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A Message from the Section Chair

We have much to celebrate!

It is truly a great honor to have the opportunity to chair the Environmental Law Section in the year that we are commemorating two major environmental milestones in New York State: the 20th anniversary of the founding of our Section and the 25th anniversary of the enactment of the State Environmental Quality Review Act (SEQRA). Now you might question why we are commemorating the Section's 20th anniversary again this year when just two short years ago, under **Joel Sachs'** leadership, we had a delightful and most humorous, albeit premature, "20th Anniversary" celebration at our Section's 1998 Fall Meeting at Jiminy Peak, at which each of the Section's past chairs was honored. To clarify this seeming confusion (and because I thought it would be fun to take a look back as I prepare to move the Section forward), with the help of **Lisa Bataille**, I embarked on a search of the Bar Association's records to compile the following brief history of the founding of the Section.

In 1974, recognizing the growth in the field of environmental law, the New York State Bar Association created a "Special Committee on Environmental Law." The first Chair of that Special Committee was **Arthur Savage,** and **Bill Fahey** (later to become a Section Chair) served as the Secretary. Several years later, in 1977, the Special Committee became a Standing Committee of the Bar Association. On April 28, 1978, the Committee on Environmental Law established an internal "Committee to Consider Section Status," which committee included members state-wide—from Glen Falls to New York City and Buffalo to Riverhead. That committee reported its initial findings to the Committee on Environmental Law on January 26, 1979 in a report entitled "Project to

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Determine Feasibility of Section Status," and thereafter, issued a final report, dated December 3, 1979, recommending establishment of the Environmental Law Section. The report was "duly debated" by the members of the Committee on Environmental Law at their March 7, 1980 meeting and it was resolved that an application would be made to the NYSBA's House of Delegates for the establishment of a new Environmental Law Section. The Committee Chairman, **Arthur Savage**, then named a Task Force of Committee members, headed by the ever-versatile **Prof. Nicholas A. Robinson**, to prepare the application.

When I read the application calling for the creation of the Section, I was struck by the thought that as much as things change they still manage to stay the same. While we have seen a sea change in the practice of environmental law as it has matured over the past 20 years, the rationale proffered for the Section's creation in the 1980 application, in my view, remains very much true of the Section's work today. With great foresight, the application stated:

> The growth in the field of environmental law continues unabated. Every practitioner has the likelihood of confronting an environmental law issue today. Attorneys as corporate house counsel are assigned full-time to environmental practice; procedures for environmental impact statements are a part of every government attorney's work; extensive environmental disclosures are required for securities registrations; new regulatory schemes for toxic substances, historic structures, coastal zone management and solar easements are currently being added to the some thirty distinct environmental regulatory programs [*OK, I haven't counted but there have to be many more than 30 programs today*] added to New York State Law over the past decade. (*Application For Establishment of An Environmental Law Section,* dated June 28, 1980.)

Even more interesting in view of the Executive Committee's continuing efforts to attract "new blood" to the Section's ranks and to increase the membership and participation of government attorneys through our newly adopted government attorneys subsidy program, the application estimated the "pool of prospective Section members" from numerous specified sources (including government attorneys and in-house counsel) could total 1,480. While our Section membership has fluctuated over the years—with the highest membership year being in 1992 when there were 1,925 members—it has, in recent years, remained fairly consistent with, or slightly down from, the estimate originally contained in the 1980 application. Where we have fallen far short of the estimates included in the application is in the category of environmental attorneys in government practice—the application estimated 200 and our membership records as of May 2000 show we have only approximately 110 attorneys who have identified themselves on their membership forms as government employees (although many members are *former* government attorneys). We already have taken steps to remedy that failing and will continue to monitor our success in attracting more government attorneys to become involved in the Section. We also continue to solicit ideas on how to attract more minority attorneys to our Section's ranks.

On the financial side, the picture is much rosier. The estimated expense budget (for the year 1981) contained in the application for the new Section was $6,500. In comparison, our current expense budget for the fiscal year 2000-2001 is $71,325 and we have an accumulated surplus from prior years of $53,325 (some of which we expect to spend this year on our government attorneys' subsidy program, our 20th Anniversary celebration and the upcoming 25th Anniversary of SEQRA conference and symposium.) Finally, the Section dues in its first year were $10. Twenty years later, Section dues are today only $30—a real bargain, wouldn't you agree?

And so, continuing this historical foray, in **late 1980** our Section was created by the NYSBA's House of Delegates. (You see, this really is our 20th Anniversary!) The first meeting of the Section's Executive Committee was held on January 23, 1981 at the New York Hilton Hotel, with **Arthur V. Savage**, the Section Chair, presiding. The other officers of the new Section were: **Nick Robinson**, **Ernie Ierardi**, **John Hanna**, and **Marty Baker**. Nineteen standing committees were created through which the work of the Section was to be conducted: Air Quality, Adirondack & Catskill Parks & Forest Preserves, Agency Oversight, Continuing Legal Education, Corporate Counsel, Energy, Environmental Impact Assessment, Historic Preservation, Land Use Planning, Membership, Natural Resource Management, Newsletter, New York/Federal Relations, Parks & Recreation, Solid & Hazardous Waste Management, Transportation, State Legislation, Water Quality and Wetlands. Today, our Section has many of the same committees (some have been renamed), and we have grown some to 30 committees and task forces (including our two substantive Task Forces on Legal Ethics and on Agriculture and Rural Issues). (See the current Committee list on pages 56-58). We strongly encourage *all* Section members to join at least one committee and to become involved!

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From the Editor

This is a combined issue, owing in part to the stream of activity that the Section and its officers have experienced of late. The overlapping developments did not allow for a clean delineation of some materials into the respective Spring and Summer issues. In consultation with the Section Chair and our publishers at the New York State Bar Association, we thought that the more pragmatic approach would be to combine as much as we could of those matters that were ready for presentation in a single mailing. The Chair's column as well as some of the correspondence in this issue give a good sampling of just some of those recent activities.

Speaking of the new Chair, Gail Port writes a heartfelt, optimistic and ambitious introductory column—ambitious in that she sets high standards for herself and for the Section in the next year. If experience is any guide, I think it a safe bet that Gail as well as the Section will perform with their usual bravado so that this time next year we can look back on a productive and satisfying year. I'd like to draw readers, though, to one of Gail's topics—a retrospective of sorts. A year and a half ago, the Section celebrated a landmark occasion at the Fall Meeting in the Berkshires under Joel Sachs' careful guidance. Gail explains why we can now celebrate again—the distinction being the difference between the appointment of a Bar Association Special Committee and the subsequent formation of the Section. However, she also reminds us about some of the visionaries who saw the future importance of the nascent field of environmental law and the need to give it some coherence for our practitioners and policy makers, and the contribution to that goal which could be made by both creating the Section as an informational clearinghouse and as a structural element of much future New York policy. These 20 years later, we can look back at a record of success, and know that the leading environmental practitioners and policy makers have passed through and are often still affiliated with the Section. When we reconvene this Fall in the Berkshires again, we can all take the opportunity to appreciate some of the history, and the successes, that we share. And as one who attended the last Fall Meeting at Jiminy Peak—with children—I can give my personal assurance that there will be ample fun in addition to business.

In this issue we also have correspondence addressing some of the recent controversy involving the Hudson River Valley Greenway Council. While the correspondence underscores the Section's reluctance to enter the political fray, it also notes our strong interest in maintaining stability in the Council's staffing and leadership and consistency in its goals. This issue includes the Chair's correspondence to several of our elected leaders to urge passage of the pending Conservation and Reinvestment Act (CARA). A response from Senator Moynihan also is included.

Lou Alexander, who is retiring from the task of arranging the annual Legislative Forum after several successful years, submits a committee report. This year's topic was pesticides, a particularly timely subject in view of newly discovered mosquito-borne diseases in our region, but also in terms of the likely increase in tick populations after a mild, wet winter. Assemblyman Steven Englebright, one of the participants as well as a legislator with a significant and growing record in the areas of pesticide legislation, thoughtfully sent us a copy of his remarks, which are included in this issue. The Legislation Committee's loss is the Environmental Justice Committee's gain. Lou, the new Co-Chair, submits that Committee's report. As Cheryl Cundall informs us in the Names in the News/People on the Move feature, Lou has also been recently appointed a member of DEC's Environmental Justice Advisory Group.

Douglas Ward, whose firm represents various Adirondacks environmental organizations, submits an analysis of a Third Department decision addressing citizen standing in litigation involving the "forever wild" clause in the New York constitution. Jennifer Rosa of St. John's Law School, our student editor, submits several topical case summaries. Finally, I would be remiss if I did not mention the regular efforts of Cheryl Cundall, for her "People" column, Marla Rubin, for her ethics column, and Whiteman, Osterman and Hanna, for its administrative update, this time by David Everett, Melissa Osborne and Jeffrey Lindenbaum. The publishers and editors of *The New York Environmental Lawyer* wish you all a wonderful summer.

Kevin Anthony Reilly

Summary of New York State Voluntary Cleanup Agreements

By Larry Schnapf

This is the 12th VCP report which covers agreements #95 through #97. The agreements are analyzed on an individual basis and highlight any significant changes in the features or provisions that have been previously reported. Readers should refer to the first report published in the Fall 1996 issue of the *New York Environmental Lawyer* for a detailed discussion on the kinds of provisions that typically appear in agreements issued under the New York Voluntary Cleanup Program ("VCP").

This package of agreements reflects some minor changes that were made to the model VCP agreement. In addition, readers should pay particular attention to the sections containing definitions of existing contamination, Work Plan procedures, reservation of rights, dispute resolution, reimbursement procedures, deed restrictions, and site listing to see interesting variations on these standard provisions. As always, unique or interesting provisions are italicized in the discussions of the individual agreements.

Recent Administrative Developments

The pace of VCP agreements has been accelerating since our last report. From the start of the program in 1996 through the end of March 2000, approximately 134 VCP agreements (covering 164 sites) have been signed by the DEC. Of these, 81 were for remediation, 29 for investigation and 24 for remediation and investigation. There are approximately another 136 applications/agreements in the administrative pipeline waiting approval or signature.

While New York does not have a statutory Brownfield Program, there are some funding sources that property owners may use to help defray the costs of remediating contaminated property in New York. The 1996 Clean Water\Clean Air Bond Act established a $200 million Environmental Restoration Project Fund to assist in the investigation and cleanup of municipally-owned contaminated properties. In January 1998, the DEC issued its regulations governing what the DEC calls its "Brownfield Program." The regulations are codified at 6 N.Y.C.R.R. 375-4 *et seq*. Through the end of March 2000, DEC has approved 99 investigation grants and 11 remediation grants under the Brownfield Program. The value of grants awarded to date is $19,148,729. No information is available on how much money had actually been disbursed under the program.

The grants are used to reimburse municipalities for their investigation and remediation costs. Generally, municipalities will be reimbursed at 75% of the eligible costs and 50% of costs associated with abatement of indoor asbestos abatement and demolition of structures unless that material *must* be disposed in a RCRA "C" landfill. "Eligible costs" include the costs of appraisal, surveying, engineering and architectural services, plans and specifications, consultant, and legal services which are necessary for conducting the approved project, and which are reasonable and properly documented, as determined by the DEC. Costs not eligible for reimbursement include lead abatement projects, costs to redevelop the property that are not necessary to remediate the property, and costs incurred prior to DEC approval of an investigation application except for pre-application costs associated with storage tank registration, closure, and disposal activities incurred on or after June 6, 1996. The cleanups must be performed in accordance with 6 N.Y.C.R.R. 375-1.10 which means that grant recipients must evaluate the feasibility of cleanup to unrestricted use of the property. If it is not feasible to cleanup to that level, then deed restrictions could be required and a higher cleanup level may be allowed based on feasibility.

Low-interest loans may also be available under the Clean Water State Revolving Fund (CWSRF) to help remediate contaminated properties. The CWSRF loans have an effective interest rate of 2.82 percent. The CWSRF is jointly administered by the Environmental Facilities Corporation (EFC) and DEC.

Section 309 of the federal Clean Water Act permits the CWSRF to be used to mitigate pollution of non-point sources. Types of non-point source projects are eligible to be financed through New York's CWSRF include remediation of contamination from leaking petroleum and chemical storage tanks, underground injection wells and spills cleanup; upgrade and rehabilitation or removal of existing petroleum/chemical storage tanks for pollution prevention; and water quality protection components of municipally-owned brownfields and inactive hazardous waste site remediation projects. Thus, contaminated properties that might be impacting surface water quality through non-point source pollution may be eligible for CWSRF loans. Governor George E. Pataki recently announced more than $67 million in CWSRF loans to 29 communities.

Recently, Empire State Development (ESD) announced the creation of its Rebuild-NY pilot program which will be used to promote the cleanup and reuse of "brownfields" that have potential for economic redevelopment because of their prime locations. The program is modeled after ESD's Build Now-NY which is developing an inventory of commercial and industrial sites that are pre-approved to avoid permitting obstacles and to expedite construction timeframes for companies locating or expanding in New York State. The Rebuild-NY will identify and develop remediation plans for up to five sites that can be added to the Build Now-NY inventory. The first Rebuild-NY sites will serve as a pilot for an expanded program that can add revitalized brownfield sites to the Build Now-NY inventory.

To be eligible for the Rebuild-NY program, a site must have at least 25 acres of developable land, or 15 acres in certain densely populated areas, and have access to transportation, skilled labor and municipal water and sewer systems. Locations should also be zoned and suitable for redevelopment as industrial, distribution, or business/commerce park facilities. A municipality or industrial development agency (IDA) may submit sites for consideration that are under their control. Private site owners may also apply if they are working with the municipality or IDA. While the level of contamination will not cause a site to become disqualified from the program, Rebuild-NY will evaluate the likely remedial costs, and weigh those costs against the site's economic development potential.

Rebuild-NY will provide consultants to perform a site investigation and to negotiate an assignable VCP agreement with DEC. However, Rebuild-NY will not pay for remediation. A municipality or IDA may apply for an Environmental Restoration Project under the Brownfield Program to pay for the cleanup or market the site to a developer who would pay for the cleanup.

Agreement Summaries

AGREEMENT NO. 95 (Amending D2-0001-96-05) (Pfizer, Inc.) (Brooklyn, New York)

[Note that the instrument summarized in this report amends an agreement that was originally reported as agreement No. 52, *The New York Environmental Lawyer*, Vol. 17, No. 3, p. 26, Summer 1997. This summary only discusses changes to the original agreement. Please refer to the earlier edition of this publication for the details of this transaction.]

I. Program Applicability

A. DEC Authority

No change.

B. Type of Contamination

The term "Existing Contamination" was amended to include environmental conditions in existence at the effective date of the Amendment.

II. Site Information

No change.

III. Status of Volunteer

No change.

IV. Scope of Response Program

The original agreement provides that the purpose of the agreement was to implement interim remedial measures identified in the Work Plan so that the site may be used for "reasonably anticipated industrial, commercial and/or recreational uses designed to preclude contact with the contaminants." The volunteer had received a no further action in February 1997. However, the Work Plan had to be amended to allow the end use to include use as a school.

A. Work Plan

An "Amendment to the Work Plan" had been previously approved on July 9, 1998 and was incorporated into the agreement. The agreement contained the standard ENB 21-day notice period for publishing in the ENB as well as the standard reopeners for modifying the Work Plan and standard termination/reservation provision.

B. Obligations of Volunteer

The volunteer had completed its obligations.

C. Progress Reports

The volunteer had completed its obligations.

D. Review of Submittals

The volunteer had completed its obligations.

E. DEC Obligations (*e.g.*, Issue Release and Covenant Not to Sue)

The original reopeners for off-site migration, new information, failure to promptly commence and diligently complete the post-response O & M plan, fraud that the site-specific cleanup levels were achieved and releases caused by the volunteer remained unchanged. The following reopeners were modified to reflect the additional approved land use.

- environmental conditions unknown to the agency at the time of the approval of the Work Plan which indicate that the site conditions are not sufficiently protective of human health for reasonably anticipated industrial, commercial and/or recreational uses of the site and/or use of the site

as a school as set forth in the Amendment to the Work Plan (designed to preclude contact with the contaminants).

- new information received after the approval of the final report indicating that the Response Program was not sufficiently protective of human health reasonably anticipated industrial, commercial and/or recreational uses of the site and/or use of the site as a school as set forth in the Amendment to the Work Plan (designed to preclude contact with the contaminants).
- the volunteer causes *or* allows the site use to change from reasonably anticipated industrial, commercial and/or recreational uses and/or use of the site as a school as set forth in the Amendment to the Work Plan (designed to preclude contact with the contaminants) to residential use.

The original agreement provided that DEC would issue a "Clean Site Notification" letter upon satisfactory completion of the response action. The Amendment changed this to a no further action letter.

F. General DEC Reservation of Rights

No change.

G. Volunteers' Reservation of Rights

No change.

H. Reimbursement of DEC Costs

No change.

I. Enforceability Provisions (*e.g.*, stipulated penalties, compliance schedule, etc.)

No change.

J. *Force Majeure*

No change.

K. Indemnification

No change.

L. Notice of Sale and Deed Restrictions

Notice of agreement had to be filed within 60 days of the effective date of the Amendment and the volunteer was required to provide proof of filing within 90 days of the effective date of the agreement.

The original agreement provided that deed restrictions had to be filed within 60 days of the approval of the final engineering report which would prohibit the site from being used for any purpose other than the reasonably anticipated industrial, commercial and/or recreational uses designed to preclude contact with the contaminants without the express written consent or waiver of the DEC. Presumably, an amended deed restriction had to be filed to reflect the changed permitted land use but the Amendment was silent on this issue.

M. SEQRA

No change.

N. Contribution Protection

No change.

O. Site Listing

The original agreement provided that the site would not be placed on the Registry but would have a "V" designation in the DEC's Annual Report of Inactive Hazardous Waste Sites ("Annual Report"). Once the Work Plan was completed, the DEC agreed to include a statement in the Annual Report that the site was successfully remediated. The Amendment did not address this issue.

P. Dispute Resolution

No change.

Q. Miscellaneous

No change.

AGREEMENT NO. 96 (V7-1011-96-11)
(Union Forging Company, Endicott, Broome County)

I. Program Applicability

A. DEC Authority

The ECL in general, ECL §§ 3-0301, 27-1313, § 176 of the Navigation Law and § 1389-b of the Public Health Law.

B. Type of Contamination

Volatile and Semi-Volatile Organic Compounds (VOC, SVOC), heavy metals and petroleum. The contaminants listed in the agreement were defined as the "Existing Contamination." *The agreement also contained a term "Covered Contamination" which encompassed the presence or release of any contamination that was identified or characterized in the final investigation report or remediated pursuant to the Work Plan to the satisfaction of the DEC.*

II. Site Information

The site consists of 6.5 acres with ten brick and wood buildings.

III. Status of Volunteer

The volunteer, UIS, Inc., purchased Union Forging Company in the 1950s and has owned and operated the site since that time. *The agreement stated that the volunteer was a PRP at the site*. It appeared that the volunteer had performed some interim response actions prior to enter-

ing into the agreement. The volunteer intends to develop the site for commercial or industrial uses.

IV. Performance of the Response Program

The volunteer has agreed to implement an approved Investigative Work Plan and to develop and implement a Remedial Work Plan.

A. Work Plan

The volunteer had already commenced the Investigation Work Plan at the time of the agreement. The volunteer was required to restart and operate a recovery well within 30 days of the effective date of the agreement. The recovery well must be operated until the site-specific cleanup levels to be established in the Remedial Work Plan are attained, or a replacement system is constructed or the DEC determines the system may be turned off.

After the DEC received the Investigative Work Plan, it would have to determine if it had sufficient information regarding the extent of the site contamination. If not, the DEC would advise the volunteer had the option of proposing a revision to the Investigation Work Plan. If the volunteer elected not to submit a revised Investigative Work Plan or if the DEC disapproves the revision and the volunteer elects not to propose a further revision after good faith negotiations, the volunteer could then terminate the agreement by written notice except that such notice would not abrogate volunteer's obligations to reimburse the DEC for its oversight costs nor to indemnify the DEC. The agreement also contained a strange reference that the DEC would be able to enforce volunteer's obligations under paragraph IV (see "H" on page 8). It is unclear if this language meant that DEC could bring a breach of contract action. Both parties would retain whatever rights they may have had prior to the agreement.

If the DEC determined that remediation was required to allow the site to be used for the Contemplated Use, the volunteer would be required to develop a Remedial Work Plan. The agreement contained the same modification terms as those for the Investigative Work Plan, including for new contamination discovered during the implementation of the Remedial Work Plan.

Once the Remedial Work Plan is approved by the DEC, the DEC was required to publish a notice of the agreement in the Environmental Notice Bulletin (ENB) within 21 days of the effective date of the agreement and equivalent notice to the Broome County and the Village of Endicott. If the DEC learns of environmental conditions that were unknown at the time of the agreement or receives information after the agreement is executed which indicates that the Work Plan was insufficiently protective of human health and the environment for the contemplated use of the property, the parties were to have good faith negotiations to modify the Work Plan. If the parties cannot agree on a revised Work Plan, either party can terminate the agreement and the parties will reserve the rights they had prior to the agreement. The same Work Plan modification provisions were in effect for changes resulting from the public comment period.

B. Obligations of Volunteer

The volunteer was obligated to the Remedial Work Plan within 90 days of its approval. The volunteer was required to implement the Work Plan within 30 days of its approval; notify the DEC if it encounters any "significant difficulties" in the implementation of the Work Plan; maintain a full-time on-site representative to oversee remediation; and submit a final engineering report which shall contain a detailed post-remediation O & M plan.

C. Progress Reports

The volunteer must submit *bi-monthly progress reports by the tenth day of every second month* following the effective date of the agreement.

D. Review of Submittals

The DEC shall review, approve or disapprove submittals in accordance with generally accepted technical and scientific principles. The DEC shall notify volunteer of a disapproval in writing within 30 days (60 days for the final engineering report) of receipt of the submission. The volunteer shall make a revised submittal within 30 days of notice of the disapproval.

If the DEC disapproves the revised submittal, the volunteer may notify the DEC within 10 days if intends to revise the submittal and may submit one further revised submittal within 21 days of the receipt of the notice of disapproval. If the DEC disapproves the revised submittal and the volunteer elects not to submit a further revised submittal or if the further revised submittal is disapproved, the parties may pursue whatever remedies at law or equity (by declaratory relief) that may be available to them without prejudice to either party's right to contest the same. However, the volunteer in such circumstances could invoke the dispute resolution provision within ten days of notice of the disapproval.

E. Obligations of DEC

When the DEC is satisfied that the response actions have been completed in accordance with the Work Plan, the DEC will issue a no further action letter and forebear from bringing any further actions or proceedings related to the investigation and remediation of the site related to releases of the *"Covered Contamination"* provided that volunteer made the required reimbursements to the DEC, files the required deed restrictions and the volunteer or its successors, assigns, lessees and sublessees have diligently pursued completing any required O & M plan.

The agreement expressly provided that the DEC reserved its rights for and the covenant not to sue, release and forbearance would not extend to natural resource damage claims against. The following reopeners applied:

- the off-site migration of contaminants other than petroleum, that may have migrated from an on-site source resulting in impacts to environmental resources, human health or other biota that are not inconsequential and for off-site migration of petroleum regardless if information was available about the migration when the Remedial Work Plan was approved;
- unknown environmental conditions at the time of the approval of the Work Plan which indicate that site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;
- new information that indicates that the Work Plan is not sufficiently protective of human health for the Contemplated Uses;
- fraud or mistake on the part of the volunteer in stating that the site-specific cleanup levels have been achieved;
- volunteer's failure to implement the agreement to the DEC's satisfaction;
- releases of hazardous substances or petroleum that is not considered Covered Contamination which release caused by the volunteer after the effective date of the agreement; and
- the volunteer causing the site use to change from the Contemplated Uses to one that requires lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment.

F. DEC General Reservation of Rights

The agreement contained an unusual reservation of rights. First, the DEC broadly reserved all its rights including for natural resources damages against parties including the volunteer subject to the no further action letter and the release and covenant not to sue. Then, the agreement provided that the agreement would not prejudice the rights of the DEC to investigate or remediate the site if the volunteer fails to comply with the agreement or for contamination other than Covered Contamination provided, however, that the DEC first had to provide written notice "where practicable" to the volunteer and provide it with "a sufficient period of time to investigate and cure any alleged failure to comply with the agreement or any finding of contamination other than Covered Contamination." The agreement also did not prohibit the DEC from exercising its summary abatement powers.

G. Reimbursement of DEC Costs

The agreement contained two cost caps provisions. First, the volunteer was only required to reimburse DEC for oversight costs up to $10,000 incurred negotiating the agreement and approving the Investigation Work Plan and any required submittals. If a Remedial Work Plan was required, the volunteer was required to reimburse DEC for costs up to $20,000 associated with the approval of the Remedial Work Plan and associated submittals. The volunteer may dispute invoices on the basis of clerical error, that the costs are unreasonable, that there is insufficient substantiation of the expenses or the costs are related to activities that are not reimbursable. The volunteer may invoke dispute resolution procedures to resolve billing disagreements provided it submits payment for undisputed costs within the required time period.

H. Enforcement Provisions

The agreement is enforceable as a contract under New York law.

I. *Force Majeure*

Standard force majeure conditions with requirement that volunteers notify DEC in writing within five working days of obtaining "knowledge of any such force majeure event." Such notice shall also include the measures taken by the volunteer to prevent or minimize delays as well as a request for an extension. The volunteers had the burden of proving by a "preponderance of the evidence" that the event is a defense for non-compliance with the agreement. [*Editors note: This will hereinafter be referred to as the "Standard* Force Majeure *Clause" with any unusual language highlighted*]

J. Indemnification

Standard indemnification clause for DEC and New York with an exception for "unlawful, willful, grossly negligent or malicious act or omission" by the DEC, New York, or their representatives and employees.

K. Notice of Sale and Deed Restrictions

Within 30 days of the effective date of the agreement, the volunteer shall request that the landlord file or cause to be filed a Notice of the agreement with the County Clerk and provide evidence of such filing to the DEC (hereinafter "Standard Notice Filing Requirement"). *The agreement provided that the volunteer may terminate the Notice when it is informed that the Remedial Work Plan has been satisfactorily completed.*

If the volunteer proposes to convey all or part of its ownership interest *before the Remedial Work Plan or required O & M activities has been satisfactorily completed,* volunteer shall provide notice to the DEC 30 days before the proposed conveyance date of or the property. The notice shall identify transferee, the nature of the conveyance and proposed conveyance date. The volun-

teer also had to notify the transferee of the applicability of the agreement.

Within 30 days of the DEC's *notification that the Remedial Work Plan has been satisfactorily completed*, the volunteer shall record *an instrument* with the county clerk which shall prohibit the property from being used for purposes other than the Contemplated Use and also prohibit the use of the underlying groundwater without first treating it to render it safe for drinking water or industrial purposes unless expressly approved by the DEC or a successor.

The agreement also contained the relatively new provision that expressly required the volunteer and its assigns or successors to maintain the engineering and institutional controls in full force and effect. The volunteer had to provide the DEC with a certified copy of the recorded instrument. The agreement also provided that the use restriction could only be enforced by the DEC and not any third party.

L. SEQRA

The agreement provided that it was an exercise of the DEC's prosecutorial discretion and that the investigations and remedial action taken under the agreement were not subject to SEQRA review under 6 N.Y.C.R.R. Part 617(c)(29).

M. Contribution Protection

The volunteer reserves rights to seek indemnification and/or claim contribution under CERCLA citing 42 U.S.C. § 9613(f)(3). In addition, to the extent authorized by 42 U.S.C. § 9613, the agreement does not constitute a waiver of any rights concerning contribution claims by other parties against the volunteers (hereinafter "Standard Contribution Protection" clause.) The agreement also states it is an administrative settlement for purposes of 42 U.S.C. § 9613(f).

N. Termination

Except for the volunteer's obligations to indemnify the DEC and to reimburse the agency's oversight costs, the agreement provided that the volunteer's obligations would terminate when it is notified that the Remedial Work Plan or the O & M was successfully completed.

O. Site Listing

The agreement provided that if the response actions reveal that a "consequential amount of a hazardous waste was disposed at the site, the site will be placed on the state's Registry of Inactive Hazardous Waste Sites (the "Registry") as a Class "V" unless the DEC determines that the disposed wastes constitute a "significant threat." Under such circumstances, the site would be designated as a "Class 2" site. However, the agreement also provided that the DEC would not list the site if it determined that disposed wastes no longer constituted and "will not foreseeably ever again constitute a significant threat to the environment." Once the Remedial Work Plan has been completed, the Annual Report of Inactive Hazardous Waste Disposal sites would include a statement that the site had been successfully remediated.

P. Volunteer Disclaimer

None.

Q. Dispute Resolution

Within ten days of receipt of the DEC's disapproval of a revised submittal or itemized invoice for reimbursement, the volunteer may request the appointment of an Administrative Law Judge (ALJ) accompanied by a written statement describing the disputed issues, relevant facts and data. Within ten days of the receipt of volunteer's statement, the DEC shall serve its "Statement of Position." The volunteer may have an opportunity to meet with the ALJ and the DEC to response to the DEC's objections or calculations. The DEC shall maintain an administrative record which shall include the statements of position and other relevant information.

If subsequent to a review of the administrative record created by this process, the ALJ determines that the volunteer shall submit a revised submittal, a revised submittal shall be submitted to the DEC for review and approval within the time frame established by the ALJ. The DEC shall make a reasonable effort to respond to the revised submittal within 45 days of receipt and provide reasons for the disapproval. The triggering of the dispute resolution procedure does not extend, postpone or effect any of the obligations of the volunteer that are not subject to the dispute resolution proceeding. By electing to pursue dispute resolution, the volunteer waives any and all other remedies which might otherwise be available to it. If the volunteer does not invoke the dispute resolution procedures, the DEC and the volunteer remain free to pursue whatever remedies may be available at law or in equity (by declaratory relief) without prejudice.

R. Miscellaneous

The volunteer has agreed to waive all rights to a claim pursuant to Article 12 of the Navigation Law. (hereinafter "Standard Spill Fund waiver").

AGREEMENT NO. 97

(Ridgestone Associates, LLC, Greece, Monroe County)

I. Program Applicability

A. DEC Authority

Sections 173 and 176 of Article 12 of the Navigation Law. The DEC of Law was not a party to this agreement even though it involved petroleum contamination.

B. Type of Contamination

Petroleum. The term "Existing Contamination" referred to contamination at levels requiring remediation which was previously disclosed to the DEC in a Response Program Work Plan.

II. Site Information

No information available on size or past uses of the property.

III. Status of Volunteer

The volunteer wanted to acquire the property and develop the site as a pharmacy, parking lot and related ancillary facilities (the "Contemplated Use"). *The agreement specifically stated that the volunteer had represented that it did not cause or contribute to the contamination and that the DEC had relied on those representations. The agreement also stated that the volunteer had not previously owned or operated the property and was not otherwise responsible to remediate the contamination at the time of the agreement.*

IV. Performance of the Response Program

Volunteer will conduct an investigation and possibly a remediation response program.

A. Work Plan

The DEC had published a notice of the agreement in the Environmental Notice Bulletin (ENB) and provided written notice to the Town of Greece and Monroe County. No comments were received.

B. Obligations of Volunteer

The volunteer was required to implement the Work Plan within 30 days of its approval; notify the DEC if it encounters any "significant difficulties" in the implementation of the Work Plan; maintain a full-time on-site representative to oversee remediation, submit a final engineering report within 30 days of completion of the Work Plan which shall contain a detailed post-remediation O & M plan.

C. Progress Reports

The agreement provided that monthly progress reports had to be submitted by the tenth day of each month until the volunteer received notification from the DEC that the Work Plan had been satisfactorily completed.

D. Review of Submittals

The DEC shall review, approve or disapprove submittals to determine they were in accordance with the agreement and generally accepted technical and scientific principles. The DEC had to notify volunteer of its approval or disapproval in writing within 30 days of a receipt of a submittal (60 days for the final engineering report) and may request volunteer to modify or expand the submittal if the matters to be addressed are "within the specific scope of work as described in the Work Plan." The volunteer shall make a revised submittal within 30 days of notice of the disapproval which "shall endeavor to address and resolve all of the DEC's stated reasons for disapproving the first submittal." The DEC shall notify the volunteer within 30 days if it approves or disapproves the revised submittal.

If the DEC does not approve the revised submittal, the volunteer would have ten days to notify the DEC that it intended to a prepare "*one further revised submittal"* and then have 21 days from receiving notice of the rejection to submit the revised submittal. If the DEC disapproves of the revised amended submittal or the volunteer elects not to submit a *further revised* submittal, the parties may pursue whatever remedies may be available at law or equity without prejudice to either's right to contest the same.

E. Obligations of DEC

The agreement provided that the DEC shall notify the volunteer within 60 days of receipt of the final engineering report whether the Work Plan has been satisfactorily implemented. Upon such a conclusion, the DEC will forebear from bringing any further actions or proceedings related to the investigation and remediation of the site related to the "Existing Contamination" against the volunteer, its successors, assigns, *lessees, sublessees and their respective creditors* provided that volunteer made the required reimbursements to the DEC, complied with the notice requirements and deed restrictions and any required O & M is promptly commence and diligently pursued. The following reopeners applied:

- unknown environmental conditions at the time of the approval of the Work Plan or the last written DEC approved modification which indicate that site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;
- new information received after approval of the final engineering report that indicates that the Work Plan is not sufficiently protective of human health for the Contemplated Uses;
- volunteer's failure to implement the Work Plan to the satisfaction of the DEC;
- fraud or mistake on the part of the volunteers in stating that the site-specific cleanup levels have been achieved;
- releases of hazardous substances or petroleum caused by the volunteer after the effective date of the agreement; and

- the volunteer or any lessees, sublessees, assigns, etc., cause the site use to change from the Contemplated Uses to one that requires lower level of residual contamination to adequately protect human health.

The DEC will also issue a NFA letter when it is satisfied with the implementation of the Work Plan.

F. DEC General Reservation of Rights

The agreement contained the standard DEC general reservation of rights provision.

G. Reimbursement of DEC Costs

No provision for payment of DEC costs.

H. Enforcement Provisions

The agreement is enforceable as a contract under New York law.

I. *Force Majeure*

The agreement contained the standard *force majeure* conditions and 5 working day notice requirement.

J. Indemnification

The agreement contained the standard indemnity without an exception for acts or omissions by the DEC, the State of New York or their representatives and employees.

K. Notice of Sale and Deed Restrictions

The agreement did not contain the standard 30-day period for filing the notice of agreement with the county but had the standard 60-day notice period for conveying part or all of the property.

Within 30 days of the DEC's notification approving the final engineering report, the volunteer shall record an instrument with the county clerk that will *"run with the land"* which shall prohibit the site from being used for "*purposes other than the Contemplated Use"* without the express written waiver of the DEC. No use restrictions were specifically listed in the agreement.

The agreement also contained a relatively new provision that required the recordable instrument give the DEC third-party enforcement rights to enforce the restrictions contained in the instrument and that the volunteer was consenting on behalf of itself, its successors and assigns to the enforcement of those restrictions by the DEC. The paragraph also expressly prohibited the volunteer, its successors or assigns from rescinding or altering in any way the instrument or any restrictions, prohibitions or consents contained therein without the express written authorization of the DEC. The volunteer had to provide the DEC with a certified copy of the recorded instrument.

L. SEQRA

The agreement stated that it was an exercise of the DEC's enforcement authority and, therefore, the actions performed pursuant to the Work Plan were exempt from SEQRA review.

M. Contribution Protection

The volunteer does not waive any rights to seek indemnity or contribution for payments made in the past or for future response costs. Since this was a petroleum site, there was no contribution protection.

N. Termination

In addition to the right to withdraw when the DEC disapproves a revised submittal or when the parties cannot agree on a modification to the Work Plan, the volunteer may seek to withdraw when the nature and cost of the remediation is *"significantly greater than was reasonably expected (for example, such cost exceeds 50 percent of the estimates set forth in the Work Plan),"* the DEC must permit the volunteer to withdraw. If the volunteer withdraws, it must leave the site in no worse condition than before it entered into the agreement.

O. Site Listing

No reference although the site presumably had an oil spill number assigned to it.

P. Dispute Resolution

None.

Q. Volunteer Disclaimers

The agreement states that the volunteer has not caused or contributed to the existing contamination.

R. Miscellaneous

The agreement contained the standard Spill Fund waiver.

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Article XIV Citizen's Suit in Federal Court Recognized by Appellate Division

By Douglas H. Ward, Dean S. Sommer, Elizabeth S. Stong, and Jeffrey O. Grossman

Introduction

Citizen suit provisions play a key role in environmental enforcement. When Congress included them in federal environmental laws such as the Clean Water Act in the early 1970s, it provided citizens with authority more typically exercised by an attorney general to seek relief from the courts when federal standards were violated. Citizen suit provisions mean that citizens do not need to rely for environmental protection on an executive branch that might be unwilling or unable to help them, and often means that citizens can sue the government itself when it violates those same standards.[1]

In New York, the history of citizen suit provisions stretches back long before the 1970s. In 1894, New York added to its constitution the first environmental citizen suit provision in the country to preserve as "forever wild" the vast acreage of land designated as the Adirondack and Catskill Forest Preserve.[2] That constitutional provision, now under Article XIV, empowered citizens, with the approval of the Appellate Division, to sue to enjoin those who endangered the Forest Preserve's "forever wild" status.

Until recently, citizen suits under Article XIV had always been commenced in, and resolved by, New York state courts. But in a recent controversy over the state's authorization of motor vehicle use in the Forest Preserve arising in a federal proceeding in the Northern District of New York, *Galusha v. Department of Environmental Conservation*, four environmental groups intervened and sought the Appellate Division's consent to bring "forever wild" claims for the first time in federal court. In a ruling unprecedented in the 100-plus years since the creation of New York's citizen suit provision, the Appellate Division granted the application of the four groups to bring federal cross-claims alleging that the motor vehicle practices at issue violated the New York constitution's "forever wild" mandate.

The Appellate Division's ruling is an important decision of first impression supporting the legal principle that citizens and the New York judiciary can enforce Article XIV's stringent protection of the Forest Preserve in any forum in which a threat may present itself. Thus, if a company is engaged in a project causing the destruction of trees in the Forest Preserve, and the commencement of federal court claims is the best way to halt that destruction, New York citizens may, with this precedent in hand (and subject only to a federal court's having supplemental jurisdiction over the claims), obtain Appellate Division consent and restrain that company in federal court from violating New York's constitution. When such suits are brought against the state and its agencies, however, as in the *Galusha* case, additional issues of federal and state constitutional law are implicated concerning the scope of a state's immunity to suit in federal court and whether a state may waive that immunity through a mechanism such as the Article XIV consent process.

Factual Background

While not a new issue in the Adirondack region's political and environmental arenas, the subject of motor vehicle use in the Forest Preserve moved to center stage legally as a result of the *Galusha* lawsuit commenced in federal court on July 13, 1998 by several persons with disabilities. Plaintiffs claimed that the state's practice of allowing its employees and large numbers of other able-bodied persons to travel freely throughout the Forest Preserve in motor vehicles unfairly discriminated against the disabled, who, while able to access certain areas of the Preserve with motor vehicles, could not do so in all of the places the state allowed its employees and others to go.

Four New York environmental groups—the Adirondack Council, Residents' Committee to Protect the Adirondacks, Environmental Advocates, and Association for the Protection of the Adirondacks—intervened in the case. The basis for their intervention was the groups' concern that the environmental implications of the state's motor vehicle practices (both the state's own administrative use and the use it allowed by issuing Temporary Revocable Permits (TRPs) to others) would not be adequately addressed by the original parties to the case. At about the same time, plaintiffs obtained preliminary injunctive relief allowing them to use motor vehicles in certain new areas of the Park. In granting them preliminary relief, the court found that plaintiffs were likely to succeed in showing that the state's prohibition on use by the disabled of motor vehicles was unfair when compared with the "extensive and often unnecessary current use of motorized vehicles" the state authorized by others throughout the Forest Preserve.[3]

The environmental groups claimed that the state's motor vehicle practices were in fact themselves unconstitutional under Article XIV and thus an improper foundation upon which to base further expansion of motor vehicle access. In order to assert their claims in *Galusha*, the environmental groups asked the New York Appellate Division for consent to bring cross-claims against the state in the federal proceeding as provided

for in Article XIV. The groups' proposed cross-claims alleged that DEC had failed to preserve the wild forest character of the Adirondack Park by issuing motor vehicle TRPs, and otherwise authorizing the use of motor vehicles, in a manner that caused unreasonable, unnecessary, and irreparable harm to the Adirondack Park and its "forever wild" status. Among the examples of such use cited by the groups was DEC's issuance of TRPs to town snowmobile clubs and town and county highway maintenance crews allowing bulldozers and other motor vehicles on snowmobile trails. The groups claimed that motor vehicle use authorized by DEC caused the destruction of trees and other plant life and otherwise severely disrupted the natural environment of the Forest Preserve.

The Constitutional Structure

The citizen suit provision of Article XIV of the New York Constitution states: "A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen."[4]

Section 1 of the same Article, the "forever wild" provision, states that "[t]he lands of the state . . . constituting the forest preserve as now fixed by law, shall be forever kept wild as forest lands." Section 5 has long been held to permit citizens to sue the state itself if the state is in fact the party that has violated the "forever wild" requirement.[5]

New York State's Constitution "has distributed the powers of government among three departments—executive, legislative and judicial—each with its own powers and duties."[6] Article XIV illustrates a somewhat unique application of this concept by vesting the judicial department with the authority to determine whether a citizen suit against the state for a violation of the Article should be allowed to proceed.[7] In the *Galusha* action, this consent to suit raised federalism issues of constitutional dimension.

The Appellate Division Proceedings

On May 14, 1999, the environmental groups filed an application for the consent of the Appellate Division, Third Department, under Article XIV, § 5, to bring their proposed cross-claims in *Galusha*. The state opposed the application, contending that the Appellate Division should reject the application because the state would allegedly be immune from the groups' claims in federal court under the Eleventh Amendment to the U.S. Constitution, and because the groups' claims would allegedly not fall within the supplemental federal jurisdiction of the federal court.

The Eleventh Amendment provides states with immunity against suits in federal court, whether those suits are based on federal or state law.[8] The Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Amendment has long been construed as prohibiting a federal court from hearing a suit brought by a citizen against his or her own state.[9] Significantly, Eleventh Amendment sovereign immunity does not automatically shield a state from suit; rather, the U.S. Supreme Court has held that the immunity is a defense that the state has the option to assert if it chooses to do so, and that a court can ignore the immunity if the state does not invoke it.[10]

Even when a state representative, such as the attorney general, attempts to assert Eleventh Amendment immunity on behalf of the state in a particular case, other circumstances may make immunity unavailable. For example, with respect to claims under federal law, the U.S. Congress has the power in certain limited circumstances to abrogate a state's immunity from suit under particular federal laws.[11] With respect to claims under state law, a state may waive its Eleventh Amendment immunity by, among other things, "declaring in its constitution or a statute that it is willing to be sued."[12] However, in order to prevent federal courts from stripping a state of Eleventh Amendment immunity where the state did not intend to waive it under state law, the U.S. Supreme Court has set forth a strict rule of interpretation for federal courts that "a State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction," and that any waiver must "specify the State's intention to subject itself to suit in federal court."[13]

The environmental groups argued that the consent-to-suit mechanism of Article XIV, § 5, which includes as a component the Appellate Division's consent to the specific federal claims sought to be asserted, constituted the necessary state waiver of Eleventh Amendment immunity for claims under state law. In addition, they contended that the federal court could exercise supplemental federal jurisdiction over their claims because the state's authorization of motor vehicle use in the Forest Preserve constituted a "common nucleus of operative fact" between the groups' claims and those of the plaintiffs.[14]

On June 18, 1999, the Appellate Division, Third Judicial Department, granted the groups' application to assert Article XIV claims. The court stated:

> Motion for permission, pursuant to NY Constitution, article XIV, § 5, to assert petitioners' [constitutional] claims for

relief in their Federal cross-claim against respondents.

. . . it is

ORDERED that the motion is granted, without costs, to the extent that petitioners seek the consent of this court to assert violations of NY Constitution, article XIV, § 1, and without prejudice to the issues as to Federal jurisdiction being raised within such Federal action, and motion in all other respects denied."[15]

The District Court Proceedings

The environmental groups' success in the Appellate Division was only the first step in presenting their claims for a hearing on the merits in the federal *Galusha* action. Simultaneously with the Appellate Division application, the groups moved before United States Magistrate Judge Ralph W. Smith, Jr. for permission to amend their pleading to assert the proposed cross-claims. The state opposed this motion, arguing once again that the proposed amendment of the pleading was futile because the claims were allegedly barred by the Eleventh Amendment.

Judge Smith rejected that argument, holding that the cross-claims should be added and heard by the district court because Article XIV granted power to the Appellate Division to consent to suit "for any violations of the forever wild provisions;" the Appellate Division's order had consented to the bringing of the groups' "Federal cross-claim;" and, lastly, because Eleventh Amendment immunity was in any event an affirmative defense more properly asserted and resolved on a motion to dismiss or motion for summary judgment.[16]

For a period of time after the Appellate Division's decision in June 1999, the groups, the state, and other interested parties attempted to negotiate new policies and standards for the state's administrative use of motor vehicles and for its issuance of TRPs. When those negotiations appeared unsuccessful, the groups filed their claims against the state in federal court in January 2000. The state moved to dismiss them as barred by Eleventh Amendment immunity. Thus, the next step was reached as the parties briefed and argued the issue of whether the Eleventh Amendment was a barrier to the groups' claims.

In this round, the state attorney general's arguments were successful. U.S. District Judge Lawrence E. Kahn granted the state's motion to dismiss in an oral ruling, and noted that Article XIV, § 5, did not state, in a sufficiently explicit manner, that the state waived its immunity to suit in federal court. The Court's oral ruling made no mention of the Appellate Division's decision granting the groups' application.

The Court's dismissal did not end the efforts of the environmental groups and the state to address the question of motor vehicle use policy in the Adirondack Park. The state continued reworking its policies along the lines the parties had discussed, and it ultimately adopted a revised policy governing administrative motor vehicle use that included the vast majority of changes the environmental groups sought.[17] This revised policy was coupled with a more concrete commitment by the state to improve and tighten its TRP requirements, which had also been an object of the groups' efforts.

Conclusion

The ultimate result in *Galusha* makes it apparent that Eleventh Amendment immunity will be an issue whenever the state is engaging in activities that violate Article XIV. Future petitioners faced with this situation might consider the following:

1. Eleventh Amendment immunity is a barrier only if a state invokes it. There may be circumstances in which the state may be convinced that it is politically undesirable to appear to be ducking responsibility in the face of allegations charging injuries to the public interest (particularly a public interest enshrined in the state constitution). Indeed, Judge Kahn highlighted this aspect of the state's invocation of the defense in an earlier decision in the *Galusha* case dismissing certain of the plaintiffs' federal claims based on Eleventh Amendment immunity:

   Irrespective of the present day appropriateness or value of sovereign immunity, the Supreme Court has recently held that the historical and extraconstitutional concept must be accorded judicial respect. . . . Thus, *all persons in the State of New York should be on notice*. Regardless of the merits of their claims, *the State may seek to take advantage of a sovereign immunity or states' rights defense to avoid accountability in federal court*. . . .[18]

2. State courts are the ultimate authority with respect to their own law. Several courts have held that when a state's highest court has interpreted a particular provision to waive Eleventh Amendment immunity, a federal court should defer to its interpretation even if the language of the provision might not otherwise satisfy the strict federal court rule of interpretation.[19] Along the same lines, future petitioners might emphasize to the Appellate Division the weight that a federal court would likely attribute to a statement from it to the effect that the Court believes Article XIV

empowers it to consent to suits against the state in any forum in which a threat to the Forest Preserve presents itself.

3. The case-specific nature of the Appellate Division's decision makes Article XIV cases different from those in which federal courts must interpret general provisions in state statutes or constitutions. The fundamental Eleventh Amendment issue for the federal court is whether a state has taken a definitive action demonstrating its agreement to be subject to the claim currently before that court. When the source of a state's alleged consent to be sued is a general statutory or constitutional provision that is not tied to a specific case, it may not be apparent whether the provision was enacted to allow that type of case or even whether the provision was written with federal cases in mind at all. Thus, federal courts may be cautious in their interpretation of such statutory or constitutional texts, to ensure that they are not misreading the state's position on whether it has consented to be sued in a particular case.

New York's Article XIV consent process, on the other hand, presents a federal court with a consent decision made in the context of a specific case, and thus the strict rule of interpretation used for general provisions should not be applied. Pursuant to Article XIV, the state—acting through the Appellate Division—consents specifically with respect to the claims at issue and the proposed forum in which the party seeks to bring them. In the Article XIV context, the federal court can rely on the fact that the branch of state government constitutionally designated by the New York Constitution to consent on behalf of the state to Article XIV claims—the state judiciary—has consented to the very claims and forum presented.

* * *

The Third Department's decision provides sound judicial precedent upon which to base a petition to the Appellate Division for consent to have a federal court address an alleged "forever wild" violation. Certainly, when the wrongdoer is a private company acting in a manner that endangers the Forest Preserve, New York citizens need not wait for the state attorney general to take action but can themselves be empowered to step into federal court to force that company to obey New York's constitutional "forever wild" requirements. When the wrongdoer is the state itself, petitioners may need to seek more definitive language from the Appellate Division and explore political solutions to the immunity issue in conjunction with the legal ones.

Endnotes

1. *See, e.g., United States Dep't of Energy v. Ohio*, 503 U.S. 607, 619 (1992) (citizen suit section of Clean Water Act "authorize[s] coercive sanctions against the National Government.")
2. David Sive, *Environmental Standing,* 10 Natural Resources & Environment 49 (Fall 1995).
3. *Galusha v. DEC*, 27 F. Supp. 2d 117, 124-25 (N.D.N.Y. 1998).
4. New York Constitution, Article XIV, § 5.
5. *See, e.g., Oneida County Forest Preserve Council v. Wehle*, 309 N.Y. 152 (1955) (upholding Appellate Division order granting consent to a membership organization and its president to institute suit against the New York State Conservation Commissioner and the Director of Lands and Forests of New York State to restrain the violation by them of § 1 of Article XIV); *Helms v. Reid*, 90 Misc. 2d 583, 394 N.Y.S.2d 987 (Sup. Ct., Hamilton Co. 1977) (deciding action commenced pursuant to Third Department, Appellate Division order granting its consent to citizen action against Commissioner of Environmental Conservation of the State of New York, the New York State Department of Environmental Conservation, the Chairman of the Adirondack Park Agency, and the Adirondack Park Agency of the State of New York.)
6. 20 N.Y. Jur. 2d *Constitutional Law* § 151 (1982).
7. *See, e.g., Oneida County Forest Preserve Council v. Wehle*, 309 N.Y. 152 (1955).
8. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).
9. *Hans v. Louisiana*, 134 U.S. 1, 20 (1890).
10. *See Wisconsin Dep't of Corrections v. Schact*, 524 U.S. 381, 389 (1998).
11. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 119 S. Ct. 2219, 2223 (1999).
12. 17 Moore's Federal Practice, § 123.21[1] at 46 (3d ed. 1998); *see also Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306-08 (1990).
13. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-41 (1985) (internal quotations omitted).
14. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).
15. Order of the Supreme Court, Appellate Division, Third Judicial Department, dated June 18, 1999.
16. Memorandum-Decision and Order dated November 19, 1999, slip op. at 7-8.
17. *Praise for Revised Policy on Access to Forests*, N.Y. Times, April 2, 2000, Metro News Briefs.
18. Memorandum-Decision and Order dated July 22, 1999, slip op. at 7 (emphasis added and citations omitted).
19. *See, e.g., Della Grotta v. Rhode Island*, 781 F.2d 343 (1st Cir. 1986); *see also Minotti v. Lensink*, 798 F.2d 607 (2d Cir. 1986) (recognizing rule but holding that state judicial opinion purportedly interpreting provision at issue did not state with sufficient clarity that provision waived state's immunity in federal court).

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Report of the Environmental Justice Committee

By Louis A. Alexander and Arlene Rae Yang

On October 4, 1999, the Commissioner of the New York State Department of Environmental Conservation, John Cahill, announced the creation of a new program to address environmental justice concerns and ensure community participation in the state's permitting process. As part of this program, Commissioner Cahill established the New York State Environmental Justice Advisory Group ("Advisory Group").

Environmental justice has been defined in federal Environmental Protection Agency documents as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

The New York State Environmental Justice Advisory Group is in the process of holding public meetings to solicit public comment on environmental justice issues of concern. The comments received during the public comment period are to assist the Advisory Group in developing recommendations for an environmental justice program that will be presented to Commissioner Cahill.

The hearing schedule was as follows: Syracuse (May 2); Buffalo (June 1), New York (June 27) and Albany (July 12). The public notice announcing these hearings lists a number of questions on which comments are being solicited, including the following:

- What environmental impacts affect you and your community?
- What is your experience in trying to get environmental justice issues addressed?
- What is your experience in trying to get information on environmental projects in your community?
- Do you have any recommendations on how DEC should address and prioritize existing environmental justice concerns?
- Would you like to see "environmental benefits" such as open space, environmental education and recreational opportunities in your community?

The period for submitting comments ended on July 15, 2000. The comments received will be considered by the Advisory Group in the development of recommendations for a New York State environmental justice program.

Pesticides and the Environment

By Assemblymember Steven Englebright

I have been the Chair of the Legislative Commission on Toxic Substances and Hazardous Wastes since 1994. The Commission has had a long and distinguished history of action on legislation regulating the use and registration of pesticides and the enforcement of pesticide regulatory requirements. It has played an integral role in the development of an extensive pesticide agenda for the Assembly.

I appreciate the opportunity to present to the State Bar Association what I believe to be some of the critical pesticide regulatory and enforcement issues in this state. Before I go into detail about the elements of the Commission's pesticide program, I think it would be useful to give you a brief description of the pesticide regulatory process. This overview should prove helpful in creating the context in which pesticide initiatives have been developed.

Pesticide Regulation in the United States and New York State

Pesticides are economic poisons, designed to control or eliminate pests in a wide variety of settings. They include herbicides, insecticides, fungicides and other categories of chemicals to control "pests." Pesticides are registered by the U.S. Environmental Protection Agency (EPA), if they are deemed to have no "unreasonable adverse effects on the environment." The term "unreasonable adverse effects on the environment" is defined in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) as 1) any unreasonable risk to man or the environment taking into account the economic, social and environmental costs and benefits of the use of the pesticide, or 2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with § 408 of the Food, Drug, and Cosmetic Act. This definition forces EPA into an untenable balancing act, trying to protect against the acknowledged hazards of a pesticide while accounting for the "benefits" of the chemical (e.g., the value of a crop on which the chemical can be used). The result is that most pesticides are registered, albeit with conditions for use in an attempt to limit exposure to humans and the environment. In addition, EPA routinely issues "conditional" registrations, which allow pesticides with incomplete registration databases to be sold and used while the additional data is developed by the registrant, with little oversight by EPA.

In 1987, the N.Y.S. Department of Environmental Conservation (DEC) changed its routine registration process to one that evaluated the federal registration data independently, with the assistance of the N.Y.S. Department of Health (DOH) and units within DEC (Fish and Wildlife, Water, etc.). In 1989, the Legislature and Governor agreed upon new pesticide product registration fees and fixed timelines for evaluating pesticide registrations. Additional staff were allocated to DEC and DOH for the process adopted in 1987. However, about four years ago, DEC and DOH stopped reviewing the data and relied solely on the EPA review documents and data summaries from the product manufacturers, which are highly unreliable. This greatly reduced review process was ultimately incorporated into regulation by the Department in 1998. Therefore, pesticide product registration has basically reverted to the pre-1987 process, with little or no detailed scientific review. The Department also continues to register pesticides that have been "conditionally registered" by EPA with no followup for the incomplete data.

Principle Pesticide-Related Activities of the Commission

The following activities have been undertaken by the Commission during my tenure:

- Participation in 1993-94 on the DEC Negotiated Rulemaking Committee for Notification of Pesticide Applications (expansion of ECL Article 33 provisions).
- The 1996 passage of my Pesticide User and Sales Registry Act, which requires submission of pesticide use and sales data for commercial pesticide applicators and sellers of restricted use pesticides.
- The 1996 creation of the Breast Cancer Research and Education Fund (in the Pesticide Registry Act), which receives money from the breast cancer income tax checkoff for breast cancer research and education grants. The Health Research Science Board, which oversees the grant program, is responsible to examine the possible link between pesticide exposure and incidence of breast cancer.
- Development of a Children's Environmental Health and Safety in Schools legislative package, which grew out of the 1994 Regent's *Environmental Quality in Schools* Report. This initiative includes bills requiring least toxic integrated pesticide management in K-12 schools and BOCES, as well as licensed day care centers. The integrated pest management (IPM) in schools bill passed the Assembly in 1999 and is likely to pass again in 2000. Other bills in the package have also been approved by the Assembly.

- Introduction in 1997 of a comprehensive bill that establishes in the ECL a policy of least-toxic pest control; expands pesticide registration data-submission requirements; requires submission of analytical method for various media; limits pesticide products that can be registered (only products that have been granted full federal registration); expands disclosure of inert ingredient information; prohibits the registration of known/probable human carcinogens and pesticides tested on humans; and requires DEC to establish a schedule for currently registered pesticides to meet the new requirements. This bill passed the Assembly in 1998 and 1999.
- Introduction of legislation in 1997 that establishes a pesticide poisoning registry in law, a requirement that currently exists only in DOH regulations. The bill requires physicians, hospitals and labs to report all cases of pesticide poisoning to DOH. The bill also requires DEC to conduct timely inspections of situations involving pesticide use. This legislation passed the Assembly in 1998, 1999 and 2000.
- Introduction in 1998 of legislation that protects farm workers and their families from exposures to pesticides, by incorporating the federal Worker Protection Standard into state law and additionally requiring use of protective clothing, training for use of respirators, reporting all pesticide exposures, cleaning of contaminated clothing, and requiring medical responses to exposures.
- Introduction in 1998 of legislation establishing a policy of environmental justice to ensure that poor or rural communities are not the recipients of activities that offer significant potential for exposure to toxic and hazardous substances, including pesticides.
- Introduction of an extensive collection of bills that improve and upgrade the pesticide regulatory program.
- Conducting extensive regulatory oversight of pesticide programs, particularly in the last five years, of agencies such as DEC, DOH, and the State Education Department (SED) on regulations, policies and guidance proposed by these agencies, as well as agency administration and enforcement of their programs. Activities include:
  - — Testimony on DEC's pesticide product regulatory amendments;
  - — Comments on DEC's termiticide regulatory amendments;
  - — Testimony on DEC's pesticide applicator regulatory amendments;
  - — Testimony on DEC's pesticide product registration amendments;
  - — Comments on DEC's proposed regulations for notification of pesticide applications on highway and utility rights-of-way;
  - — Evaluation of DEC's implementation of the pesticide sales and use registry;
  - — Evaluation and recommendations on DOH's administration of the Health Research Science Board and the grant program for breast cancer research and education grants.
  - — Testimony on SED's regulations on school environmental health and safety, including use of integrated pest management and least toxic pesticides; and
  - — Evaluation and comment on DOH and DEC handling of the West Nile virus outbreak.

Agency-Specific Concerns

1. Department of Environmental Conservation

I am particularly concerned about DEC's lack of meaningful oversight and enforcement of pesticide laws, regulations and guidance. Concerns include the deficiencies in the pesticide product registration process; inadequate pesticide applicator training, testing and certification; inadequate requirements for pesticide businesses, including liability insurance with pollution exclusion clauses; lack of pesticide storage regulations; lack of meaningful protections for farmworkers and their families; insufficient followup inspections for reported pesticide poisonings; lack of permits for aerial pesticide applications and pesticide applications to wetlands; insufficient pesticide safety and emergency response requirements; lack of specific requirements for pesticide applications to food-selling establishments; lack of retail pesticide display requirements; and updated requirements for pesticide disposal. DEC has, in my opinion, been taking the wrong direction with regard to regulation of pesticide use. For example, their recent amendments to the pesticide applicator certification regulations only create more bureaucracy. Creation of a three-tiered applicator certification program is only an elaboration of government bureaucracy, which does not improve the quality of pesticide applications by regulated parties. The agency also had the opportunity to significantly upgrade the training, testing and certification requirements for commercial and private (farmer) pesticide applicators, but failed to take advance of this opportunity.

A critical element of the pesticide regulatory program is the inspection of pesticide applicators, pesticide businesses and sellers of restricted use pesticides. Most of the investigations conducted by DEC staff are of paperwork requirements, and inspections of actual pesti-

cide use activities are virtually nonexistent. Because the training and testing elements of the applicator certification are so weak (e.g., no testing of actual ability to calculate dose rates on the job; ability to mix, load or apply pesticides; no testing of ability to calibrate pesticide application equipment; no testing of ability to fit-test personal protective equipment on applicators), it is critical that inspections of actual pesticide applications, including all elements of handling, mixing, equipment calibration and loading, are conducted.

Based on previously discussed concerns about the inadequacy of the current pesticide product registration process at DEC, the Commission has identified a number of issues needing attention, including upgrading of the registration process and a commensurate increase of pesticide product registration fees; prohibition against the registration of pesticides that are known or probably human carcinogens or pesticides that have used human subjects for testing; banning certain highly toxic pesticides and requiring use of least toxic pesticides.

Despite the fact that DEC received $12 million the first year for administering and enforcing the pesticide use and sales reporting requirements and continues to receive $3.5 million annually, their progress has been poor. The first report is incomplete and the data is highly unreliable. To the agency's credit, they have recently begun to deal more effectively with those failing to report. One reason the DEC's approach should be improved is to enable researchers to make use of the data. For this to occur, there has to be more confidence in the quality of the data. The underlying purpose of this law, to help save lives and prevent disease, should not be defeated by incompetent administration.

There has been little or no enforcement of the prior notification requirements for indoor and outdoor pesticide applications currently in the Environmental Conservation Law. Public concern regarding exposures to pesticides has increased and is clearly reflected in the broad support for the DiNapoli bill (A.1461-B) that requires notification of neighbors when pesticides are applied (this bill has passed the Assembly for last 3 years). I am hopeful that the Senate will pass this bill in the near future.

The public is demanding greater accountability from DEC on pesticide regulation and I, for one, strongly support a vastly improved and aggressive regulatory and enforcement effort by DEC.

2. State Education Department

The Commission has devoted significant energies to encouraging the SED to take a greater role in the reduction and elimination of pesticides in school environments. In 1998, the Legislature passed the RESCUE law (Chapter 56 of the Laws of 1998, Budget bill A.9094-C). SED developed draft regulations for the implementation of this law, titled "Comprehensive Public School Safety Program and the Uniform Code of Public School Buildings Inspection, Safety Rating and Monitoring." The Commission provided extensive comments on these draft regulations and many of our recommendations were incorporated into the final regulations.

One of the deficiencies of the final regulations was the lack of a definition for IPM, despite the existence of a excellent IPM definition previously adopted by the Regents in the 1994, *Environmental Quality in Schools*. Furthermore, SED has failed to provide adequate guidance for schools to report on their implementation of integrated pest management strategies, thereby weakening their own regulatory requirements. The Commission's package of eight Healthy Schools bills contains several proposals applicable to schools K-12 and BOCES, including NYC schools (A.8206) and licensed day care centers (A.9044), to reduce and eliminate the use of pesticides in these settings. Another bill A.9775 requires prior notification to parents, students and teachers of pesticide applications and other environmental hazards in schools.

3. Department of Health

The Commission has monitored and critiqued a number of DOH programs relating to pesticides. One of these programs is the Pesticide Poisoning Registry, which has been in place without specific regulatory structure for a number of years. DOH considers much of the information reported to be confidential and is generally reluctant to pass along this information to DEC for inspection purposes.

Another DOH oversight activity has been the administration of the Health Research Science Board and its mandates, which includes consideration, based on evolving scientific evidence, whether a correlation exists between pesticide use and pesticide exposure. As part of such consideration the Board is to make recommendations as to methodologies that may be utilized to establish such correlations. Further, the Board is to compare the percentage of agricultural crop production general use pesticides being reported to the total amount of such pesticides being used in the state (only agriculture general use pesticide sales from sellers of restricted use pesticides are required to be reported; agricultural pesticide **use** is exempted from the pesticide use reporting requirements). Limited progress has been made on these issues.

Conclusion

I look forward to continuing to work with my Senate colleagues, especially Senator Marcellino, on these issues and am optimistic that with the continued help and insightful input from the New York State Bar Association and other concerned groups, we will make ever greater strides in law to protect the health and well-being of the people of New York State.

Legislative Forum—Pesticides and the Environment

Report of the Legislation Committee

By Louis A. Alexander, Chair

This year's Legislative Forum, which was held on May 3, addressed legislative proposals and regulatory initiatives regarding the use of pesticides in New York State. The speakers at the Forum included Senator Carl L. Marcellino, Chairman of the New York State Senate Committee on Environmental Conservation; Assemblyman Steven C. Englebright, Vice-Chair of the Legislative Commission on Toxic Substances and Hazardous Wastes; Carl Johnson, Deputy Commissioner of Air and Waste Management, New York State Department of Environmental Conservation; Audrey Thier, Project Director, Environmental Advocates; and Allen James, Executive Director of RISE (Responsible Industry for a Sound Environment).

Senator Marcellino presented a comprehensive overview of pesticide-related concerns, and addressed various legislative initiatives regarding pesticide use notification, and integrated pest management plan requirements for school and governmental facilities. Assemblyman Englebright reviewed issues relating to governmental programs regulating pesticides, outlined needed reforms, and discussed critical aspects of the pesticide notification bills now under consideration.

Mr. Johnson detailed the scope of the Department of Environmental Conservation's regulatory and public information efforts with respect to pesticides. He also specifically reviewed the Department's compliance and enforcement activities relating to pesticides.

Ms. Thier and Mr. James offered differing perspectives on pesticide issues. Ms. Thier addressed the environmental and health risks of pesticides, the benefits of reducing the amount of pesticides used, the merits of certain proposed legislation (particularly with respect to notification), and the opportunities for the use of alternatives to pesticides. Mr. James detailed the benefits of the use of pesticides in contemporary society, particularly as to reducing disease and helping to increase food production. He also outlined concerns with certain proposed legislation and offered alternative solutions for consideration.

The Forum speakers gave an excellent presentation that helped to advance an understanding of pesticide issues. Also, as part of the Forum, a program book of supplemental materials was distributed. Included among the materials were copies of pesticide bills that have been introduced in the New York State Senate and the Assembly, articles and related information provided by Environmental Advocates and RISE, selected documents prepared by the Department of Environmental Conservation including guidance memoranda and public information materials, articles on the West Nile Virus and the efforts being undertaken to limit its spread, and a listing of websites that offer legal and technical information on pesticides.

New York State Bar Association

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NYSBA

June 6, 2000

By Hand Delivery to Meeting

TO: The Board of Directors,
For the Greenway Conservancy for the Hudson River Valley, Inc.
And
The Hudson River Valley Greenway Communities Council
C/o Joint Meeting
Dockside Restaurant, Cold Spring, New York

FROM: Officers of the Environmental Law Section of the New York State Bar Association

RE: Statutory Mandates in The Hudson River Valley Greenway Act of 1991

Dear Members of the Greenway Conservancy and Council,

The Officers of the Environmental Law Section of the New York State Bar Association (NYSBA) have noted with concern the matter of possible dismissals and resignations from among your Members and with respect to the Executive Directors.

See, e.g. Robert Worth, "Dismissals Ignite a Furor On The Hudson River," NEW YORK TIMES, June 4, 2000, p. 43, col. 1-3.

As you meet to deliberate proposals to dismiss David Sampson, as Executive Director of the Greenway Communities Council, and Maggie Vinciguerra, as Executive Director of the Greenway Conservancy, we trust that you will pay close attention to the statutory duties imposed upon you by the Hudson River Valley Greenway Act, L. 1991, Ch. 748. This Act established a process to build regional planning to harmonize economic development, conservation, agriculture, transportation, and environmental protection interests of the Hudson River Valley.

The NYSBA Environmental Law Section was a strong supporter of the Greenway legislation, as were many legislators and local mayors and supervisors, including our Governor when he served in the Senate. We know and appreciate the deep bipartisan support that exists for the Greenway, and are grateful to each of you for the care and deliberation which you have brought to your duties.

The Environmental Law Section has followed the work of the Conservancy and Council since their inception, and has a high opinion for the professionalism and careful manner in which you and your small staffs have implemented the Greenway Act.

Before you act on the proposals to change your staff directors, may we urge that you examine closely your statutory mandates, and take the time to ensure that the changes you contemplate are made with full attention to the requirements of law. We have been advised that The Assembly will hold hearings on the personnel changes that are contemplated on next Monday, June 12, 2000, and that three Committee Chairs have requested that you defer any action for thirty days to permit these hearings to take place. This strikes us as a reasonable and sensible proposal, as it affords an opportunity for further consideration of this important matter.

The Greenway Act is based on building procedures to instill confidence in inter-municipal cooperation and in inter-agency cooperation. Precipitous decision-making was eschewed in favor of lengthy deliberations and consensus building processes. For instance, the Conservancy did a full programmatic environmental impact statement on its Strategic Plan (1995-2005) before it even began its work, and the Council's memoranda of cooperation with local governments respect home rule and have built mutual respect and collaboration gradually. We have seen this first hand, since our Environmental Law Section has been pleased to work with the Communities Council and with Senator Stephen Saland and others on clarifications to the General Obligations Law to facilitate the Greenway's efforts to provide public access to the Hudson River (see your Communities Council Resolution 5-94).

The two Greenway entities are designed without any sizable bureaucracy and are not strong executive agencies. You work by cooperation and fostering collaboration among different constituencies, and we respectfully submit you have a continuing duty to maintain that cooperative mission.

From the published accounts, it is evident that an important component of the Greenway's constituents, the Executive Chamber, wishes to effect a change in personnel. While this is within the prerogative of the Governor, it is equally important to note that The Greenway Act requires the Governor to share that right with the legislative leaders and the leaders of local governments, and respect the special autonomy of the two Greenway institutions under the Greenway Act.

Accordingly, may we respectfully suggest that before the Council acts on any replacement of David Sampson, as the Communities Council's Executive Director, you take the time to consult with your constituent communities and with the leadership of the Senate and Assembly, and that you act to clarify the terms of reference for this post and to decide upon your search process. The terms of reference and employment conditions for this position should be formalized. Would it not also be prudent to decide on a transition period, and not immediately leave a vacancy in this important position? Above all, since The Greenway Act requires that you employ a careful and inclusive process that is respectful of the Senate, Assembly, Executive Branch, and local governments in the Greenway, we would urge you to use your customary procedures of working by consensus, not by divisive voting. We would urge that you rebuild that consensus as your highest priority.

The Conservancy is a public benefit corporation, and its Executive Director is employed under a contract. Only the Conservancy Board can hire and replace its staff. You have a fiduciary duty to tend to the contractual, property and other obligations of the Conservancy as a public benefit corporation, and as an operating body, it must conduct its affairs in accordance with sound management practices.

We regret that the apparent disagreements over continuing staff threaten to compromise the reputation and effectiveness of the nation's first statutory Greenway. There are now over 500 greenways across the U.S.A., and New York should be proud of the success of our Heritage Greenway for the Hudson River Valley. Just as the Environmental Law Section has devoted special attention to the unique legal provisions of the Adirondack & Catskill Forest Preserves and the Adirondack Park Agency, we are especially concerned to sustain the land use planning innovations of the Greenway. We urge you not to take any action which jeopardizes the non-regulatory and cooperative approach of the Greenway legislation.

Your meeting today takes place across from Storm King Mountain, where modern Environmental Law began with the *Scenic Hudson Preservation Conference v. Federal Power Commission* case. We hope you take courage from the inspiration of those who have worked to preserve the history and beauty and productivity of the Hudson River Valley. Your staff has served the people of the Hudson Valley and the Greenway Act with distinction. We stand ready to provide any assistance we can to the Greenway in the future as we have in the past.

Respectfully Submitted,

Gail S. Port	Daniel A. Rumow	John L. Greenthal	James J. Periconi	Virginia C. Robbins
Chair	First Vice-Chair	Second Vice-Chair	Treasurer	Secretary

THE MINEFIELD
Profits and Pitfalls: Lawyer/Consultant Business Relationships
Part II—Business Ownership; MDP Issues

The Lawyer's Code of Professional Responsibility

By Marla B. Rubin

Part I, appearing in the Fall 1999 issue, addressed fee-sharing, confidentiality, and the ethical dilemmas that may arise from conflicts among professional rules when lawyers offer in-house consulting services, particularly those of professional engineers. Part II addresses avoidance of lawyer/client conflicts and, again, protection of client confidences. These issues are addressed in the context of lawyer ownership of consulting firms and in the larger discussion of lawyers in multidisciplinary practices.

Business Ownership

The obvious ethical issues of a law firm owning a consulting or other ancillary business outright have been the subject of many Bar Association opinions. Lawyers generally may not use the law practice as a feeder for the other business or vice-versa. Lawyers must disclose their interest in the other business. Lawyers must ensure that confidential information gained in the professional relationship remains inaccessible to the ancillary business unless disclosure is authorized by the client. Lawyers may not prejudice the client by referring the client to the ancillary business if those providers might not be the best for the client. These issues are magnified in the context of a law firm-financed ancillary business. These and other ethical issues also justify rejecting the concept of law firms in a multidisciplinary practice (MDP).

The Lender Law Firm

A subtle and troubling scenario is the law firm-financed ancillary business. Is providing funding for a business the equivalent of ownership, with the concomitant responsibilities of disclosure and protection of client confidences? Does a lender law firm have a duty to disclose the financial interest to a client to whom it has referred the ancillary service? Will a lender law firm have access to documents that the professional engineer has a duty to keep confidential?

Also very troubling is whether the lender law firm would have access to the ancillary business' files. Suppose another law firm referred clients to such a business, not knowing of the other firm's interest. The work of a consulting firm working at the direction of attorneys retains some confidentiality. However, much damage could be done to a client whose files are exposed, albeit inadvertently, to a law firm that may represent an adverse party, either currently or in the future.

Yet another problem, one that may soon get a public hearing, arises if a law firm is financed by a nonlegal business, which is not operating at the same location. See the section below on practice under trade names for a very interesting example.

MDP = More Damn Profit

The proponents of changing legal ethics rules to permit multidisciplinary legal practice have been vocal and well-spoken. They advocate allowing either law practice taking place within another business or law firms taking other businesses into their corporate forms. To date, this vocal minority appears to consist mostly of the following: so-called "Big Five" accounting firm nonlawyers and general counsel types; big law firms with ever-increasing bottom lines and profit goals; law firms or lawyers already engaged in multidisciplinary practice seeking official approbation; and law professors needing new and controversial ideas in order to "publish or perish." There may also be some law firms positioning themselves to "do the deal" if and when permitted. There is much written about the inevitability of such firms, seeing a new (legal) world order dominated by large MDPs.[1] Nevertheless, when put to a vote on changing the rules any time soon, the idea has been defeated overwhelmingly.[2]

According to many lawyers and bar associations, the general public does not appear to be clamoring for such services. One bar association report stated: "Although there is anecdotal information about the demand for multi-disciplinary practice, there is little empirical evidence."[3] Another bar association committee remarked: ". . . we are not aware of any data (as contrasted with self-serving statements) that purports to show whether consumers of legal services would benefit from MDPs."[4]

It seems apparent that the reasons for changing the rules can be summed up in two words—more profit.

The reasons for not changing the rules can be summed up in three words—protection of clients.

What Rules Would Need to Be Changed to Allow MDPs?

MDPs fashioned after the Big Five models[5] implicate, at a minimum, real or potential violations of ethical rules on fee-sharing, forming partnerships with nonlawyers, lawyer/client conflicts of interest, provision of legal services by nonlawyers, practice under trade names, confidentiality requirements, and the requirement of zealous advocacy. The duties of absolute loyalty to clients and avoidance of the appearance of impropriety, concepts deemed outdated by some but highly touted by the courts (and some lawyers), are also implicated.[6] For MDPs even to appear to comply with legal ethics rules, the Bar would have to change the rules on fee-sharing and partnerships with nonlawyers and promulgate new rules for sanctioning nonsupervisory lawyers for the unethical conduct of their nonlawyer partners and business associates to whom the lawyers report. One of the most comprehensive analyses of these issues was published on January 8, 1999 by the New York State Bar Association Special Committee on Multi-Disciplinary Practice and the Legal Profession ("the NYSBA Report"). If there is a theme of its lengthy analysis, it might be "that it is the interests of the client and the public which must remain paramount, not the interests of the lawyers or any other profession."[7]

Fee-Sharing

Code of Professional Responsibility Disciplinary Rule (DR) 3-102 prohibits sharing legal fees with a nonlawyer except with respect to payments to a lawyer's estate for death benefits or for the purchase of a law practice if the lawyer whose practice is being purchased is deceased, disabled or "disappeared" or as part of a compensation or retirement plan based on profit-sharing. Since the revenue lawyers generate consists of fees for legal services, any configuration of an MDP would appear to violate the fee-sharing prohibition. As stated in the NYSBA Report, "[t]he policy underlying DR 3-102 is that the professional independence and judgment of a lawyer must be completely unimpaired and unencumbered. The lawyer must have undivided loyalty to his or her client and must remain independent of outside influences."[8]

Today no one would argue that many, perhaps most, lawyers operate under fixed and continuing pressure to meet various iterations of business goals, such as minimum billing hours or maintenance of certain levels of business development. It would be naïve to deny that such pressure within a law firm often results in value-added billing, work reviewed and repeated at several levels, make-work tasks, and, unfortunately, time sheet padding. Presumably, law firm leadership works to ensure that if the best interests of the clients are not served by such practices, they are at least discouraged. Changing this rule to accommodate the Big Five MDP concept of providing legal services allows nonlawyers—with no duty to clients to forego maximum profit if not in the clients' best interests—to pressure lawyers to produce that maximum profit. This puts lawyers in the MDP into a conflict between their professional judgment and their personal interests. Hypothetically, both the lawyers giving in to this pressure and the management lawyers putting firm lawyers into such a predicament can be disbarred for violation of DR 5-101(A).[9] Management nonlawyers will either count their money or hire new lawyers to do their bidding. The MDP lawyer has no protection from the Bar. If the Bar is not protecting the lawyers trying to protect the clients, it certainly is not protecting the clients.

Partnership with Nonlawyers in a Practice Providing Legal Services

DR 3-103(a) prohibits forming a partnership with a nonlawyer "if any of the activities of the partnership consist of the practice of law." This rule was developed to maintain the professional independence of a lawyer, prevent the provision of legal services by nonlawyers, and protect a client against pressure by a lawyer to use nonlegal services provided by the partnership that would result in financial benefit to the lawyer.[10]

Some of the arguments against changing this rule are similar to the arguments against fee-sharing. There is potential for pressure from nonlawyers to maximize profit. And while one client may see the provision of nonlegal ancillary services as "one-stop shopping," another may see it as greedy lawyers looking for more ways to make money. No client will see the business goals of such a partnership. The potential for abuse is huge.[11]

An "Environmental" MDP May Be the Worst

A partnership between environmental lawyers and environmental consultants has been cited as one model MDP.[12] In fact, this is one with potential conflicts at the start. The environmental defense lawyer negotiates to have a client responsible for as little remediation work as possible under the law. This often conflicts with the scientific and engineering disciplines that often require more painstaking and time-consuming approaches to problems. Untempered, the consultants' approach, even when valid and offered in compliance with their professional training, often results in increased billing to the client. Such a partnership makes it easy for a lawyer to defer to the consultant partner and fellow profit-genera-

tor to do more work, rather than less. This type of approach is most satisfactory to the regulators. Everybody wins except the client.

Lawyer/Client Conflicts of Interest

As previously stated, the conflict of interest rules require lawyers to put client interests ahead of their personal and financial interests. There is so much potential for pressure from nonlawyers on lawyers in MDP firms at least to consider the economic impact on the firm of decisions made in the course of legal representation. Lawyers placed in that position can choose to comply with the ethical rules against such conduct or suffer the employment consequences. There is no protection for the revenue-producing lawyer. There is also no protection for the client against such business practices. Further, it appears obvious that a whistle-blowing former MDP lawyer would have difficulty finding new employment, particularly in a new world dominated by MDPs.

Aiding in the Unauthorized Practice of Law

In the Big Five MDP model, multiple services are offered the client concurrently. Services of lawyers in a legal department might be offered in a package of services in a matter with numerous legal and business issues. In tax issues, the legal and nonlegal lines can get blurred. The personnel may appear interchangeable in certain situations.[13] In a law firm, lawyers would make the decision about what constitutes the practice of law, and would not allow the provision of legal services by a nonlawyer. At a minimum, nonlawyer managers in an MDP might not be familiar enough with the law to make that determination. At worst, they might disagree with firm lawyers making such a determination and overrule the lawyers. This would force the lawyers to aid in the unauthorized practice of law or suffer the employment consequences. Nothing protects the MDP lawyer. Nothing protects the client from getting legal services better provided by a lawyer than a nonlawyer.

Practice under Trade Names

Practice under trade names is prohibited by DR 2-102(B) and may be prohibited by Model Rule of Professional Conduct 7.5 throughout the United States[14] except Washington, D.C.[15] These are rules to ensure that a firm name is not deceptive or misleading to the true protagonist of this piece, the client. A bizarre, almost mysterious twist on this issue has occurred in Washington, D.C. Perhaps to invoke a challenge to ethics rules currently prohibiting the formation of multidisciplinary firms, a law firm financed by a Big Five accounting firm has opened its doors as McKee, Nelson, Ernst & Young.[16] Openly declaring the funding arrangement and their "strategic alliance," the lawyers even include Ernst & Young in the firm name, although none of the partners are named "Ernst" or "Young." Washington, D.C. ethics rules permit the use of a trade name. However, at least one professional responsibility professor has questioned whether including "Ernst & Young in the name could mislead clients into thinking that the [accounting] firm is directly involved in the provision of legal services by the law firm, which it insists it is not."[17] Alternately, the client going to the McKee, Nelson, Ernst & Young firm in Washington might expect to get both legal and accounting services in one office, under one fee agreement, with one set of players. This client will be surprised.

Changing the rules puts the burden on the client to investigate who is being hired, rather than making it obvious. This is no burden on sophisticated clients. This is a burden on unsophisticated, uneducated, or just plain scared clients. Changing these rules does not protect the client from the confusion they were meant to avoid.

Client Confidentiality

DR 4-101 protects client confidentiality. Protecting client confidences is part of the absolute loyalty the courts think lawyers owe their clients. The Big Five MDP model provides significant risk of disclosure of client confidences that would be prohibited by legal ethics rules. The largest risk exists in the conflict between the accounting ethics rules and the legal ethics rules. Simply put, accountants have a duty to provide the whole picture of a scenario—be it a financial statement, a due diligence report, or a tax return—regardless of the impact on the client.[18] Lawyers, as we all know, must represent the best interests of the client. Short of lying, fraud, or a criminal act, lawyers as advocates have a duty to put a picture in the best light for the client's position.[19]

Suppose a lawyer and an accountant work together on a prospectus on behalf of a seller client. Suppose they find potential liabilities for a buyer in certain environmental matters and in the construction of previous financial deals. Most likely, the lawyer would have a duty to keep confidential all or some of the aspects of the potential liabilities. The accountant, on the other hand, might have a duty to disclose those liabilities, to the detriment of the client.[20] If the accountant makes the disclosure in a report in which the lawyer has participated as an author, editor, or researcher, is the lawyer violating the duty to protect client confidences, or circumventing the requirement by allowing the partner/accountant to make the disclosure? Such circumvention of ethical rules is prohibited by DR 1-102(A)(2). This is an extremely difficult predicament for the lawyer. This hypothetical also implicates the

duty of zealous advocacy, something else the courts think lawyers owe their clients.

Why We Should Not Change the Code to Accommodate MDP

The MDP movement has been initiated largely not by lawyers, but by the Big Five accounting firms.[21] Their representatives urge the Bar to change its ethical rules to accommodate their economic goals, but refuse to consider regulation on a firm-wide basis.[22] One might note, however, the striking fact that even a year ago, Ernst & Young employed 2,400 lawyers, about twice as many as Skadden Arps or Jones Day, two of the nation's largest law firms.[23] Incredible as it may seem, Big Five representatives steadfastly maintain that their lawyers—at least in the United States—are not practicing law.[24] Nevertheless, the intense lobbying by these firms for changes to the ethical rules that would allow their lawyers to "practice law" raises the question of what their thousands of lawyers are doing while they are waiting for those changes. The New York State Bar Committee analyzing these issues stated that such firms currently are "largely unregulated. . . ."[25]

Former NYSBA President Robert L. Ostertag has asked: ". . . what do they want? They want money, market, revenue, your clients and my clients."[26] This sums up the apparent reasons for the movement to change the rules to accommodate MDPs: more clients, more clients' money, and no enforcement of legal ethical rules on nonlawyer decisionmakers. MDP lawyers will be caught perpetually between the proverbial rock and a hard place, between risking disciplinary action or unemployment.

Conclusion

The Bar always has examined carefully professional and business alliances undertaken by lawyers to ensure compliance with the Code and, presumably, to protect clients from many predictable abuses. Rather than loosen the rules to accommodate new schemes to increase lawyer profit, the Bar should continue to stand firm in its position that protection of clients is paramount.

Endnotes

1. *See, e.g.*, Anthony E. Davis, *Collision Course With Disaster—Changes in 'MDP,' 'MJP,' and 'UPL,'* New York Law Journal, March 6, 2000 at 3; Gary A. Munneke, *Lawyers, Accountants and the Battle to Own Professional Services*, paper presented at 24th Annual ABA Conference on Professional Responsibility, May 28, 1998; Mark Hansen, *All Aboard for MDP Train*, ABA Journal, January 2000 at 28.

2. On August 10, 1999, the ABA House of Delegates defeated a proposal to change the Model Rules to accommodate MDPs by a vote of 304-98. John Gibeaut, *MDP Debate Still Alive*, ABA Journal, October 1999 at 84. The Executive Committee of the Association of the Bar of the City of New York did not oppose the concept of MDPs, but stated explicitly that the MDPs most vehemently sought—the Big Five-controlled MDP—could never pass ethical muster: ". . . under no circumstances should an MDP be allowed to provide audit and legal services to the same client." Association of the Bar of the City of New York Statement of Position on Multidisciplinary Practice, July 20, 1999, Introduction. On June 26, 1999, the New York State Bar Association approved a resolution that opposed changing ethics rules to accommodate MDPs at this time. NYSBA Press Release, June 29, 1999. Similar opposition was voiced in 1999 by the Pennsylvania, Florida, Ohio, and Illinois State Bars. New York Law Journal web page on the ABA 1999 Annual Meeting and Multidisciplinary Practice. On March 24, 2000, however, the Philadelphia Bar Association approved a resolution supporting amending Rule 5.4 to allow lawyers to share legal fees with nonlawyers. LawNewsNetwork.com, March 24, 2000, publishing *Philly Bar Approves Lawyer-Owned MDPs*. (According to those who were there, as well as the text of the article, this title does not reflect the Bar's action, which was limited to that described above.)

3. Report of the Special Committee on Multi-Disciplinary Practice and the Legal Profession, New York State Bar Association, January 8, 1999 ("the NYSBA Report") at 4. This article acknowledges and incorporates much of the analysis of the Special Committee.

4. The Association of the Bar of the City of New York Statement of Position on Multidisciplinary Practice ("the ABCNY Statement"), July 20, 1999 at 2.

5. For at least ten years, the Big Five accounting firms (the Big Six at the beginning of this period) have been acquiring or developing law firms in Australia and Europe. At these firms, lawyers "are ultimately directed by nonlawyers in providing legal services to their clients." Philip S. Anderson, *We All Must Be Accountable*, ABA Journal, October 1998 at 6 (Mr. Anderson is a past ABA President).

6. Other rules that might be implicated are the rules on solicitation of clients, disqualification of lawyers and law firms (by imputation), simultaneous representation of multiple clients or representation of clients with adverse interests. Issues concerning these rules are not addressed here; nor is the issue of the validity of the attorney work product privilege in an MDP setting.

7. NYSBA Report at 4.

8. NYSBA Report at 24.

9. Both of these rules allow a lawyer to continue employment despite such a conflict of interest after full disclosure and client consent. What should the MDP lawyer disclose to the client—"If I don't bill 700 hours this year on your case I'll lose my job?" "If I don't bill 700 hours this year on your case my bonus will only be $5,000 instead of $10,000?" The NYSBA Report questioned:

   > Might a non-lawyer manager . . . direct a lawyer to close a transaction notwithstanding the lawyer's knowledge that the client has failed to disclose a critical fact? How long will it be before non-lawyers pressure their lawyer partners to seek relaxations of ethical rules that govern attorneys but often get in the way of revenue generation? . . . some members of the Committee note that these problems can arise in law firms, but they may be exacerbated by MDPs.

   NYSBA Report at 12. *And see* footnote 7, *supra.*

10. *See, generally*, Stephen Gillers and Roy D. Simon, *Regulation of Lawyers—Statutes and Standards*, 1999 edition at 305-312.

11. *See* footnote 10, *supra.*

12. ABCNY Statement at 2; NYSBA Report at 6-7; Current Reports, *ABA/BNA Manual on Professional Conduct* ("*ABA/BNA Manual*"), August 4, 1999 at 373.
13. Accountants are allowed to appear on behalf of clients in several tax courts.
14. Rule 7.5 allows practice under a trade name if, among other conditions, the use of the name does not violate Rule 7.1, prohibiting "false or misleading communication about the lawyer or the lawyer's services." For a prime example of what might constitute such a violation, see discussion above.
15. D.C. Rule 5.4(b) allows lawyers to have nonlawyer partners in an organization whose sole purpose is to provide legal services to clients, any nonlawyer having a financial interest or "managerial authority" in such an organization must agree in writing to comply with the legal ethics rules, and any lawyer having a financial interest or "managerial authority" in such an organization undertakes to be responsible for such compliance by the nonlawyers. There is no enforcement mechanism pertaining to the nonlawyers.
16. Mark Hansen, *All Aboard for the MDP Train*, ABA Journal, January 2000 at 28.
17. *Id.*
18. The NYSBA Report offers an excellent analysis of the accountant's basic duties under the *Code of Professional Conduct of the American Institute of Certified Public Accountants* ("*AICPA Code*"). The Report describes the several sources of an accountant's duty to the public and duty of objectivity, contrasting those duties of a lawyer to advocate for the lawyer's client. NYSBA Report at 16-17.
19. *See* Model Rules, Article 3, and Model Code, Canon 7.
20. "Independent auditors are obliged to disclose those facts which would be material to the reader of the entity's financial statements or to someone investing in or extending credit to the entity." NYSBA Report at 20.
21. "ABA Multidisciplinary Panel Hears Final Witnesses on Regulation of MDPs," (no attribution), *ABA/BNA Manual*, March 17, 1999; NYSBA Report at 4.
22. *Id.*
23. NYSBA Report at 8.
24. John Gibeaut and James Podgers, *Feeling the Squeeze*, ABA Journal, April 1999 at 83; Debra Baker, *Voices from the Other Side*, ABA Journal, October 1998 at 88. This author personally heard such remarks from Big Five general counsel at an ABA conference in May 1998.
25. NYSBA Report at 9.
26. Bill Rainbolt, *MDP Emerging as a Contentious Issue For Lawyers*, State Bar News (New York), March/April 2000 at 35.

Marla B. Rubin is a sole practitioner in New York City. She chairs the New York State Bar Association Environmental Law Section's Task Force on Legal Ethics. She writes and lectures extensively on environmental law and legal ethics issues.

NYSBA

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

May 5, 2000

BY FAX AND OVERNIGHT MAIL
Honorable J. Dennis Hastert
Speaker of the House
United States House of Representatives
H232 - The Capitol
Washington, DC 20515

Dear Speaker Hastert:

We understand that the 106th Congress has before it landmark legislation, The Conservation and Reinvestment Act, HR 701 ("CARA"), which will provide for the stewardship of our nation's natural and cultural resources by permanently and fully funding the Land and Water Conservation Fund at its authorized level. On behalf of the New York State Bar Association's Environmental Law Section, we strongly urge you and your distinguished colleagues to consider and pass this most worthy legislation.

In addition to providing for increased and enhanced recreational opportunities through land acquisition and park enhancements throughout the nation, if it becomes law, CARA will also afford state-side funding for non-game species wildlife management and coastal management projects. We believe that funding for such projects and stewardship is critically important to the continued enhancement and improvement of New York State's environment, including its rich and historic natural and cultural resources, open spaces, outdoor recreational facilities, wildlife management and coastal zone management programs. This legislation is so important to our nation's environment that it now enjoys over 300 co-sponsors, including support from at least 26 of New York State's Representatives, and an identical bill (S.2123) has been introduced in the United States Senate by Senators Landrieu, Murkowski, Lott and Feinstein.

The New York State Bar Association's Environmental Law Section consists of over 1400 members and includes many of New York State's leading environmental lawyers, including federal and state

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government lawyers, and nationally prominent law professors. The Environmental Law Section is one of the substantive sections of the New York State Bar Association, one of the oldest and largest voluntary state bar associations in the nation.

The members of the New York State Bar Association's Environmental Law Section respectfully request that you allow H.R. 701 – CARA – to be favorably considered on the floor of the House of Representatives and that you urge your colleagues to pass this landmark Act.

Respectfully,

Gail S. Port
Chair

The letter reprinted above also was sent to Majority Leader Richard K. Armey with copies to Hon. Daniel P. Moynihan, Hon. Charles E. Schumer, Hon. Amo Houghton, Hon. Jack Quinn, Hon. John J. LaFalce, Hon. Louise M. Slaughter, Hon. Thomas M. Reynolds, Hon. Maurice D. Hinchey, Hon. James T. Walsh, Hon. John M. McHugh, Hon. Sherwood L. Boehlert, Hon. John E. Sweeney, Hon. Michael R. McNulty, Hon. Benjamin A. Gilman, Hon. Sue Kelly, Hon. Nita M. Lowey, Hon. Eliot L. Engel, Hon. José E. Serrano, Hon. Charles B. Rangel, Hon. Carolyn B. Maloney, Hon. Vito J. Fossella, Hon. Nydia M. Velázquez, Hon. Major R. Owens, Hon. Edolphus Towns, Hon. Anthony D. Weiner, Hon. Jerrold Nadler, Hon. Joseph Crowley, Hon. Gregory W. Meeks, Hon. Gary L. Ackerman, Hon. Carolyn McCarthy, Hon. Peter T. King, Hon. Rick A. Lazio, Hon. Michael P. Forbes.

DANIEL P. MOYNIHAN
NEW YORK

United States Senate

WASHINGTON, DC 20510-3201

May 22, 2000

Ms. Gail S. Port
NYS Bar Association
One Elk St.
Albany, New York 12207

Dear Ms. Port:

Thank you for contacting me in support of the Land and Water Conservation Fund (LWCF). I too, support this program and will continue to work to promote and ensure its preservation.

When President Clinton signed the budget for FY2000 into law, $40 million was provided for statside funding for the LWCF. In addition, I have Cosponsored two bills that I believe will be very important in achieving the goal of continued funding in the future: S. 1573, The Natural Resources Reinvestment Act of 1999 and S. 446, The Resources 2000 Act. The Natural Resources Reinvestment Act of 1999 was introduced on September 9, 1999 by Senator Joseph Lieberman and is currently in the Senate Committee on Energy and Natural Resources. The Resources 2000 Act is also in the Committee on Energy and Natural Resources and was introduced on February 23, 1999 by Senator Barbara Boxer. Together, these actions take significant strides towards the support of the LWCF.

The LWCF program is vital for protecting open space and preserving recreational areas for our nation's citizens. It has served as the primary Federal source of funds for the acquisition of recreational lands since 1965. Also, the LWCF has protected more than seven million acres of open space and contributed to the development of 37,000 parks and recreation areas across the country. The Appalachian Trail and Niagara Falls are just a few examples of treasured places across the country that have been created or protected with help from the Land and Water Conservation Fund.

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Please be assured that I will keep your views in mind as I complete the remainder of my term, and feel free to contact me again on this or any other issue.

Sincerely,

Daniel Patrick Moynihan

Names in the News/ People on the Move

Governor Pataki has re-appointed **Gail S. Port** of Proskauer Rose LLP (New York City) to the New York State Environmental Board, the governmental board responsible for overseeing the promulgation of environmental regulations and environmental policy in the state. Gail has served on the Board since June 1992, when she was appointed by Governor Cuomo.

Louis A. Alexander of Bond, Schoeneck & King, LLP (Albany) has been appointed as a member of NYSDEC's Environmental Justice Advisory Group.

Gerard P. Cavaluzzi was elected Vice President of Malcolm Pirnie, Inc., an engineering firm headquartered in White Plains, New York. As General Counsel for the firm, Gerry is responsible for delivery of legal services for Pirnie, providing expertise in contracts, construction law and claims resolution, as well as environmental law and insurance issues.

Laurel J. Eveleigh and **Kevin G. Roe** have been named partners at Devorsetz, Stinziano, Gilberti, Heintz & Smith. Both practice in the firm's Environmental and Land Use Group.

Three new attorneys have joined EPA's Region 2 Office of Regional Counsel: **Mathew Garamone, Laura Scalise,** and **Karen Taylor.** All three were formerly employed in technical and science jobs at EPA Region 2, and earned their law degrees while working full time for EPA. Mathew and Laura are working on water pollution issues, while Karen is working on TSCA, EPCRA and FIFRA matters.

James J. Periconi filed a petition for a writ of certiorari in the U.S. Supreme Court in May 2000, following the affirmance by the Second Circuit of dismissal of Clean Air Act citizens' suit complaint concerning the proposed redevelopment of Columbus Circle.

Thomas W. Raleigh has recently joined Hancock & Estabrook, LLP, in Syracuse. Tom was formerly with NYSDEC Region 2.

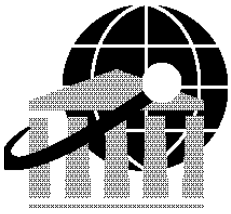
Marla B. Rubin of Londa and Gluck was on a panel addressing Multi-Disciplinary Practice at the ABA National Conference on Professional Responsibility in June in New Orleans.

Barry M. Schreibman taught environmental law in the Municipal Clerks program offered by Syracuse University in July 2000.

John V. Soderberg has joined Anson Environmental, Ltd., in Huntington, New York.

On May 1, 2000, Judge McAvoy rendered his decision in the Alcan Aluminum case, finding Alcan jointly and severally liable to the U.S. and N.Y. under CERCLA. Assistant Attorney General **David A. Munro** tried the case for New York State last October, and **Beverly Kolenberg** and **Carol Berns** represented EPA.

Compiled by Cheryl L. Cundall



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Message from the Chair
(Continued from page 2)

Much has happened in the two months since I have become the Section Chair and much more is in the works. First, thanks to the tireless work of **Lou Alexander**, the Section hosted another very well received Legislative Forum in early April 2000, followed by an extremely well attended Government Attorneys' Reception and Luncheon, during which we were honored to be addressed by **NYSDEC Commissioner John Cahill**. This year's Forum on Pesticides makes it a hat trick for **Lou** who also successfully presided (along with **Mike Lesser)** over last year's forum on New York's Superfund and Brownfield initiatives (more to come on that subject) and the Forum in 1998 on Waste Tires. Congratulations and thanks again for all your excellent work, **Lou**. (For those of you who have not already heard the news, **Lou** has moved over to Co-Chair, along with **Arlene Yang**, the Environmental Justice Committee. I am sure he will bring the same dedication, energy and enthusiasm to the EJ Committee as he did to the Legislation Committee. We are fortunate that **Phil Dixon** and **Joan Leary Matthews** have agreed to replace Lou and Mike as co-chairs of the Legislation Committee.)

David Freeman and **Larry Schnapf,** the current heads of our *Ad Hoc Task Force on Superfund Reform* spent time in Albany meeting with various players in the legislative process, including representatives of the Governor's counsel's office, the Department of Environmental Conservation, and the staffs of the State Assembly and Senate, and in New York City, with representatives of the Attorney General, to promote the Recommendations for Superfund and Brownfield Reform that had been endorsed by the Section's Executive Committee at its January 2000 meeting. (Those Recommendations had been forwarded to the Governor by our immediate past chair, **Daniel Riesel**.) Although regrettably, as of this writing, neither a Superfund reform, nor a Brownfield bill has been passed (and the Senate is about to adjourn for the Summer), the Section has been recognized as an "honest broker" in this area. Suffice it to say that the work of the Section's *Ad Hoc Task Force* (which, in addition to **Dave** and **Larry,** includes **Walter Mugdan, John Privitera, Mike Lesser, Lou Alexander** and **Peter Bergen**) will continue until the State Legislature passes an appropriate Superfund and Brownfield reform bill.

The Section also (this time, successfully) weighed in on landmark federal legislation, The Conservation and Reinvestment Act, HR.701 (CARA) that was pending before the 106th Congress. On behalf of the Section I sent a letter strongly urging Majority Leader Richard Armey and Speaker Dennis Hastert and their colleagues to consider and pass the CARA legislation that would provide for the stewardship of our nation's natural and cultural resources by permanently funding the Land and Water Conservation Fund at its authorized level. (A copy of my letter supporting the passage of CARA is reproduced on page 29 of this publication.) According to **OPRHP Commissioner Bernadette Castro**, who first brought this matter to the Section's attention when she gave her keynote address at the Section's Annual Meeting last January, New York's share from this legislation would be over $100 million, including approximately $23 million for state-side funding, $40 million for coastal programs and $17 million for non-game species wildlife management. I am delighted to report that are efforts have been rewarded—on May 11, 2000, the bill passed the House of Representatives and included the Young-Miller-Boehlert-Tauzin Amendment which removes incentives for the development of offshore drilling and requires state coastal conservation plans to address environmental concerns. The bill has been referred to the United States Senate for consideration and we will continue to follow its progress until it becomes law.

As I mentioned above, this year also marks the 25th anniversary of the adoption of the SEQRA. Many of our Section members have made their fortunes (OK—maybe not fortunes, but a least a respectable living) practicing under SEQRA. To mark this milestone, among other things, we are planning an elaborate one-to two-day SEQRA institute/conference, in conjunction with Albany Law School and perhaps other institutions, to be held in February or March, 2001. **Dan Ruzow** is heading up the planning committee, which includes **Rosemary Nichols, John Hanna** and **Mark Chertok**. If you want to get involved in the early stages of the planning activities, contact **Dan Ruzow**. Watch for further announcements on this event.

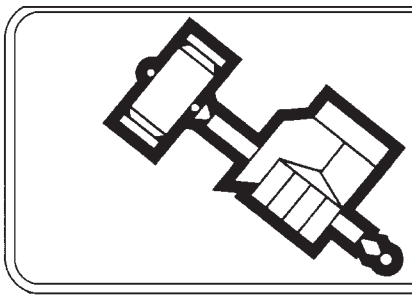
Our Section also had a big role in planning and running the third (roughly bi-annual) EPA Region II conference. The conference, entitled "EPA Region II Roundup: Trends, Developments and Visions for the Future," was held on June 12th at the Great Hall of the Association of the Bar of the City of New York. It was so well attended (over 150 attendees) that we ran out of copies of the course materials! In addition to our Section, it was co-sponsored by the ABA Section of Environment, Energy and Resources, the Association of the Bar of the City of New York Committees on Environmental Law and International Environmental Law, and the New Jersey State Bar Association's Environmental Law Section. Section Secretary **Ginny Robbins** and I were on the Planning Committee for the conference and **Ginny** moderated an interesting panel on the Redevelopment of Contaminated Properties—Economic and Marketing Perspectives. All of the speakers were well-versed and informative. Of course, Section Executive Committee member **Walter Mugdan** (EPA Region II's Regional Counsel) also played a huge role, not only by

presenting the opening remarks at the conference, but also by having EPA Region II—which just recently become a CLE provider—step up to the plate to provide the CLE accreditation for the conference when, because of bureaucratic snafus, none of the other co-sponsoring organizations was able to fill that role. Who ever said that government is slow to act? Thanks **Walter** and thanks to all the other EPA Region II speakers who participated in this successful conference. Next time, we should seriously consider expanding the conference to a full day (as it used to be).

Finally, planning is well underway for what I fully expect to be a fabulous weekend Fall Meeting at Jiminy Peak on **October 27-29, 2000.** The Co-Chairs of the Fall 2000 Meeting are: **Kevin Healy** (we already know from past experiences that Kevin knows how to throw a great party!), **Antonia Bryson** and **Bob Tyson**. The CLE course at the Fall meeting, and indeed the theme of the weekend, will focus on New York's front burner Clean Air Act initiatives (in permitting, enforcement and others) and will also explore the implications in New York State of global climate change. We will kick-off our Section's year-long 20th Anniversary celebration at the Fall meeting. As those of you who attended the fun-filled 1998 Fall Meeting can attest, Jiminy Peak is a very family-friendly location with lots of cultural and recreational resources. We are planning a number of activities that children will enjoy, as well. Please mark your calendars now and save the date! And while you have your calendars and pens out, you might also ink-in **January 26, 2001** for our Annual Meeting in NYC. (The Chairs for that event have already been selected, but I will save that for my next column!)

While I am very excited about all the events we are busily planning, I and the other Section officers always welcome new challenges and opportunities. So, if you have any issues or topics the Section should be taking up or suggestions on how we might do things better, please contact me or any of the other Section officers. Have a great summer and I'll see you in Jiminy Peak on October 27th.

Gail S. Port



Administrative Decisions Update

By David R. Everett, Melissa E. Osborne and Jeffrey Lindenbaum

CASE: ***In re the Application of Richard and Carol Leberner (the "Applicants") for a Tidal Wetlands Permit Pursuant to Environmental Conservation Law, Article 25 (Tidal Wetlands) and 6 N.Y.C.R.R. Part 661 (Tidal Wetlands).***

AUTHORITIES: ECL Article 25

6 N.Y.C.R.R. Part 661
(Tidal Wetlands—Land Use Regulations)

DECISION: On March 16, 2000, the DEC Commissioner John Cahill issued a decision denying the Applicants a tidal wetlands permit under Article 25 of the NYS Environmental Conservation Law and 6 N.Y.C.R.R. Part 661. The Applicants had sought to build an elevated dock and associated structures in a tidal wetland on the shores of Clam Pond in the Village of Saltaire, Suffolk County, New York. In denying the permit, the Commissioner held that the Applicants had failed to meet the standards for permit issuance as set forth in 6 N.Y.C.R.R. Part 661.

A. Facts

In July 1998, the Applicants sought a tidal wetlands permit from the DEC seeking to construct a 45-foot-long dock leading to a ramp and several floats in a tidal wetland located in Clam Pond. The dock was designed to be an elevated catwalk located approximately four feet above the wetland. The floats would be secured by four pilings and the water depth around the dock would range from 13 to 18 inches depending on the tide. Although the dock was designed to accommodate boats up to 30 feet in length, the Applicants proposed to use the dock to launch and moor a kayak or possibly a rowboat or small motor boat. The project was expected to impact approximately 144 feet of shoals, mud flats and littoral zone.

In December 1998, the DEC rejected the Applicants' request for a permit and the Applicants requested an adjudicatory hearing. A hearing was held in August 1999 and a hearing report was prepared by Administrative Law Judge (ALJ) Frank Montecalvo. The ALJ recommended that the permit be issued. For the reasons set forth below, the Commissioner rejected the ALJ's conclusion and directed that the permit be denied.

B. Discussion

1. Tidal Wetland Permit Standards

In denying the permit application, the Commissioner determined that the Applicants had failed to meet the standards for permit issuance as set forth in 6 N.Y.C.R.R. Part 661. Under these regulations, a tidal wetlands permit can be issued only if it is determined that the proposed activity:

(1) is compatible with the policy of the tidal wetlands act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity will not have an undue adverse impact on the present or potential value of the affected tidal wetlands area or adjoining or nearby tidal wetland areas for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation, taking into account the social and economic benefits which may be derived from the proposed activity;

(2) is compatible with the public health and welfare;

(3) is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent;

(4) complies with the development restrictions contained in 6 N.Y.C.R.R. § 661.6; and

(5) complies with the use guidelines contained in 6 N.Y.C.R.R. § 661.5.[1]

In particular, the Commissioner noted that the Applicants had failed to meet standards (1), (2) and (3) above. With respect to the first standard, the Commissioner noted that the proposed project was not compatible with the express statutory policy to preserve and protect tidal wetlands. For example, evidence had been

presented at the adjudicatory hearing that the floating docks would cause shading which could kill submerged vegetation and other bottom dwelling organisms. Similarly, turbidity from the movement of the docks and boat propellers in the shallow waters around the dock would suffocate aquatic vegetation, shellfish and other organisms. Moreover, the propeller dredging from boats would impact marine food production and fragment and eradicate wetland habitat.

With respect to the second standard, the Commissioner determined that the project was incompatible with the "public health and welfare" because boats could not safely navigate through the shallow water surrounding the dock. Evidence had been presented that the water depth around the dock ranged from 13 to 18 inches depending on the tide. Moreover, the dock was designed to accommodate vessels up to 30 feet in length which generally require a minimum water depth of three feet. Although the Applicants indicated that they would use the dock for a kayak, and possibly a rowboat or small motor boat, the dock was designed for much larger vessels. Given these facts, the Commissioner determined that the project would impose a risk to boaters (and possibly swimmers) who would assume they had sufficient room to navigate and dock causing such boats to run aground and possibly harm the occupants. In fact, the DEC's boat had ran aground twice while conducting site inspections in the summer of 1999.

The Commissioner also determined that the Applicants had failed to meet the third standard because there were reasonable alternatives to the project. For example, the Commissioner noted that there are existing beach areas nearby for launching small vessels; there is room for mooring farther out in Clam Pond; and public mooring is available approximately 500 feet east of the proposed project. Alternatively, the project could be redesigned to minimize wetland impacts by placing floats offshore anchored with mushroom anchors instead of pilings. A boat could be kept easily at these floats. The Applicants had not proposed any alternatives.

2. Segmented Review

To facilitate the issuance of a permit, the Applicants attempted to divide the evaluation of their project into individual components—ramps, docks, floats and pilings. In doing so, they argued that when evaluated separately, the individual components did not require permits under the DEC's tidal wetlands regulations. For example, the proposed 144 square feet floating dock was not regulated because it was below the 200 square feet threshold requiring a permit.[2] Similarly, the driving of pilings was not regulated because they were considered recreational moorings which do not require a permit.[3]

The Commissioner rejected the Applicants' segmentation approach for several reasons. First, he noted that contrary to the Applicants' assertions, some of the individual components were indeed regulated activities requiring a tidal wetlands permit. The floating dock, for example, would still require a permit because it would rest on the bottom of the pond at low tide thereby causing shading, turbidity and the compaction of aquatic plants and animals. Such activity would substantially impair or alter the natural condition and function of the wetland which is regulated under 6 N.Y.C.R.R. § 661.4(ee)(1)(vi). Similarly, the dock pilings, while intended for recreational purposes, still could accommodate large boats which, given the shallow depth of water beneath the dock, would increase the likelihood of propeller dredging, another regulated activity under the tidal wetland regulations.[4]

Secondly, in rejecting the Applicants' argument, the Commissioner stated that the project's individual parts cannot be divided up, defined as comprising mostly permissible uses, and then construed to have less impact when viewed separately than when considered as part of the whole project. He opined that segmenting the review process would be inconsistent with the applicable regulations and with the DEC's general obligation to assess the overall potential environmental impacts of a project in its entirety.

In drawing an analogy to the State Environmental Quality Review Act (SEQRA), the Commissioner noted that the courts tend to look with disfavor upon dividing the environmental review of an action in such a way that various segments of the project are addressed as though they were independent, unregulated activities needing individual determinations of significance.[5]

C. Conclusion

Based on the foregoing, the Commissioner denied the Applicants' request for a tidal wetlands permit for failing to comply with the standards set forth in 6 N.Y.C.R.R. Part 661. The Commissioner did note, however, that the Applicants were free to resubmit an application consistent with the less intrusive alternative outlined by the DEC staff.

By David R. Everett

* * * *

CASE: ***In re Causing, Engaging in or Maintaining a Condition or Activity Which Presents an Imminent Danger to the Health or Welfare of the People of the State of New York, or Which Is Likely to Result in Irreversible or Irreparable Damage to Natural Resources of the State in Violation of § 71-0301 of the Environmental Conservation Law of the State of New York (ECL), and Title 6 of the Official Compilation of Codes, Rules***

and Regulations (6 N.Y.C.R.R.) Part 620 by John R. Barnes, Henri Janian, and Ara Kradjian ("Respondents").

AUTHORITIES: ECL Article 15 (Water Resources)

ECL § 71-0301 (Summary Abatement)

ECL § 71-1709 (Formal Hearings; Notice and Procedure)

CPLR Rule 2103(b)(6) (Service of Papers)

CPLR Rule 318 (Designation of Agent for Service)

6 N.Y.C.R.R. Part 608 (Use and Protection of Waters)

6 N.Y.C.R.R. Part 673 (Dam Safety Regulations)

DECISION: On April 24, 2000, the Commissioner of the NYS Department of Environmental Conservation (DEC), John P. Cahill, issued a decision upholding a January 31, 2000 Summary Abatement Order holding Respondents Henri Janian and Ara Kradjian liable for maintaining conditions which presented an imminent danger to the health or welfare of the people of New York through the continued operation of the Barnes Creek Dam located in the Town of Owego, Tioga County, New York. Since the DEC did not properly serve the Summary Abatement Order upon Respondent John R. Barnes, the Order was amended, without prejudice, to remove Mr. Barnes as a Respondent.

A. Facts

The Barnes Creek Dam, located in Owego, New York and built around 1880 is an earth embankment measuring 350 feet in length and impounding about 120 acre-feet of water. Some time between 1922 and 1974, trees and other vegetation grew on top of the dam causing its integrity to be compromised. Significant soil erosion has also contributed to the dam's decay.

The property containing the Barnes Creek Dam was purchased by the three Respondents, Barnes, Janian and Kradjian, prior to 1970. In 1982, Barnes conveyed his interest in the property to Messrs. Janian and Kradjian.

Numerous inspections of the dam by the DEC Bureau of Dam Safety, beginning in November 1993 and continuing through January 2000, uncovered the deteriorating conditions that were the subject of the alleged ECL Article 15 violations. Pursuant to 6 N.Y.C.R.R. Part 673, the dam was assigned an "Unsafe" condition rating; the most severe condition rating assigned by the DEC. The dam also received a "Class B" hazard rating because multiple facilities located downstream from the dam, including Lockheed-Martin, NYSE&G, Hadco and the Owego sewage plant, were placed in danger of significant adverse impact if the dam fails.

On January 31, 2000, Commissioner Cahill signed the Summary Abatement Order and Notice, concluding that in violation of 6 N.Y.C.R.R. Parts 608 and 673, the condition of the Barnes Creek Dam posed an imminent danger to the people of New York and to the state's natural resources. This Order required the Respondents to remediate the conditions of the dam. The DEC sent copies of the Order and Notice by UPS overnight mail to the Respondents and their respective attorneys.

B. Discussion

1. Personal Jurisdiction

Alleging that he was improperly served with the Summary Abatement Order, Respondent Barnes contended that he should, therefore, be removed from this action. The DEC may commence an enforcement proceeding by serving a Summary Abatement Order pursuant to ECL §§ 71-0301 and 71-1709. In accordance with ECL § 71-1709(4), service of the Summary Abatement Order must be made by personal service, or service by registered or certified mail. Since the Order was sent to Respondent Barnes through UPS overnight mail, Barnes never signed for receipt of the mail and therefore no evidence existed indicating that Barnes was ever served with the Order.

The DEC argued that these papers were properly served since they were sent via overnight mail to Barnes' attorney in accordance with CPLR § 2103(b)(6). The Commissioner explained, however, that reliance on CPLR § 2103(b)(6) was misplaced because that particular rule only applies to service of papers in a pending action. A pending action is one that has already begun, whereas service of a Summary Abatement Order and Notice of Hearing is an attempt to begin an action. Also, in accordance with CPLR Rule 318, Barnes' attorney could have been served with papers only after Barnes submitted a written designation indicating that his attorney has been approved as an agent for service. Such a designation was not present in the case.

Since the DEC did not properly serve the Order upon Respondent Barnes, the Commissioner amended the Order, without prejudice, to remove Mr. Barnes as a Respondent.

2. Liability

Respondent Barnes also argued that since his ownership of the dam was transferred in December 1982, and the DEC did not classify the dam as a hazard until 1993 or later, he is not responsible for remediating the conditions of the dam. The DEC, however, contended

that all three Respondents were liable for the remediation costs since all three, at some point, contributed to the condition of the dam. The DEC relied on the prior commissioner's decision in *Triad*, in concluding that anyone who "participated, either directly or indirectly, in causing and maintaining the condition" should be held liable, regardless of current ownership.[6]

Respondents Janian and Kradjian alleged they were only former owners of the property since Barnes agreed to re-purchase the property in September 1996. Therefore liability, they contended, should rest solely with Barnes.

Prior to addressing the liability issue in this case, the Commissioner had to resolve the issue of ownership. In September 1996, Respondents Janian and Kradjian attempted to convey all interests in the property back to Barnes by providing him with a Quit Claim Deed. Although Mr. Barnes received the Quit Claim Deed, he never filed it with the Tioga County Clerk. Janian and Kradjian argued, however, that the official recording of a deed is not required to transfer title under New York State law. Instead they contended, and the Commissioner agreed, that a conveyance takes place when the deed is delivered by the grantor and accepted by the grantee.[7]

The facts in this case indicated that by 1996, when Mr. Barnes refused title, he was fully aware of the "risk factor" associated with the property. There was also additional evidence indicating that in an effort to transfer the property, Janian and Kradjian in 1993 may not have truthfully informed Barnes about the condition of the dam, and instead may have provided him with erroneous information. After discovering the actual condition of the dam, Mr. Barnes refused to accept this transfer. The Commissioner therefore concluded that Respondent Barnes, fully aware of the dam's deteriorating condition, did not accept the Quit Claims Deed, and subsequently possessed no ownership in the property.

Respondents Janian and Kradjian were thereby established as the sole owners of the property since 1982, and were therefore responsible for implementing the remediation at the Barnes Creek Dam.

C. Conclusion

Based on the foregoing, the Summary Abatement Order dated January 31, 2000 holding Henri Janian and Ara Kradjian was confirmed and continues. In addition, since the DEC did not properly serve Respondent John R. Barnes with the Order, Mr. Barnes was removed from the Order without prejudice.

By Jeffrey Lindenbaum

*** * * ***

CASE: ***In re the Alleged Violations of Articles 25 of the Environmental Conservation Law of the State of New York and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by Santino Tomaino ("Respondent").***

AUTHORITIES: ECL Article 15 (Protection of Waters)

ECL Article 25 (Tidal Wetlands)

ECL Article 71 (Enforcement)

6 N.Y.C.R.R. Part 608 (Use and Protection of Waters)

6 N.Y.C.R.R. Part 661 (Tidal Wetlands—Land Use Regulations)

DECISION: On January 25, 2000, New York State Department of Environmental Conservation (DEC) Commissioner, John P. Cahill, issued an order adopting the Findings, Conclusions and Recommendations of ALJ Kevin J. Cassuto holding that Respondent Santino Tomaino knowingly and willfully violated the tidal wetlands law and regulations at his two properties in Southampton, Suffolk County, by engaging in regulated activities without a required tidal wetlands permits.

A. Facts

Respondent Santino Tomaino owns two separate parcels of property in the Town of Southampton, Suffolk County, one on Peconic Trail and the other on Point Road. DEC initiated two separate enforcement proceedings against Respondent pursuant to ECL Article 25 (Tidal Wetlands), which were subsequently consolidated. Both sites are open, unwooded and adjacent to flowing navigable creeks. At both sites, existing conditions are readily observable from adjacent public rights-of-way. Up until August 8, 1998, Respondent made no attempt to restrict the DEC's access during its inspections of either site. At that time, however, well after the site inspections had occurred, Respondent sent a letter indicating that he wanted to be contacted prior to any future site visits.

1. Peconic Trail Site

Regarding the Peconic Trail site, DEC contended that the property was within and located adjacent to an inventoried tidal wetland classified as littoral zone. DEC alleged that the Respondent violated ECL § 25-0401(1) and provisions of 6 N.Y.C.R.R. Part 661 at various times from August 21, 1994 to August 9, 1996 by undertaking the following five regulated activities without a permit: (1) clearing vegetation on several occasions; (2) placing debris in the wetland; (3) applying herbicide to vegetation not in the tidal wetland; (4) planting a lawn in the tidal wetland where the wetland vegetation had been removed; and (5) constructing a 10-foot timber and brick retaining wall in the adjacent

area of the tidal wetland. DEC sought a total civil penalty of $51,000 as well as an order requiring Respondent to restore the Peconic Trail site according to a DEC-approved plan.

Respondent had no Departmental tidal wetlands permit authorizing him to clear or discard the cut vegetation in the tidal wetland. In August 1994, DEC sent, and Respondent received, a Notice of Violation alleging that Respondent violated ECL §§ 15-0505(1) & 25-0401, and 6 N.Y.C.R.R. Parts 608 & 661. The Notice advised Respondent of possible criminal, civil or administrative sanctions. Respondent met with DEC staff, who explained the tidal wetland regulations and identified the regulated areas.

On May 31, 1995, nine months after meeting with DEC, an even larger area of wetlands vegetation was again cleared from the intertidal marsh. Again, Respondent did not have a permit. On June 16, 1995, DEC inspected the site and found that the shoreline was eroding due to lack of vegetation in the intertidal marsh area. DEC sent, and Respondent received, another Notice of Violation.

On August 9, 1996, DEC staff inspected the site to find that between May 31, 1995 and that time, all the intertidal marsh and high marsh vegetation had been cut down and removed from the site. A grass lawn had been planted in the area previously vegetated with high marsh plant species and the concrete block retaining wall had been altered by a ten-foot brick and timber extension and a new cement cap. The ALJ found that alterations to the retaining wall allowed fill to erode from behind the retaining wall and into the tidal wetland. On August 21, 1996, the DEC sent another Notice of Violation; it could not be determined whether Respondent received this Notice.

2. Point Road Site

Regarding the Point Road site, DEC alleged that the site was adjacent to an inventoried tidal wetland which appears on a DEC tidal wetland map and that Respondent violated ECL § 25-0401(1) and 6 N.Y.C.R.R. Part 661 by undertaking the following six separate regulated activities without a permit: on or before February 4, 1997 (1) placing two loads of fill in the adjacent area; (2) placing one load of solid waste on another portion of the adjacent area; (3) clearing vegetation from the adjacent area; (4) constructing an 80-by-20-foot road. Then, on February 7, 1997, (5) placing additional fill over the entire site; and (6) installing a septic system in the adjacent area. DEC sought a total civil penalty of $55,000 and as well as an order requiring Respondent to restore the Point Road site according to a DEC-approved plan.

Respondent contracted with Tufano Asphalt Paving Co. to regrade the Point Road site with fill material and install a new septic system. Tufano employees worked at the site from December 1996 through February 1997 and delivered at least 540 cubic yards of fill material. Respondent paid Tufano $7,000 for the fill delivery and regrading and told Tufano that no permits were needed for the filling and regrading at Point Road. Respondent's wife, Janet Tomaino, also signed an agreement with Tufano to pay any fines or penalties that might result from Tufano's work.

On February 2, 1997, DEC staff conducted an inspection and observed a large band of debris consisting of tree limbs and lumber between the seaward edge of the wetland and the fill. Sometime in early February, prior to February 8, Tufano installed a new septic tank and ring. On February 4, 1997, DEC staff conducted another inspection and observed a large amount of fill, some of which had already been graded into the site. In total, three separate areas on the Point Road site were regraded with new fill, one of which was approximately 10 feet from the wetland boundary.

By certified mail, return receipt requested, DEC sent Respondent a Notice of Violation dated February 5, 1997. Respondent never claimed the Notice. DEC staff returned to the site two days later and observed that the remaining ungraded piles had been graded into the site. DEC sent another Notice of Violation return receipt requested. Once again, Respondent failed to claim the Notice. The returned notices were remailed regular mail. In June, DEC staff returned and observed that fill had been leveled across the side and backyard of the site and into the tidal wetland. There were several piles of landscaping debris and hay bales were placed parallel to the fill in the wetland. By September, the fill along the wetland boundary was eroding into the tidal wetland, and by October, further plumbing work had been done, new vegetation had been planted, and the landscape debris, hay bales and fill were still present in and adjacent to the wetland.

B. Discussion

1. Administrative Inspection Program

Respondent first asserted that DEC staff inspections of his property without a warrant constituted a violation of his constitutional protections against unreasonable search and seizure and that, accordingly, evidence garnered during those inspections should be suppressed. Respondent relied on several federal cases and *Sokolov v. Village of Freeport*,[8] for the proposition that administrative agencies cannot conduct investigations that infringe upon people's constitutional rights. DEC staff countered that the tidal wetlands administrative program and inspections were proper and lawful and that none of the resulting photographs or testimony should be suppressed. Staff relied on *FRJE Holding Corp. v. Jorling*,[9] where the court found that a property owner who had obtained a freshwater wetlands permit that

provided for site inspections by DEC staff had no reasonable expectation of privacy regarding an unfenced freshwater wetland where the violation was visible from a public right-of-way.

The ALJ and, hence, the Commissioner, held that although the Respondent in *FRJE Holding* had a permit specifically allowing DEC staff inspection, this distinction was ineffectual, reasoning that Respondent's failure to comply with permitting requirements should not inure to his benefit. The ALJ further held that Respondent's reliance on *Sokolov* was similarly ineffectual, inasmuch as respondent did little more that recite a "truism" and failed to demonstrate how the *Sokolov* principle applied in this case or provide any analysis of the federal case law to which he cited. Instead, the ALJ found that because the site was readily observable from public right-of ways and navigable streams and Respondent had failed to post any fences or signs or indicate his wish to be contacted by DEC prior to its visits until August 8, 1998, the administrative inspections conducted by DEC staff were lawful, proper, administrative inspections. The ALJ also noted that Respondent had adequately preserved his constitutional claims should he wish to pursue them in a court of appropriate jurisdiction.

2. Selective Enforcement

Respondent next asserted that staff's enforcement action was really brought at the behest of one of his Point Road neighbors and that, accordingly, DEC's actions constituted selective enforcement. The Commissioner issued an interlocutory ruling stating that purported selective enforcement was no excuse for tidal wetlands violations and accordingly, the Commissioner struck the affirmative defenses of selective enforcement and unfairness. Accordingly, ALJ Cassuto held that the selective enforcement defense was not relevant to the determination of whether the alleged tidal wetland violations had occurred. Notably, however, the ALJ further advised the parties that if the selective enforcement charges were true, they raised very serious charges against the DEC staff and he advised Respondent that this claim could be pursued in a CPLR article 78 proceeding, a federal civil rights action, or other appropriate court proceeding.

3. Liability

Pursuant to ECL § 25-0401(1), no person may conduct any activities regulated thereunder without obtaining a DEC tidal wetlands permit for the proposed activity. Regulated activities include:

> any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads, the driving of any pilings, or placing of any other obstructions, whether or not changing the ebb and flow of the tide, and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area.[10]

The tidal wetland regulations provide a definition of "regulated activity" that is substantially the same as that in ECL § 25-0402(2).[11] Part 661.5(b) identifies specific regulated activities that require a Departmental permit when undertaken in either the tidal wetland or an adjacent area, such as: substantial restoration or reconstruction of existing functional structures; fill; installation of a new septic system; the use and application of pesticides, including herbicide; disposal of solid waste; and any other regulated activity not expressly identified but determined by the definition of the term "regulated activity."

When each of a respondent's activities is a distinct regulated activity that would independently require a Departmental permit, each unpermitted regulated activity constitutes a separate violation.[12] Even if a single project includes many different activities, each discrete activity can constitute a separate finding of violation.[13] Pursuant to ECL § 71-2503, during a continuing violation, each continuing day is deemed a separate and distinct violation.

With regard to the Peconic Trail Site, the ALJ found that all charges except charge five, the application of herbicide, were sustainable. The ALJ found that, although the retaining wall extension is usually a compatible use with the function and benefits provided by the tidal wetland, it is nonetheless a regulated activity and a Departmental permit was required. The ALJ then found that the remainder of the charges pertaining to the Peconic Trail Site all constituted activities which, although not expressly identified, constituted regulated activities because they could, and in fact did, substantially alter the natural condition of the tidal wetland pursuant to the definition of "regulated activity." Accordingly, the ALJ found that Respondent violated ECL § 25-0401(1) and 6 N.Y.C.R.R. § 661.8 by undertaking these activities without a tidal wetlands permit. The ALJ further found that each substantiated charge at the Peconic Trail site constituted a separate and distinct violation.

With regard to the Point Road Site, the ALJ found that from December 1996 to February 1997, Respondent undertook regulated activities on the adjacent area that included filling several different areas of the site, discarding debris, and installing a septic system, and that Respondent did not have a Departmental tidal wetlands permits authorizing any of these regulated activi-

ties. Accordingly, the ALJ found that Respondent violated ECL § 25-0401(1) and 6 N.Y.C.R.R. § 661.8. The ALJ also found that for the purposes of penalty assessment, the three separate fill charges were appropriately considered one continuing fill violation during the 36 days that Tufano Asphalt Paving Co. was at the site delivering fill material.

However, the ALJ also found that, with respect to the charge of clearing and damaging vegetation on site, the vegetation damage occurred when Respondent regraded the site with fill and that, consequently, this charge was part of the continuing fill violations and did not constitute a separate and distinct violation. Nonetheless, the damaged vegetation in the adjacent area could adversely impact the tidal wetlands and, accordingly, the ALJ determined that this fact should properly be considered an aggravating factor in determining an appropriate civil penalty on the fill charges.

The second separate and distinct violation occurred when Respondent disposed of solid waste (tree limbs and construction lumber) on site without a permit. Although Respondent had alleged that the debris had been disposed of there by an unknown third party without Respondent's knowledge or consent, the ALJ rejected this argument and held that, because Respondent owned and controlled the site, it was reasonable to conclude that he caused the material to be deposited there. The ALJ also rejected Respondent's contentions that both sites were subject to recurring vandalism, including the removal of "no trespassing" signs and solid waste disposal, inasmuch as Respondent failed to substantiate these contentions with any evidence of complaints filed regarding the alleged incidents. The ALJ found that the installation of the septic system without a Department permit constituted a third separate and distinct violation. The ALJ credited Mr. Tufano's uncontroverted testimony and staff's independent testimony on the subject. In total, the ALJ found that Respondent was liable for nine separate violations of ECL § 25-0401(1), six associated with Peconic Trail and three associated with Point Road.

4. Penalties

a. Civil Penalties

ECL § 71-2503 provides for civil penalties of up to $10,000 for each violation of ECL article 25 and also authorizes the Commissioner to order restoration and remediation of the affected wetland resource. According to the Department's *Civil Penalty Policy*, actual and potential environmental impacts are relevant in determining the appropriate civil penalty. While such impacts are considered aggravating circumstances and can be a basis for increasing a penalty, their absence is not a mitigating factor.

The ALJ found that Respondent's actions had adversely impacted the tidal wetland and water quality of the intertidal creek related to the Peconic Trail Site. Absent any wetland vegetation, the area can no longer serve as a food source or habitat for marine life, and runoff loaded with silt and organic material from the upland areas can freely wash into the wetlands and intertidal creek. The ALJ further found that the tidal wetland could no longer offer any protection from storm events and that, accordingly, accelerated erosion of the site would continue.

The ALJ similarly found that Respondent's actions had adversely impacted the tidal wetlands associated with the Point Road Site. The ALJ found that fill placed on the site had been placed directly into the tidal wetland and other fill was eroding into the wetland from the adjacent area. Moreover, fill placed on the site had covered and damaged the upland vegetation that had been growing in the adjacent area. The lack of vegetation prevented the normal function of the adjacent area and its role as a buffer to the tidal wetland, allowing runoff loaded with silt and organic materials from the upland areas to freely wash into the wetland. Wetland values adversely impacted by Respondent's activities included losses to marine food production, reduced flood and erosion control, and reduced storm control. The ALJ then recommended that the Commissioner consider the actual resulting environmental impacts as aggravating factors justifying a significant civil penalty.

In determining the appropriate civil penalty, the ALJ first noted that a violator's culpable mental state may be a factor in the determination, and then turned to the *Civil Penalty Policy* which suggests considering two factors: (1) the amount of control Respondent had over the events constituting the violations, and (2) the likelihood that Respondent knew his actions constituted violations. The ALJ found that, inasmuch as Respondent owned both sites at all relevant times, he had substantial control over the sites and that Respondent knew his actions constituted violations of article 25. The ALJ relied on Respondent's receipt of certain Notices of Violation, his meetings with Department staff at which staff explained the tidal wetland regulations and identified the regulated area on the Peconic Trail Site, and his knowing and willful disregard of the regulations thereafter.

With respect to the Point Road Site, the ALJ considered crucial that by the time Respondent had contracted with Tufano Asphalt & Paving, staff had already served Respondent with a Complaint regarding the Peconic Trail Site and that, despite that pending administrative enforcement action and his knowledge of the regulations and their applicability to the Point Road Site, Respondent dismissed Tufano's permitting concerns and willfully, intentionally and knowingly chose to dis-

regard the regulations. The ALJ recommended that the Commissioner consider Respondent's knowing and willful disregard as a significant aggravating factor further justifying a substantial civil penalty.

Regarding the appropriate assessment, the ALJ found that no mitigating circumstances existed in this case to warrant a downward adjustment from the beginning maximum penalty amount of $10,000 per violation, as provided by the guidance of the *Tidal Wetland Enforcement Guidance Memorandum*. Moreover, the ALJ found that Respondent's high degree of culpability at both sites were aggravating factors justifying a significant civil penalty. The ALJ then adopted staff's recommended penalty (excluding the penalty recommended for the unsubstantiated charge of herbicide application) and assessed a $41,000 fine associated with the Peconic Trail Site.

With respect to the Point Road Site, the ALJ found that the staff's recommended penalty of $55,000 was appropriate. The ALJ recommended that the Commissioner assess the penalty as follows: (1) an initial civil penalty of $10,000 for the fill violation that began on January 1, 1997, and an additional daily civil penalty of $26,000 to be divided evenly over the remaining 35 days that the violation continued, amounting to an additional $742.86 per day; (2) the maximum civil penalty of $10,000 for the solid waste discarded on the property; and (3) $10,000 for the violation associated with installation of the septic system.

In total, the ALJ recommended, and the Commissioner approved, a $96,000 civil monetary penalty for Respondent's violations on both sites.

b. Restoration and Remediation

ECL § 71-2503 provides that the Commissioner has the power to direct a violator to "restore the affected tidal wetland or area immediately adjacent thereto to its condition prior to the violation, insofar as possible and within a reasonable time and under the supervision of the Commissioner." With regard to both sites, the ALJ found that Respondent's actions had adversely impacted the associated tidal wetlands adjacent areas. For the Peconic Trail Site, the ALJ recommended that the Commissioner direct Respondent to restore the wetland vegetation on the site by developing a planting plan acceptable to the Region 1 Department staff and to implement it under staff's supervision. For the Point Road Site, the ALJ recommended the following restoration and remediation: (1) remove the solid waste to an approved solid waste management facility; (2) submit a permit application for staff to review, describing the design and installation of the septic system or, alternatively, provide proof that the Suffolk County Department of Health approved the system's design and location. The ALJ further provided that staff, in its discretion, could direct Respondent to relocate the septic system.

C. Conclusion

Based on the foregoing, the Commissioner found that Respondent knowingly and willfully violated the tidal wetlands laws and regulations by engaging in regulated activities without required Departmental tidal wetlands permits and committing several violations over a period of years at the Peconic Trail and Point Road Sites. The Commissioner then sustained nine charges against Respondent alleging violations of ECL § 25-0401 and 6 N.Y.C.R.R. Part 661, and dismissed Respondent's affirmative defenses, including the selective enforcement and warrantless search defenses. The Commissioner then assessed the sum total penalty of $96,000 and ordered Respondent to perform restoration and remediation at the two sites in accordance with an outlined plan of the Department's Bureau of Marine Habitat Protection.

By Melissa E. Osborne

Endnotes

1. 6 N.Y.C.R.R. § 661.9.
2. 6 N.Y.C.R.R. § 661.5.
3. *Id.*
4. 6 N.Y.C.R.R. § 661.4(ee)(1)(i).
5. *See Concerned Citizens for the Environment v. Zagata*, 243 A.D.2d 20, 22 (3d Dep't 1998), *lv. denied*, 92 N.Y.2d 808 (1998); *Shultz v. Jorling*, 164 A.D.2d 252, 255-256 (3d Dept. 1990), *lv denied*, 77 N.Y.2d 810 (1991).
6. *See In re Triad, et al.*, DEC File No.: 1-4350-90-09, Decision and Order dated December 4, 1991.
7. *See In re Marriage Encounter v. Bd. of Assessors*, 75 Misc. 2d 147, 149 (1973); *Bianco v. Furia*, 41 Misc. 2d 292, 294 (1963); *Buckley v. Chevron, USA Inc.*, 149 Misc. 2d 476, 478-79 (1991).
8. 52 N.Y.2d 341 (1981).
9. 193 A.D.2d 1013 (3d Dep't 1993).
10. ECL § 25-0401(2).
11. *See* 6 N.Y.C.R.R. Part 661.
12. *Linda Wilton & Costello Marine, Inc.*, Commissioner's Order, February 1, 1991.
13. *Beaver Dam Condominiums, Ltd.*, Commissioner's Order September 16, 1991.

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Recent Decisions in Environmental Law

Student Editor: Jennifer S. Rosa

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

Abate v. City of Yonkers, et al., 694 N.Y.S.2d 724 (2d Dep't 1999), *leave to appeal dismissed*, 94 N.Y.2d 834 (1999).

Facts: This proceeding was an appeal by petitioners whose article 78 proceeding was dismissed as premature by the Supreme Court of Westchester County. Respondents included builders, local Teamsters Union, Home Depot U.S.A., Costco Wholesale Corp., and the New York State Thruway Authority (NYSTA). The initial proceeding was brought to stop the city of Yonkers from issuing building permits for a commercial development project, the "Austin Avenue Shopping Center" ("Shopping Center"). The Appellate Division vacated the judgment entered by the Supreme Court, reinstated the petition and remitted the case to the Supreme Court, Westchester County, awarding appellants' costs payable by respondents.

Issue: Were claims asserted by the plaintiffs in article 78 proceeding premature and properly dismissed.

Analysis: The city of Yonkers City Council adopted a Statement of Findings in 1995 ("Statement") which called for the opening of a road to mitigate traffic conditions in the development of the Shopping Center. The Appellate Division found that some of the respondents violated the Statement, and therefore the appellants' claims were not premature.

The Appellate Division held that petitioners also raised questions of State Environmental Quality Review Act (SEQRA) compliance that were valid and improperly dismissed. Respondents contended that a stipulation of settlement that they had entered into in a different proceeding was not reviewable under SEQRA. The court held the stipulation was not exempt from SEQRA review as a court action because it was a Type I action.[1] Additionally, the court noted that the results of this settlement were predetermined, because it contemplated "after-the-fact SEQRA compliance" which merely "rubber-stamps" decisions that were already made.[2] Petitioners argued that this raises the issue of whether the stipulation was a final action, ripe for judicial review. The court held that this was a valid issue that should not have been dismissed. The court noted that petitioners also validly questioned the representation of their interests in the related action.[3]

The court also held that because the NYSTA took conflicting positions regarding the stipulation, whose terms it effected, there was an issue as to whether a version of its Letter of Intent issued by the NYSTA was subject to SEQRA review as a final agency action.[4] The court remarked that the NYSTA previously adopted a resolution that contravened the 1995 Statement & Findings, and although it was a final agency action, it was not subject to SEQRA review first.[5]

As a result, the Court of Appeals denied a motion for leave to appeal because the order appealed from was not a final determination and was not provided for in CPLR 5602(a)(2).

Jennifer S. Rosa '01

Endnotes

1. *See* 6 N.Y.C.R.R. 617.5(b)(37).
2. *Abate v. City of Yonkers*, 694 N.Y.S.2d 724, 726 (2d Dep't 1999).
3. *See* CPLR 7804(e).
4. *See* 6 N.Y.C.R.R. 617.2.
5. *See* 6 N.Y.C.R.R. 617.2(c).

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American Trucking Ass'ns v. United States Envt'l Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999), *petition for reh'g granted in part and denied in part, modified,* 195 F.3d 4 (D.C. Cir. 1999), *petition for cert. filed,* 68 USLW 3496 (U.S. Jan. 27, 2000) (No. 99-1257, 1263); (U.S. Feb. 28, 2000)(No. 99-1426,1431,1442).

Facts: The Clean Air Act (CAA) requires the Environmental Protection Agency (EPA) to promulgate and periodically revise National Ambient Air Quality Standards (NAAQS) for each air pollutant identified by the agency as meeting certain statutory criteria. For each pollutant identified, the EPA sets a "primary standard"—a concentration level "requisite to protect the

public welfare" with an "adequate margin of safety" and a "secondary standard"—a level "requisite to protect the public welfare."[1] In July 1997 the EPA issued their final rules revising the primary and secondary NAAQS for ozone and particulate matter (PM). The EPA regards ozone definitely, and PM likely, as non-threshold pollutants that have the possibility of some adverse health impact at any exposure level above zero. The final rules enacted by the EPA revised both the permissible level of ozone allowed in a given area and an annual standard for PM to the lowest levels where the EPA had confidence that the epidemiological evidence displayed a statistically significant relationship between air pollution and adverse health effects.

After the EPA made the revisions to the NAAQS, certain small business petitioners brought claims arguing that the EPA construed §§ 108 and 109 of the CAA so loosely as to render them unconstitutional delegations of legislative power. After hearing the matter, the Court of Appeals for the District of Columbia ruled that the EPA had in fact construed §§ 108 and 109 so loosely as to render the revised NAAQS the result of an unconstitutional delegation of power.[2] The court based its decision on the widely accepted fact that Congress is given only those powers that are "herein granted" and any delegation of those powers must be effectuated through the use of an intelligible principle channeling the application of those powers. Instead of striking down the statute as unconstitutional the court remanded the NAAQS to the EPA to articulate a standard that was sufficiently definite for the court to consider. The court also ruled that the establishment of the new particle indicator was unsupported by the evidence established in the record and as a result was arbitrary and capricious. The court's opinion discusses multiple issues, the two most significant are discussed here in detail. Other issues of note include a holding that the EPA must consider the beneficial impacts of ozone when setting the NAAQS, that the CAA § 109 does not allow cost considerations, that the CAA does not require the elimination of all visibility effects when setting NAAQS, and that the revised NAAQS did not violate the National Environmental Policy Act (NEPA).

Issues:

1. Whether the EPA had construed §§ 108 and 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power.
2. Whether the establishment of the particle indicator is unsupported by the evidence contained in the record and is therefore arbitrary and capricious.

Analysis: Article 1, § 1 of the U.S. Constitution provides that all "legislative powers herein granted shall be vested in a Congress of the United States." The nondelegation principle provides that an agency define an "intelligible principle" to channel its application of particular legislation. The court concluded that the factors the EPA used in determining the degree of public health concern associated with different levels of ozone and PM were reasonable, but the EPA failed to articulate an intelligible principle to channel its application of those factors, nor was one apparent from the statute.

In 1990 Congress substantially revised the CAA by adding specific enforcement provisions for both particulate matter and ozone. These amendments however, did not alter the section of the CAA that provides for setting and revising primary and secondary NAAQS. The administrator must thoroughly review the NAAQS every five years and make appropriate revisions.[3] This court agreed with the Second Circuit that this section sets a bright-line rule for the agency. The court concluded that there is nothing in the Act that modifies this bright-line rule or otherwise makes it inapplicable to the revision of the ozone NAAQS. It is important to note at the outset that this court only discussd the primary standard because the secondary standards, which were based on the primary standard, were remanded for further consideration.

In reaching the decision that the EPA violated the nondelegation principle, the court examined the factors the EPA uses for assessing health effects when setting the NAAQS for non-threshold pollutants. The EPA determined the nature and severity of the health effects involved, the size of the sensitive populations at risk, the type of health information available, and the kind and degree of uncertainties that must be addressed. The court found that although these criteria as stated are a bit vague, they essentially mean that the EPA considers the severity and certainty of effect, and size of population effected. The EPA argued that § 109(b)(1) requires that they promulgate NAAQS based on air quality criteria issued under § 108 that are requisite to protect the public health with an adequate margin of safety. According to the EPA, this language and the related legislative history, provides sufficient parameters for the agency to follow in setting the NAAQS. The EPA contended that the CAA provides a sufficient "intelligible principle" to guide the EPA's discretion. This argument was relied on in both the initial case and on petition for rehearing.

The court concluded that the argument relied on by the EPA begged the question of what really is the intelligible principle. The court reasoned that the EPA failed to state any determinate criterion for drawing lines and failed to state intelligibly how much is too much. In reaching this decision the court focused on the EPA's defense of the revised level of 0.08 ppm of the ozone NAAQS. The EPA argued that the choice of 0.08 ppm was superior to retaining the existing level of 0.09 ppm, because more people are exposed to more serious effects at 0.09 ppm than at 0.08 ppm. In defending its

decision not to fix the level at 0.08 ppm, the EPA made three arguments.

First, the most certain effects, while adverse, are transient and reversible at levels below 0.08 ppm, and the more serious effects with greater immediate potential long-term impacts on health are less certain, both as to the percentage of individuals exposed and as to long-term medical significance of these effects at higher levels. The court responded that this is nothing more than a conclusion that lower exposure levels are associated with lower risks to public health. The EPA failed to contradict the intuitive proposition that reducing the standard to 0.07 ppm would bring about comparable changes. The majority found the language relied on by the EPA does not make the categorical distinction, as the dissent claimed, that health effects occurring below 0.08 ppm are transient and reversible, and it is far from apparent that any health effects existing above the level of 0.08 ppm are permanent or irreversible.

Second, the EPA cited the consensus of the Clean Air Scientific Advisory Committee (CASAC) that the standard should not be set below 0.08 ppm. The CASAC gave no specific reasons for its recommendations. The court determined that the CASAC failed to provide an intelligible principle given by failing to provide any specific reasons for their recommendations. It should be noted that the dissent stressed the undisputed eminence of CASAC's members, a fact the majority countered by observing that the question of whether the EPA acted pursuant to lawfully delegated authority is not a scientific one.

Finally, the EPA argued that a 0.07 ppm standard would be closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources, and thus would be more likely to inappropriately target those areas. The court felt that the EPA's language, coupled with data on peak background levels, seemed to be another way of saying that setting a standard at a level that is achievable without chemicals from outside nature is inappropriate. The EPA's failure to explicitly adopt such a conclusion negated the significance of the courts concession that this may in fact be a sound reading of the statute.

The court also determined that the principle the EPA invokes for each increment in stringency could easily justify a standard of zero for any non-threshold pollutant. Instead, the EPA frequently defends a decision not to set a standard at a lower level on the basis that there is greater uncertainty that health effects exist at lower levels than the level of the adjusted standard. The arguments offered by the EPA show only that the EPA is applying the stated factors and that larger public health harms, including increased probability of such harms, are associated with higher pollutant concentrations. This increasing-uncertainty argument is only helpful if some principle reveals how much uncertainty is too much. There was no such principle here.

Even though the EPA failed to establish an intelligible principle, the court stated:

> [w]here (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, [the court's] . . . response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.[4]

The court felt that it appeared from the EPA's past behavior that there was some readiness to adopt standards that leave a non-zero residual risk. If the agency was able to develop determinate, binding standards for itself, it would be less likely to exercise the delegated authority arbitrarily. The court felt that an agency wielding the power over American life possessed by the EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account the population affected, and the severity and probability of the harm. At the time of rehearing however, the EPA had yet to clearly state and apply what the court believed to be an intelligible principle that would satisfy the nondelegation principle.

The court determined that the explanations given for its decision to revise the NAAQS amounted to assertions that a less stringent standard would allow the relevant pollutant to inflict greater harm on public health, and that a more stringent standard would result in less harm. Such arguments would only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is requisite or not requisite to protect the public health with an adequate margin of safety. Based on this, the court concluded initially and on rehearing that they were correct when they determined that the EPA construed §§ 108 and 109 of the CAA so loosely as to render them unconstitutional delegations of legislative power.

In dealing with the issue of whether the establishment of the new fine particle indicator is unsupported by the evidence contained in the record and is arbitrary and capricious it was noted by the court that both the 1987 NAAQS and the proposed standards regulate all particles with diameters under 10 micrometers, which is signified by the indicator PM sub10. Coarse particles generally have diameters between 2.5 and 10 micrometers (PM sub10-2.5) and fine particles generally have diameters of 2.5 micrometers or less (PM sub2.5).[5] The Petitioners argued that there was no scientific basis for regulating coarse particles at all, and that even if there

were, retention of the PM sub10 indicator simultaneously with the establishment of the new fine particle indicator is unsupported by the evidence in the record and is arbitrary and capricious.

The EPA contended that coarse and fine particles pose independent and distinct threats to public health and should be regulated independently. The court agreed with the EPA that there is a significant relationship between PM sub10 pollution and adverse health effects justifying the 1987 NAAQS. But, the EPA nevertheless decided to regulate the coarse fraction of PM sub10 indirectly. Even though the EPA recognized that PM sub10-2.5 would have served as a satisfactory coarse particle indicator, the EPA offered three justifications for the decision to use PM sub10 instead. First, the EPA argued that studies relied upon used PM sub10, not PM sub10-2.5 as the variable in their models; second, the PM sub10 standards will work in conjunction with the PM sub2.5 standards by regulating the portion of particulate pollution not regulated by the PM sub2.5 standards; and third, a nationwide monitoring program for PM sub10 already exists.[6]

The court concluded that none of the arguments set forth by the EPA were persuasive. First, the court noted that the EPA's argument that PM sub10 is an effective indicator for the regulation of coarse particulate pollution was contradicted by its own staff papers, which concluded that PM sub10 is inherently confounded by the presence of PM sub2.5 particles, so that any regulation of PM sub10 pollution will include both coarse and fine particles. Therefore, using PM sub10 as the coarse particulate indicator would regulate more than just the coarse fraction of PM sub10, and that the amount of coarse particulate pollution permitted will depend on the amount of PM sub2.5 in the air. Second, the court determined that the EPA's argument that the PM sub10 standard would work in conjunction with the PM sub2.5 standard suffered from the same deficiency because the very presence of a separate PM sub2.5 standard made the retention of the PM sub10 indicator arbitrary and capricious. It was determined that the PM sub10 and PM sub2.5 indicators, when used together, lead to "double regulation" of the PM sub2.5 component of PM sub10 and potential under regulation of the PM sub10-2.5 component.[7] Finally, the court dismissed the contention that PM sub10 is a better indicator because of a nationwide monitoring program already in existence because the EPA is barred from considering factors unrelated to public health in setting air quality standards. The administrative convenience of using PM sub10 could not justify choosing an indicator poorly matched to the relevant pollution agent.

Based on the foregoing analysis, the court determined that the EPA had read §§ 108 and 109 of the CAA so loosely as to render them a violation of the nondelegation principle and the manner in which the EPA attempted to regulate coarse particulate matter was arbitrary and capricious.

Kyle F. Barry '01

Endnotes

1. 42 U.S.C. § 7409(b).
2. *See American Trucking Ass'ns v. United States Envt'l Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).
3. *See* 42 U.S.C. § 7409 (d)(1).
4. *Id*. at 1038.
5. *See id*. at 1053.
6. *See id*. at 1054.
7. *Id*.

* * *

Burnette v. Carothers, 192 F.3d 52 (2d Cir. 1999).

Facts: Plaintiffs, homeowners in the Rye Hill section of Somers, Connecticut, alleged that toxic substances emanating from the Connecticut Correctional Institute (CCI) had polluted and were continuing to pollute their on-site water wells. The Connecticut Department of Corrections operates the CCI. Plaintiffs named as defendants various officials of the state of Connecticut, operating in their official capacity. In 1993, water samples from wells in the Rye Hill area were found to contain certain chemicals in excess of standards for safe drinking water set by the state of Connecticut and the United States. The hazardous substances were found to be flowing from CCI, apparently as a result of previous disposal practices. Upon discovering the contamination, Connecticut officials immediately ordered special filters to be installed in homes with high levels of the chemicals. The Department of Environmental Protection (DEP) also began providing bottled water to the affected residents. A public water system was subsequently extended into the Rye Hill area, although not all of the homeowners chose to connect to it. The Department of Corrections, pursuant to a consent decree it entered into with the DEP, ceased maintaining the filters after the public water system became operational.

Plaintiffs, were seeking (a) injunctive and monetary relief, (b) reimbursement from the defendants for the response costs allegedly incurred as a result of "a release or threatened release of hazardous substances" from CCI, and (c) claims under the Comprehensive Environmental Response, Compensation and Liability Act § 9613(f)(1) (CERCLA) for a declaratory judgment, future response costs, and contribution.

The district court dismissed all claims and granted summary judgment with regard to the response costs sought, all on grounds that they are barred by the sovereign immunity doctrine of the Eleventh Amendment.

Issue: Whether Congress, by authorizing these citizen suit provisions, abrogated the states' sovereign immunity.

Analysis: The court began its analysis by noting that "when the state is the real party in interest, the Eleventh Amendment generally bars federal court jurisdiction over an action against a state official acting in his or her official capacity."[1] The court did recognize that Congress may abrogate the states' constitutionally secured immunity from suit in federal court, but it must make "its intention unmistakably clear in the language of the statute."[2] The Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), and CERCLA contain substantially identical provisions permitting citizens to sue as private attorneys general in circumstances where government authorities have, after notice, failed to take steps to remedy particular environmental harms. The court concluded that the provisions did not express an unequivocally intent to abrogate sovereign. The court affirmed the United States District Court dismissal of all claims for lack of subject matter jurisdiction. In reviewing the dismissal de novo pursuant to Fed. R. Civ. P. 12(c), the court applied the same standard as that applicable to a motion under Rule 12 (b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.

The appellants, (plaintiffs above) appearing *pro se*, also tried to assert their claims as a *qui tam* action. The court disagreed and stated "the statutes at issue do not grant citizens the right to sue on behalf of the United States, . . . to the contrary, the citizen suit provisions authorize 'any citizen [to] commence a civil action on his own behalf.' 33 U.S.C. § 1365(a)."[3]

The court then reviewed the district court's grant of summary judgment with respect to the CERCLA claims for response costs and contribution, applying a *de novo* standard of review. The appellants sought contribution pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f). Claims made pursuant to this section are available only to a potentially responsible party seeking to recover from another potentially responsible party. Since the appellants did not claim to be a potentially responsible party, the court barred recovery under this section.

The appellants also claimed response costs under CERCLA § 107(a), 42 U.S.C. § 9607(a). In order to determine if the state is liable to private parties pursuant to CERCLA, the court applied the test set down by the United States Supreme Court in *Seminole Tribe v. Florida*.[4] The first requirement of *Seminole Tribe* asks if the legislation unequivocally expressed Congress' intent to abrogate the states' immunity. The court determined that this requirement had been satisfied. The second requirement of *Seminole Tribe* asks if in enacting the legislation, Congress validly exercised its power. The court, relying on the reasoning in *Seminole Tribe*, that Congress can abrogate the states' immunity only if acting under § 5 of the Fourteenth Amendment, held that CERCLA was enacted pursuant to the Commerce Clause. Therefore, the court ruled that any provision in CERCLA that makes a state liable to private parties is unenforceable.

The appellants contended that CERCLA was also enacted pursuant to Congress's spending power under Article I, § 8, Clause 1, or alternatively that CERCLA created a property right and was therefore enacted pursuant to § 5 of the Fourteenth Amendment. The court rejected both of these arguments noting that since the decision in *Seminole Tribe*, "Congress cannot abrogate the States' Eleventh Amendment sovereign immunity pursuant to any Article I power."[5] The court also found that claims for CERCLA response-cost do not establish a property interest under the Fourteenth Amendment.

Appellants additionally asserted that although Connecticut did not expressly waive its sovereign immunity, its actions may be construed as a constructive waiver. However, that argument was flatly rejected because the precedent relied on to establish the constructive waiver doctrine argued had been expressly overruled.[6]

Lastly, Appellants argued that Connecticut consented to a suit through the acceptance of federal monies. The court affirmed the district court's finding that Connecticut did not consent to a suit in federal court. The court stated that under CERCLA, Congress did not articulate the unequivocal intent to condition the receipt of federal funds on a state's waiver of sovereign immunity.

David Badanes '00

Endnotes

1. *Burnette v. Carothers*, 192 F.3d 52, 57 (1999).
2. *Id*. at 57 (citing *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)).
3. *Id.* at 58.
4. 517 U.S. 44, 55 (1996).
5. *Burnette*, 192 F.3d 52, 59 (1999) (quoting *Close v. New York*, 125 F.3d 31, 38 (2d Cir. 1997)).
6. *See id.* at 60 (discussing *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)).

* * *

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc., 120 S.Ct. 693 (2000).

Facts: Laidlaw Environmental Services (TOC) Inc. now named Safety-Kleen (Roebuck), Inc., operated a hazardous waste incinerator facility including a wastewater treatment plant in Roebuck, South Carolina. Laidlaw held a National Pollutant Discharge Elimination

System permit (NPDES) allowing Laidlaw to discharge treated water into the North Tyger River. The permit also functions to limit the discharge of pollutants into the water. Laidlaw's discharges, in particular its discharge of toxic mercury, repeatedly exceeded the limits allowed by the permit. Friends of the Earth (FOE) and Citizens Local Environmental Action Network (CLEAN), later joined by the Sierra Club, brought action pursuant to the citizen suit provision in the Clean Water Act against Laidlaw. Plaintiffs sought civil penalties, injunctive relief and attorney fees for violations of mercury discharge limits. FOE took preliminary steps towards litigation against Laidlaw on April 10, 1992 by sending a letter to Laidlaw indicating their intention to file a citizen suit against it under § 505(a) of the Clean Water Act after the expiration of the requisite 60-day notice period. Laidlaw contacted the South Carolina Department of Health and Environmental Control (DHEC) to ask them to consider filing a lawsuit against Laidlaw for its violations and failure to meet the NPDES permit's daily average limits on mercury discharges into the river. Laidlaw asked DHEC to file the lawsuit in an effort to bar FOE's proposed citizen suit against it according to 33 U.S.C. § 1365(b)(1)(B).[1] DHEC agreed to file a lawsuit against Laidlaw. On June 9, 1992, the last day before the expiration of the 60-day notice requirement was satisfied by FOE, DHEC and Laidlaw reached a settlement imposing $100,000 of civil penalties and requiring that they make efforts to comply with the permit obligations. On June 12, 1992, FOE brought this citizen suit against Laidlaw. The district court denied Laidlaw's summary judgment motion and found that FOE had standing to bring the suit, "by the very slimmest of margins."[2] The United States joined FOE, appearing as *amicus curiae*. The district court also denied Laidlaw's motion to dismiss based on the claim that FOE's suit was barred by the prior action against it, holding that the DHEC's action against Laidlaw was not "diligently prosecuted."[3] The district court imposed a civil penalty of $405,800 against Laidlaw, required Laidlaw to reimburse the plaintiffs for legal fees, but declined FOE's request for injunctive relief because Laidlaw had been in compliance with the permit regulations since August of 1992. Both parties appealed and on July 16, 1998 the Court of Appeals for the Fourth Circuit held that the case was moot because of Laidlaw's present compliance. The appellate court reasoned that the only remedy available to FOE was civil penalties that would be paid to the government, and would not therefore compensate any injury that FOE had suffered. The Court of Appeals also noted that the elements of Article III standing; injury, causation, and redressability, must be present at every stage of review.[4] After this decision, Laidlaw's incinerator facility in Roebuck was permanently closed and put up for sale, and all discharges into the Tyger River ceased. The United States Supreme Court granted certiorari in 1999.

Issues:

1. Whether the FOE had the requisite standing to bring this citizen suit against Laidlaw.
2. Whether Laidlaw's compliance with the permit and the eventual closing of the plant rendered the claims for civil penalties under the Clean Water Act moot.

Analysis: The Supreme Court reversed the judgment of the Court of Appeals and held that the court erred in concluding a citizen claim for civil penalties must be moot when the defendant has come into compliance after the commencement of litigation. A defendant's voluntary cessation of unlawful conduct does not render a case moot.[5] Also the Court found that civil penalties may serve the same purpose as an injunction to deter future violations and redress the injuries suffered by the plaintiff.[6]

First, the Court considered whether the plaintiffs have standing and found that in fact it was proper for FOE to bring the suit. For a plaintiff to have standing they must show first, that they have suffered an "injury in fact," second, that the injury is fairly traceable to the challenged action of the defendant, and finally, it must be likely that the injury will be redressed by a favorable decision.[7] An association like FOE has standing on behalf of its members when the members would have the right to sue on their own, the interests at stake are germane to the organization's purpose, and individual members are not required by the claim to participate in the lawsuit.[8] For the purposes of Article III a relevant showing of injury is not an injury to the environment, but an injury to the plaintiff. The Court found that the evidence presented by members' affidavits cited reasonable concerns about the effects of Laidlaw's discharges directly affecting the affiant's recreational, aesthetic, and economic interests. The Court determined that FOE had the requisite standing to pursue injunctive relief.

FOE can seek civil penalties because of their deterrent nature regardless of the fact that if these penalties would ultimately be paid to the United States and not to plaintiffs directly. A sanction that would effectively abate conduct that causes injury to the plaintiff and prevents future injury, provides a form of redress to the injury. The Court held that civil penalties can fit this description and, specifically in this case because they will likely redress FOE's injuries by abating current violations and preventing future ones.[9]

The Court also considered whether the case became moot when Laidlaw achieved compliance with the NPDES permit in August of 1992 or when it subsequently shut down the Roebuck facility. The Court indicated that a case might be considered moot if subsequent events make it absolutely clear that the wrongful behavior would not occur again in the future.[10] The

burden of proof lies with the party asserting mootness. The Court found that compliance with the permit requirements and the closing of the facility did not make it absolutely clear that Laidlaw's violations would not recur. The Court held that these facts were disputed and open for consideration on remand. Additionally, the civil penalty was not so intertwined with the injunctive remedy that FOE doomed its civil penalty claim to mootness by failing to appeal the district court's denial of injunctive relief. The district court based its award of civil penalties on the need for deterrence most likely because of the burdensome nature of an injunction which could be time consuming and costly, as it often requires the supervision of the court.

Furthermore, the Court emphasized that standing and mootness should not be confused. Standing is determined at the outset of a case as a threshold regarding the specific plaintiff whereas mootness can be addressed later in the case and focuses on the continuing personal interest in the litigation over the progression of time. The Court noted that exceptions to what might otherwise render a case moot, like voluntary cessation of wrongful acts, mean that the mootness defined as continued standing is not comprehensive. There are situations where potential acts of the defendant will not render a case moot, but might preclude standing. The Court did not address the reimbursement of costs and attorney fees to the plaintiff, finding it to be an issue best addressed by the district court.

There was a lengthy dissent by Justice Scalia, joined by Justice Thomas. Justice Scalia asserts that the Court too willingly accepted vague claims of injury by FOE members and in doing so improperly relaxed the injury in fact requirement of standing. Scalia also argues that by requiring that the defendant show that "'it is absolutely clear' that the conduct 'could not reasonably be expected to recur,'"[11] the majority has heightened the threshold showing required for mootness, which is "standing set in a time frame."[12] The dissent argues with the very premise underlying citizen suits. Scalia asserts that by allowing citizens to pursue civil penalties that are payable to the government, giving private citizens power to enforce the law, the redressability requirement of standing is lost by allowing public penalties to redress private wrongs.

Elizabeth Vail '02

Endnotes

1. 120 S.Ct. 693, 702.
2. *Id.*
3. *Id.*
4. *Id.* at 703.
5. *Id.* at 700.
6. *Id.*
7. *Id.* at 704.
8. *Id.*
9. *Id.* at 706.
10. *Id.* at 708.
11. *Id.* at 721.
12. *Id.* at 722.

* * *

***United States v. 150 Acres of Land*,** 204 F.3d 698 (6th Cir. Jan. 20, 2000)

Facts: Plaintiff, the federal Environmental Protection Agency (EPA) brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, against defendants, Glidden Company, *in personam* and against three parcels of land owned by members of the Bohaty family *in rem*. The government settled with Glidden for $60,000, and both the government and the Bohatys cross-moved for summary judgment. The government was granted summary judgment and the district court determined the damages to be $854,436.87. A lien was perfected on the Bohaty property under 42 U.S.C. § 9607(1)(1) and a motion for an order of sale was allowed.

This suit arose over hazardous drums that were discovered on the Bohatys' land. The property consisted of three parcels of land, totaling approximately 150 acres. It had been owned by the family "for at least three generations" during which a farm-equipment repair business was conducted on the outermost western portion of the land. Vencel Bohaty and other Bohaty family members inherited their interests in 1982. Vencel Bohaty died in 1984, leaving his interest to his wife, Ethel Bohaty. Currently, Ethel Bohaty has the largest interest in the property, 37/45. Most of Ethel's interest was inherited; however, a 12/45 interest was bought from other heirs to the family land.

In 1987, the Ohio Environmental Protection Agency (OEPA) was notified about drums on the land. It investigated the matter, which resulted in negative toxicity tests. Ethel Bohaty requested notification if a problem arose, however, she was never contacted. In 1989, the city of Medina appropriated four acres for road construction. OEPA inspected the property again but only in relation to the appropriation. Ethel Bohaty stated to the investigators that she wished to rid the property of any toxic drums found. OEPA discovered 200-300 drums and five underground storage tanks. Dense vegetation hindered the investigation, so OEPA recommended an inspection in the fall. Nonetheless, OEPA was able to conclude that drum placement began in the mid 1950s and continued until the early 1970s. Ethel Bohaty stated that she was not informed about the contents of the drums or what she should do about them.

In 1991, the EPA inspected the property at OEPA's request. The EPA called for a removal action under 40 C.F.R. § 300.415(b)(2) after it found approximately 400 drums, and tests revealed that the soil had an ignitability hazard and significant acidic pH values. In addition, there was evidence that Ethel's Bohaty's husband, Vencel, had allowed drum placement and may have been compensated for it. The Bohaty family claimed no knowledge of such placement, except those used in connection with the farm-equipment business. That same year, the EPA sent Ethel Bohaty and family a notice, which required an answer within five days, asking them to pay for the response activities. The Bohatys did not respond, and the EPA removed about 1000 drums. Almost half of these drums were empty, and all of them were removed from parcel number one.

Issues:

1. Whether the Bohatys qualified for the "innocent landowner" defense of 42 U.S.C. §§ 9607(b)(3) and 9601(35).
2. Whether the two unaffected parcels were properly considered part of the "facility."
3. Whether removal costs assessed were appropriate.

Analysis: The court held that the Bohatys, both the 33/45 interest, the inheritance interest, and the 12/45 interest, the interest sold to Ethel Bohaty, had displayed genuine issues of material fact that would need to be tried on remand. The 33/45 interest had raised issues of fact as to each element of the CERCLA innocent landowner defense. In order for the 33/45 interest to avoid liability, the Bohatys needed to prove by a preponderance of the evidence that

> (1) the "disposal" or "placement" occurred before 1982, (2) the "release" of the substances and the damages resulting from the release were caused solely by the act or omission of a third party . . . , and (3) they exercised due care with respect to the substances, in light of all relevant facts and circumstances, and took precautions against the foreseeable actions and omissions of third parties since they have owned the land.[1]

CERCLA defined "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substances or pollutant or contaminant).[2] When defining "disposal," CERCLA referred to the Solid Waste Disposal Act, which described it as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water."[3]

In considering the first element of the CERCLA innocent landowner defense, the court noted the importance of distinguishing between "disposal" and "release." Traditionally, CERCLA decisions have construed "disposal" to include movement that does not involve human activity. The court noted that recently two circuit courts have required "disposal" to require human activity. There were three reasons why this court found the latter interpretations to be more persuasive. First, "disposal" was defined with words indicating activity, thus, the words that could be seen as passive in nature should be interpreted in their active form. Next, "disposal" was included in the definition of "release," an indication that release is given a broader application. Lastly, interpreting the words as the circuit courts did was most sensible in light of the statutory scheme and the words themselves. In following the more recent interpretation, the court held that the Bohatys owned the property after the disposal, and therefore, did not "dispose" of hazardous substances. The question of a "release" after the Bohatys gained ownership remained.

As to the other three remaining elements of the CERCLA defense, the government failed to show sufficient evidence that the hazardous substances had in fact been "released" onto the land. In addition, after the inspections by OEPA in 1987 and 1989, the Bohatys asked to be advised as to any appropriate steps that they should take in regards to the situation. Tests performed by OEPA were negative, and OEPA never instructed the family to take action. Finally, the government did present evidence that the Bohatys may not have taken the appropriate steps in regards to foreseeable acts or omissions of third parties and the consequences that may have arisen from not taking such precautions. However, there was nothing in the record proving that any acts or omissions by third parties caused hazardous substances to be released. Therefore, the precautions taken by the Bohatys may have been sufficient given the situation. Because the government did not show the absence of a genuine issue of material fact, the court determined that the government should not be entitled to summary judgment.

With respects to the 12/45 interest, Ethel Bohaty raised a genuine issue of material fact as to whether she "undert[ook], at the time of the acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."[4] Under the statutory definition, the type of inquiry that is required is determined in light of the total circumstances. Some elements to be considered are special

knowledge of the defendant, purchase price, value of property, the likelihood of contamination on the property and the ability to detect contamination, if any. However, such considerations are usually given by one who purchases the property for a particular purpose. Ethel Bohaty's situation is different from the one above because she, as part-owner of the inheritance, acquired the other part-owners' inheritance interests only in an effort to consolidate ownership. The "appropriate inquiry" of this type would require a very fact-specific analysis. Absent evidence of customary practices to this situation, the court could not hold as a matter of law that Ethel Bohaty did not make an "appropriate inquiry."

In determining if the two unaffected parcels were properly considered part of the "facility," the court held that they were because the three parcels did not constitute "reasonable or natural" divisible lands. The only time that the property was considered separate was for purposes of the land records, and this division did not deem them separate in terms of a "facility."

In regards to issue of appropriate costs, the court found that they were adequate because under the National Contingency Plan (NCP) and 40 C.F.R. § 300.415 the "lead agency may take any appropriate action . . . [which includes] removal of drums . . . that contain or may contain hazardous substances."[5] Even though almost half of the drums removed by the EPA were empty, the permissive grant of the statute indicated that removal of such drums was reasonable. Additionally, removal of these drums did not add to the costs significantly. Therefore, the costs imposed were appropriate.

Ann Coale '02

Endnotes

1. *United States v. 150 Acres of Land*, 204 F.3d. 698, 704 (6th Cir. Jan. 20, 2000).
2. 42 U.S.C. § 9601(22).
3. 42 U.S.C. § 6903(3).
4. *Id*. at 707.
5. *Id*. at 709-10.

* * *

***United States v. Locke*,** 120 S. Ct. 1135 (2000).

Facts: *United States v. Locke* brought before the United States Supreme Court a decade-old dispute between the United States federal government and the state of Washington. In response to the Oil Pollution Act of 1990, (OPA)[1], Washington has followed Congress' lead, enacting its own oil spill regulations. The International Association of Independent Tanker Owners, ("Intertanko"), an international trade association whose members own or operate more than 2,000 tankers of the United States and foreign registry, filed suit claiming that 16 of Washington State's Best Achievable Protection, (BAP) regulations were unconstitutional. The OPA seeks to create a uniform and clearly organized set of standards and protect waters from oil pollution. Section 1018 of the OPA, known as the savings clause, states that: "Nothing in this Act . . . shall affect, or be construed as interpreting as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil . . ."[2] The BAP regulations rely on the rationale of § 1018 of the OPA, whose language is interpreted by states as a grant of power to enact oil spill prevention laws which "relate" to oil discharge as opposed to a narrow delegation of power governing penalties, liability and compensation plans to those injured from an oil spill. The regulations, promulgated by Washington's Office of Marine Safety in 1995, govern tank vessel design, construction, operation, manning and personnel qualifications. State requirements are compared in light of federal regulations and international agreements to which the United States is a party. For example, the BAP standards for drug and alcohol testing extend to all crew members on all covered vessels, on a random or probable cause basis, and are conducted before employment or after an incident. Federal drug and alcohol testing regulation is limited to mariners in "safety-sensitive" positions. Contrary to federal and international standards regarding training and shipboard drill requirements, the state (BAP) standards apply to vessels that are not operating in Washington waters and to vessels entering Washington waters, including those with destinations in other states. Also, the state (BAP) requirements go beyond federal law regarding work hours and language, because the requirements also apply to vessels with foreign flags.

The district court held that: (1) the statutes and regulations in question were not preempted by federal law; (2) the provisions did not violate the Commerce Clause or the Foreign Affairs Clause of the United States Constitution; and (3) the provisions were not improper extraterritorial restrictions in violation of the state of Washington's Constitution. Ultimately, the court concluded that the laws serve to protect Washington's marine resources through the state's police powers.[3] The Ninth Circuit of the Court of Appeals reversed the district court, holding that while several BAP regulations related to navigation and specialized towing equipment were preempted by federal law, those dealing with staffing, training and the operation of ships were not.[4] The navigation and specialized towing equipment regulations were interpreted to be design and construction requirements, subjects that were pre-

empted. Design and construction requirements were classified as non-operational and subject to field preemption. The emergency equipment requirements were classified as a design and construction requirement preempted. Similarly, the navigation regulation was preempted by the Ports and Waterways Safety Act of 1972 (PWSA) as a design and construction requirement.[5] In effect, 14 of the 16 regulations were deemed "operational" in nature and upheld. The court declined to extend preemption precedent to requirements concerning operations, personnel qualifications, training, and manning. Section 1018 (a) of the OPA was found to have a non-preemptive effect, permitting states to regulate "operational" vessel activity. Finding that Washington's BAP regulations clearly concerned the discharge of oil, the appellate court held that they were not preempted by federal law and did not frustrate Congress' purposes.[6] Furthermore, the court found that the BAP regulations: (1) did not violate the Commerce Clause or infringe upon the foreign affairs power of the federal government under the Constitution; and (2) were not preempted by international treaties.[7]

Issue:

1. Whether Washington BAP safety and environmental regulations on oil tankers entering its ports are preempted by federal law within the meaning of the Constitution, Oil Pollution Act's savings clause, and international law.

Analysis: The United States Supreme Court reversed the appeals court, holding that Washington rules concerning crew training, English language proficiency, navigation watch and accident reporting were preempted by federal law. Writing for a unanimous court, Justice Kennedy stated that "uniform, national rules regarding general tanker design, operation, and seaworthiness have been mandated" by federal law.[8] Federal law that is supplemented by state law was deemed to have a compromising effect on the federal laws' uniformity. Justice Kennedy addressed the area of maritime law and commerce as "an area where the federal interest has been manifest since the beginning of our republic and is now well-established."[9] States, however, maintain some power to set their own safety standards addressing unique local waterway conditions where the regulation is directed at "peculiarities of local waters" and does not conflict with federal rules.[10] For example, several of Washington's regulations concerning specific needs of navigation in Puget Sound may not be preempted. Similar local requirements, including watch requirements at a time of restricted visibility in Puget Sound, were remanded for review.

The Supreme Court based its decision of exclusive federal regulation primarily on the PWSA, which requires the Coast Guard to issue regulations governing tanker design, construction, operation, manning, repair, and personnel qualification.[11] States, however, may enact laws regarding vessel traffic and navigation, areas that are not required to be federally regulated by the Coast Guard. The Supreme Court also analyzed the language of the OPA and concluded that "if Congress had intended to disrupt national uniformity in all of these matters" it would have been done so directly. [12] The decision, however, does not limit the ability of the state to impose additional liability in response to oil discharges within their jurisdictions.

Justice Kennedy further noted that the international treaties did not preempt the state regulations but illustrated the congressional intent, promoting national uniformity in the context of maritime commerce. Intertanko contended that the state regulations interfered with various international treaty obligations. The BAP laws, including, American regulations of work hours and language, interfered with international laws due to its extensive application to vessels of foreign flags within state waters. Also, strict requirements regarding training and shipboard drills applied at times when the vessel was not operating within the state's waters. Rejection of the international standards implied that BAP laws frustrate the President's role in foreign relations. Intertanko's objective was to raise international marine safety standards, a goal that was not achievable if the United States permitted states and municipalities to enact laws that conflicted with their commitments with foreign nations. Justice Kennedy was sympathetic with environmental concerns and addressed the destruction possible to coastal life from the oil tankers contents. The issue, however, was not "adequate regulation but political responsibility," a responsibility that was held to belong to Congress and the Coast Guard.[13]

Maria Efaplomatidis '01

Endnotes

1. *See* Oil Pollution Act, OPA, 33 U.S.C. § 2718 (1994).
2. *See id*.
3. *See Intertanko v. Lowry*, 947 F. Supp. 1484, 1500 (W.D.Wash. 1996).
4. *See Intertanko v. Locke*, 148 F.3d 1053, 1066 (1998).
5. *See id*. at 1069.
6. *See id*. at 1060.
7. *See id*. at 1063.
8. *See United States v. Locke*, 120 S.Ct. 1135, 1148 (2000).
9. *See id*. at 1143.
10. *See id*. at 1148.
11. *See id*. at 1144.
12. *See id*. at 1147.
13. *See id*. at 1152.

* * *

***United States v. Mango*,** 199 F.3d 85 (2d Cir. 1999)

Facts: The Administrator of the Environmental Protection Agency (EPA) is the main party responsible for the enforcement and interpretation of the Clean Water Act (CWA), which forbids the release of pollutants into the water, with specified exceptions. However, the Secretary of the Army (the "Secretary"), acting through the Chief of Engineers (the "Chief"), has the power to give out permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[1] In addition, the Secretary has appointed certain district engineers to issue permits and, even though lower level employees may sign the permits, the district engineer's name must appear on them.[2] The EPA Administrator can rescind an issued permit if the released materials have a harmful effect on the environment pursuant to 33 U.S.C. § 1344(c). Together the Secretary and Administrator promulgated regulations which contain criteria to be considered when issuing discharge permits.[3]

Defendants, members of a 370-mile pipeline construction project to run from Canada to Long Island, N.Y., and its environmental inspectors, applied for and were granted a discharge permit by the Army Corps of Engineers ("Corps") pursuant to the CWA and the Rivers and Harbors Act, 33 U.S.C. § 403. A lieutenant in the Corps, acting on behalf of the Corps' New York District Engineer, signed the permit and required defendants to perform certain environmental mitigation measures specified in the final Environmental Impact Statement Appendices. Defendants were charged in an indictment with knowingly and negligently violating conditions of the permit. In response, defendants acquired a bill of particulars and moved to dismiss. The motion was granted because the district court stated that the CWA prohibits anyone other than the Chief from issuing such permits. Furthermore, the court said that it would dismiss these counts regardless of the delegation issue because the conditions imposed were ambiguous and were not directly related to the discharged materials.[4] The government appeals from the counts of the indictment that were dismissed based on the delegation and the relationship of the conditions imposed to the discharge.

Issues:

1. Whether the CWA allows the Secretary to delegate authority to issue discharge permits to district engineers in the Corps and their designees.
2. If so, then how broad is the scope of authority within which the district engineer can set conditions for the permit.

Analysis: The court concluded that the CWA permits the Secretary to empower district engineers in the Corps to issue discharge permits. Defendants failed in directly supporting their position that the Secretary's power to subdelegate must be construed narrowly. The court then used statutory construction to determine that if Congress's intent is clear, then the court must follow such intent. However, if the statutory language is ambiguous, then the court will look to "[a]n agency's construction of a statue it is charged with enforcing . . . if it is reasonable and not in conflict with the expressed intent of Congress."[5] The court stated that the use of the language "acting through the Chief of Engineers" does not clearly deny subdelegation to those other than the Chief. The court's decision was based on four considerations: (1) that the CWA, § 1344(a), does not specifically address delegation authority; (2) unlike in other cases invalidating delegation authority, the issue in this case is one of internal, not external, subdelegation; (3) the court found no legislative history indicated that Congress explicitly rejected subdelegation, as was the case in precedents relied upon by the defendants; and (4) granting the Secretary the authority to subdelegate is consistent with the overall intent of the CWA.

Having found no express bar to delegation, the court examined the reasonableness of the Secretary's interpretation of § 1344 to delegate in the present case. The Secretary's interpretation was found to be reasonable because Congress used this same "acting through the Chief of Engineers" language in other statues that clearly assume delegation of authority to those subordinate to the Chief. In addition, the enormity of the permitting job is such that it calls for more than one official to execute it effectively, suggesting Congressional intent to allow subordination of the authority. Also, Congress had not repealed the Secretary's long-standing interpretation, which the court took as an indication that Congress intended the statute to be read consistent with the Secretary's interpretation.

The court remanded on the issue pertaining to the scope of the authority to set permit conditions. Agreeing with the district court, the Second Circuit found that because under the CWA the Secretary has limited jurisdiction regarding discharges, conditions placed on permits must be related to the discharge to fall within the Secretary's jurisdictional scope. The court noted that the CWA does not explicitly state that the conditions imposed have to be *directly* related to the discharge. Again using statutory interpretation norms, the court stated that in deference to the agency, because the CWA does not specify the relationship that imposed conditions must have to the discharge, the Secretary's interpretation will be upheld so long as it is reasonable. The regulations promulgated by the Secretary and the Administrator allow for either a direct or indirect connection between the permit conditions and discharge, so long as reasonably related.[6] The court found the district court's requirement of a direct relationship excessive and was satisfied that the regulations constituted a

reasonable interpretation of the statutory authority. The court stated that, "[t]he CWA is reasonably interpreted to allow the Secretary to consider the cumulative effect of a discharge on an entire ecosystem rather than confining him to consideration of the effects of the permitted discharge on the river into which it is discharged."[7] While the reasonably related standard satisfied the court, the case was remanded on this issue because the government failed to explain the relationship between the discharge and the conditions imposed present on these facts. The court held that without an explanation, it was unable to determine which of the conditions of the permit were in fact reasonably related to the discharge. The court remanded for a consideration of the permits under the standards set forth in the regulations.

Ann Coale '02

Endnotes

1. *U.S. v. Mango*, 199 F.3d 85, 87 (2d Cir. 1999) (quoting § 33 U.S.C. § 1344 (a), (d)).
2. *See* 33 C.F.R. § 325.8 (a), (b).
3. *See* 33 U.S.C. § 1344 (b); 40 C.F.R. Part 230.
4. *See U.S. v. Mango*, 997 F. Supp. 264 (N.D.N.Y. 1998).
5. *Id*. at 89.
6. *See* 40 C.F.R. § 230.1(c).
7. *Id*. at 93.

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