhaps sixty to seventy years—would experience a great deal of the "alteration." Further, the idea that "no single individual" would bear the full brunt of the leveling seems to overlook the entire concept that the impact would be felt by the community as a whole, over generations to come.

125. *See* New York State Office of Parks, Recreation and Historic Preservation, Field Services Bureau, *Project Review and Compliance*, *at* <http://nysparks.state.ny.us/field/projrevcomp/> (last visited Feb. 3, 2001) (stating that "[t]he focus of the [OHRPH's] . . . role in state and federal environmental review is to ensure that properties that are listed on the New York State and National Registers of Historic Places and properties that are eligible for registers listing are considered during the project planning process."

126. *See In re Lane Constr. Co.*, 1998 WL 389019, at *20 (ALJ's Recommendations) (stating the OHPRH's official position that the Snake Mountain mining proposal would have adverse visual impacts on surrounding historic sites and that these impacts could not satisfactorily be mitigated).

127. *See id*. (remarking that the OHPRH had no "substantive basis" for its opinion).

128. *See supra* note 119 and accompanying text.

129. *See In re Lane Constr. Co.*, 1998 WL 389019, at *20 (ALJ's Recommendations) (concluding that "the visual impacts of the [Snake Mountain mine] project would be mitigated to the maximum extent practicable").

130. *See* 6 N.YC.R.R. § 617.11(d). Under the New York State Environmental Quality Review Act (SEQRA), when reviewing mining permit applications, the NYSDEC must

> (1) consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS;
>
> (2) weigh and balance relevant environmental impacts with social, economic and other considerations;
>
> (3) provide a rationale for the agency's decision;
>
> (4) certify that the requirements of this Part have been met; and
>
> (5) certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that *avoids or minimizes adverse environmental impacts to the maximum extent practicable*, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable [emphasis added].

131. *In re Lane Constr. Co., 1998 WL 389019*, at *39 (Recommendation).

132. *Id*. at *20.

133. *Id*. at *2.

134. *See* note 130, *supra*.

135. 1998 WL 389019, at *2.

136. *Lane Constr. Corp. v. Cahill*, 704 N.Y.S.2d 687, 689 (3d Dep't), *appeal denied*, 95 N.Y.2d 765 (2000) (TABLE, NO. 925).

137. *See id*. (summarizing Lane's contention that the Deputy Commissioner's decision was "ultra vires" since the agency lacked any official standards on visual impacts to back up the decision).

138. *Id*. The court stated that the issue of the lack of an official NYSDEC visual impact standard had not been preserved for appeal, since Lane had never raised the issue in the proceeding below. However, the court apparently saw the need to resolve this point, and issued what some might view as an "advisory opinion" on the matter. *See id*.

139. *Id*. (citing *Akpan v. Koch*, 75 N.Y.2d 561, 555 N.Y.S.2d 16, 554 N.E.2d 53 (1990); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986)).

140. *See id*. at 690 (noting that the Commissioner "appropriately balanced" these competing concerns in the Lane decision).

141. *Id*.

142. *See supra* notes 98–104 and accompanying text (discussing twentieth century trends in village government).

143. *See* Picchi, *supra* note 9, at B1 (describing how land use issues can lead to rather extreme responses, especially from citizens seeking to keep out developers (quoting Joseph Zimmerman, "a political scientist at the University at Albany")).

144. *In re Lane Constr. Co.*, 1998 WL 389019, at *3 (Decision).

145. *See supra,* notes 136–141 (discussing the Third Department decision).

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CASE: ***In re Application of Consolidated Edison Company of New York, Inc. for: (1) a State Pollutant Discharge Elimination System (SPDES) Permit Pursuant to Environmental Conservation Law (ECL) Article 17 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 N.Y.C.R.R.) Parts 750 et seq.; (2) a pre-construction Air State Facility Permit Pursuant to ECL Article 19, and 6 N.Y.C.R.R. Part 201 and Subpart 231-2; and (3) a Prevention of Significant Deterioration (PSD) Permit Pursuant to Title 40 of the U.S. Code of Federal Regulations (40 CFR) 52.21.***

AUTHORITIES: ECL Article 17
(Water Pollution Control)

ECL Article 19
(Air Pollution Control)

6 N.Y.C.R.R. § 201
(Permits and Registrations)

6 N.Y.C.R.R. § 231-2
(Requirements for Emission Units)

DECISION: On August 16, 2001, New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty ("Commissioner") affirmed the DEC ALJ/Associate Examiner's conclusion that a SCONOx alternative has not been achieved "in practice" and therefore it is not available to be used at the applicant's East River Generating facility. The SCONOx alternative uses a potassium carbonate-coated catalyst to reduce oxide in nitrogen emissions from natural gas-fired, water-injected turbines. The Commissioner also denied Manhattan Community Board No. 3 and East River Environmental Coalition's (CB3/EREC) request for further DEC review with respect to health impacts and social costs associated with PM_{10} emissions, alternatives and additional mitigation to minimize adverse impacts. Accordingly, the Commissioner adopted the reported findings and conclusions of the Recommended Decision (RD) issued on June 28, 2001, as her own and declared that the requirements of 6 N.Y.C.R.R. § 231-2 had been met. The Commissioner also concluded that the draft conditions of the SPDES modification related to the project are consistent with the applicable state and federal regulations that control wastewater discharges and directed the DEC staff to issue the pertinent permits consistent with the Recommended Decision.

A. Facts

Consolidated Edison ("Con Edison" or "Applicant") proposes a repowering project at its East River Generating Station located in Manhattan between East 13th Street and East 15th Street, from the FDR Drive to Avenue C. The Applicant seeks to construct and operate two dual fuel combustion 180-megawatt turbine generators and two heat-recovery steam generators that would produce an electric capacity of 360 megawatts, and an estimated three million pounds per hour of steam. The two units will use non-interruptible natural gas, and in emergency situations, distillate oil. The purpose of the repowering project is to decommission and remediate the Waterside Generating Station at First Avenue and East 38th Street.

Con Edison applied for certain environmental permits as part of its application for a certificate of environmental compatibility and public need pursuant to Article X of the Public Service Law (PSL). The New York Public Interest Research Group (NYPIRG) filed a combined petition with CB3/EREC for a rehearing of the Siting Board's June 22, 2001 Order and a brief on exception[1] with the Siting Board. On July 23, 2001, the Applicant, DPS, DEC and Department of Health (DOH) each filed briefs opposing the exceptions. On July 30, 2001, the Applicant filed a response opposing the joint petition filed by NYPIRG and CB3/EREC for a rehearing of the Board's previous Order.

B. Discussion

Petition for Rehearing

As stated above, NYPIRG and CB3/EREC ("Petitioners") jointly filed a petition for a rehearing with the DEC. The petition for rehearing sought reconsideration to allow the Petitioners to present evidence on the human health impacts of $PM_{2.5}$ in lieu of *Uprose et al v. New York Power Authority* ("Uprose"), a recent court case in the Second Department. In *Uprose*, the court decided that an environmental impact statement (EIS) under SEQRA must be prepared on an applicant's installation of small electrical-generating turbine power plants in the metropolitan New York City area. The court also stated that the issue of fine

particulate matter was not adequately analyzed by the applicant in the Environmental Assessment Form (EAF). Because the court decided the fine particulate matter analysis was not sufficiently detailed in the EAF, that lack of analysis tipped the balance in favor of preparing an EIS.

In the instant matter, the Commissioner reiterated a previous DEC decision that found Article X's comprehensive environmental analysis under PSL sections 163, 164, 167 and 168, is at least as rigorous and thorough as an EIS review under SEQRA. In light of this previous decision, the Commissioner distinguished the Applicant's situation from that of the *Uprose* case. The Commissioner stated that the environmental information contained in the Article X application was voluminous and comprehensive; including analysis of particulate matter, and it systematically considered significant environmental impacts, alternatives and mitigation. Upon reviewing the record, the Commissioner determined that the evaluation of particulate matter in the Applicant's Article X application was established consistent with approved and accepted methodologies. The Commissioner also stated that the appropriate stipulations between disagreeing state agencies were properly entered into and that the RD findings met all NAAQS and New York State Standards for criteria pollutants, as well as the health-based standards for non-criteria pollutants. The Commissioner determined that the totality of the information easily distinguishes the instant application from that of *Uprose* and was sufficient to deny the petition for rehearing.

Federally Delegated Permits

Air Permits

The Commissioner's June 4, 2001, Interim Decision stated that three matters concerning the Applicant's pending Air State Facility permit were in need of further elaboration on the record. These three matters, which were adjudicated in the proceeding, include: (1) whether SCONOx is an "available" technology or one that can be achieved in practice; (2) an evaluation of the results of the "gradual plum rise" air impact modeling analysis,[2] which considers potential impacts at elevated receptors; and (3) adjudication of alternative sites under 6 N.Y.C.R.R. Part 231 (New Source Review in Nonattainment Areas and Ozone Transport Regions).

The Commissioner affirmed the DEC ALJ/Associate Examiner's conclusion that the intervenor's proposed SCONOx alternative has not been "achieved in practice" and therefore it is not available to be used at the Applicant's proposed facility. The intervenors did not take exception to the findings and conclusions related to the results of the gradual plume rise modeling. The RD fully addressed the matter and additional permit conditions were developed to ensure that the potential emissions would be less than the significant impact levels established by federal regulation. Accordingly, the Commissioner adopted the ALJ's findings as they were and affirmed the related conclusions respecting gradual plume rise.

Pursuant to an Interim Decision by the Commissioner, the RD contained certain findings with respect to the issue of alternative sites. The intervenors did not expressly object to the findings related to the alternatives. Rather, CB3/EREC presented arguments for further hearings to consider the potential public health impacts from adverse air emissions. Further, CB3/EREC requested that the record be reopened with respect to health impacts and the social costs associated with PM_{10} emissions, alternatives and additional mitigation to minimize adverse environmental impacts. The Commissioner denied intervenor's request stating it was improper procedure to raise these issues again after the RD had been issued. The Commissioner adopted the DEC ALJ's reported findings and conclusions and declared that 6 N.Y.C.R.R. § 231-2 requirements had been met.

SPDES Permit

During the issues conference, the Applicant and the DEC staff confirmed there were no disputes over any substantial terms or conditions of the draft SPDES permit. Neither CB3/EREC's joint petition for full party status nor the petitions for status asserted any issues about the draft SPDES permit conditions. In addition, there were no exceptions to the RD that argued to adjust the draft SPDES permit. For these reasons the Commissioner only gave cursory treatment of this issue. Based upon the Commissioner's review of the administrative record concerning the SPDES permit, she concluded that the draft conditions of the SPDES modification related to the proposed project were consistent with the applicable state and federal regulations that control wastewater discharge.

C. Conclusion

Based upon the foregoing determinations, the Commissioner directed the DEC Staff to issue the pertinent permits and to provide such permits to the Siting Board.

Endnotes

1. Pursuant to the PSL, if a party is not content with the findings and conclusions in the RD, than the party may file a brief on exception with the Siting Board challenging the RD.
2. Con Edison's approved air-modeling protocol for the project included an analysis of the potential adverse impacts from emissions on elevated receptors. Part of this evaluation required Con Edison to include the "gradual plume rise" for downwashing stacks. This option was included because the height of the four emission stacks at the East River complex is less than that called for by good engineering practice. Under these circumstances, as plumes are emitted from the stacks, they may impact receptors at or near the tops of nearby tall buildings during the "gradual" rise of the plumes before the plumes reach their final height.

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Recent Decisions in Environmental Law

Student Editor: Elizabeth Vail

Prepared by students from the Environmental Law Society of St. John's University School of Law.

Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001)

Facts: The plaintiffs brought a negligence action against Texaco on the grounds that its activities resulted in property damage, personal injury and increased risk of disease in Ecuador and Peru. Specifically, they alleged that Texaco took the toxic by-products of the oil exploration in Ecuador and dumped them into the local rivers instead of properly disposing of them in accordance with industry standards. In addition to dumping toxic by-products in the river, plaintiffs also alleged that Texaco burned the by-products, spread them over dirt roads and dumped them directly into landfills. Finally, the plaintiffs alleged that the Trans-Ecuadorian Pipeline, built by Texaco, leaked and contaminated the environment.[1]

Texaco's involvement in oil exploration in Ecuador was small. They indirectly invested in a tier four subsidiary of Texaco named Texaco Petroleum Company (TexPet). TexPet initially operated the petroleum concession for the Consortium. It also held several interests, until 1992 when the government of Ecuador took complete control of the Consortium. TexPet is not named as a party in this lawsuit. However, the claim against Texaco is based on the allegation that Texaco controlled the Consortium's activities from the United States.

Two suits were consolidated to form the present case. The *Aguinda* suit included 76 residents of the Oriente region of Ecuador. The *Ashanga* suit included 23 residents of adjoining Peru. Both suits were purported to be on behalf of thousands of people who were in the same corresponding class as the plaintiffs. The suits were originally brought in the Southern District of New York in April of 1994. The plaintiffs were allowed to conduct significant discovery at that time into Texaco's involvement. After the death of the original judge, the case was dismissed on the grounds of *forum non conveniens*.[2] The Court of Appeals reversed for two reasons. First, because the District Court did not get a commitment from Texaco that it would submit itself to Ecuadorian jurisdiction. Second, that the dismissal on grounds of *forum non conveniens* relied too heavily on similar cases in other federal jurisdictions.[3] On remand, Texaco committed itself to be subject to Ecuadorian jurisdiction and renewed its motion to dismiss. The District Court then allowed the plaintiffs the opportunity to re-open the issue of whether or not Ecuadorian courts would be able to provide an impartial forum adequate to satisfy a due process standard. The District Court cautioned that it was leaning toward a motion to dismiss and finally granted the defendant's motion on grounds of *forum non conveniens*.

Issues:

1. Whether an Ecuadorian Court is an adequate alternative forum to pursue claims against Texaco for injuries sustained in Ecuador.
2. Whether the public and private interest factors of an alternative forum outweigh the plaintiffs' original choice of forum.

Analysis: The District Court believed that since Texaco submitted itself to the jurisdiction of Ecuador, that fact alone should be enough to settle whether or not there was an adequate alternative forum. The court was concerned however, because the plaintiffs made some objections as to why Ecuador was not an adequate alternative forum. First, plaintiffs claimed that the system of Ecuadorian jurisprudence was not adequate because it did not recognize tort claims. The court dismissed this argument and pointed to several cases resolved in Ecuadorian courts that had the same allegations as the present one and the plaintiffs were able to recover. The court also pointed to other United States courts that found Ecuador to be an adequate alternative forum for tort claims similar to the ones alleged by the plaintiffs.

Next, the plaintiffs claimed that Ecuador was not an adequate alternative forum because it did not allow class actions lawsuits and could not grant the relief that the plaintiffs were seeking. The court said that merely because Ecuador did not have a procedural device for class actions suits, the forum would not be rendered

inadequate. The court also rejected the plaintiffs' assertion that the procedural devices of Ecuador made it inadequate. They reasoned that some of the procedural devices used in Ecuadorian courts might in fact make the forum more adequate to arrive at a just result.

The court also attacked several general assertions made by the plaintiffs regarding corruption in the Ecuadorian judicial system. The court did not believe and found no evidence that Texaco or other foreign corporations were able to corrupt or influence the judicial system or administrative proceedings as alleged. The court also found no preferential treatment given to multinational corporations who had cases in Ecuadorian courts. Finally, regarding corruption, the court felt that this case would receive strict scrutiny in Ecuador because of the ramifications this case would have on local residents. Since this case would be carefully watched, the chances of influence or corruption would be small.

The plaintiffs' final argument on the issue of inadequate alternative forum stemmed from Interpretive Law 55.[4] Law 55 essentially said that a claimant could choose between filing a lawsuit in Ecuador and filing a lawsuit in a foreign forum. Once a claimant had chosen a foreign forum, jurisdiction by Ecuadorian judges would be terminated. The court did not believe that Law 55 applied, for two reasons. First, the law was enacted after this case began, and therefore the law would not apply retroactively. Second, the court believed that the statute was intended to provide only one forum for adjudication. In fact, the court said that if it was wrong about its interpretation of Law 55 and the plaintiffs pursued their claim in Ecuador and it was denied all the way up to the highest court in the land on Law 55 grounds, the plaintiffs could return to the District Court with their claim. The court concluded that there was no strong argument why an Ecuadorian court would be an inadequate alternative forum for the plaintiffs' claim.

Applying the *Gilbert* test,[5] the court then balanced whether the public and private interests in dismissing the claim outweighed the plaintiffs' interest in pursuing the claim in their original choice of forum. The court first looked at the private interest factors. As spelled out in *Gilbert*, the private interests include ease of access to source of proof, cost of obtaining attendance of willing witnesses, availability of compulsory process for obtaining attendance of unwilling witnesses and reviewing the relevant premises.[6] The court determined that the Ecuadorian court would be in a better position to view the premises. In addition, since nearly all of the witnesses reside in the area, it would be far easier for them to appear in an Ecuadorian forum than it would be for them to appear in New York. The documentary and testamentary evidence that was obtained by the Consortium was in Ecuador as well. Finally, the key activities took place in Ecuador by employees of the Consortium and hence would make it a more appropriate forum. Based on the above reasoning, the court concluded that the private interests far outweighed the plaintiffs' original forum selection.

The court then considered the public interest factors for keeping the original forum. The court again turned to *Gilbert* for guidance and looked at the public interest factors that could favor the original forum of the plaintiff. The first guideline the court looked to was whether there was a local interest in the controversy. They reasoned that since it was Peruvians and Ecuadorians that were injured, their government had a greater interest in protecting its citizens.

The court also looked at whether dismissing the claim would lead to court congestion in Ecuador. In fact, the court believed that the United States was a more litigious society with congested courts, and hence the plaintiffs' claim would be better expedited if it was heard in Ecuador. The third factor the court looked at was whether dismissing the case would avoid unnecessary problems in applying foreign law. They felt that since this problem affected Ecuadorian lands and people, the laws of Ecuador would apply to most of the claims and Ecuador courts are in the best position to find and apply their own laws. The court was also concerned about imposing jury duty on residents of New York who had little relationship to the controversy. They determined that an Ecuadorian judge would be better suited to apply Ecuadorian law than a New York jury would, especially considering the Spanish language testimony and documents that would be necessary to consider.

Finally, the plaintiffs claimed that despite the evidence in favor of dismissal, the court should look at their claim under the Alien Tort Claims Act,[7] which allowed a federal forum for aliens suing a United States entity that had violated the law of nations. The court rejected this argument as well because it believed that the claims brought did not rise to a level of violating evolving international environmental law. Also, the court reasoned that the information the plaintiff obtained during discovery regarding Texaco in no way established that Texaco was materially part of the pollution problems in Ecuador. Therefore, since the court established that an Ecuadorian court was an adequate alternative forum and the public and private interests outweighed the plaintiffs' interest in preserving their original choice of forum, the dismissal was granted on grounds of *forum non conveniens*.

Daniel A. McFaul, Jr. '02

Endnotes

1. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155–56 (2d Cir. 1998).
2. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).
3. *Jota*, 157 F.3d at 159.
4. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 546 (S.D.N.Y. 2001).
5. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–509 (1947).
6. *Id.* at 508.
7. 28 U.S.C. § 1350.

* * *

Friends of the Cowlitz and CPR-Fish v. Federal Energy Regulatory Commission, 253 F.3d 1161 (9th Cir. 2001)

Facts: Friends of the Cowlitz River and CPR-Fish ("Petitioners"), appeal to the United States Court of Appeals for the Ninth Circuit charging the Federal Energy Regulatory Commission's (FERC) summary disposition of their complaint lacked a justified legal basis. Petitioners argued that FERC's refusal to investigate the alleged failure by the City of Tacoma ("Tacoma") to operate a hydroelectric power project on the Cowlitz River in a manner that would maintain agreed-upon levels of fish populations was an abuse of the Commission's discretion.

The Cowlitz River Project (FERC Project No. 2016) is a major hydroelectric project in Lewis County, Washington consisting of two dams. It has the capacity to generate 460 megawatts of hydroelectric power and is operated by the city of Tacoma under a license ("License") granted by FERC. At the time of licensing, the Washington Department of Fisheries and Wildlife (WDFW) worried the project would destroy the use of the Cowlitz River for spawning anadromous fish; including chinook, coho salmon and steelhead trout. Tacoma entered into an agreement ("Agreement") with the WDFW which promised "to maintain the numbers" of fish populations in the Cowlitz River and submitted a preliminary draft of the Agreement to FERC for comment. The FERC replied that its approval of the Agreement was not required, but suggested several provision changes and requested a final copy of the Agreement for its file.

Petitioners filed a complaint with FERC, alleging Tacoma was violating the terms of the Agreement and the License by failing to maintain the agreed-upon levels of fish populations. The FERC issued an order summarily dismissing the complaint without prejudice on the grounds that the Agreement was a private contract whose terms were never approved by FERC or incorporated into the License itself. The Ninth Circuit denied review of petitioners' appeal holding "the FERC has virtually unreviewable discretion to enforce (or, in this case, to not enforce) any alleged license violations."[1]

Issue: Whether FERC has unreviewable discretion when the applicable substantive statute does not provide guidelines for the agency to follow when exercising enforcement powers.

Analysis: The Ninth Circuit found that FERC plainly erred in summarily dismissing the petitioners' complaint. However, under the Supreme Court's decision in *Hackler v. Chaney*,[2] and applicable statutes, the Ninth Circuit held it lacked the authority to compel FERC to enforce the terms of the License. In *Heckler v. Chaney*, the Supreme Court stated, "an agency's decision not to take enforcement action should be presumed immune from judicial review under [Administrative Procedures Act (APA)] § 701(a)(2)."[3] This presumption may be rebutted if the substantive statute provides guidelines for the agency to follow when exercising its enforcement powers.

Under the APA judicial review provisions at § 701 *et seq.* (1996) and § 313(b) of the Federal Power Act (FPA) the Court found it had jurisdiction to hear the case. The APA allows a court to set aside FERC actions if they are: (1) arbitrary or capricious, in the sense that the agency did not engage in reasoned decision making; or (2) not supported by substantial evidence. The *Chaney* Court held that a decision not to enforce is within an agency's absolute discretion when "a court would have no meaningful standard against which to judge the agency's exercise of discretion."[4]

The Ninth Circuit found the language of 16 U.S.C. § 823b(a),[5] and the fact that the FPA contained no establishment of priorities or meaningful guidelines, provided FERC's enforcement decisions wide latitude. Enough latitude that if the Commission instead found that Tacoma had violated the License by inadequately cooperating with WDFW to preserve fish stocks, the Commission could still lawfully decline to prosecute the alleged violations and its decision would remain immune from judicial review.[6] The Ninth Circuit then turned to 16 U.S.C. § 825f[7] and found that the plain meaning of the statute granted FERC complete discretion when making investigative decisions.

Furthermore, the court held, under applicable regulations, the decision to investigate is committed to the complete discretion of FERC. Under 18 C.F.R. § 1b.5, "the Commission may, in its discretion, initiate a formal investigation by issuing an Order of Investigation." Likewise, § 1b.6 states, "the Commission or its staff may, in its discretion initiate a preliminary investigation . . . [w]here it appears from the preliminary investigation that a formal investigation is appropriate the staff will so recommend to the Commission." Finally, § 1b.7 states that "where it appears that there has been or may be a violation of any of the provisions of the acts administered by the Commission or the rules, opinions,

or orders thereunder, the Commission may institute administrative proceedings . . . or take other appropriate action."

Under the plain meaning of the relevant FPA and APA provisions governing hearings as well as FERC regulations, the court found that FERC's decision not to hold evidentiary hearings or investigate the alleged violations of Tacoma's license was within the agency's broad discretion. The Ninth Circuit concluded that it lacked authority and denied the petition for review.

Cristina Fernandez '03

Endnotes

1. 253 F.3d 1161, 1162 (9th Cir. 2001).
2. 470 U.S. 821 (1985).
3. *Chaney*, 470 U.S. at 832.
4. *Id.* at 830–31.
5. "After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this subchapter."
6. *Friends of the Cowlitz*, 253 F.3d at 1171.
7. 16 U.S.C. § 825f states the Commission

> may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provision in this chapter.

* * *

Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2000)

Facts: This is a dormant Commerce Clause case involving the state of Virginia's restrictions on importing municipal solid wastes (MSW). The state of Virginia enacted several statutes designed to restrict the use of Virginia landfills for foreign waste disposal. These enactments were in response to several factors. First, statistics showed Virginia was the nation's second-largest importer of MSW, behind only Pennsylvania. Second, the future volume of imported MSW was slated to increase due to New York City closing its Fresh Kills landfill and contracting with private landfills in Virginia to receive a major part of Fresh Kills MSW. The plaintiffs, landfill operators and waste transporters brought suit claiming that Virginia's statutes were unconstitutional under the dormant Commerce Clause in that the statutes discriminated against out-of-state MSW, thus harming the free flow of interstate commerce.

In March and April 1999, Virginia passed a series of statutes designed to cap and restrict the import of MSW. The enactments included a provision capping landfill imports to 2,000 tons per day or an alternative average amount; a provision requiring the Virginia Waste Management Board to promulgate regulations regarding the transportation of MSW by barge, including regulations on stacking containerized waste; prohibitions against MSW transport upon certain rivers; prohibitions against transport by trucks with four or more axles; and finally, increased regulation of tractor transport of MSW.[1] These enactments grew out of feelings by such persons as Virginia Governor Gilmore that "the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds."[2]

The major landfill operators and transporters fiercely opposed these measures. One of these operators was Waste Management Holdings, Inc., an operator that had large sums of investments and potential contracts at stake. Waste Management had two contracts with the city of New York and was a primary bidder on a third contract that would contemplate handling the entire city's MSW, representing 12,000 tons a day. In addition it had agreed to purchase $4 million worth of steel containers, had made $5 million in facility improvements and had guaranteed payment of $5 million for cranes to unload containers.

The district court granted summary judgment for the plaintiffs, declaring that the enacted Virginia statutes were exactly what the dormant Commerce Clause forbids. Defendants appealed.

Issues:

1. Whether the state statutes violate the dormant Commerce Clause as defined by a state law that discriminates in its practical effect or purpose against interstate commerce.
2. If the state statute is found discriminatory, whether it will survive by proving that it is justified by factors unrelated to economic protectionism, and that no adequate nondiscriminatory alternatives exist.

Analysis: The court first looked at whether these state laws were discriminatory in their practical effect. First, regarding the statute requiring a 2,000-ton-per-day cap on imports, a witness testified that the small local landfills, which only accept *intrastate* MSW, accepted much less then the maximum 2,000 tons. Meanwhile, those few larger landfills that handle *interstate* MSW, accepted more than the cap limit; therefore, the practical effect was to discriminate against out-of-state MSW. The witness on this issue, however, did not identify a basis for his opinion, so the court decided a material issue of fact remained. Second, for the provision limiting the number of containers that can be stacked, it was

shown that the statute would double the cost of shipping. The court found that discrimination existed because only out-of-state MSW comes by barge, and thus only out-of-state MSW would be affected by higher shipment costs. Therefore, this provision had the practical effect of being discriminatory.

The court then looked to see if the statutes were also enacted with a discriminatory purpose. Given the volume of legislative history explicitly talking of the need for limiting foreign MSW imports, the court found that the statutes were enacted with a discriminatory purpose. Some of the arguments made during passage of the bills included the need to preserve landfill space for Virginia citizens; lack of confidence that foreign waste will be free of hazardous items; harm to Virginia's image; and potential environmental impacts. The court saw these arguments as clear proof of a discriminatory purpose behind the statute.

The next step upon a finding of discrimination is to declare the enacted statutes invalid unless the state can show that a valid justification for the law exists, and a nondiscriminatory alternative does not exist under a "strict scrutiny test."[3] For the first part, Virginia presented evidence showing that other jurisdictions defined MSW differently and that foreign MSW may not meet Virginia's strict standards against inclusion of hazardous materials. It showed that Maryland and North Carolina in limited circumstances permit infectious items such as blood and urine to be included in MSW, and New York does not have any limitations whatsoever on what constitutes MSW. Since Virginia law is more restrictive then other places, MSW from other states could pose a health risk that in-state MSW does not. The court, therefore, found that all the enacted statutes at issue exist for a justified reason other then economic protectionism.

The court then went on to the second prong—which has to be concurrently satisfied—that the enacted statutes are the least discriminatory means of redressing the "valid" reason for the discriminatory statute in the first place. For the statute regarding the 2,000-tons-per-day cap, Virginia argued the "valid" reason for discriminating against foreign waste is to protect Virginia citizens from the health risks of contaminated foreign MSW. If Virginia does not limit the imports, the argument goes, it will have to conduct prohibitively expensive inspections on the MSW before it can enter Virginia landfills to ensure safety. Some of these inspection methods would include unloading the waste onto an impermeable pad and breaking the waste into smaller pieces so it can be screened for contaminants and, in addition, special time-consuming tests would have to be done for non-visible contaminants. Virginia argued that the volume of imported MSW must be kept to the limited amount so it can be inspected; therefore, the 2,000-ton limit is the least discriminatory way of achieving protection from possibly contaminated foreign waste.

The plaintiffs countered, and the court agreed, that the current cap provision does not pose the "least burden possible on interstate commerce."[4] Nothing about restricting imports only from those states with inferior standards is part of the statute. A statute that did require restrictions only on importing MSW from states with fewer restrictions would pose less of a burden than the current across-the-board cap. Therefore, the court found that the current statute was not the "least burdensome" means of attacking the problem of contaminated MSW. The plaintiffs prevailed on this issue because the law as written was too broad and needlessly discriminated against everyone, including those with MSW restrictions equal to those of Virginia.

The court found an issue of fact existed for the statutes regulating stacking of containers and transportation on certain rivers. The court concluded that serious health risks might exist from the transportation of MSW, citing testimony of a previous incident where containers came loose from improper lashings and testimony of a barge fire. The court agreed with the state, and summary judgment was overruled. The court found issues of fact existed as to whether these discriminatory statutes are the least discriminatory means available to ensure the safe transport of MSW.

Finally, the court looked at the provisions regulating tractor-trailers and the provision limiting MSW transport on trucks with four or more axles. The defendants relied on the usual "traditional" deference courts grant to states in the area of highway safety. The court rejected this, asserting that the deference is reserved for intrastate issues where the political process can serve as a check against burdensome regulations. Where a regulation affects interstate commerce, and where it has already been shown that the regulation exists to discriminate against interstate commerce, the court found no such deference was warranted. The state failed to show any facts that these provisions were the least burdensome alternatives, thus summary judgment was upheld for the plaintiffs on this issue.

Karl Silverberg, P.E. '03

Endnotes

1. Va. Code Ann. §§ 10.1-1408.1(Q); 10.1-1408.3; 10.1-1454.1(A); 10.1-1454.2; 10.1-1454.3.
2. 252 F.3d at 327.
3. *Id*. at 342.
4. *Id*. at 343.

Section News

Call for Nominations: Albany Law School 2002 Bernard E. Harvith Distinguished Environmental Service Award

The Steering Committee of the Albany Law School Environmental Alumni Group is seeking nominations for the 2002 Bernard E. Harvith Distinguished Environmental Service Award. The award recognizes outstanding service on behalf of New York's environment and is named for longtime Albany Law School professor Bernard Evans Harvith, whose commitment to environmental law made him an inspiration to many.

Previous recipients include individuals who have played significant roles in shaping New York's environmental protection efforts, such as David Sampson, former Executive Director of the Hudson River Valley Greenway; and Val Washington, Executive Director of Environmental Advocates, former Assistant Attorney General and Department of Environmental Conservation attorney.

Please provide your nomination no later than July 1, 2002, accompanied by a brief explanation of why you think the nominee would be a deserving recipient of this prestigious award. All nominations should be provided in writing to the Alumni Office, Albany Law School, 80 New Scotland Avenue, Albany, New York 12208 or faxed to (518) 445-3255.

Names in the News/People on the Move

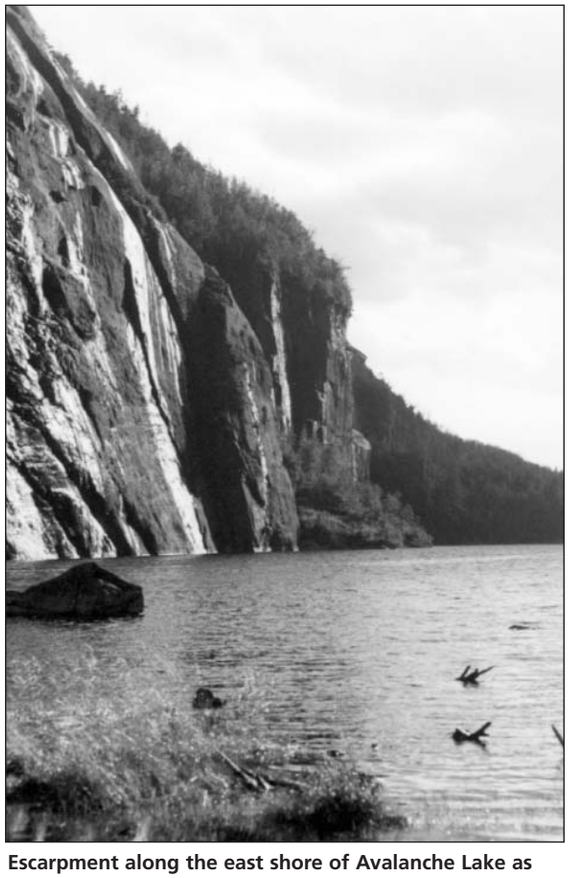
Morgan G. Graham has been named Managing Partner of Phillips, Lytle, Hitchcock, Blaine & Huber LLP. He is a graduate of Indiana University School of Law Bloomington and the University of North Carolina at Chapel Hill. Prior to attending law school, he worked at the U.S. Environmental Protection Agency. In his tenure with Phillips, Lytle, he has served for a number of years as an administrator of the Environmental Practice Group and has been on the firm's management committee.

Fall Meeting

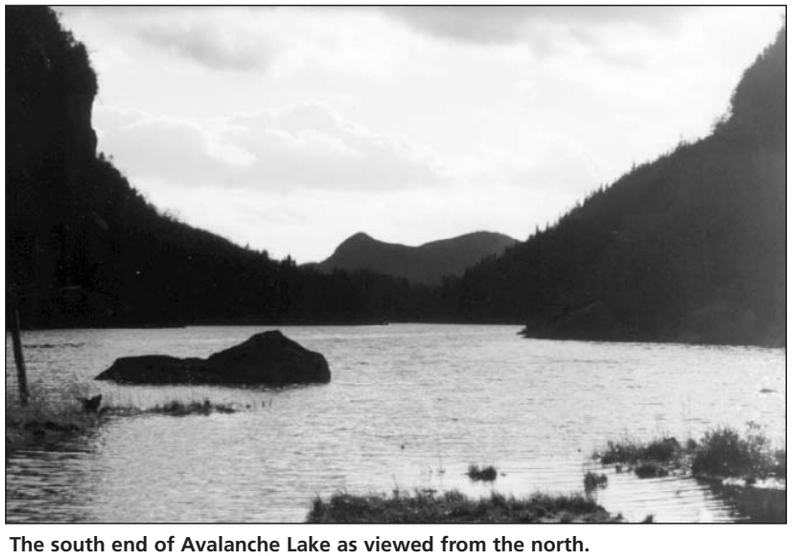
The Environmental Law Section Fall Meeting will be held on September 27–29, 2002, at The Otesaga Hotel in Cooperstown New York.

Environmental Law Section Fall Meeting—October 19–21, 2001—Lake Placid, NY

The photos below were taken on October 20, 2001, during a break from the Fall Meeting of the Environmental Law Section. They show Avalanche Lake, one of the lakes identified as affected by acid rain in the presentation earlier that day by Karen M. Roy. Although beautiful, its fish population has been decimated by acidification. Photos by Kevin G. Ryan.



Escarpment along the east shore of Avalanche Lake as viewed from the north.



The south end of Avalanche Lake as viewed from the north.

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NYSBA**CLE** **Publications**

Zoning and Land Use

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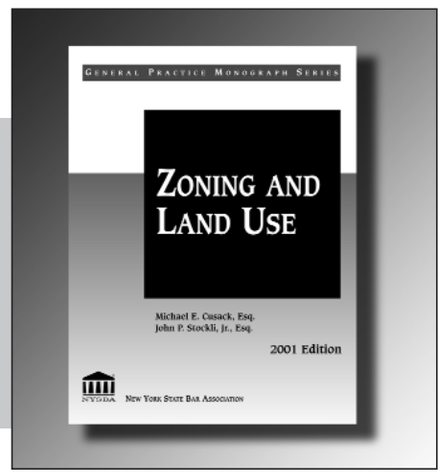

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To some practitioners, zoning and land use law is rarely encountered, a remnant of bar review courses of years gone by. To others, it is a specialty to which their careers are largely devoted. To the vast majority, however, it falls in the middle. For them, the zoning and land use process may be tangential to a commercial development or real estate matter, or perhaps comes into play when a client is concerned about a proposed project in his or her neighborhood which could potentially impact the neighborhood setting or quality of life.

This publication is devoted to the latter practitioners, who need to understand the general goals, framework and statutes relevant to zoning and land use law in New York State for intermittent purposes. It is intended to provide a broad discussion of zoning and land use in New York State and, above all, to remove the mystique surrounding this practice area. Traditional zoning laws as well as other land use regulations are covered. Numerous practice guides make this reference even more useful.

In addition to updating case and statutory references, this latest edition discusses new legislation which allows town, city and village boards to create alternate member positions to replace members who are unable to participate due to conflicts of interest, and includes discussion of current case law regarding public hearings, application approvals, and repeated denials of an application which constitute a temporary taking.

Contents

Publication—Editorial Policy—Subscriptions

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Publication Policy: All articles should be submitted to me and must include a cover letter giving permission for publication in this *Journal*. We will assume your submission is for the exclusive use of this *Journal* unless you advise to the contrary in your letter. If an article has been printed elsewhere, please ensure that the *Journal* has the appropriate permission to reprint the article. Authors will be notified only if articles are rejected. Authors are encouraged to include a brief biography.

For ease of publication, articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect 6.1. Please also submit one hard copy on 8½" x 11" paper, double spaced. Please spell-check and grammar check submissions.

Editorial Policy: The articles in this *Journal* represent the author's viewpoint and research and not that of the *Journal* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

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