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The New York Environmental Lawyer

A publication of the Environmental Law Section
of the New York State Bar Association

A Message from the Section Chair

As I assume the Chair of the Environmental Law Section, I feel like the second runner on a 800-meter relay team. Former Chair **Gail Port** has just handed me the baton after running a record-setting first leg and teammates **John Greenthal, Jim Pericone, Ginny Robbins** and **Miriam Villani** are rooting me on. Former Chairs from **Nick Robinson** through **Dan Riesel** are in the stands, shouting out pointers. It's a race I've sought to run since I first joined the Section in 1980, and as Gail has learned, it's over in the blink of an eye. I've trained hard for this race and I am appreciative of the opportunity to lead a Section of the New York State Bar Association with so many great people committed to the ideals of our profession.

While the field of environmental law has changed significantly over the last 20 years (McKinney's ECL is now three volumes instead of two and the old Volume A of the green looseleaf regulations has morphed into six binders), the basic challenge of how to weigh competing resource demands and achieve balance of economic, social and environmental values has not. Indeed, to many of us, one of environmental law's great attractions is that even its most esoteric legal issue has at its heart a balancing of fundamental values.

For those of us who started their environmental legal careers in government service (and by my count that is a third of the Section Chairs), the continued attraction to environmental policy issues and debate remains overwhelming. (There's no such thing as an unimportant policy debate, especially when you're involved in it!) The Section has long provided exciting opportunities for lawyers in government service to sharpen their skills, advocate their views and gain insight from the viewpoints of others with different experiences. It is no surprise that the leadership of the Section for its 20-plus year life has extended a hand to lawyers in government service, and done so in ways that are unique to our Section of the Bar. I certainly will do my best to encourage our colleagues in both government and not-for-profit service to join and remain active in our Section.

Inside

With a new administration in Washington, elected by a whisker, we certainly live in interesting times. Nevertheless, the power of the new administration to affect our environment in New York as well as the rest of the country remains very real despite the pregnancy of a paper chad in Florida. The more things change, the more they stay the same. The environment remains at the heart of so many critical issues facing the state and nation and the environmental policies implemented in Washington will certainly continue to affect us here. Congressman Sherry Boehlert shared that thought with us at the Annual Meeting in January. Within New York State, the current round of siting of electric generating facilities should stir the memories of our Section members who participated in the nuclear plant siting battles along the Hudson in the 1970s and others who did battle in the coal-conversion cases in the 1980s. It is remarkable that, decades later, we are still wrestling with the same basic issues of the level of acceptable impacts to our historic Hudson Valley. Visibility of stacks and plumes, effects of water withdrawal and thermal discharges, and, of course, air quality emissions once again confront and confound the original and a new generation of environmental attorneys. This time the advocates of new sources of energy are not the old monolithic monopolies sanctioned by the State but rather new creatures of an untested, deregulated, largely free market. Who will win this round? Who should win this round? Hopefully our children. A new balance must be found and struck. And once again, our Section members will play a key role in helping to define that delicate balance.

We have started our new year with two wonderfully successful programs, thanks to **Gail Port**'s leadership, **Lisa Bataille**'s hard work and the overwhelming support and participation of our Section members. The 25th Anniversary of SEQRA program at the Albany Law School on March 15-16th had over 250 attendees with more than 75 presenters, many from our Section. Former Section Executive Committee member and DEC Commissioner **Lang Marsh** joined the event and shared his recent experiences and insights gained as Director of Oregon's Department of Environmental Quality. We explored SEQRA's past, present and future with much enthusiasm (and not all of it stemming from **Gerrard, Ruzow & Weinberg**)! On April 24th, at the LOB in Albany, the Section hosted its 2001 Legislative Forum on the State Superfund Reauthorization and Reform. Program Chairs **Phil Dixon** and **Joan Leary Matthews** pulled together a terrific panel of the key players in the ongoing debate, including Senator Carl Marcellino, Assemblyman Richard Brodsky, DEC Exec. Deputy Commissioner **Glen Bruening**, Environmental Advocates Executive Director **Val Washington** and our Section's Task Force Co-Chair **David Freeman**. Unfortunately, the key state players are not talking—but should be. David and Task Force Co-Chair **Larry Schnapf** will get them talking!

Following the Forum, the Section hosted a full house of over 100 attorneys at the Government Attorney's Reception at the State Bar Center. Recently appointed DEC Commissioner Erin Crotty joined us for lunch, spoke of her goals for DEC and shared her enthusiasm for the opportunity she has been given by Governor Pataki.

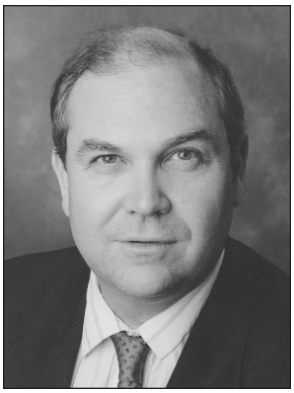
At the April Executive Committee that followed the luncheon, we discussed a number of new and ongoing initiatives by Section members. These include an effort to reexamine the Committee structure with Treasurer **Ginny Robbins** taking the lead; a Special Committee on petroleum and related issues suggested by **Judy Drabicki**; and a SEQRA Distance Learning Initiative proposed by **Alan Knauf**.

Lastly, before you take off for the beaches of coastal New York, or the mountains and lakes of the Catskills or Adirondacks, please remember to mark your calendars and attend two important events coming this fall. The first is an Advanced Environmental Law Workshop to be held in Paris, France, on September 7-8th. Program Chairs **Marty Baker**, **John French** and **Connie Sidamon-Eristoff** guarantee a stimulating program and a wonderful time. Information about this workshop should already be in your hands. The second event is the Section's Fall Meeting, to be held at the Lake Placid Hilton on October 19-21. Program Co-Chairs **Barry Kogut** and **Tom Ulasewicz** will help ensure that a great time is had by Section members and their families alike.

J'espere que vous passez un bon ete et j'attends avec impatience notre rendezvous a Paris et au Lac Placid.

Daniel A. Ruzow

From the Editor



Gail Port has recently retired as Section Chair after an industrious and productive year, hopefully to return to a peaceful and undisturbed new life at Proskauer Rose. Dan Ruzow can now look forward to his own year-in-the-life, in which managerial and professional law firm responsibilities must be balanced with also managing one of the State Bar Association's most active and productive Sections. Throw in some possible legislative initiatives in Albany and maybe some administrative changes, and the next year may well challenge Dan's own administrative skills. Judging by past experience, of course, this is likely just the job in which he excels. We start Dan's tenure with the Section's annual legislative forum at which the state's hazardous waste law will be discussed.

Let me talk of the future first, though, by talking of the past. Someone once said that. The Section's Annual Meeting in New York City was well planned and well attended. Gail hosted a reception at Proskauer the prior night at which many of us had the opportunity to mix casually, catch up with or meet new colleagues without the distractions of business or professional commitments or the constraints of formality. In sum, it was fun. The next morning's seminars were focused on some of the cutting-edge technologies that immeasurably help, yet too often bedevil, lawyers, as well as a fruitful panel on the essential topic of insurance coverage. DEC Commissioner John Cahill, a Section member who has since risen even further in Governor Pataki's entourage, was honored at lunch along with Congressman Sherwood Boehlert, who provided the keynote speech. The speech was published in the *Journal* just as we went to press with the Winter 2001 issue. The Congressman has been at the forefront of many environmental legislative issues. Governor Pataki recognized the Section's 20-year history and our honorees in a letter which is included at page 4. The Executive Committee meeting that followed was not only well-attended but also productive and, thanks to our presiding officer (i.e., Gail) consistently on schedule.

In the present issue, we include George Rusk's prepared remarks from the Annual Meeting. George, a Section member as well as one of the panelists, spoke on Graphic Information Systems and other new technologies. We also include Terresa Bakner's and Andrew Dalton's article on the recent, and, to some, unsettling, sharply split Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. This decision limited federal regulation of isolated wetlands by a close reading of the Clean Water Act. Philip Weinberg and Paul Bray submit an article on DEC's authority, often underappreciated, to consider cumulative impacts when determining whether or not to issue a permit or license. Joseph Durkin and Sara Potter from the New York State Dormitory Authority submit an article that picks up where the authors left off when litigating *River Center LLC v. Dormitory Authority*. The article addresses a standing issue that the authors contend was raised but left unresolved by the decision in that case. Jacalyn Fleming, a 2001 graduate of Albany Law School, authored an article addressing recovery, in toxic tort and environmental litigation, correlating with the diminishment of market value resulting from third-party contamination. The article was a finalist in the Section's environmental essay competition.

Lou Alexander informs us of the winners of the Section's Minority Fellowships. Biographical details are also provided. Lou also has assumed responsibility again for providing notice of the death of a Section member, Carol Knox. The obituary drafted by Lou is included at page 37. Elizabeth Vail, the *Journal*'s new student editor from St. John's Law School, supervised the case summaries. Diane Jacques, John Vero, Scott Decker and Jason DiMarino, of Whiteman, Osterman & Hanna, submitted the administrative decisions update.

Happy Holidays to our readership. As the father of two young school children, I can assure you that Spring Break has taken on an entirely different meaning for me of late (i.e., which parent takes off to watch the kids during *their* break). As summer approaches on the horizon, I'd like to remind persons who intend to submit articles to please comply with the deadline for the Summer issue. Deadlines, as always, are posted on the back page of the *Journal*.

Let me include as a final note a reminder about the 25th Annual SEQRA Conference, co-sponsored by the Section, being held at St. John's Law School on October 21, 2001. Details are on page 7. Readers should also note the opportunities for International CLE listed on page 36.

Kevin Anthony Reilly

STATE OF NEW YORK

GEORGE E. PATAKI
GOVERNOR

January 26, 2001

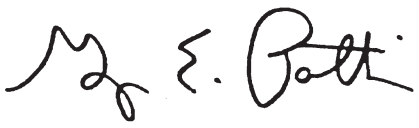
Dear Friends:

It is a pleasure to send greetings to all gathered for the Annual Meeting of the Environmental Law Section of the New York State Bar Association.

This year marks the 20th anniversary of the founding of the Environmental Law Section. Your annual gathering provides a welcome opportunity for your members and the community at large to reflect upon the Section's record of achievement and success in upholding its mission. Comprised of members of the New York State Bar Association who share an abiding interest in environmental law, the Section has clearly earned recognition for its efforts to further the education of the bar and general public. Furthermore, your members have demonstrated a strong commitment to work for legislation to better effectuate protection of human health, the natural environment and the public welfare.

I am pleased to join in congratulating your esteemed honorees as you bestow the New York State Bar Association's Environmental Section Award upon John P. Cahill, Commissioner of the New York State Department of Environmental Conservation, and Congressman Sherwood L. Boehlert, your keynote speaker. Congratulations to both of these gentlemen and best wishes to the proud members of the Environmental Law Section as you mark this important milestone.

Very truly yours,



EXECUTIVE CHAMBER STATE CAPITOL ALBANY 12224
http://www.state.ny.us

Newest Tools in the Environmental Toolbox: Geographic Information Systems (GIS) and Other Technologies

Adding Value to Environmental Projects and Litigation

By George A. Rusk

Prepared Remarks Presented at January 26, 2001 Annual Meeting of the Environmental Law Section

Good Morning,

Many thanks to Gail Port and the Annual Meeting Co-Chairs for putting this program together. It is a well-established tradition of this Section dating back some 20 years, that Section members share their personal experience, academic study, and professional insights with our colleagues at the Annual Meeting. This has made our Environmental Law Section among the best in the country and I will do my best to carry that tradition forward today.

I am speaking to you this morning as an in-house attorney and Section member, on a topic on which I have become well acquainted over the years. Over the past several years I have headed up the forensics services of Ecology and Environment, Inc. (E & E). My focus has been to develop technical facts that can provide the legal edge in contested litigation. Some of the typical questions we try to answer in a forensic analysis are:

- On a spill or waste allocation case, who was involved in a particular incident or activity and what did they do?
- On a groundwater contamination case, what are the risks posed for a particular chemical exposure?
- On a toxic tort air release case, what confounding causation factors contribute to personal injuries?
- In an enforcement case, is the violation one of major significance on a penalty matrix?
- Does the methodology employed by the opposing expert satisfy *Daubert* standards?

Questions like these require a high degree of technical expertise to answer and that is what the scientists I work with at E & E focus their attention on.

The purpose of my presentation today is to provide you with a better understanding of Geographic Information Systems (GIS). Over the next 15 minutes I will try to show you what a GIS is and, more importantly, how it can play a central role in conducting a forensic analysis and how it can be used effectively to improve your respective legal practices. Rather than explain in words how a GIS works and what it can do, I will try to show you some practical GIS examples and you can make your own judgment as to how you can best use this important tool. After seeing some examples, you will be able to better understand how it integrates detailed technical information in a way that allows you to present the broad concepts and strategic end points to a jury or a public audience in an effective and persuasive manner.

"GIS . . . is a system that allows layers of information to be added atop one another so that specific issues can be viewed in proper context."

Before we launch into specific examples, some brief introductory information about GIS is useful. Based on a show of hands, roughly 50% of the audience is generally familiar with GIS applications or have used it in some way in the past. As you will see, the strength of GIS is in its power to visualize trends and present information that has a spatial component to it. For example, New York State DEC in assessing total maximum daily loads (TMDL) on New York State waterways, or private parties involved in litigation focusing on the potential impact of MTBE on water supply, has used GIS extensively to identify potential impact areas around the state. Similarly, in cases involving large-scale spills or chemical air releases, or widespread groundwater contamination—the impact associated with particular contaminants can be simplified considerably by using GIS to identify the primary impact areas associated with these incidents. Almost any environmental impact which extends over a large geographic area can be simplified and visually enhanced through GIS analysis.

The GIS has its roots in computer cartography, remote sensing, satellite imaging, database management, and computer aided design. Describing GIS in its most basic terms, it is a system that allows layers of information to be added atop one another so that specific issues can be viewed in proper context. In addition, specific "attribute" information that is included in each data layer can be separately identified, tracked, and sorted. Any digital information such as photographs and video clips can also be integrated into the GIS to enhance the effectiveness of a particular presentation.

Now for some specific examples to show you what a GIS is and what it can do:

- One example of a GIS application is using it to organize data to make sense of complex waste site investigations. For example, if one is to evaluate a large industrial facility or Department of Defense military facility, base maps can be created by using aerial photographs. On these base maps, graphics can be added to highlight specific features such as management units or areas of concern located around such things as airplane servicing hangars, waste generation or storage areas, landfill and underground storage tank areas. Once the highlighted maps are established, site-specific data layers can be added such as streets, dams, nearby National Priority list sites, streams, lakes, waterways, and nearby urban areas. When reading a GIS map, note that the left margin has various check marks. Each of the check marks indicates that the particular data layer identified has been added to the base map.

  As I noted previously, the GIS allows information to be organized spatially in a way that creates powerful images that communicate key concepts. Instead of looking at numerous reports to identify exceedances of specific sampling events relative to regulatory standards, once the data is geo-referenced and stored in a GIS, data relative to each management unit or area of concern can be color coded and mapped so that the different level of contamination can be viewed on a map. Further, once the data is in the system, it can be readily sorted so that all data points exceeding applicable regulatory standards can be highlighted and shown on the base map to identify specific areas of elevated contamination. Specific maps can be created highlighting plume dispersion pathways and levels of groundwater contamination exceeding regulatory levels of concern. GIS is a powerful tool that allows us to understand the significance and severity of environmental impacts at a glance.

- Another example of a good GIS application is using it to compare impacts associated with linear rights of way, such as a pipeline system. Data on sensitive environments or threatened or endangered species can be gathered in the field by using portable equipment (GPS) linked to orbiting satellites to identify specific locations. Data gathered in the field might include such things as the location of wetlands, significant land uses such as parks, and properties zoned for urban or residential use. Once the data is logged in, each corridor can be qualitatively evaluated for each data set and meaningful comparisons made. For example, the percent of land along the specific corridor devoted to urban or residential use or impacting threatened and endangered species habitat, can be compared to identical features for the alternative corridor. This type of analysis can be enhanced by presenting the information in a pie chart or bar graph format to compare land use for the alternative routes. The system can also be queried to identify specific information that comes up during the course of the alternative analysis so that a particular wetland or endangered specie habitat location can be located on a map and further identified by specific latitude and longitude coordinates.

- Another example of GIS application is using it to refine the analysis of a toxic tort exposure claim. On a major case involving 16,000 plaintiffs claiming exposure to a variety of combustion byproducts resulting from a major fire in the Houston ship channel, we used GIS to assemble air quality data from emergency response personnel and fixed air monitoring stations. Once entered into the GIS, the data was used to develop plume dispersion maps for a specific contaminant. We then integrated specific locations for the 16,000 plaintiffs on the map to see where their residences were located relative to the plume. Health record information for the various plaintiffs was then integrated into the GIS and we compared the alleged injuries to the exposure identified in their respective geographic areas so that the alleged injuries could be initially reviewed and screened. A unique feature of GIS is the ability to query data to visually display all data points greater than a certain value. In this case, we used the Texas air permitting standards to establish the reference value, and then identified all data points greater than that value. The highlighted area on the GIS map now establishes the impact area and plaintiffs outside that zone are unlikely to have a legitimate personal injury claim based on chemical exposure from the incident in question. We were able to use GIS very effectively in this manner to identify claims that were not causally related to the incident in question and others (inside the impact zone), which required further evaluation and consideration for settlement purposes. Again, on a large-scale project such as this where there is a large geographic impact, GIS is an extremely useful tool that allows us to analysis the data and allow very practical litigation decisions to be made in terms of screening claims and establishing settlement parameters.

- Finally, let's look at some of the newest innovations involving GIS. One involves the posting of

GIS information on secure project-specific "extranet" sites. Authorized users can use a password to log on to a particular project site on the World Wide Web. Among other things, GIS maps can be read on the authorized user's computer screen and printed out on his own printer as any other document. This is a tremendous innovation given the difficulty sending faxes or down loading complex GIS maps. A second innovation is using software that only became available in the last year to conduct "Web Meetings." This has become a cost-effective way to communicate and share complex GIS information simultaneously to multiple locations. For example, in a recent case involving real property devaluation claims resulting from an explosion at a resin manufacturing facility, E & E used GIS to sort data on neighborhood demographics and layered on this information to make some informed decisions as to what constituted a comparable neighborhood. Once comparable neighborhoods were identified based on quantifiable, objective characteristics, we were able to look at the real estate property values in the comparable neighborhoods, identify property value increases or decreases over time, and develop useful comparisons of trends. The types of information that were layered onto the GIS in this case to identify comparable neighborhoods, included such things as appraised value, age of housing stock, education, crime, and ethnic characteristics of the neighborhood populations.

Again, what is normally a subjective analysis can now be evaluated by objective, quantitative criteria to allow for a more refined and accurate comparison of neighborhoods to be made that will withstand scrutiny if challenged.

In sum, GIS greatly increases the professional's ability to make informed decisions in litigation and in assessing environmental impacts. Given the many innovations in making GIS available over the Internet and the major strides being made on database technology systems, in the not too distant future we will be able to not only be able to request a report listing addresses of all persons with a similar name in a particular town, but also will soon be able to identify locations of those persons on a map. GIS spatial information is becoming a standardize component in the development of litigation-quality evidence and developing demonstrative aids for courtroom presentation.

Hopefully this will provide you with a better understanding how we as attorneys can use GIS in a useful and practical way. Thank you for your patience, and for those that want to learn more about GIS, feel free to contact me or the Bar Association to get a copy of the GIS paper, which was included in the Annual Meeting conference handout materials.

George A. Rusk is Director, Forensic Toxicology and Medical Services, Ecology and Environment, Inc. (E & E), Buffalo, N.Y.

Save the Date:

Friday, October 12, 2001

St. John's University School of Law is holding an all-day conference on the 25th Anniversary of SEQRA (the State Environmental Quality Review Act), co-sponsored by the Environmental Law Section of the New York State Bar Association.

This conference, for which CLE credit will be available, will highlight SEQRA policy, litigation, relationship to land use and zoning, and the use of new technology in preparing environmental impact statements. It is designed for attorneys, environmental consultants, governmental officials and employees, and planners. Attendees are encouraged to fully participate.

Specific sessions will focus on SEQRA and suburban land use, New York City Watershed, and environmental justice concerns—as well as anticipated legal issues arising under SEQRA, and its prospects for the future.

This is a one-day version of the program sponsored by Albany Law School in March 2001, designed for Metropolitan area, suburban and Long Island participants.

Program Chairs:

John Armentano, Esq.
Farrell Fritz

Mark Chertok, Esq.
Sive Paget and Riesel

Professor Philip Weinberg
St. John's Law School

Supreme Court Decision Limits Federal Regulation of Isolated Wetlands

By Terresa M. Bakner and Andrew J. Dalton

On January 9, 2001, the United States Supreme Court, in a 5-4 decision, invalidated the so-called Migratory Bird Rule. The Migratory Bird Rule allowed United States Army Corps of Engineers ("Corps") to assert jurisdiction over intrastate waters and wetlands if they are or would be used as habitat by migratory birds or endangered species. The Supreme Court held that the Corps exceeded its jurisdiction under the Clean Water Act (CWA) when it asserted regulatory control over abandoned mining pits and seasonal ponds based solely on the presence of migratory birds at the site.[1] The mere presence of migratory birds in an isolated pond on your property is no longer a valid basis for the Corps to assert its jurisdiction under the CWA.

In this case, the Solid Waste Agency of Northern Cook County (SWANCC, a consortium of 23 Chicago-area municipalities) sought to convert an abandoned sand and gravel pit mining site into a nonhazardous waste site. After initially concluding that it had no jurisdiction over the site, the Corps asserted jurisdiction over the project site because the Corps determined that the abandoned gravel mining pits and seasonal ponds had developed a natural character and were being used as habitat by migratory birds. Although SWANCC obtained all of the necessary state approvals for the project, the Corps refused to issue SWANCC a federal permit under the CWA, and SWANCC appealed the Corps' denial all the way to the Supreme Court.

The Supreme Court held that the abandoned gravel pit and ponds were not navigable waters, or otherwise part of the waters of the United States, and therefore, any activities affecting the pits and ponds were not subject to regulation under the CWA. In addition, the Court noted that the Migratory Bird Rule was inconsistent with both the CWA and the Corps' earlier regulations interpreting the CWA because the rule essentially deleted the term "navigable waters" from the CWA. The Supreme Court reasoned that, at a minimum, Congress's use of the term navigable in the CWA demonstrates that the CWA is primarily concerned with the regulation of bodies of waters that are, had been or could reasonably be navigable in fact, and not with discharges to isolated waters.

The Supreme Court also limited its prior interpretation of the CWA in *United States v. Riverside Bayview Homes, Inc.*,[2] to instances where the Corps asserts regulatory control over wetlands that are adjacent to open or navigable waters. The Court reasoned that case was not applicable to the facts of this case, because here the Corps sought to assert jurisdiction over gravel pits and ponds that were isolated from, rather than adjacent to, open or navigable water.

Finally, the Supreme Court held that the Migratory Bird Rule could not be justified under the Commerce Clause of the United States Constitution because there is no clear indication in the text of the CWA that Congress ever intended the CWA to regulate isolated waters such as ponds in abandoned gravel pits, and allowing the Corps to regulate those isolated waters under the Migratory Bird Rule would significantly and unreasonably restrict the States' traditional and primary power over land and water use.

Accordingly, the Supreme Court held that the Corps exceeded its authority under the CWA by exerting federal jurisdiction under the Migratory Bird Rule, and precluded the Corps from asserting jurisdiction over isolated ponds and gravel pits based simply on the presence of migratory birds. The Supreme Court's decision may also have a significant impact on the Corps's ability to regulate any isolated wetlands because the decision suggests the CWA was only intended to regulate wetlands or ponds that are inseparable from, or adjacent to, interstate or navigable waters. Therefore, landowners and developers may now be able to make a reasonable argument that many of the wetlands that the Corps has traditionally exerted jurisdiction over in New York were never intended to be subject to regulation under the CWA. These resources that may now be free from federal regulation could include isolated wetlands and ponds or waters that are not part of a tributary system to interstate waters or to navigable waters.

In light of the Supreme Court's decision, it is likely that the Corps will be rethinking whether it has any authority to regulate isolated wetlands, ponds and waters. So for now, the ball is in the Corps's court, and how the Corps elects to interpret the Supreme Court's decision will shed more light on how isolated wetlands will be regulated, if at all, in the future.

Endnotes

1. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, __ U.S. __, __ S. Ct. __, 2001 WL 15333 (2001).
2. 474 U.S. 121, 106 S. Ct. 455 (1985).

DEC's Overlooked Authority to Weigh Cumulative Impacts

By Philip Weinberg and Paul M. Bray

Sandwiched in among the broad powers bestowed on DEC by the Legislature in ECL § 3-0301 is the express authority to "[c]oordinate and develop policies, planning and programs related to the environment of the state and regions thereof"[1] and to

> [p]romote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, enhancement . . . and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action. . . .[2]

"Why has DEC not made use in a quarter of a century of this weapon designed to furnish authority to consider the cumulative impact of development and to foster the planning of future development that New York so sorely lacks?"

This seemingly sweeping but vastly underutilized grant of power conferring the authority to consider cumulative impacts when deciding on licenses or permits was enacted in 1975, the same year as the State Environmental Quality Review Act (SEQRA).[3] Why has DEC not made use in a quarter of a century of this weapon designed to furnish authority to consider the cumulative impact of development and to foster the planning of future development that New York so sorely lacks?

The court in the well-known *Town of Henrietta v. DEC*,[4] which made clear that SEQRA authorizes the Department (as well as other agencies, state and local) to require project sponsors to mitigate environmental impacts, explicitly noted the powers granted DEC in § 3-0301(1)(b) to "take into account the cumulative impact" when considering a license or permit. The Appellate Division aptly described this as a "separate grant of authority" in addition to SEQRA. Significantly, this section's applicability was, the court pointed out, "not raised by the DEC. . . ."[5]

It is striking that DEC, the Attorney General and citizen plaintiffs have ignored the strong mandate of this language. A few reported decisions have relied on § 3-0301 generally as furnishing DEC with broad overall "responsibility to carry out the environmental policy of this State," as the Court of Appeals held in *Flacke v. Freshwater Wetlands Appeals Board*[6] (sustaining DEC's right to appeal from an adverse decision of the respondent agency). Again, in *Sherwood Medical Co. v. New York State DEC*,[7] the court cited a related subsection of § 3-0301 to show it "evident that the legislature intended to confer upon the Commissioner a broad based authority to implement the environmental policy of this State." Otherwise, the silence is deafening.

The language regarding cumulative impacts was added, according to the State Executive Department, "[t]o confirm the authority of the Commissioner of Environmental Conservation to base determinations relating to licenses, orders, permits . . . or . . . rules, regulations, standards or criteria on the cumulative impact on fish, wildlife, water, land and air resources of the State of the project or matter involved, where such factors are not otherwise required to be considered."[8] The final clause of this sentence makes crystal clear that the added language was specifically intended to broaden the Department's authority.

"A few reported decisions have relied on § 3-0301 generally as furnishing DEC with broad overall 'responsibility to carry out the environmental policy of this State.'. . .Otherwise, the silence is deafening."

The Memorandum goes on to refer to *Ton-Da-Lay, Ltd. v. Diamond*,[9] where one year earlier the Appellate Division, Third Department, upheld DEC's denial of a water supply permit to a vacation home developer, but went on to rule that the Department could only examine the project's own water supply concerns, not its impacts on the environment generally—particularly the nearby Adirondack Forest Preserve. The history behind the *Ton-Da-Lay* decision is instructive. In the 1960s and early 1970s, in the aftermath of the building of the Northway interstate divided highway between Albany

and Canada along the eastern side of the six-million-acre Adirondack State Park, there was a boom of interest in second-home development in the Adirondack Park. One major proposed second-home development, the 18,386 acre Ton-Da-Lay project in the Town of Altamont in Franklin County, would have had a significant impact on the forests, waters and mountains of the unique Adirondack Park. At the time few of the many towns and villages within the Adirondack Park had adopted zoning and planning laws and enactment of the State private land use plan for the Adirondack Park (Article 27 of the Executive Law) did not take effect until 1973. In fact, it is likely that the prospect of the State exercising some form of comprehensive land use jurisdiction in the Park hastened developers to act before it took effect.

"But the courts' insistence that the projects be part of, or dependent on, an overall long-range plan, has led them to reject suits to require weighing of cumulative impact."

The only meaningful environmental review that most Adirondack second-home developments were subject to before 1973 was associated with permitting requirements under the Environmental Conservation Law for water supply and sewage treatment system permits under ECL §§ 15-1501 and 15-1503. These permits had essentially been subject to basic engineering standards and not to a broader review of a project's impact on natural resources or, in special places like the Adirondack and Catskill Parks, the character of the parks. The Ton-Da-Lay developer's application to DEC for a water supply and a sewage treatment system permit in 1971 marked a watershed in how DEC applied its permitting authority. Following intervention in the permitting proceeding by the Sierra Club, ably represented by attorneys Robert Kafin and the late Ed Needleman, the Department's traditional narrow consideration of permit applications was expanded to a comprehensive look at the impact of the proposed second-home development on natural resources and the character of the region over a 20-day hearing. In August 1973 DEC denied the developer's application based on the cumulative impact of the proposed project on the unique and special resources of the Adirondack Park—the determination the Appellate Division circumscribed. This directly led to the legislation amending § 3-0301.

Gov. Hugh L. Carey's memorandum approving the 1975 bill, like the Executive Department Memorandum, noted that "[i]n the past, the Commissioner has asserted his authority to consider the overall environmental impact in making his determinations." After *Ton-Da-Lay* "raised some doubt as to the Commissioner's authority to take into consideration environmental factors other than those specifically relating to the permits applied for," this legislation "would clarify the Commissioner's authority in that regard, and insure that the total environmental impact of proposed projects will be considered by the Commissioner in making his determinations."[10]

While this legislation, though enacted, languished, several cases reached the Court of Appeals raising the issue whether agencies adequately considered a project's cumulative impacts under SEQRA. That statute requires state and local agencies to prepare an environmental impact statement (EIS) describing "the environmental impact of the proposed action including short-term and long-term effects," along with alternatives and mitigation measures.[11] DEC's regulations make clear that cumulative impacts must be considered under SEQRA for actions resulting in "changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in a substantial adverse impact on the environment."[12] Similarly, these rules require an EIS for "two or more related actions[,] none of which has or would have a significant effect on the environment, but when considered cumulatively would meet one or more of the criteria" for significant impact.[13] Agencies are to weigh "reasonably related" cumulative effects, including actions that are "included in any long-range plan," or are likely to occur as a result of, or depend on, such a plan.[14]

The Court of Appeals has mandated that agencies consider cumulative impacts, notably in *Village of Westbury v. Department of Transportation*[15] where an EIS was ordered for two related highway projects, and in *Save the Pine Bush v. City of Albany*[16] involving development of parcels in an environmentally sensitive pine barrens. But the courts' insistence that the projects be part of, or dependent on, an overall long-range plan, has led them to reject suits to require weighing of cumulative impact. For example, in *Long Island Pine Barrens Society v. Planning Bd. of Town of Brookhaven*[17] the Court of Appeals ruled an EIS to examine the cumulative impact of development in Long Island's central pine barrens, vital to the island's water supply, was not required since there was no overall plan to safeguard the pine barrens—the very reason why weighing the cumulative impacts of that development was so important. And in *Stewart Park and Reserve Coalition v. New York State Dept. of Transportation*[18] cumulative impacts again were not required to be looked at where, the courts ruled, the impacts of two related actions—increasing flights at an airport and expanding its size—were different.

While none of those decisions happened to involve DEC as a lead agency with primary responsibility

under SEQRA, many significant environmental determinations of course do. And in those situations, ranging from air and water permits to wetland protection and land use in wilderness areas where DEC has chief responsibility, § 3-0301 imposes on the Department a clear mandate to consider the cumulative impacts on the state's environment of the action or project before it. The 1975 amendment to this statute, enacted the same year as SEQRA and for largely the same purpose, is really in pari materia with SEQRA. It is a clear, resounding mandate to DEC requiring it to weigh projects' cumulative impacts, and one that New York's courts should enforce vigorously. Insuring that DEC shoulder this responsibility the Legislature gave it 26 years ago is long overdue.

Endnotes

1. ECL § 3-0101(1)(a).
2. *Id.* (1)(b).
3. 1975 N.Y. Laws ch. 532. SEQRA is ECL art. 8.
4. 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).
5. 76 A.D.2d at 222, 430 N.Y.S.2d at 447.
6. 53 N.Y.2d 537, 541, 428 N.E.2d 380, 381, 444 N.Y.S.2d 48, 49 (1981).
7. 158 Misc. 2d 281, 285, 599 N.Y.S.2d 382, 385 (Sup. Ct., Albany Co. 1993), *reversed on other gds.*, 206 A.D.2d 819, 615 N.Y.S.2d 140 (3d Dep't 1994) (citing § 3.0301[1][i] empowering DEC to prevent and abate air, land and water pollution).
8. Mem. of State Exec. Dep't, McK. 1975 Sess. Laws, 1668-69.
9. 44 A.D.2d 430, 355 N.Y.S.2d 820 (3d Dep't 1974), *app. dism.*, 35 N.Y.2d 789, 320 N.E.2d 870, 362 N.Y.S.2d 156 (1974), 36 N.Y.2d 856, 331 N.E.2d 695, 370 N.Y.S.2d 918 (1975), and 36 N.Y.2d 646, 332 N.E.2d 362, 371 N.Y.S.2d 1027 (1975).
10. Mem. of Approval, McK. 1975 Sess. Laws, 1756.
11. ECL § 8-0109(2)(b), (d), (f).
12. 6 N.Y.C.R.R. § 617.7(c)(1)(xi).
13. *Id.* § 617.7(c)(1)(xii).
14. *Id.* § 617.7(c)(2).
15. 75 N.Y.2d 62, 549 N.E.2d 1175, 550 N.Y.S.2d 604 (1989).
16. 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).
17. 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992).
18. 157 A.D.2d 1, 555 N.Y.S.2d 481 (3d Dep't 1990), *aff'd mem.*, 77 N.Y.2d 970, 575 N.E.2d 391, 571 N.Y.S.2d 905 (1991).

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Do Condemnees in an EDPL Proceeding Automatically Have Standing to Challenge the Taking on the Grounds of SEQRA Noncompliance?

By Joseph Durkin and Sara Potter

The question of who is a proper plaintiff to bring an action challenging the environmental review of a project can be a difficult one to answer at times. The interplay between SEQRA and other laws illustrates how difficult it is to answer this question in a given situation. Just when the Legislature or the courts try to solve one standing related issue, another seems to arise.

For example, consider the following scenario. Suppose a property owner learns that his property is to be acquired by a governmental agency pursuant to the Eminent Domain Procedure Law (EDPL) in order to build a project. The governmental agency (or condemnor) follows the procedures for the taking as set forth in the EDPL, and conducts an environmental review of the project it proposes to build on the condemned property pursuant to SEQRA. The landowner (or condemnee) challenges the taking, alleging violations of SEQRA. Can the landowner bring an action to challenge the adequacy of the governmental agency's SEQRA review?

"Just when the Legislature or the courts try to solve one standing related issue, another seems to arise."

At first glance, the answer would appear to be a clear "YES." The EDPL enables a condemnee to commence a proceeding to protect its rights if the condemnee believes that it is aggrieved by the determination of the governmental agency to acquire the condemnee's property. Specifically, EDPL § 207(C)(3) provides that:

> Any person . . . aggrieved by the condemnor's determination and findings made pursuant to [EDPL sec. 204] may seek judicial review. . . .
>
> (C) the court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether . . .
>
> (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and **with article eight of the Environmental Conservation Law**. (emphasis added)

The inclusion of subdivision (3), which expressly incorporates SEQRA into the list of items, which are subject to judicial review, would appear to grant the condemnee the ability to challenge the SEQRA review undertaken by the condemnor.

However, maybe the answer is not quite so obvious. Suppose that the condemnor seeks to acquire the landowner's entire parcel, leaving him no remaining property in the vicinity. While it is likely that the condemnee would suffer some economic consequences as a result of the taking, the EDPL provides for payment of compensation and establishes a mechanism for resolving economic disputes.[1] Should the condemnee, who will not retain any property rights in the surrounding area, also have the right to challenge the adequacy of the condemnor's SEQRA review based upon alleged defects in the environmental review process?

Perhaps the answer should depend not upon the condemnee's status as a landowner, but upon whether the condemnee can show that he will suffer some environmental harm as the result of the governmental agency's actions. Otherwise, it is possible that SEQRA-related challenges could be brought to protect interests that are solely economic in nature. The courts have declined to expand the principles of standing to enable SEQRA to be used for that purpose, as discussed in greater detail later in this article.

Although it may seem "only fair" to grant the condemnee standing to challenge the taking on SEQRA-related grounds, consider these additional hypothetical factors to help illustrate the incongruity in the case law that such a result could cause. What if the landowner also wanted to build his own project on the site, and had publicly announced plans to do so prior to the condemnation of his property? Should he still have standing to challenge the governmental agency's SEQRA review? What if the landowner only conducted a business on this parcel and would lose the economic value of having his business located in that particular location?[2]

This point is significant because, generally, where a complainant seeks to invoke SEQRA, he must show that he is within the zone of interest to be protected by the SEQRA statute.[3] This means that he must demonstrate that he will suffer some form of environmental harm resulting from the governmental action. In the circumstance where a landowner's only use of the site is

for a business and where the condemnor is taking all of the landowner's property, what environmental harm would the landowner suffer once the taking is complete and the project that was subject to the SEQRA review is ultimately completed? What interest would such landowner be seeking to protect? One could argue that in many instances it would only be the landowner's economic interest in the value of the property and the business. However, it is well-established that economic interests are not protected under SEQRA.[4] Since the EDPL provides for the payment of compensation for the taking, the landowner's economic interests are already protected.[5] Therefore, it would seem that to allow such a landowner to maintain a proceeding under EDPL § 207(C)(3) would be contrary to the case law that has developed under SEQRA and would provide a means to a condemnee to delay a proceeding when the only issue is compensation. Accordingly, it may be appropriate to deny a condemnee's challenge based on EDPL § 207(C)(3) on standing grounds where the condemnee would not have standing in an Article 78 proceeding to assert a SEQRA-related challenge.

A. The Reference to SEQRA in EDPL § 207 Presupposes Independent SEQRA Standing

Requiring a condemnee to show environmental harm is actually consistent with the purpose behind EDPL § 207(C)(3). As discussed below, EDPL § 207(C) was amended to allow a court to review SEQRA issues once, in a proceeding commenced under EDPL § 207, rather than compelling a condemnee to commence two separate proceedings—one to challenge the EDPL proceeding under EDPL § 207 and a separate Article 78 proceeding to raise any SEQRA-related claims. However, this amendment was not intended to change the substantive law under SEQRA by giving a condemnee any greater rights when the challenge is brought in conjunction with an EDPL proceeding.

The Court of Appeals traced the genesis and purpose of § 207(C)(3) in the case of *In re East Thirteenth Street Community Association v. New York State Urban Development Corporation*.[6] In *East 13th Street*, the Court noted that prior to the addition of § 207(C)(3) in 1991, a condemnee who wished to bring both a SEQRA claim and a claim pursuant to EDPL § 207 was required to bring two separate lawsuits with two separate statutes of limitations—an Article 78 proceeding to challenge alleged SEQRA deficiencies, and an EDPL § 207 claim.[7] The Court also noted that in response to its ruling in the case of *Pizzuti v. Metropolitan Transit Authority*,[8] the New York State Legislature enacted subsection (3) to EDPL § 207(C) in 1991 (the "1991 Amendment"). The legislative history states that the purpose of the "technical" amendment is to "correct an anomaly in the statute revealed by [the *Pizzuti* case] . . . this bill would streamline the procedure for judicial review of decisions to acquire real property by eminent domain by making both the SEQRA issues and the eminent domain issues reviewable in the same proceeding."[9] In *Pizzuti*, Petitioner brought an action to challenge the taking of a portion of his property by the Long Island Rail Road. Petitioner alleged that the condemnor failed to comply with SEQRA, and that such failure deprived the Long Island Railroad of its right to condemn the property. The Court of Appeals affirmed the dismissal of the proceeding, holding that although SEQRA and EDPL may overlap in some respects, by its terms EDPL § 207 did not permit a court to review compliance with SEQRA in the same action.

"Requiring a condemnee to show environmental harm is actually consistent with the purpose behind EDPL § 207(C)(3)."

The *East 13th Street* action was commenced subsequent to the 1991 Amendment that expressly incorporated the reference to SEQRA in the EDPL. The Plaintiffs in *East 13th Street* were condominium boards, tenants and residents of buildings near a proposed project to house homeless and low-income families. The Urban Development Corporation, as condemnor, held the requisite hearing pursuant to the EDPL and ultimately decided to utilize its condemnation powers over the site in order to implement the proposed project. A negative declaration for the project was issued pursuant to SEQRA. The plaintiffs brought an action against UDC, alleging claims under both the EDPL and SEQRA. The *East 13th Street* plaintiffs asserted that they had standing under EDPL § 207 by virtue of the 1991 Amendment. The Court compared the procedural posture of such actions before and after the 1991 Amendment. In contrast to the situation in *Pizzuti*, where a plaintiff was forced to bring both an Article 78 proceeding and an action under the EDPL based upon the same facts, the 1991 Amendment enabled both actions to be brought at the same time.

According to the Court of Appeals, the purpose of incorporating SEQRA review into the EDPL was to promote judicial efficiency in proceedings to acquire real property and ". . . the 1991 amendment was intended to permit a reviewing court to pass on both the EDPL issues and the SEQRA issues in one proceeding, thereby facilitating prompt review and conserving judicial resources."[10] The Court added that a petitioner possessing only SEQRA standing cannot acquire EDPL standing "by bootstrapping EDPL claims onto a legitimate SEQRA claim."[11] The converse should also be true. A condemnor should not be able to bootstrap a SEQRA

challenge for which they would lack standing in an Article 78 action onto their EDPL claim. The *East 13th Street* Court held that only a petitioner who can establish EDPL aggrievement, and who can also maintain a separate Article 78 challenge to a SEQRA finding, is entitled to seek SEQRA review in the eminent domain proceeding.[12] There is no indication in either the legislative history or in the Court of Appeals reasoning in the *East 13th Street* case that the 1991 Amendment was intended to expand the bases upon which plaintiffs can challenge a SEQRA determination in the context of an EDPL proceeding.

Indeed, the stated goal of judicial efficiency is only realized where a condemnor would have standing under SEQRA if the SEQRA challenge was brought in an Article 78 proceeding. Otherwise, EDPL § 207 would expand the universe of aggrieved parties under SEQRA and would enable non-meritorious cases to be brought under the guise of "environmental" injuries. There is nothing in the legislative history to indicate that the legislature desired this result. In fact, it appears that it desired the opposite, stating that judicial efficiency would be obtained by the 1991 Amendment in part because "a clear body of case law has developed under SEQRA that is well known to the Appellate Divisions of all four judicial departments."[13]

"The issue of standing under SEQRA is the subject of a well-established body of case law."

Clearly, it was anticipated that the reviewing court would apply established SEQRA principles to cases brought under EDPL § 207, including standing principles. It does not appear that the 1991 Amendment was intended to incorporate only certain discrete principles of this established body of case law into the EDPL. To do so would result in two disparate bodies of case law regarding alleged SEQRA violations—one under Article 78 and another for claims brought under the EDPL where standing to bring a SEQRA challenge under Article 78 could not be independently maintained. This hardly achieves the intent of judicial efficiency and would not "correct an anomaly" in the EDPL. It would establish a truly anomalous situation where, on the one hand, in EDPL proceedings parties whose only interests are economic would be allowed to raise any number of SEQRA objections to a project, while in Article 78 proceedings, parties who are truly motivated by concern about the environment are not allowed to raise any SEQRA objections to a project unless they can meet the standing tests set forth in SEQRA case law. In order to prevent such a result, the 1991 Amendment should be interpreted to require that, in order to mount a challenge based upon alleged SEQRA deficiencies pursuant to EDPL § 207, a condemnee must be able to demonstrate independent standing under SEQRA. If standing could be maintained in an Article 78 action, then of course the SEQRA-related challenge should be brought simultaneously with the EDPL claims to promote the stated goal of judicial efficiency. Where, however, the landowner would not have standing under SEQRA if such action was brought as an Article 78 proceeding, standing to allege SEQRA-related claims should not be conferred merely because the landowner has EDPL claims relating to the same property.

B. In an Article 78 Proceeding, Environmental Harm—Not Economic Injuries—Are Necessary to Confer Standing Under SEQRA

To the extent that EDPL § 207(C)(3) does not by its terms automatically confer standing to raise a SEQRA challenge within the context of an EDPL proceeding, the question arises as to whether the landowner described above has standing under SEQRA. We suggest that the landowner may not. It may appear rather ironic, but the taking of the land by eminent domain may also take away standing under SEQRA. This is so because in the case where all of the landowner's land is to be acquired, such landowner will not feel the effects of the project that will ultimately be constructed on the land condemned by the governmental agency, and therefore would not suffer any environmental harm distinct from the public at large.

The issue of standing under SEQRA is the subject of a well-established body of case law. The Court of Appeals has held on more than one occasion that in order to establish standing under SEQRA, plaintiffs must demonstrate that the purported injury is environmental in nature; economic injury alone is an insufficient basis for standing, as such injuries are not within the zone of interests sought to be protected by SEQRA.[14] In sum, there are two ways for a plaintiff to demonstrate standing to challenge a SEQRA-related determination. First, by satisfying the principles set established in the case of *Society of Plastics*; Second, by a presumption of actual injury.[15] In the case of *Society of Plastics* the court set forth the essential principles of standing under SEQRA. First, the complaining party must have an "injury-in-fact"—an actual legal stake in the matter being adjudicated. Second, the interest or injury asserted must fall within the zone of interests protected, which under SEQRA is the character and quality of the complaining party's environment. Third, the complaining party must demonstrate that his "injury in fact" is in some way different from that of the public at large.[16]

In establishing these criteria for standing under SEQRA, the Court cautioned that unless the principles of standing were construed in this manner, the SEQRA

statute was subject to misuse: "challenges unrelated to environmental concerns can generate interminable delay and interference with crucial governmental projects. We have recognized the danger of allowing special interest groups or pressure groups, motivated by **economic self interests**, to misuse SEQRA for such purposes."[17]

In *Society of Plastics*, the Court held that an organization comprised of businesses associated with the plastic industry did not have standing under SEQRA to maintain an action challenging a law which was intended to reduce the amount of plastic being disposed of in landfills. In that case, the plaintiffs were denied standing. Although they alleged environmental harms such as increased truck traffic and increased air and noise pollution as the result of the increased weight and bulk of mandated paper substitutes for plastic products, the environmental injuries of which they complained were no different that those that would be suffered by the public at large.[18] The Court opined, "Though couched as environmental harms, plaintiff's assertions of injury by and large amount to nothing more than allegations of added expense it might have to bear if plastics products were banned and paper products substituted [but] economic injury is not by itself within SEQRA's zone of interests."[19]

Under the test set forth in *Society of Plastics*, it is possible that a landowner whose property is totally condemned in an EDPL proceeding could not establish standing, for his injury would be solely economic in nature. While the landowner may assert some type of generalized environmental injuries, like the plaintiffs in *Society of Plastics*, it would seem that such alleged injuries would be raised as a way to protect economic interests, an interest that is not within SEQRA's zone of interests.

Assuming that the landowner could not establish standing through the three-part test from *Society of Plastics*, we turn to the "presumption of standing" analysis to see whether standing could be maintained under the constructs established by the Courts. We suggest that, because in a total taking the landowner will not retain any ownership rights and therefore he will not have any property to be impacted by the project constructed on the condemned parcel, such presumption would not apply.

The Court of Appeals has acknowledged that in some circumstances, a landowner is presumptively aggrieved and need not plead special damages or in fact injury to establish standing in an Article 78 SEQRA proceeding.[20] In *In re Har Enterprises v. Town of Brookhaven*, the Court of Appeals held that an owner of property which is rezoned need not plead specific environmental harm to challenge an agency's SEQRA compliance; rather, special injury is presumed because of the petitioner's ownership interest in the property.

However, in a rezoning matter the landowner will continue to own the property and be subject to the consequences of the rezoning subsequent to the zoning board's determination. Therefore, this presumption of standing has been applied only to those matters involving rezoning. Unless the SEQRA review was undertaken as part of a zoning enactment, standing will be conferred upon a party seeking to raise a SEQRA challenge only if it can demonstrate that it will suffer a specific environmental injury rather that one that is solely economic in nature.[21]

It might seem to be a reasonable extension of the "presumption principle" set forth in the rezoning cases to actions involving the condemnation of property. That is, to conclude that because of his ownership interest in the property being condemned, that the landowner would have standing to make a SEQRA based challenge. The Court of Appeals declined to extend this principle, however, in the *East 13th Street* case, noting the essential difference between rezoning matters and EDPL proceedings. The EDPL seeks primarily to protect the interests of property owners and to ensure that their property is taken in accordance with the law, and that the owner is provided just compensation. In contrast, zoning ordinances are intended to protect the general welfare of the entire community.[22] If, as we have suggested, the only interest of a condemnee in a particular EDPL proceeding is economic, why should an exception be made to the existing standing principles under SEQRA?

It appears that only one case, which was brought under Article 78 and not under EDPL § 207, has addressed whether a condemnee has standing to make SEQRA-related claims.[23] Although the decision in the case of *Swan Lake Water Corporation v. Suffolk County Water Authority* is brief, and not many facts are set forth therein, the court held that a water company whose supply and distribution system was subject to condemnation by the Suffolk County Water Authority lacked standing to assert a SEQRA claim in an Article 78 action, since it was not aggrieved under that statute.

There may be circumstances where a landowner who is being dispossessed may still be able to demonstrate environmental harm by the act of displacement. For example, in the case of *Chinese Staff and Workers Association v. City of New York*,[24] the Court of Appeals recognized that the very act of displacement was sufficient to confer standing under SEQRA. Similarly, there may be other circumstances in which standing should be conferred—for example if the building is historic, an item that is specifically enumerated as an area of concern in SEQRA (on Type I list).[25] Thus, if under a given

set of circumstances a condemnee can demonstrate that it would suffer environmental harm, then it would have standing to raise SEQRA issues in the EDPL proceeding.

It is important to reiterate that while this result may seem harsh, the condemnee is not left without a remedy where, in the circumstance we have given, the condemnee's only interest is economic. Article 5 of the EDPL sets forth a process to ascertain the appropriate compensation for the property to be taken. To allow the landowner to bootstrap a SEQRA challenge onto such a proceeding, however, would be a misuse of SEQRA, which is something that the Court of Appeals cautioned against in the case of *Society of Plastics*.[26]

"We do not suggest that in those instances where there is a partial taking of property, or where the landowner could otherwise satisfy the three-part standing test set forth in Society of Plastics, *that standing should be denied."*

Conclusion

We do not suggest that in those instances where there is a partial taking of property, or where the landowner could otherwise satisfy the three-part standing test set forth in *Society of Plastics*, that standing should be denied. It is only in those limited circumstances where there is a total taking of one's property and the landowner would not be able to independently establish standing under an Article 78 proceeding that such denial would be appropriate. In light of the legislative history of the 1991 Amendment and the interpretation of such amendment by the Court of Appeals, it appears that this result strikes the proper balance between promoting judicial efficiency and ensuring that SEQRA is not misused to further solely economic interests.

Endnotes

1. N.Y. Eminent Domain Procedure Law, § 101, § 301 and Article 5 (McKinney 1979).
2. It does not appear that any court has addressed this particular issue. Although the court was invited to do so in the case of *River Center, LLC v. The Dormitory Authority of the State of New York,* 275 A.D.2d 683 (1st Dep't 2000), the First Department assumed that the petitioner had standing and ruled on the merits of the Dormitory Authority's (the condemnor), SEQRA determination.
3. *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 161 (1991).
4. *Mobil Oil v. Syracuse Industrial Development Agency*, 76 N.Y.2d 428 (1990).
5. *Supra* note 1.
6. *In re East Thirteenth Street Community Association v. New York State Urban Development Corporation*, 84 N.Y.2d 287 (1994).
7. *Id*. at 296.
8. *Pizzuti v. Metropolitan Transit Authority*, 67 N.Y.2d 1039 (1986).
9. New York State Attorney General's Legislative Program Memo, Bill Jacket L. 1991 ch. 356.
10. *East 13th Street*, *supra* note 6 at 297.
11. *Id.*
12. *Id.*
13. New York State Attorney General's Memorandum for the Governor, Bill Jacket L. 1991 ch. 356.
14. *Society of the Plastics Industry*, *supra* note 3; *Mobil Oil*, *supra* note 4.
15. *Har Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524 (1989); *see also In re Sun Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead*, 69 N.Y.2d 406 (1987).
16. *Society of the Plastics Industry*, *supra* note 3 at 773-4.
17. *Id.* at 774.
18. *Id.* at 777.
19. *Id.*
20. *Har Enterprises*, *supra* note 15.
21. *Boyle v. Town of Woodstock*, 257 A.D.2d 702 (3d Dep't 1999) and *Town of North Greenbush*, 254 A.D.2d 614 (3d Dep't 1998).
22. *East 13th Street*, *supra* note 6 at 296.
23. *Swan Lake Water Corporation v. Suffolk County Water Authority*, 204 A.D.2d 463 (2d Dep't 1994).
24. *Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359 (1986).
25. 6 N.Y.C.R.R. § 617.4
26. *Society of the Plastics Industry*, *supra* note 3 at 774.

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Diminished Market Value of Real Property Caused by the Wrongful Acts of Another: Recovering Stigma Damages in Environmental and Toxic Tort Litigation

By Jacalyn Fleming

"[T]he perceived collective wisdom may bear little, if any, relationship to reality."[1]

I. Introduction

In New York, the status of stigma damages in environmental and toxic tort cases remains uncertain. In *Scheg v. Agway Inc.*,[2] the Fourth Department reinstated claims for damages for a continuing nuisance where plaintiffs alleged that the value of their property was diminished due to its proximity to hazardous waste landfill.[3] The plaintiffs did not claim that their property was exposed to any contamination.[4] Similarly, a lower court found that plaintiffs had established an issue of fact sufficient to withstand a motion for summary judgment for a public nuisance claim by presenting evidence of depreciation in value of their properties due to the close proximity to a hazardous waste site.[5] Thus, New York caselaw includes examples of courts willing to consider stigma damages where there had been no on-site contamination.

Two federal courts interpreting New York law have also been willing to consider stigma damages with on-site contamination, in addition to cost of remediation.[6] Similarly, the Third Department noted that, under Navigation Law, permanent damages to real property may include "any reduction in value" including "all direct and indirect damages" caused by contamination, and only dismissed a claim for stigma damages because the plaintiff failed to meet its burden of proof.[7] Despite these prior cases, the Second Circuit applying New York law to a claim for stigma damages with on-site contamination stated that "whether stigma damages can be recovered following an environmental cleanup" was "uncertain."[8]

The scope of stigma damages remains uncertain in many states, but claims including stigma damages are increasing. This note analyzes recent cases from across the country dealing with claims for stigma damages, focusing on environmental and toxic tort litigation. Part II defines stigma damages and summarizes the controversy surrounding claims of stigma damages. Part III discusses the range in circumstances under which claims for stigma damages have arisen in tort litigation, and how the interaction of circumstances and asserted claims affects recognition of stigma damages by various courts. Part IV discusses the type of proof needed to establish stigma damages, including causation, harm, and diminution in value. Part V summarizes the techniques and arguments that have been most successful in recovering stigma damages under various circumstances.

II. Stigma Damages and Real Property

A. What Are Stigma Damages?

Stigma damages in environmental and toxic tort litigation are based on a diminution in market value of real property due to the public's fear caused by contamination either on the property or in the vicinity.[9] While stigma is not a new concept, claims for stigma damages in environmental and toxic tort litigation have risen in recent years.[10] A recent example involves a claim by a homeowner in Pittsfield, Massachusetts, against General Electric Company (GE) for injuries caused by GE's dumping of soil contaminated with polychlorinated biphenyls (PCBs) in the vicinity of plaintiff's home over a number of years.[11] The homeowner did not allege that her property was actually contaminated.[12] Rather, the claim asserted that she was unable to sell her home because of the PCB contamination in the neighborhood and the uncertainty about whether her property was contaminated.[13] The district court denied a motion to dismiss and allowed the case to proceed under a private nuisance cause of action.[14]

B. Effects of Stigma on Property

Many Americans are very concerned about hazardous waste sites and have been willing to spend millions of tax dollars on cleanup under the federal Superfund program.[15] This general concern can translate into fear when property owners or prospective buyers believe that they may be personally at risk. This fear may be based on the perceived risk of a health threat or uncertainty regarding liability for remediation if the contamination affects the property. As a result of such fears, a property's market value may plummet when prospective buyers seek out property further away from known contamination. Even mistaken beliefs can affect people's actions.[16] Thus, negative perceptions about a parcel can be based on actual or feared contamination, either of the property or in the vicinity.[17] In turn, market values of property can be affected by negative perceptions even if the property is not actually contaminated.[18]

The effects of stigma may vary depending on the type of real estate involved. The value of residential property may be more at risk than either commercial or industrial property because recent contract and insurance vehicles have been developed to limit risk in business transactions involving contaminated real estate.[19] Yet even these attempts to limit risk may not always be enough. Indemnity contracts and liability insurance may not cover all possible risk. For example, contracts or insurance may not compensate the owner when the local jurisdiction prohibits expanded development on land adjacent to a contaminated site. In addition, a prospective buyer could fear the loss of specific attributes of the property such as use of well water. For instance, with the recent rise of methyl tertiary-butyl ether (MTBE) contamination of groundwater throughout the country,[20] landowners may face a drop in the market for real estate that has lost the use of its traditional water supply. This lost use does not have to be the result of direct groundwater contamination of the property, and may include the need of the local jurisdiction to find an alternative, more expensive, water supply. In sum, a parcel located near a contaminated site, or affected by contamination from an off-site source, risks a loss in market value based on people's negative perceptions.

C. Controversy Surrounding the Stigma Concept

Many state and federal courts have now considered the application of stigma damages in environmental or toxic tort litigation.[21] The acceptance of stigma damages by the courts has been mixed.[22] Several courts have severely limited the circumstances under which stigma damages may be awarded.[23] A few lower courts have rejected stigma damages outright.[24] In the wake of these decisions, several commentators have argued that stigma damages should not be awarded, at least in most situations.[25]

Stigma damages are controversial for several reasons. Called nothing more than a paper loss by some, it is argued that they are at most temporary economic losses that will disappear over time as the contamination dissipates.[26] Stigma damages are also considered too speculative because they are based on public perception, which can change.[27] The potentially speculative nature of a stigma claim has been confirmed where property allegedly stigmatized sold for a relatively high price. For example, cases have reported that property allegedly stigmatized was sold during the court proceedings for a price above the assessed market value assuming no stigma.[28]

More generally, tort law does not protect against all economic loss related to actions by neighbors.[29] A homeowner cannot bring a common law action in tort because the neighbors fail to adequately maintain their homes and the market value of all the homes in the neighborhood suffers. Yet at some point, harm caused by others rises to the level of tort. Where this line is drawn may depend in part on public policy considerations.

One commentator arguing against stigma damages based her public policy reasoning on the assumed inability of most plaintiffs to offer reliable evidence that the property actually realized the harm at the time of trial because they have not sold their stigmatized property.[30] This is an unfair standard to apply, however, because courts have not required plaintiffs to sell the property in order to provide evidence of a diminution in property value in other tort settings. Fairness requires an award of stigma damages where sufficient evidence of stigma is available.

Fairness is the cornerstone of tort law. Tort law is forged from public policy considerations, including the goals of compensation and deterrence.[31] Pollution should not be a costless activity. At a minimum, fairness requires that polluting companies or parties internalize the costs rather than forcing them onto their neighbors.[32] Only then will companies seek to reduce their output of pollution. Where pollution remains, fairness requires that neighbors not be harmed by the polluter. Harm may include reduced market value. The "attributes of ownership" of real property arguably include the right to alienation and the "right to capital value."[33] Where the value of real property is harmed by intentional or negligent wrongdoing, it is unfair to make the injured neighbor absorb the loss.

Despite the controversy, stigma damages have been awarded and continue to be included in claims for damages in environmental and toxic tort cases. Stigma damages should be allowed whenever the plaintiff can provide sufficient evidence that the defendant's negligent or wrongful acts caused the harm that led to the diminution in value from stigma.[34] However, as discussed below, a review of the cases indicates that awards of stigma damages may be more circumscribed by a court.

III. Recognition of Stigma Damages

A. Factors Considered

Most courts have held that causing the value of another's property to diminish is not enough to establish tort liability.[35] In short, stigma is not a cause of action. Whether a court recognizes stigma as compensable damages often depends on the circumstances under which the underlying claim arose. The primary distinction to date has been on-site versus off-site contamination. Where there is on-site contamination, additional factors may include tangible versus intangible invasion and permanent versus temporary harm.[36] Claims for stigma damages have received greater acceptance by the courts when the claim has included tangible con-

tamination of the property and the contamination continues even after attempted remediation.[37] Without any underlying physical harm to the property, courts have been much more reluctant to allow claims for stigma damages.[38]

Two federal circuit court cases have significantly influenced other federal and state courts considering the application of stigma damages. In *Berry v. Armstrong Rubber Co.*, the Fifth Circuit applied Mississippi law in holding that stigma damages were not compensable when caused only by public perception and without accompanying physical harm to the property.[39] Similarly, in *In re Paoli R.R. Yard PCB Litigation*, the Third Circuit applied Pennsylvania law in holding that recovery of stigma damages may be allowed "when there has been some initial physical damage to plaintiffs' land."[40] The court explained that, where some temporary physical damage occurred, damages for diminution in a property's value could be recovered if the plaintiff could demonstrate that repair of the damage would not restore the property to its original market value and there was some ongoing risk to the land.[41] The Third Circuit further indicated that the stigma itself could be a permanent injury to the land.[42] These Fifth and Third Circuit opinions have been cited often by both federal and state courts in rejecting claims for stigma damages where there was no on-site contamination.[43]

Despite this reluctance to allow claims for stigma damages without contamination of the property, a few courts have allowed claims without such a showing. For example, in addition to the Massachusetts case discussed above, an Ohio court recognized that plaintiffs seeking diminution in value of their property from a landfill need not show a physical intrusion onto the land to recover damages in private nuisance.[44] A New York appellate court also held that non-exposure claims alleging diminished property value resulting from proximity to a hazardous waste landfill stated a cause of action in continuing nuisance.[45]

Similarly, in *Walker Drug Co.. v La Sal Oil Co.*,[46] a Utah appellate court appeared to leave open the possibility that a claim for stigma damages without physical invasion could be successful in at least one limited setting. The court noted that an action for private nuisance cannot be based on unsubstantiated fears of third parties, but may be "sustained in the absence of physical invasion to the property if damages are sufficiently 'substantial' and 'unreasonable.'"[47] Thus, when no on-site contamination has occurred, a court may be willing to consider stigma damages where the plaintiff can maintain a nuisance action.

B. Causes of Action Generally

Recognition of stigma and the factors required by a court depend upon the underlying cause of action, such as trespass, nuisance, or negligence.[48] As further discussed in Part C, meeting each element of the underlying cause of action can prove just as problematic as any reluctance the court may have accepting stigma damages.[49] This difficulty in establishing a cause of action is only partly mitigated by the common strategy of pleading several alternative causes of action, in effect allowing the court to choose the cause of action it finds best fits the circumstances.[50] Further complicating the process, different states and even different courts within a state may define a cause of action differently, making it difficult to predict the type of proof needed to establish a claim.[51]

C. Specific Causes of Action

1. Stigma in Environmental and Toxic Tort Litigation

Many claims for stigma damages are brought under theories of trespass or private nuisance.[52] In addition, negligence, strict liability, public nuisance, and riparian rights claims have been argued.[53] In addition to environmental and toxic tort litigation, subsection 2 discusses other areas where courts have allowed diminution in value of property due to stigma.[54]

While the type of proof needed obviously depends on which legal theory is used, courts often have not agreed on how to the apply claims for stigma damages to a given cause of action.[55] While general conclusions about the availability of stigma damages for a given cause of action are difficult to make, the discussion below attempts to provide a representative view from different state and federal courts that have recently dealt with stigma claims.

a. Trespass

Trespass requires an intrusion on land.[56] Where the trespass is intentional, a showing of harm generally is not needed to sustain the claim.[57] For liability, all that may be needed is proof that defendant knew, with substantial certainty, that the act would lead to trespass.[58] Physical impairment of the land is not required where property owners can otherwise establish either interference with their right to exclusive possession of the property, or invasion of some other legally protected interest.[59] Where negligent trespass is recognized, liability depends on a showing of actual harm, either to the land, the possessor, or some other legally protected interest.[60]

The requirement of an intrusion onto the land eliminates claims for "mere" stigma damages.[61] Courts have been unwilling to find that negative public perception interferes with a landowner's interest in exclusive possession. Claims generally meet this element, however, where the evidence shows contamination of the property.[62] For example, a Connecticut court found a cause of

action in intentional trespass could be maintained where leaching of liquids or aerial transmission of dust was alleged.[63] In addition, the court applied the rule that "intent to invade another's land may be established by showing conduct of a kind substantially certain to result in invasion."[64]

A gray area has developed as the alleged contamination becomes less tangible. Even with intentional trespass, some courts have required that the invasion be tangible, reasoning that claims for invasions by intangibles are properly brought in nuisance.[65] In contrast to the Connecticut court above, a Michigan court concluded that a claim based on damages from airborne particulates was properly brought in nuisance, at least where the particles do not "occupy the land on which they settle in any meaningful sense."[66]

Other courts have allowed a cause in action in trespass for intangible invasions only with a showing of actual harm. For example, a district court applying Kentucky law reasoned that a showing of harm is needed for an invisible object because it is the only way to demonstrate that an invasion has occurred.[67] This reasoning is weakened when there are alternative measures of invasion by intangibles such as chemical testing. Similarly, the Fifth Circuit required actual harm to the property from the intangible invasion, and then allowed the jury to decide whether the test for trespass was met.[68] In response to this harm requirement, a Michigan court argued that by twisting trespass to include invasion by intangibles, courts have confused the line between trespass and nuisance.[69] Thus, the elements for trespass may vary from jurisdiction to jurisdiction.

When the test for trespass has been met, sigma damages have been allowed where harm to the land was found to be permanent.[70] However, there is no bright line distinguishing permanent from temporary harm. Courts have interpreted permanent to include contamination of the property that cannot be completely abated.[71] In addition, the Third Circuit has indicated that stigma could be a permanent harm.[72] Where the court fails to adopt the Third Circuit's rule that stigma can be a permanent harm to the property, unabated contamination may be needed for a finding of permanent harm.[73] Where plaintiffs have failed to allege permanent harm, the claim for stigma damages generally failed.[74]

In addition to permanent injury cases, courts have considered stigma damages where the on-site contamination is considered a temporary injury because it can be abated.[75] Beyond damages for the temporary injury, such as cost of remediation, diminution in value from stigma may be awarded as permanent damages.[76] Diminution in value from stigma is calculated as the loss "resulting from the long-term negative perception of the property in excess of any recovery obtained for the temporary injury itself."[77] Thus, recovery includes "the residual loss of market value of damaged property" after the site has been remediated.[78]

b. Private Nuisance

Private nuisance is a field of tort liability where an actor's "conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land. . . ."[79] The conduct must also be either "intentional and unreasonable," or unintentional but meets the elements of negligent, reckless, or abnormally dangerous conduct.[80] Unless a statute provides otherwise, the gravity of the harm is weighed against several factors, including the utility of the actor's conduct and "the burden on the person harmed of avoiding the harm."[81]

Nuisance has its disadvantages and its advantages as compared to trespass, with respect to winning stigma damages. One disadvantage is that a nuisance generally must be "substantial and unreasonable" to establish liability.[82] One advantage over trespass is that a tangible physical invasion is not a necessary element of nuisance.[83] Thus, even a claim of mere stigma may be possible under nuisance, at least where interference with physical comfort is not required.[84] However, without on-site contamination, the test for substantial and unreasonable interference of use and enjoyment may require a showing of harm beyond stigma. Loss in property value alone has been rejected as meeting the test.[85] Yet even for courts following this reasoning, once nuisance is established in some other way, stigma damages may be compensable.[86]

The substantial and unreasonable test has been met where the plaintiff also alleged that the defendant's actions created a legitimate fear for the plaintiff's health and safety. For example, in *Lewis v. General Electric Co.*,[87] the court cited to Prosser and Keeton on the Law of Torts in defining private nuisance to include a disturbance "merely [of] a plaintiff's peace of mind, as in the case of a bawdy house . . . or the unfounded fear of contagion from a tuberculosis hospital."[88] The court in *Lewis* found that the plaintiff met the private nuisance test by alleging "not only the diminution of property value in response to legitimate concerns of contamination, but fear for her child's health and safety."[89] The court reasoned that, where a condition created by the defendant caused fear in the plaintiff, this met "the basic tenets of nuisance law requiring merely an interference with use and enjoyment of land. . . ."[90] Thus, the claim for stigma damages survived summary judgment because the court found that the elements for a nuisance cause of action were met.[91]

Once a nuisance is established, damages may depend on whether the nuisance is permanent or abat-

able.[92] As with trespass, courts may allow diminution in market value from stigma only for permanent harm.[93] The plaintiff may be able to choose whether to treat a nuisance as permanent or not, at least where there is doubt about its permanency.[94]

c. Public Nuisance

"A public nuisance is an offense against the state and is generally prosecuted by the State."[95] For private plaintiffs to maintain an action, they must offer proof that they suffered harm different in kind than the harm suffered by the general public.[96] This special damages requirement may be satisfied by a diminution in property value resulting from a wrongdoing. For example, in *Nashua Corp. v. Norton Co.*, the district court applied New York law in concluding that the plaintiff could "demonstrate special damages by showing that its property value has been diminished by [defendant's] actions."[97] In addition, interference with the condition of the land is sufficient to constitute harm different than that suffered by the public at large.[98]

Public nuisance claims may also need to incorporate an additional pleading where the defendant is a municipality. For example, in Connecticut, "the plaintiff must prove that the defendants, by some positive act, intentionally created the condition alleged to constitute the nuisance."[99] The court rejected plaintiff's pleading as insufficient where it was alleged that the defendants "'knew or should have known of the possibility' that toxic substances would be created."[100]

d. Negligence or Negligence *Per Se*

Negligence claims, like trespass, generally require a showing of physical harm either to plaintiff's property or person to recover economic losses such as stigma damages.[101] Thus, a claim of mere stigma generally will not be sufficient to sustain a negligence cause of action based on this limitation alone. In addition, establishing duty and breach of duty may also be difficult to establish where the harm was from pollution, at least where there is no underlying violation of a statute. A court will have to find that the defendant owed a duty to conduct operations to avoid harm to plaintiff's property.[102] This element requires plaintiffs to demonstrate that defendants knew or reasonably should have known that their actions could harm the plaintiffs. For example, in *Rudd v. Electrolux Corp.*, the plaintiffs' negligence claim failed when they could not establish that the defendants knew or reasonably should have known that their underground storage tanks were leaking.[103] The court noted that neither the common law nor the applicable regulations imposed a general duty to inspect the tanks.[104]

Where duty and breach can be established, some courts may find foreseeability and proximate cause because the dangers of pollution "are known even by school children."[105] Harm from stigma has been found to be foreseeable. "It is reasonably foreseeable that a plaintiff's property may lose its market value if a defendant fails to exercise reasonable care in remediating environmental contamination that seeps through to the plaintiff's property."[106]

A negligence claim may be easier to establish where an enforcement action has been taken against the defendant under an environmental statute. Violation of a statute or a regulation may be negligence *per se* depending on whether the legislature intended a private right of action for violation of the statute.[107] A negligence *per se* claim may also depend on whether "the plaintiff is within the class of persons whom the statute was intended to protect and if the harm was of the type that the enactment was intended to prevent."[108] Where the standard of care is contained in a regulation rather than a statute passed by a legislature, courts may be less willing to adopt the standard.[109] In addition, courts may construe a regulation as merely forbidding a result rather than establishing a duty of care.[110]

Even where negligence is established, damages will not be awarded without a proper showing of harm. For example, a district court applying Kentucky law directed a pretrial verdict against defendants for negligence or gross negligence because they allowed massive amounts of hazardous materials to escape into a drainage system and contaminate a nearby river.[111] However despite a finding of liability, when the plaintiffs could not establish a significant increased risk of harm from the contamination, the court granted defendants' motion to dismiss.[112]

Establishing a negligence claim may be preferable to intentional tort for several reasons. A wider variety of damages may be possible with negligence, such as pain and suffering, medical monitoring, and purely economic injuries.[113] Also, if the defendant is a government entity, sovereign immunity may only be waived for negligence.[114] Similarly, insurance coverage may only apply for negligence,[115] statute of limitations may be longer under negligence,[116] and it may be easier to apply agency law.[117]

e. Other Common Law Causes of Action

i. Strict Liability

Strict liability can be used to avoid the need to establish negligence or intent by basing liability on proof of harm caused. The Restatement (Second) of Torts makes strict liability applicable to "abnormally dangerous activities" based on six factors that weigh the activity's potential risk and harm against its appropriateness and value to the community, while considering the ease with which the risk can be eliminated.[118]

An abnormally dangerous condition or activity is one which is unduly dangerous or inappropriate to the place where it is maintained.[119] However, a court will not apply strict liability where it finds that the risk can be eliminated by the exercise of reasonable care.[120]

Strict liability has been applied to the storage of toxic or hazardous chemicals, but only in exceptional cases. For example, in *Branches v. Western Petroleum, Inc.*, the court held the defendant strictly liable for the harm resulting from ponding of toxic water in an area adjacent to plaintiff's wells.[121] Other courts have similarly found a polluter strictly liable for pollution of groundwater either because the creation of the pollution was an abnormally dangerous and inappropriate use of the land, or because the industrial polluter should assume the costs of pollution.[122] In contrast, in *Walker Drug Co., Inc. v. La Sal Oil Company*, the strict liability claim lost on summary judgment because defendant's operation of a service station that led to groundwater and soil contamination by gasoline was found not to be an abnormally dangerous activity.[123]

ii. Riparian Rights

Under common law, riparian rights are a real property right presumptively conveyed to owners of land adjacent to both navigable and non-navigable waterways.[124] Riparian owners have the right to continued purity of the water even if they hold no title to the land under the waterway.[125] Riparian rights can therefore expand a plaintiff's scope of coverage under nuisance law. For example, the Supreme Court of Mississippi held that if this right is substantially invaded by pollution from an upstream source, the riparian owner has a cause of action in private nuisance, regardless of motive.[126] The court further held that no balance test or affirmative defense would be applied.[127] Riparian rights could also support a finding that the plaintiff suffered special damages from a public nuisance.[128] For example, a public nuisance could also arise where pollution killed fish and thus interfered with a common right to fish in a public stream.[129]

f. Other Applications of Diminution in Value from Stigma

In addition to stigma's potential effect on the value of property in a tort setting, courts have also considered stigma effects in the context of real property tax assessment and for valuation in eminent domain or inverse condemnation. For example, stigma remaining after remediation has been listed as one of the "factors to be considered when valuing contaminated property for the purpose of tax assessment."[130] Similarly, a decrease in value due to the public's fear of electromagnetic emissions from power lines, even if the fear is unreasonable, was held to be a recoverable quantity in a condemnation proceeding.[131]

g. Limits from the Economic Loss Doctrine

The economic loss doctrine limits purely economic damages, such as lost profits or diminution in property value, under tort theories if the claim arises out of a commercial transaction.[132] The doctrine is predicated on maintaining a distinction between contact and tort law and applies where plaintiff is successor in interest to defendant in a commercial setting.[133] The law assumes that in a commercial transaction, the parties are free to negotiate the allocation of risk of purely economic loss.[134] However, the doctrine does not apply "where a product that one party has purchased from another party causes personal injury or property damage to property other than the product itself."[135]

Not all cases are easy to categorize for purposes of the economic loss doctrine. For instance, in *Ratheon Co. v. McGraw-Edison Co.*, a company purchased a parcel of land and later learned that the parcel was contaminated and that environmental regulations required the company to remove the contamination.[136] The court found that "the only reason the contamination had to be removed was because the law deems the same a threat to public health and the environment."[137] While only the product itself, the land, incurred costs for damages, the court viewed the situation as a hybrid between contract and tort law.[138] Absent the duty imposed by the law, the purchaser had no need to clean up the industrial site. Despite these acknowledgments, the court found that the claim essentially asserted that the land "was inferior and did not work for its intended purpose."[139] The court concluded that "absent some allegation that [defendant's] actions caused personal injury or harm to property other than the property sold by the defendant, the plaintiff does not have a tort law remedy against [the defendant]."[140] The court also found that the claim for stigma damages was within the scope of the economic loss doctrine.[141]

As the court in *Ratheon Co.* pointed out, claims within the economic loss doctrine's domain may survive if the defendant's actions caused personal injury or harm to other property. Meeting either of these tests may not be easy in contamination cases. "Mere risk of harm to the public or the environment . . . is not sufficient to transpose [plaintiff's] economic losses into tort damages." In addition, allegations of harm to property other than the property sold must meet the doctrine's strict definition of "other property." For example, in *Alden K. Mose and Woods Corp. Center v. Tedco Equities*,[142] the court rejected plaintiff's argument that either groundwater or property of an adjoining landowner satisfied the "other property damage" requirement.[143] The court stated that "a plaintiff must have sustained an injury to his or her person or his or her other property as a result of purchasing the allegedly defective property."[144] The neighbor's property failed because it

was not plaintiff's, and groundwater failed because it was not "other" property but rather an integral part of the plaintiff's property.[145] Thus, in real estate transactions, the "other property" test may best be met by harm to plaintiff's personal property.

IV. Proving Stigma Damages

As stated earlier, stigma damages are not a cause of action. Therefore, in order to prove stigma damages, plaintiffs must first prove a cause of action. A tortious act is where the actor either intentionally or negligently caused an invasion of a legally protected interest subjecting the actor to liability for the harm caused.[146] Thus, causation and harm are key elements that must be established by a plaintiff for any tort claim. This section first discusses the elements of causation and harm generally and later applies the causation and harm elements to a claim for stigma damages. In addition, the effect of statute of limitations is briefly addressed.

A. Causation

To establish causation,[147] a plaintiff must establish linkage between the defendant's acts and harm to the plaintiff.[148] Where on-site contamination is alleged, the plaintiff must establish that: (1) the defendant is the source of contamination on plaintiff's property and, (2) the contamination was of a magnitude sufficient to cause harm.[149] Where no on-site contamination is alleged, plaintiff must establish that defendant is the source of the off-site contamination and that this contamination was a substantial factor in the reduction in market value from stigma.[150]

Proving causation for property damage claims may be less complex than in personal injury cases,[151] but similar evidence, including expert testimony and scientific testing data, will likely be required.[152] Expert testimony must be specific and fact based. For example, in *Nalley*, the New York court ruled that an expert's affidavit was inadmissible because the affidavit failed to recite the factual basis used to support its conclusions, and so was vague and conclusory.[153] The court further stated that it was the plaintiff's burden in a nuisance claim "to produce competent and convincing proof, through qualified experts, demonstrating the immediate effects of property contamination and/or, at the very least, a reasonable probability and expectation of contamination in the future."[154]

Notably, even where government regulators have stepped in to enforce environmental laws on the defendant's property, additional proof of causation could be required. Causal bootstrapping from the enforcement action is not allowed where the threshold of proof for regulatory agencies is lower than the "more likely than not" standard of tort law.[155] In addition, the defendant may not be the only possible source of the contamination.[156]

Where at least the threat of actual contamination of plaintiff's property is required, courts may accept scientific models predicting movement of contaminants through groundwater or air plumes.[157] However, this can be an expensive option because the assumptions that these models are based upon should be case-specific. Information is needed regarding the amount of contaminant released and its likely path through the environment.[158] Unless the required data is public information, it will have to be obtained through discovery or scientific testing. The expense may be worth it where current on-site testing has failed to demonstrate contamination of plaintiff's property. For example, at least one court allowed a model as some evidence of past contamination sufficient to withstand summary judgment even though current testing found no existing contamination.[159]

Causation can also be challenging where there is a general background level of the substance in the area. In this situation, plaintiff must prove that the levels on their property are higher than the background levels.[160] If the levels are higher, and defendant is the only likely source, the court may infer that defendant caused the contamination.[161] The court may then require the defendant to produce evidence that the contamination was more likely to have come from another source. For example, in *Bradley v. Armstrong Rubber Co.*, the Fifth Circuit applied Mississippi law in a case alleging contamination of property from carbon black.[162] The plaintiff had established that the contaminant on their property was a substance produced by the defendant, and the court "allow[ed] the jury to infer causation from the closeness of the affected property to the source."[163] In addition, the court allowed the claim to survive summary judgment without expert testimony that the substance was carbon black because a reasonable person could decide from the physical properties whether the substance on the plaintiff's property was carbon black.[164]

B. Harm

The Restatement (Second) of Torts § 7(2) defines "harm" as the loss "of any kind" that results from any cause. Comments to the section include the impairment of pecuniary advantage within the definition.[165] To win stigma damages, plaintiff's may need to establish two levels of harm, harm sufficient to sustain the cause of action, and evidence of diminution in market value.[166] Courts have rejected the argument that diminished market value constitutes harm to property, but may "quantify the magnitude of the injury otherwise proven."[167] Methods of establishing diminution in value are discussed below in part "D."

In most contamination cases, harm to a property interest will be involved. To establish a common law cause of action of harm to the land, plaintiff may rely

on the same facts that establish liability, the extent of the defendant's invasion and the gravity of the interference.[168] For example, in nuisance a reasonableness test may be used for both liability and damages. Reasonableness depends upon the severity of the harm compared to its social value.[169] The amount of damages once liability is established depends on evidence that compares the interference to the plaintiff with the wider community interest.[170]

As discussed above, establishing harm to the land is not always necessary.[171] For example, a health hazard may be sufficient harm to sustain a cause of action in nuisance, without showing physical harm to the property.[172] In addition, the plaintiff is not required to prove actual physical harm in negligence.[173] In negligence, the scope of the harm includes whatever harms are rendered more likely by the actor's conduct.

When harm to the land is an element, the type of evidence needed may depend on additional factors such as whether the harm was considered tangible or intangible, or permanent or temporary. One court established a strict test for showing harm by intangibles: plaintiffs should establish: (1) intentional conduct, (2) invisibility of the object, and (3) that the object was an airborne substance, or traveled by water.[174] Some courts may require "real and substantial damage," others only proof of actual damage.[175] Courts may not interpret real and substantial to include something imperceptible to human senses.[176]

Under common law, injury to land or to the possessor's interest is classified as temporary or permanent.[177] Damages for permanent injuries are generally calculated as "the difference between the value of the land before the harm [or at the beginning of the statute of limitations period] and the value after the harm."[178] In *In Re Paoli*, the court accepted stigma damages based on a finding of two permanent injuries: (1) a continuing health hazard from PCBs remaining after remediation, and (2) the public's continued fear of the remaining PCBs.[179]

For temporary injury, the measure of damages is typically the cost of remediation.[180] Where the cost to remediate far exceeds the value of the land itself, some courts have applied an economic waste rationale and found the injury to be permanent.[181] Other courts have also found a "permanent injury," even for injury that is not physical, when remediation alone was inappropriate.[182] Remediation alone would be inappropriate whenever a "perfectly functioning market" fails and remediation fails to fully compensate the plaintiff.[183]

C. Statute of Limitations

In some states, there may be a benefit of pleading a continuous harm to stay within applicable statute of limitations.[184] For example, in *Walker Drug*, the appellate court held that if plaintiffs "could show a continuous trespass or nuisance, as opposed to permanent, the claims would not be time-barred but that recovery would be limited to damages sustained within the three-year period preceding the Walkers' filing of the complaint."[185] However, on remand the trial court excluded all evidence of stigma damages because it found that plaintiffs failed to show that the damages arose during the limitations period. The appellate court found this exclusion of testimony to be an abuse of discretion because the testimony "adequately stated facts from which the jury could have found causation."[186] The court found that, while the amount of stigma was not specific because the property was not for sale during the relevant time period, the evidence provided was "the best evidence available to [the plaintiff] under the circumstances."[187]

D. Diminution in Value Due to Stigma

In addition to establishing harm sufficient to sustain the cause of action as discussed above, the plaintiff must produce nonspeculative evidence of harm from the stigma caused by the defendant.[188] Stigma damages are measured as the diminution in market value of property caused by the alleged harm. Diminution in property value may mean either the reduction in the dollar amount based on market assessment or as it relates to obtaining favorable loan terms.[189]

To establish stigma damages in a tort action, plaintiff may be required to show (1) that the fear is reasonable,[190] (2) that the fear enters into the calculations of a substantial number of persons who deal in buying or selling of similar property, and (3) depreciation of market value because of such fear.[191] Considering society's limited understanding of many chemicals, including their effects on humans, it may be reasonable for prospective buyers to worry that off-site contamination may move on-site, or that there may be residual contamination remaining after attempted remediation. In addition, people may fear future liability from having residual contamination on-site or from off-site contamination spreading on-site.[192]

To meet the third element of the test above, diminution in fair market value can be established in at least three ways: (1) evidence of fair market value before and after the causative event, (2) evidence of cost of repair needed to return the value of the property to pre-event values, (3) a combination of the first two where repair will not restore the property to its full value before the event.[193] Stigma effects can be incorporated into the third measure, where stigma is the "remaining loss" in the property's value after remediation has been taken into account.[194] The plaintiff has the burden of offering sufficient evidence to clearly show how much of any

decline in market value is attributable to stigma.[195] The more widespread the fear is shared in the community, the more willing a court may be in awarding stigma damages.

The evidence that the market value of the property has been reduced must be in relation to comparable properties not affected by the harm.[196] This may be more difficult where the market is not active. When there are not sufficient sales of comparable contaminated or remediated properties, a contingent valuation method may be used. This contingent method is more controversial and involves surveys of market participants using hypothetical questions.[197]

Even though "[t]here is no longer much doubt that residual stigma can reduce the value of remediated property, at least temporarily,"[198] plaintiffs have lost when their "expert" failed to supply adequate proof. For example, in *Mercer*, plaintiff's expert failed to undertake a "proper survey" of comparable properties and included forced sales figures and sales between family members.[199] Another plaintiff failed to establish a reduction in marketability due to stigma when plaintiff's expert appraiser failed to consider information related to the spill in question or the testing of the property, or to take into account that the property might have rental value or other marketable uses.[200] Courts may also factor in the potential mitigating effects of "obtaining a release of liability from the appropriate environmental agency."[201]

In *Terra-Product, Inc.*, the court adopted the rule that stigma may be established by evidence of remaining loss after remediation, but found that the plaintiff failed to meet its burden of showing that remediation did not restore the property to its pre-event value even though the property sold at auction for considerably less than its appraised price.[202] The court found that there was no evidence in the record to support the "assertion that the auction price represents the value of the [site] after remediation."[203] Further, the court found that there was no reliable evidence of the fair market price prior to contamination because of a combined appraisal.[204]

In sum, in calculating stigma damages, diminution in value must incorporate more than the cost of remediating the contamination or reduction in value due to physical harm to the property. The plaintiff must also be compensated for "indefinitely lost market value due to the negative perceptions caused by temporary physical injuries."[205]

V. Future of Stigma Damages

No state has accepted stigma as a cause of action. While there is some state-to-state variation in the details of when stigma damages are allowed, states generally accept that stigma may affect property values. The details of when stigma damages have been allowed may reflect more on the types of complaints considered than any overall rejection of the stigma concept. The trend is for courts to allow claims for stigma damages where there has been on-site contamination and the plaintiff claims that stigma represents a permanent harm beyond the cost of remediation. Less frequently, claims for stigma damages without on-site contamination have been allowed where the plaintiff has otherwise successfully alleged the necessary elements of cause of action, such as nuisance or negligence. Without on-site contamination, the most promising prospects are claims where plaintiff alleges a continuing nuisance or fear from a threat to the health of themselves and their family.

States that have yet to consider claims for stigma damages in a tort case may have opened the door by allowing diminution in value of property due to stigma in other setting, including eminent domain or tax assessment. For example, the Third Circuit stated that "compensation in a tort case is generally at least as great as in a takings case."[206] In tort, compensation may be awarded for additional injuries not recognized in eminent domain, such as property losses and incidental injuries proximately caused by defendant's action.[207] The appropriate measure of damages in tort is whatever is necessary to fully compensate the plaintiff.[208]

In states which have yet to develop a rule, it may be worth arguing against a requirement of on-site contamination. The seminal cases from the Fifth and Third Circuits discussed above included the requirement of on-site physical contamination in response to the fears of polluting companies and insurance companies that insubstantial or peripheral claims would lead to limitless recoveries. Yet tort already has a check for insubstantial or peripheral claims. The requirement of proving causation acts as the limiting force. There is no need to rely on an arbitrary requirement of on-site contamination. In addition, a *per se* rule against purely economic harm in a tort setting is illogical where it is not based on a case-specific finding that the harm is too remote or unforeseeable. Stigma may be a credible injury.

In sum, a court's unwillingness to compensate unfounded fears should not stop tort law from compensating homeowners when they cannot sell their homes because of well-founded fears based on the unreasonable acts of the defendant. For example, the fears of prospective buyers are not unfounded when the city in which the plaintiff's home is located has just discovered that its drinking water reservoir is contaminated by MTBE and everyone will have to switch to bottled water for an indefinite period of time. Scientists have known for years that MTBE is contaminating the nation's groundwater and it is difficult for gas companies to argue that the harm was unforeseeable or speculative.[209]

Conclusion

A claim for stigma damages in environmental and toxic tort litigation is a viable option in virtually all states where: (1) on-site contamination has occurred; (2) plaintiff can otherwise establish a cause of action, and (3) plaintiff can provide sufficient, nonspeculative evidence of permanent diminution in value from stigma. Without on-site contamination the case either becomes much more difficult or is rejected out of hand, depending on the state's common law. Without the other two elements the case will fail.

Endnotes

1. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 Stan. L. Rev. 683, 761 (1999).
2. 645 N.Y.S.2d 687 (1996).
3. *See id.* at 687.
4. *See id. See also Nalley v. General Electric Co.*, 630 N.Y.S.2d 452 (Sup. Ct., Ren. Co. 1995) (finding no competent evidence of imminent threat of contamination of plaintiffs' properties and dismissed claims of private nuisance where claims were not based on interference from noxious odors); *Cottonaro v. Southtown Indus.*, 213 A.D.2d 993 (4th Dep't 1995) (including stigma damages in determining consequential damages in a negligence claim).
5. *See Nalley v. General Electric Co.*, 630 N.Y.S.2d 452 (Sup. Ct., Ren. Co. 1995). *See also Nashua Corp., v. Norton Co.*, 1997 WL 204904 (N.D.N.Y.) (allowing claim for diminished value due to stigma in addition to cost of repair).
6. *See Nashua Corp. v. Norton Co.*, 1997 WL 204904 (N.D.N.Y.) (stating that, because plaintiffs offered proof that the site could not be remediated to its original uncontaminated condition, that they could present evidence of diminution in value from stigma); *Scribner v. Summers*, 138 F.3d 471 (remanding for further evidence relating to diminution in value remaining after cleanup was complete, yet also stating that it was inclined to certify the issue of stigma damages to the Court of Appeals).
7. *Putnam v. State of New York*, 636 N.Y.S.2d 473, 475 (1996) (citing Navigation Law § 181 and applying strict liability to spill by oil spill caused by DOT where on-site contamination was remediated and tests showed no groundwater contamination).
8. *Scribner v. Summers*, 138 F.3d 471, 473 (1998) (noting that the court below did not address stigma nor rule on other issues related to calculating permanent damages in addition to cleanup costs where plaintiff brought common law claims of trespass and nuisance in addition to a CERCLA claim).
9. *See, e.g., Mehlenbacher v. Akzo Nobel Salt, Inc.*, 1999 WL 965379 (W.D.N.Y.) (discussing stigma damages as being the "diminution in property value attributable to the stigma that has allegedly attached itself to their property in the minds of the public. . . ."); *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 175 (5th Cir. 1997) (defining market stigma as "a reduction in market price caused by the public's fear of contaminated property, which lingers even after contamination has been remediated").
10. *See, e.g.*, Joseph C. Kearfott et al., *Toxic Tort Litigation at the Millennium*, SD67 ALI-ABA 35, 83 (1999) (calling stigma damages a "more recent 'novel' damage theory in environmental cases").
11. *See Lewis v. General Electric Co.*, 37 F. Supp. 2d 55, 57 (D.Mass. 1999).
12. *See id.* (listing eight counts including negligence, strict liability, nuisance and response costs under federal law).
13. *See id*.
14. *See id. But see Blackmore v. Massachusetts Turnpike Auth.*, 2000 WL 420844 (Mass. Super) (rejecting the reasoning of *Lewis* and stating the rule of Massachusetts as requiring physical damage to property before stigma damages could be recovered under tort law).
15. *See* Kuran & Sunstein, *supra* note 1, at 696-97 (citing a 1987 EPA study). *See also* Comprehensive Environmental Response, Compensation, and Liability, 42 U.S.C. §§ 9600 *et. seq*. (McKinney 1980).
16. *See* Kuran & Sunstein, *supra* note 1 at 685 (explaining "availability cascades" as taking mental shortcuts by relying on the beliefs of others either because the beliefs may be thought to be correct, or because they are viewed as the dominant belief which must be followed in order to fit in).
17. *See id*. at 691-97 (discussing Love Canal, noting that after initial findings of low levels of carcinogens in basements near the dump site, exhaustive studies in 1982 found no evidence of environmental contamination, yet the situation led to a multimillion dollar relocation and clean-up effort).
18. *See id.; see also Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 745 (W.D. Ky. 1998) (describing Kentucky law as allowing stigma damages for a depreciation in market value based on reasonable fear).
19. *See* William J. Stack & Terri Jacobsen, *Diminution in Property Value Arising from Stigma of Environmental Contamination: A Phantom Injury in Search of Actual Damages*, 11 Envtl. Claims J. 21 (1998) (discussing mechanisms such as bottom fishing, risk-based corrective action, indemnities, and insurance to address legitimate concerns in transactions for contaminated property); *see also* Richard A. Neustein & Randall Bell, *Diminishing Diminution: A Trend in Environmental Stigma*, 11 Envtl. Claims J. 47 (1998) (noting "risk-based remediation, completion bonds, comfort letters, and cost cap insurance).
20. *See, e.g., Damon v. Sun Co. Inc.*, 87 F.3d 1467, 1471 (1st Cir. 1996) (using the presence of MTBE as indication of when a petroleum spill could have occurred); *see also Kara Holding Corp., v. Getty Petroleum Marketing Inc.*, 67 F. Supp. 2d 302, 311 (S.D.N.Y. 1999) (using levels of MTBE and other chemicals to argue that a petroleum spill met the statutory requirement of an "imminent and substantial endangerment to health or the environment"). MTBE is by far the dominant fuel additive used for oxygenation and octane enhancement purposes. It has not been found to occur in nature and is derived from a chemical reaction. In 1996 the United States produced approximately 10.6 tons. Biodegradability of MTBE in the soil has been found to be limited. *See* International Programme on Chemical Safety (IPCS), Environmental Health Criteria: Methyl tertiary-butyl ether, (visited March 20, 2000) <<http://www.who.int/pcs/docs/ehc_206.htm>>.
21. *See* Stack & Jacobsen, *supra* note 19, at 32-36 (summarizing a selection of decisions from 1988 to 1997). At least 17 state courts, or states where state law was interpreted by a federal court (plus the District of Columbia), have had to address a claim for stigma damages.
22. *See infra* at notes 23, 24 and 28 and accompanying text (discussing the range of circumstances under which claims for stigma damages arise and the acceptance by courts).
23. *See, e.g.*, Stack & Jacobsen, *supra* note 19, at 32-40 (summarizing cases that have rejected or accepted stigma damages).
24. *See id.* at 34 (citing two cases, one from a California Court of Appeals and the other from a district court in New Jersey, that

rejected stigma damages even with impact to the property). More recent California and New Jersey cases, however, have not rejected stigma outright. *See Santa Fe Partnership v. Arco Products Co.*, 54 Cal. Rptr. 2d 214, 220 (1996) (holding that stigma damages are only recoverable for permanent, not temporary, trespass or nuisance).

25. *See* Stack & Jacobsen, *supra* note 19 at 22. *See also* E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort*, 15 U.C.L.A. J. Envtl. L & Pol'y 185 (1996-97); Anthony Vale & Joan Cline, *Stigma and Property Contamination—Damnum Absque Injuria*, 33 Tort & Ins. L. J. 835 (1998).

26. *See* Stack & Jacobsen, *supra* note 19 at 22 (arguing that stigma losses would be erased over time).

27. *See* Johnson, *supra* note 25, at 186 (calling awards of stigma damages a defiance of fundamental principles of common law because they are based on "conjecture and speculation").

28. *See, e.g.*, *Nat'l Tel. Coop. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 5 (1998) (noting that the property was placed under contract for a figure that "exceeds the value at which NTCA's own expert appraised the property in its uncontaminated state"). *See also Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1244 n.5 (1998) (reporting that plaintiff successfully offered a portion of one property alleged to be stigmatized as collateral for a loan to build an improvement on the property, which later sold at a price "substantially above its appraised value").

29. *See, e.g.*, *Mercer v. Rockwell Intern. Corp*, 24 F. Supp. 2d 735, 741 (noting that trespass protects against another's interference with exclusive possession (i.e., one's sense of ownership), but that not every touching of the land causes such interference) *See also In Re Paoli*, 35 F.3d. 717, 798, n.64 (3d Cir. 1994) (no cause of action for tortious interference with fair market value).

30. *See, e.g.*, Johnson, *supra* note 25 at 191, 230 (acknowledging that, similar to medical monitoring costs, factors in favor of stigma damages include (1) statute of limitations, (2) undisputed perception that risk can affect market values, and (3) intervening factors that may arise while plaintiff waits for harm to materialize). The author further noted that, unlike the health threat from exposure to hazardous substances, property may improve over time as the contamination dissipates.

31. Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 Cornell L. Rev. 469, 486 (1988) (discussing Calabresi's theories on tort law).

32. Historically, the common law rule required that legal acts by one landowner could only result in compensable injury to another where negligence or malice could be shown. Today society looks for ways to make companies internalize costs and not force others to pay for the companies' pollution, particularly where there is no argument for public necessity. *See, e.g.*, *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982) (citing *Atlas Chemical*, 514 S.W.2d 309). To maximize social utility, liability should be imposed on the polluter where the cost of an accident exceeds prevention.

33. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992) (J. Blackmun, dissenting). *See also* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621, 663 n. 187 (1998) (citing A. M. Honore's Oxford Essays in Jurisprudence).

34. *See supra*, note 30 and accompanying text (discussing the types of evidence used to establish stigma).

35. *See, e.g., Mehlenbacher v. Akzo Nobel Salt Co.*, 1999 WL 965379 (W.D.N.Y.) at 9 (stating that the "widely accepted if not universal view among the courts in this country is that causing the value of another's property to diminish is not in and of itself a basis for tort liability.").

36. *See infra* at 38 and 44 and accompanying text.

37. *See, e.g.*, *Mehlenbacher*, 1999 WL 965379 at 11-12 (noting the widely accepted view that mere stigma is not enough but rejecting a motion for summary judgment on a claim for stigma damages because limited discovery made it impossible to measure the final diminution in value, if any).

38. *See id.* at 15 (granting summary judgment for defendant where plaintiffs sought "only damages for the diminution in value of their property, not associated with any actual surface damage to their property"). *See also Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993)

39. *See Berry*, 989 F.2d at 829.n 7 (rejecting plaintiff's claim for stigma damages). *See also Berry v. Armstrong Rubber Co.*, 130 F.3d 168, 175 (reaffirming the *Berry* rule and allowing a claim for stigma damages where on-site contamination created a health hazard).

40. *In re Paoli R.R. PCB Litigation*, 35 F.3d 717, 798 n. 64 (3d Cir. 1994).

41. *See id*. 796-98 (reversing lower court's summary judgment for defendant and allowing the claim to go to the jury). *Cf. Bartleson v. United States*, 96 F.3d 1270, 1276 (allowing stigma damages where plaintiff's property was adjacent to a military shelling range that had a history of misfirings that would not likely be abated in the future, and that even if the misfirings stopped, the uncertainty of unexploded shells would not be abated).

42. *See In re Paoli R.R. PCB Litigation*, 35 F.3d at 797-98 (finding persuasive the reasoning from lower court cases that "permanent injury was meant to apply whenever repair costs would, for some reason, be an inappropriate measure or damages.") (citation omitted). *See also In re Paoli PCB Litigation*, 113 F.3d 444, 463 (1997) (explaining their prior rule in *In re Paoli II* as allowing recovery for stigma damages where plaintiffs could prove that "stigma associated with their land will remain in place after any physical damage to their land has been repaired").

43. *See, e.g.*, *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 175-76 (1997) (citing cases that reject stigma damages without showing of actual harm).

44. *See Desario v. Industrial Excess Landfill, Inc.*, 587 N.E.2d 454, 460-61 (Ohio 1991) (stating further that "a class action may be premised on the public's perception of contamination irrespective of actual land contamination"). *See also MHE Assoc. v. United Musical Instruments*, 1995 WL 1051651 (N.D. Ohio) at 3 (concluding that "Ohio courts permit claims for the loss in value based on public perception" if the interference is unreasonable and substantial).

45. *See Scheg v. Agway, Inc.*, 645 N.Y.S.2d 687 (4th Dep't 1996). However, the significance of this New York holding was later questioned in a opinion by a district court judge for the Western District of New York. *See Mehlenbacher v. Akzo Nobel Salt, Inc.*, 1999 WL 965379 (W.D.N.Y.) at 4-7 (rejecting *Scheg* and citing *Berry* and *In re Paoli R.R. PCB Litigation* as persuasive for holding that physical invasion, damage, or unreasonable interference with use and enjoyment is needed).

46. 972 P.2d 1238 (Utah 1998).

47. *Walker Drug Co. Inc. v. La Sal Oil Co.* 972 P.2d at 1246 n.10. *See also In re Tutu Wells Contamination Litigation v. Texaco Inc.*, 909 F. Supp. 991 (D.C. Vir. Is. 1995) (citing the Restatement for the rule that the harm in private nuisance does not have to be physical, just "significant"); *Cook v. Rockwell International Corp*, 147 F.D.R. 237, 244-45 (D.Colo. 1993).

48. *See, e.g.*, *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d. 735, 744-45 (discussing Kentucky law of trespass and nuisance and concluding that unlike the court's own understanding, Kentucky law would require a "touching of the land" under nuisance so that on-site contamination might be required under both trespass and nuisance). It should be noted that CERCLA does not exclude other remedies available to injured landowners. *See* 42 U.S.C. §§ 9652(d), 9614(a).

49. *See, e.g.*, *In re Burbank Envtl. Litig*. 42 F. Supp. 2d 976, 984-85 (C.D. CA, 1998) (noting that while plaintiffs alleged both permanent and continuing trespass and nuisance, they point to no evidence that meets the court's definition of permanent harm).

50. *See, e.g.*, *Bradley*, 130 F.3d at 170 (stating that plaintiffs brought claims in trespass, nuisance, strict liability, and negligence for alleged contamination).

51. *See infra* at 79, 80 and 81.

52. *See infra* at 56 and 57.

53. *See infra* at 79, 80 and 81.

54. *See infra* at (discussing stigma damages in tax and eminent domain cases).

55. *See infra* at 146.

56. *See, e.g.*, Restatement (Second) of Torts § 158 (defining intrusion as denoting "the fact that the possessor's interest in the exclusive possession of his land has been invaded without his consent"). In addition to invasion of the land, liability may arise if an actor causes a thing or a third person to remain or "fails to remove from the land a thing which he is under a duty to remove." *Id.*

57. *See* Restatement (Second) of Torts § 158 (discussing liability for intentional intrusions on land, including comment to 158(a) that intent to invade may be established when that the conduct was substantially certain to result in invasion).). *See also National Tel. Coop. Assn. v. Exxon Corp*., 38 F. Supp. 2d. 1, 12-13 (D.C. 1998) (explaining that specific intent is not needed, rather what is needed is a "volitional action to be present on the property," and that the trespasser "need not intend or expect the damaging consequences of his intrusion"); *Phillips v. Sun Oil Co*., 121 N.E.2d 249, 250-51 (N.Y. 1954) (concluding that the intrusion must at least be "the immediate or inevitable consequence of what [the actor] willfully does, or which he does so negligently as to amount to willfulness.").

58. *See* Restatement (Second) of Torts § 8(a).

59. *See, e.g.*, *Mercer v. Rockwell Intern. Corp*., 24 F. Supp. 2d 735, 741 (W.D. Ky. 1998) (citing to Prosser & Keeton for the rule that trespass "protects against another's interference with an owner's right to exclusive possession of the property" and to an Oregon case that looked for an intrusion that violated a legally protected interest).

60. *See* Restatement (Second) of Torts § 165 (discussing liability for intrusions resulting from reckless or negligent conduct and abnormally dangerous activities and the requirement of harm). *See also, Mercer,* 24 F. Supp. 2d at 740 (discussing the Restatement rule for negligent trespass because no Kentucky case could be found stating the elements).

61. *See In re Tutu Wells Contamination Litig*., 909 F. Supp. 991, 995 n.9 (Vir. Is. 1995) (rejecting as sufficient defendant's argument that trespass cannot be premised on the threat of future entry because no direct authority was cited). In *In re Tutu Wells Contamination Litig.* the court noted that because of the "convoluted" presentment by both sides of the issue of whether on-site contamination was involved, the trespass claim must go to trial. *See id.*

62. *See id.* (noting that invasion by a tangible object can often be assumed trespass). *See also Wilson v. Amoco Corp*., 33 F. Supp. 2d 969, 980 (D.C. WY 1998) (concluding that plaintiff must offer proof of some physical injury or harm to the property); *Mercer v. Rockwell Intern. Corp*., 24 F. Supp. 2d 735, 744 (W.D.Ky. 1998) (concluding that "[s]tigma damages are recoverable only in instances where there has been physical damage to the property . . . [to] prevent windfall recoveries for routine fluctuations in market price").

63. *See Accashian v. City of Danbury*, 1999 Conn. Super. LEXIS 36 at 22 (noting the rule that intent to invade "may be established by showing conduct of a kind substantial certain to result in invasion"). *See also* Restatement (Second) of Torts § 159 (discussing intrusions upon, beneath, and above the surface of the earth).

64. *Accashian v. City of Danbury*, 1999 Conn. Super. LEXIS at 22. (citing comments to Restatement (Second) of Torts § 158).

65. *See Adams v. Cleveland-Cliffs Iron Co*., 1999 Mich. App. LEXIS 202 at 12-17, 21 (discussing a claim for trespass for invasion by intangibles such as dust, noise, and vibrations).

66. *See Adams*, 1999 Mich. App. LEXIS 202 at 2, 24 (noting that claims of trespass and nuisance are "difficult to distinguish and include overlapping concepts.") (citation omitted).

67. *See Mercer v. Rockwell Inern. Corp*., 24 F. Supp. 2d 735, 741 (W.D.Ky. 1998) (applying trespass rules to a claim involving on-site contamination of PCBs and explaining that other courts have reasoned that harm is needed in intentional trespass with invisible objects because "an invisible object traveling indirectly cannot be proven without a showing of harm").

68. *See Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 178 (5th Cir. 1997) (remanding for a new trial "in which the plaintiffs may attempt to prove market stigma damages").

69. *See Adams* 1999 Mich. App. LEXIS at 12 (agreeing with Prosser and Keeton's reasoning that invasion by intangibles is better brought in private nuisance or negligence).

70. *See, e.g.*, *Walker Drug Co., Inc. v. La Sal Oil Co.*, 972 P.2d 1238, 1246 (Utah 1998) (noting the rule that diminished market value is a typical measure of damage for permanent trespass). *See also Mercer v. Rockwell Intern. Corp*., 24 F. Supp. 2d 735, 744 (W.D. Ky. 1998) (stating that "the issue of permanency is important because a plaintiff may recover only the difference in fair market value [including for stigma] if the injury is permanent"); *In re Burbank Envtl. Litig*., 42 F. Supp. 2d 976,. 984 (concluding that stigma damages are only recoverable for a permanent trespass and that plaintiff failed to meet that test because when abatement will be complete). *Cf. id.* (stating that trespass entitles plaintiff to "compensatory damages in amount that will compensate for all detriment proximately caused"). The Restatement (Second) of Torts § 929 discusses damages for harm to land from past invasions. Where total destruction of value has not occurred, plaintiff may be compensated for diminution in value or cost of remediation, lost use, and discomfort and annoyance to the occupant.

71. *See In re Paoli Railroad Yard PCB Litig*. 35 F.3d 717, 796 (3d Cir. 1994) (reasoning that diminution in value of the property compensates plaintiffs when repair costs are not sufficient). *See also Bartleson v. United States*, 96 F.3d 1270, 1276 (equating permanent with a condition of indefinite duration).

72. *See In re Paoli Railroad Yard PCB Litig*., 35 F.3d at 796 (concluding that plaintiffs "convincingly argue that the stigma associated with the prior presence of PCBs on their land constitutes permanent, irremediable damage to property under Pennsylvania case law. . . .").

73. *See id. See also Mercer*, 24 F. Supp. 2d 735 at 745) (concluding that plaintiffs may recover damages for diminution in value if they

can demonstrate that the contamination on their land constitutes a health hazard). However, the *Mercer* court distinguished recovery for diminution from stigma and diminution in value from permanent injury from a remaining health hazard. *See id* at 745 n.5. The Third Circuit has indicated that it is a jury question whether remediation of contamination to the level allowed by EPA remains a permanent injury. *See In re Paoli Railroad Yard PCB Litig*., 35 F.3d at 796.

74. *See, e.g., In re Burbank Envtl. Litig*., 42 F. Supp. 2d at 985 (granting defendant's motion to dismiss because mere allegations of permanence did not point to any harm that was not abatable according to the court).

75. *See, e.g., Black v. Coastal Oil New England, Inc.*, 699 N.E.2d 353, 356 (discussing the differences between permanent and temporary injury and the measure of recovery under each).

76. *See id.*, (citing a Massachusetts case that affirmed an award for remediation costs and stigma damages where defendant did not contest the potential duality of damages). The court also noted that "diminished market value serves to establish the limit of 'the expense of repairs. . . .'" *Id.*

77. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1246 (Ut. 1998).

78. *See Aas v. Superior Court of San Diego Ct*., 75 Cal Rptr. 581, 603 (CA 1998) *review granted*, *see also Hendler v. United States*, 38 Fed. Cl. 611, 175 (CA 1997)) (The measure of damages may include diminished market value of the property, property injury that resulted from the trespass, all detriment proximately caused, and consequential losses).

79. Restatement (Second) of Torts § 822. *See also Cook v. Rockwell Int'l Corp*., 181 F.R.D. 473, 485 (U.S.D.C. Col. 1998) (applying Colorado law).

80. Restatement (Second) of Torts § 822. *See also Nashua Corp. v. Norton Co*., 1997 WL 204904 (W.D.N.Y.) at 3 (stating the rule for private nuisance in New York required either an invasion that is either "(1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities. The court also explained that a subsequent owner cannot maintain a nuisance action against a prior owner). *See also Accashian* at 27 (stating that plaintiff must allege intent to create a nuisance, that the actor either knew of the danger, or was "reasonably certain of its occurrence").

81. Restatement (Second) of Torts § 827 (listing the factors involved in judging the gravity of harm, and explaining that the weight of the factors is case specific).

82. *See, e.g.,* Restatement (Second) of Torts § 829A (defining "unreasonable" as severe harm, greater than the landowner should bear without compensation). *See also* Restatement (Second) of Torts § 829 (noting an exception to the unreasonable requirement where defendant's sole purpose is to cause the nuisance-type harm).

83. *See, e.g., MHE Assoc. Ltd. v. United Musical Instruments, USA, Inc.*, 1995 WL 1051651 (N.D.Ohio) at 3 (stating that "[p]laintiffs do not need to show physical harm to the property nor physical discomfort"). *See also Nalley v. General Electric Co.*, 165 Misc. 2d 803, 807, 811 (defining nuisance to include an act which renders the property specially uncomfortable or inconvenient, including interference from noxious odors); *Cook*, 181 F.R.D. at 485.

84. Three cases have allowed nuisance claims for the loss in value based on public perception alone, two based on Ohio law and the third applying Colorado law. *See Desario v. Industrial Excess Lanfill, Inc.*, 587 N.E.2d 454, 461 (Ohio 1991) (including in the opinion's appendix the lower court's ruling that in Ohio plaintiff need not show a physical intrusion under nuisance and the "public's perception of contamination irrespective of actual land contamination" may be the premise of a class action); *Cook v. Rockwell Int'l Corp*., 147 F.D.R. 237, 244-45 (D.Colo. 1993); MHE, 1995 WL 1051651 at 3 (N.D. Ohio) (concluding that "Ohio courts permit claims for the loss in value based on public perception").

85. *See, e.g.,* Walker Drug 972 P.2d at 1244 (adopting the "majority" rule that "unsubstantiated fears of third persons regarding the contamination of an adjacent property are not the kind of 'substantial' and 'significant' interference with a landowner's use and enjoyment of his property so as to allow recovery for nuisance."). *See also National Telephone Cooperative Assn*., 38 F. Supp. 2d 1, 14 (D.C. 1998) (requiring accompanying personal or property damage, but noting a Maryland case accepting only an intangible tortious interference with use and enjoyment); *Mercer*, 24 F. Supp. 2d at 745 (interpreting Kentucky law as requiring physical damage to property to recover stigma damages. *But see Scheg v. Agway, Inc.*, 229 A.D.2d 963 (1996)).

86. See Restatement (Second) of Torts § 7(2) comment b (including the impairment of pecuniary advantage in the definition of harm. *See also Wilson* at 976; *In re Tutu Wells Contamination Litigation v. Texaco Inc.*, 909 F. Supp. 991, 998 n.11 (D.C. V.I. 1995) (comparing two possible lines of cases, one line that rejected basing nuisance on a finding of decreased market value alone without a separate showing of significant harm, and a second line that could allow a claim of nuisance on depressed property value alone if it resulted in a significant harm).

87. 37 F. Supp. 2d 55 (1999).

88. *Lewis*, 37 F. Supp. 2d at 61 (1999).

89. *Id.*

90. *Id. See also* MHE 1995 WL 1051651 at 3 (defining nuisance as anything that "endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.") (citation omitted). *But see Rudd*, 982 F. Supp. 355 at 370 (W.D.N.C. 1997) (requiring either an intentional or negligent act on defendant's part to meet elements of nuisance and trespass, rejecting a claim of "unknown migration of contaminants onto plaintiff's property").

91. *See Lewis*, 37 F. Supp. 2d at 61.

92. *See, e.g., Hammond v. City of Warner Robins*, 482 S.E.2d 422, 428 (1997).

93. *See id.* (concluding that a stigma damages may be awarded as special damages with a permanent nuisance, but only where a "minimal physical invasion through nuisance" is found, but that "[i]nability to obtain loans or refinancing the realty does not constitute a special damage"). *See also Rudd*, 982 F. Supp. 355 at 372 (noting that some courts defined permanent as present for an indefinite, but significant period, or that the damaging agent continued to present ongoing risk to the property).

94. *See Bartleson v. United States*, 96 F.3d 1270, 1274 (9th Cir. 1996) (stating the California rule, which also classifies nuisances as either permanent or continuing).

95. *Nashua Corp. v. Norton Co.,* 1997 WL 204904 (N.D.N.Y) at 4. (noting further that, in New York, release of hazardous waste into the environment is a *per se* public nuisance which can be based on threatened harm even before it leaves defendant's facility).

96. *See, e.g., Prescott v. Leaf River Forest Products*, 1999 Miss. LEXIS 253 at 22. *See also Accashian v. City of Danbury*, 1999 Conn. Super LEXIS 36 at 24 (setting forth the elements of proof for a public nuisance in Connecticut, including that the "condition complained of has a natural tendency to crate danger and inflict injury upon person and property").

97. *See Nashua Corp. v. Norton Co*., 1997 WL 204904 (W.D.N.Y.) at 5 (citing to the Supreme Court in *Ouellete v. International Paper Co.*,

479 U.S. 481 (1987)). *See also Nalley* at 812 (quoting the Court of Appeals rule that depreciation in the value of the premises can establish special damages in allowing a claim of depreciation from close proximity to a hazardous waste site).

98. *See Lewis*, 37 F. Supp. 2d at 61 (allowing a public nuisance claim where plaintiff alleged that defendant's contamination of the area constituted a threat to public health and the environmental and where plaintiff's alleged special damages in her inability to sell her property). *See also Prescott* 1999 Miss. LEXIS 253 at 22. *Cf. Nat'l Tel. Coop. Ass'n* at 13, (rejecting a claim damages for diminution in market value of plaintiff's property under public nuisance where plaintiff failed to identify a public harm).

99. *Accashian*, 1999 Conn. Super. LEXIS at 24-25 (noting that the municipality has acted intentionally if it knows that the condition complained of is "substantially certain" to result).

100. *Id.* at 26.

101. *See, e.g., Lewis*, 37 F. Supp. 2d at 59 (citing the Restatement (Second) of Torts § 766c and Massachusetts precedence).

102. *See Wilson v. Amoco Corp.*, 33 F. Supp. 2d at 978-79 (citing a Wyoming case that held that a duty exists where "the interest of the plaintiff which has suffered invasion [is] entitled to legal protection at the hands of the defendant").

103. *See Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 367 (M.S. N.C. 1997).

104. *See id. Cf. Nat. Tele. Coop Assn.*, 38 F. Supp. 2d at 7 (discussing a case where defendant was held strictly liable for a leak from a storage tank). A plaintiff need not present an expert witness to establish the applicable standard of care for acts that are not "beyond the ken of the average person." NTCA at 9 (citing a prior District of Columbia case) But where technical issues are related to some science, profession, or occupation, expert testimony is required to survive summary judgment. *See also* NTCA at 10-11 (noting that defendant's deviation from its own internal policy documents was not sufficient to establish standard of care).

105. *See Wilson*, 33 F. Supp. 2d at 979 (quoting the Ninth Circuit).

106. *Natl. Tele. Coop Assn.*, 38 F. Supp. 2d at 16.

107. *See, e.g., Rudd*, 982 F. Supp. at 365-66 (setting forth the elements necessary for a negligence per se claim and concluding that "North Carolina case law holds that, at least in some circumstances, regulations can be used to establish negligence per se"). *See also Accashian v. City of Dansbury*, 1999 Conn. Super, LEXIS 36 at 17 (stating the Connecticut rule that duty of care may derive from statute).

108. *Accashian*, 1999 Conn. Super. LEXIS 36 at 18. *See also Lewis*, 37 F. Supp. 2d at 59 (citing precedent in dismissing a claim based on violation of a state statute because "the Legislature did not intent to create a cause of action permitting recovery for economic loss not directly resulting from environmental damage.").

109. *See id.* (citing to the Restatement (Second) of Torts § 286 comment d. (1965)).

110. *See id.* at 366 (adding that it was also not clear that the legislature expected the regulations to "govern civil liability between private parties").

111. *See Mercer,* 24 F. Supp. 2d 735, 738 (W.D.KY 1998).

112. *See id.* at 738-39.

113. *See, e.g.,* NTCA at 16 (noting that Maryland courts permit recovery for purely economic injury, without physical impact, including lost profits).

114. *See, e.g., White v. Univ. of Idaho*, 768 P.2d 827 (Id. Ct App. 1989).

115. *See, e.g., American Nat'l Fire Insur. Co. v. Schuss*, 607 A.2d 418 (Conn 1002).

116. *See, e.g., Gouger v. Hardtke*, 482 N.W.2d 84 (Wisc. 1992).

117. *See, e.g.*, Restatement Second Agency § 245 & comment b.

118. *See* Restatement (Second) of Torts § 519 (setting forth the general principles of an abnormally dangerous activity). *See also Accashian v. City of Dansbury* 1999 Conn. Super. LEXIS 36 at 19 (defining ultrahazardous activity as that which "poses danger even if due care is exercised" and is a question of law).

119. *See id.*

120. *See, e.g., Grube v. Daun*, 570 N.W.2d 851, 856-57 (Wisc. 1997) (rejecting a claim in strict liability for an underground storage tank because any risk could be minimized by the exercise of reasonable care).

121. *See Branches v. Western Petroleum, Inc.* 657 P.2d 267 (Utah 1982).

122. *See id.* (citing cases from the 7th Circuit, several state courts in support of finding a polluter strictly liable for polluting groundwater). *See also Putnam v. State of New York*, 223 A.D.2d 872, 873 (3d Dep't 1996) (discussing statutory creation of strict liability for discharges of petroleum, creating a private right of action for all direct and indirect damages).

123. *See Walker Drug*, 972 P.2d 1238, 1242 (Utah 1998) (rejecting a claim in strict liability for an underground storage tank because any risk could be minimized by the exercise of reasonable care). *See also NTCA*, 38 F. Supp. 2d 1, 8 (noting that the overwhelming majority of courts have concluded that the mere burial of storage tanks beneath gas stations in commercial settings is not abnormally dangerous). *Cf. Brennan Constr. Co. v. Cumberland*, 29 App. D.C. 554, 562 (1907) (holding defendant strictly liable for leaking storage tank where the defendant "deliberately elected to store such a large quantity of such a substance in a location where, if it escaped, the greatest amount of damage would ensue. . . .").

124. *See, e.g.*, 3 Warren's Weed N.Y. Real Property Law, Land Under Water § 6.03(2).

125. *See, e.g., Prescott v. Leaf River Forest Products, Inc.*, 1999 Miss. LEXIS 253 at 24 (stating the rule in Mississippi).

126. *See id.*

127. *See id*. at 24-25 (explaining that where injury is established, the pollution "will not be justified by the importance of the business of the upper proprietor to wither the public or the wrongdoer, or by the fact that the later is conducting such business with care and in the only known practicable mode.").

128. *See, e.g.,* Restatement (Second) Torts § 821C (describing when a riparian proprietor suffers special harm that gives him standing to sue in public nuisance).

129. *See, e.g.,* Restatement (Second) Torts § 832 (describing how pollution of waters can meet the elements of nuisance).

130. *Commerce Holding Corp. v. Board of Assessors of the Town of Babylon*, 88 N.Y.2d 724 (1996).

131. *See Criscuola v. Power Authority of the State of New York*, 81 N.Y.2d 649 (1993) (allowing stigma in a situation where the fear would not persist after the cause was eliminated). *But see Accashian v. City of Danbury,* 1999 Conn. Super. LEXIS 36 at 30 (citing Connecticut precedence in granting defendant's motion to strike the inverse condemnation claim and noting that plaintiffs' allegations set forth conclusory claims that contamination and stigma deprived them of substantially all of the value of their property rather than meet the stricter test of complete diminution).

132. *See, e.g., Alden K. Mose and Woods Corporate Center, L.L.C. v. Tedco Equities*, 598 N.W.2d 594 (Wisc. 1999) (applying the economic loss doctrine in a situation involving the sale of contaminated real property); *IMC Chemicals, Inc. v. N. American Chemical Co.*, 30 F. Supp. 2d 1328, 1331 (D.C. Kan. 1998) (stating that "[e]ven

in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.").

133. *See id.*

134. *See, e.g., National Tel. Coop. Assn.*, 38 F. Supp. 2d 1, 14 (D.C. 1998) (discussing the economic loss doctrine).

135. *Ratheon Co. v. McGraw-Edison Co., Inc.*, 979 F. Supp. 858, 866 (E.D. Wisc. 1997).

136. *See Raytheon Co. v. McGraw-Edison Co., Inc.*, 979 F. Supp. 858 (E.D. Wisc. 1997) (holding that the economic loss doctrine barred claims of negligence, trespass, nuisance, and other common law causes of action, but that purchaser of the property stated a claim for breach of contract).

137. *Id.* at 867.

138. *See id.*

139. *See id.* at 868.

140. *Id.*

141. *See id.* at 868, n.11.

142. 598 N.W.2d 594 (Wisc. 1999) 228 Wis. 2d 848, 858 (Ct. App. 1999).

143. *Id.* at 858 n.5.

144. *Id.* (explaining further that groundwater contamination is property damage, but not to other property where the test applied is whether there is an "integral relationship" between the two "properties" in question).

145. *See id. See also Lewis*, 37 F. Supp. 2d at 59 (dismissing all negligence and strict liability counts based on the economic loss rule where the plaintiff did not allege physical damage to person or property).

146. *See* Restatement (Second) of Torts § 6 (defining tortious conduct).

147. *See, e.g.,* Restatement (Second) of Torts § 431 (defining legal cause of harm to another).

148. *See, e.g.,* Restatement (Second) of Torts § 822 comment e (defining legal cause as the cause-effect relationship between an act or omission and the consequences).

149. *See* S. Jasanoff, *Science at the Bar* 114 (1995) (distinguishing general causation, where the defendant could have caused the harm alleged, from specific causation where it can be shown that the defendant's acts did cause the harm). *See also* Restatement (Second) of Torts § 7 (defining "harm").

150. *See, e.g.*, Restatement (Second) of Torts § 834 comment f (explaining that defendant's act must have been a substantial factor in causing the harm where an intervening force is involved).

151. *See, e.g.*, Brennan, *supra* note 31 at 502-03 (describing four methods for identifying carcinogens or other toxic substances). *See also Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 715 (Tx. 1997) (noting the rule that plaintiff must also rule out all other possible causes of the damage).

152. *See Mercer*, 24 F. Supp. 2d 735 at 745-46 (comparing the proof needed to sustain claims for both medical monitoring and stigma, and concluding that even where the proof fails to sustain medical monitoring, a stigma claim could remain).

153. *See Nalley*, 630 N.Y.S.2d 452 (discussing an expert's affidavit that was used to review engineering studies regarding the migration of a toxic plume through the groundwater).

154. *Id.*

155. *Nat'l Bank of Commerce v. Assoc. Milk Producer*s, 22 F. Supp. 2d 942, 960 (E.D. Ark. 1998).

156. *See* Restatement (Second) of Torts § 834 comment d (stating that if only one of many, the defendant must be a substantial participant).

157. *See, e.g., O'Connor, v. Boeing North American, Inc.*, 184 F.R.D. 311, 321 (C.D Ca. 1998).

158. *See id.*

159. *See id.*

160. *See, e.g., Mercer,* 24 F. Supp. 2d at 751.

161. *See id*.

162. *See Bradley v. Armstrong Rubber Co.*, 130 F.3d 168 (reversing summary judgment for defendant on trespass and nuisance claims).

163. *Id.* at 173.

164. *See id*. (noting concession by the defendant's employees that the company produced carbon black and that it was possible for the wind to blow the substance onto the plaintiff's property). "Carbon black is a black fluffy, extremely fine, odourless powder." It is manufactured and used mainly in rubber goods and as a black pigment in printing. *See* Basic Information on Carbon Black, Canadian Centre for Occupational Health & Safety, <<http://www.msds.org/oshanswers/che..em_profiles/carbonbl/basic_cb.html>> (visited 4/27/00).

165. *See* Restatement (Second) Torts § (7)(2), comment b.

166. *See, e.g., Mercer,* 24 F. Supp. 2d at 739-40 (not intentional trespass).

167. *See id.* at 743, (citing *Bradley).*

168. *See Walker Drug*, 972 P.2d 1238 at 1244-45. According to the test from *In re Paoli*, for making out a claim without showing permanent physical damage to the land, the plaintiff should establish that: (1) the defendant caused some (temporary) physical damage to the plaintiff's property, (2) demonstrate that repair alone does not restore the full value of the property, (3) some ongoing risk the land exists. (*In re Paoli* at 798.)

169. *See Walker Drug*, 72 P.2d 1238 at 1244-45. According to the test from *In re Paoli*, for making out a claim without showing permanent physical damage to the land, the plaintiff should establish that: (1) the defendant caused some (temporary) physical damage to the plaintiff's property, (2) demonstrate that repair alone does not restore the full value of the property, (3) some ongoing risk the land exists. *See In re Paoli,* 35 F.3d 717 at 798.

170. *See Walker Drug*, 972 P.2d 1238 at 1245 (holding that bifurcation of liability and damages should not be used where the issues of damages and liability are not clearly separable, as in trespass and nuisance cases).

171. *See supra* note 167 and accompanying text.

172. *See, e.g., Mercer*, 24 F. Supp. 2d 735 at 743.

173. *See, e.g., National Tele. Coop. Assn.*, 38 F. Supp. 2d at 15-16.

174. *See Mercer*, 24 F. Supp. 2d 735 at 742.

175. *See id.*

176. *See id.*

177. *See, e.g., Terra-Products, Inc., v. Kraft General Foods, Inc.*, 653 N.E.2d 89, 91 (discussing permanent injury in detail). Stigma damages are generally a facet of permanent damages, a residual loss that would deprive the plaintiff of significant value if not compensated. *See Walker Drug*, 972 P.2d at 1246).

178. Restatement (Second) Torts § 929(1)(a) (1977). *Cf, Scribner v. Summers*, 138 F.3d 471, 472 (2d Cir. 1998) (stating the New York rule for "the proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration . . . [where it is] the defendant's burden to prove 'that a lesser amount . . . will sufficiently compensate for

the loss.' A plaintiff may also recover temporary damages, measured by the 'reduction of the rental or usable value of the property' during the pendency of the injury.").

179. *See In re Paoli*, 35 F.3d at 797-98.

180. *See, e.g., Terra-Products*, 653 N.E.2d at 92.

181. *See id.*

182. *See, e.g., In re Paoli,* 35 F.3d at 796-97. *See also Terra-Products*, 653 N.E.2d 89 at 93; *Scribner*, 138 F.3d at 473 (discussing a 1997 case that relied on a rule from a 1949 New York Appellate Division case stating that "[w]here the repairs do not restore the property to the condition before the accident, the difference in market value immediately before the accident and after the repairs have been made may be added to the cost of repairs"). In *Scribner*, the Second Circuit state that "[d]ue to the uncertainty of New York law on whether stigma damage can be recovered following an environmental cleanup, we would be inclined to certify the question to the New York Court of Appeals. . . ."

183. *Terra-Products*, 653 N.E.2d 89 at 93. *See also Nashua*, 1997 WL 204904 (W.D.N.Y.) at 6 (citing an exception to the New York general rule that allows damages for the difference in market value before the accident and after repairs in addition to the cost of repairs).

184. *See, e.g., Scheg v. Agway*, 229 A.D.2d 963 (N.Y. 1996) (explaining that for a continuing trespass or nuisance, New York had two applicable statute of limitations: One for "exposure" claims which begin to run from the date of discovery, and a second for non-exposure claims to property which under a continuing exception limits recovery to the three-year period prior to commencement of the action).

185. *Walker Drug*, 972 P.2d at 1242 (citing prior history).

186. *Id.* at 1247 (explaining that the testimony included at least inferences about why potential buyers during the limitations period would have known about the contamination and been concerned enough to have the knowledge affect the assessed value, including new regulations and requirement that real estate agents disclose contamination to prospective buyers).

187. *Id.* at 1248 (citing Utah precedence).

188. *See Mercer*, 24 F. Supp. 2d at 745 n.5 (noting that other courts have considered stigma a separate injury from actual physical damage to property). *See also Nashau* at 6 (discussing examples of cases where evidence of damages was found too speculative after a full trial in which there was an opportunity to weigh credibility).

189. *See MHE Assoc. v. United Musical Instruments Inc.*, 1995 WL 1051651 at 3, n.4.

190. A requirement of reasonableness may be contrasted with condemnation cases where a plaintiff may be compensated for diminution if value from high voltage lines regardless of whether any fear is reasonable. *See, e.g., Crisucuola v. Power Authority of N.Y.*, 621 N.E.2d 1195, 1196-97 (N.Y. 1993); *San Diego Gas & Electric Co. v. Daley*, 253 Cal. Rptr. 144, 151-53 (Ct. App. 1988). Private tort actions in contamination cases may be distinguished from condemnation cases where the "Fifth Amendment requires full compensation for governmental takings. . . ." Howard Ross Cabot, *Post-remediation 'Stigma' Damages Hinge on Hard Evidence of Residual Risk*, 8 No. 9 Inside Litig. 27 (1994).

191. *See Mercer,* 24 F. Supp. 2d at 745, n.5 (citing Kentucky precedence).

192. In contrast, in a commercial setting, some lenders may prefer a site that has been tested, remediated, and received government approval than an untested property, at least in an industrial setting. *See, e.g.,* James A. Chalmers & Jeffre B. Beatty, *Valuation of Property Affected by Contamination or Hazard, Environmental Risk Management: A Desk Reference* 11 (2d ed. 1994) (providing examples from their appraisal practices).

193. *See Terra-Products* 653 N.E.2d at 93. *See also* James R. Arnold *et al.*, *The Value of Contaminated Property,* CA 47 ALI-ABA 643 (1995) (listing four methods: (1) comparable sales/market data, (2) reduced income flow, (3) replacement cost, and (4) statistical approach using large-scale comparable sales approach).

194. *See Terra products* 653 N.E.2d at 93.

195. *Scribner*, 138 F.3d 471 at 474.

196. *See Putnam* 636 N.Y.S.2d at 475.

197. *See* Cabot, *supra* note 190 at 29 (describing the contingent valuation method and how to make it more reliable).

198. *See id.*

199. *See Mercer,* 24 F. Supp. 2d at 753-754.

200. *See Putnam*, 636 N.Y.S.2d at 475.

201. *See Scribner,* 138 F.3d 471 (2d 1998).

202. *See Terr-Products, Inc.*, 653 N.E.2d 89 at 94.

203. *See id.*

204. *See id.*

205. *See Walker Drug,* 972 P.2d at 1248, n.11.

206. *In re Paoli,* 35 F.3d at 797 n.62 (citing *In re Larsen*, 616 A.2d 529 (1992) (cert. denied). *See also Nashua Corp. v. Norton Co.*, 1997 WL 204904 (N.D.N.Y) at 6 (stating "[t]here is no sound analytical basis for defining diminished property value in the context of a nuisance action differently from the way it is defined in the takings context.").

207. *See In re Paoli*, 35 F.3d at 797 (explaining the differences between tort and takings actions).

208. *See id.* (noting the goal of compensation in tort).

209. In 1996, the USA "capacity for production" was approximately 10.6 million tons. International Programme on Chemical Safety (IPCS), Environmental Health Criteria 206: Methyl tertiary-butyl ether (visited March 20, 2000) <http://www.who.int/pcs/docs/ehc_206.htm>. The Clean Air Act did not mandate MTBE, but it "is currently by far the dominant [fuel additive]." *Id.* MTBE can persist in groundwater and can be measured in the ambient air (testing has found that exposure could be significant during refueling, but even riding in a car using fuel containing the additive may lead to exposure). *See id.*

Jacalyn Fleming tied for third place in the Environmental Law Section's Law Essay Contest. She is a 2001 graduate of Albany Law School.

THE MINEFIELD
Ethics for The Attorney/Mediator: Answering to Two Masters

By Marla B. Rubin

The Lawyer's Code of Professional Responsibility

Many attorneys branching out into the mediation field ask the same question: what should I do in the event of a conflict between my professional standards as a mediator and my professional obligations as an attorney? Some people say that as long as it is clear to the mediating parties that you are not there as anyone's attorney, there can be no such conflicts. Some wish it were that easy.[1]

Sources of Standards

Unlike other professions, such as the legal profession, the medical profession, and some aspects of the engineering profession, there are no generally accepted, enforceable standards of conduct for mediators. Often, what standards should be applied depends on the setting in which the mediation takes place.

For example, some court-related mediation services are governed by certain standards of conduct and competence. Some mediation takes place through an alternative dispute resolution organization, like JAMS, that may have its own set of standards. Professional organizations, like the Society of Professionals in Dispute Resolution (SPIDR), may have their own set of standards.[2] Mediation standards may also be set by the mediating parties and the mediator, in advance of the mediation, and in a contractual agreement.

There are also being propounded a number of sets of "model rules" for "third-party neutrals." Among them are the rules proposed by the American Bar Association Ethics 2000 Commission[3] and those proposed by the CPR Institute for Dispute Resolution in conjunction with Georgetown University Law School.[4]

Attorneys are governed by the Code of Professional Responsibility or the Rules of Professional Conduct of the state in which they are admitted. If they are practicing *pro hac vice* in another jurisdiction, they are bound by the ethical standards adopted there.[5] Attorneys are also bound by individual court rules of conduct, when applicable.

Comparison of Duties

The most striking contrast between the two undertakings is the duty of a mediator to maintain impartiality and the duty of an attorney to be a zealous advocate. The mediator's duties are to all the negotiating parties. The mediator must ensure that the parties understand the mediation process. The attorney, on the other hand, has an absolute duty of loyalty to the attorney's client only. The attorney has no duty to explain anything to the other party or parties, unless it would be to the attorney's client's advantage.

There are general similarities of some duties. If requested by the parties and under prescribed circumstances, the mediator must maintain confidentiality during the process. The mediator is expected to maintain the confidentiality of the proceedings once they have ended. The attorney's duty of confidentiality is not dictated by the client or the process, but by ethical standards, with few exceptions, varying among jurisdictions.[6]

The mediator is expected to disclose potential or actual conflicts of interest. The mediator must withdraw under certain circumstances. The attorney may not undertake or continue employment if an actual or potential conflict with the attorney's own interest, or the interests of a present or former client, may affect the attorney's professional judgment or duties to other clients. (Although, in some circumstances, these conflicts may be waived.)[7]

Interestingly, whether competency in the subject area of a mediation is required is debated by mediation professionals. Some standards maintain that the mediator must be sufficiently knowledgeable in the subject area of the mediation to guide it to its end.[8] Some mediators claim that the only competency required is in mediation skills. New York's Canon 6 requires that an attorney be competent to handle a legal matter.[9] On the other hand, an attorney not competent to handle a particular matter may still work on that matter if associated with competent counsel.[10]

In the jurisprudence of professional legal ethics, one issue that arises frequently is whether an attorney ever takes off the "attorney hat," particularly when offering personal services. For example, an attorney may own an interest in an insurance business, but may not use

the insurance business as a feeder for the legal business.[11] An attorney may be employed full-time as an accountant, but must ensure that the accounting client understands that only accounting services are being offered.[12] With respect to sanctions, an attorney convicted of a felony, whether related to law practice or not, is automatically disbarred.[13]

In mediation, the attorney may be called upon in a variety of circumstances to act like a lawyer. For example, a mediating party—or even the party's attorney—may ask the mediator for personal legal advice e.g., what action would you recommend if you were my attorney? One or both of the parties may ask you for the probable judicial interpretation of an issue before them.

It might be even more difficult to restrain from offering a legal opinion if counsel for one of the parties is mistaken or incompetent, to the detriment of the client. It might be difficult to maintain mediator impartiality when one of the mediating parties clearly is disadvantaged. The mediator's impartiality may also be difficult to maintain if one or both of the parties imparts "confidential" information to the mediator that appears to be necessary for a fair mediation.

The attorney's ethical duties may pull on the attorney/mediator if one or both of the parties are using the mediation to effect a criminal or fraudulent act. If a mediating party's attorney demonstrates conduct that requires reporting under DR 1-103, the attorney/mediator will be caught in conflict between the mediator's duty to keep the proceedings confidential and the attorney's duty to report. A similar conflict occurs if, during the mediation process, the mediator discovers that a fraud is being perpetrated on a tribunal. The attorney has a duty to report under DR 7-102(B)(2). The mediator has a duty to keep the proceedings confidential.

"Downstream" Conflicts

Finally, the attorney/mediator who also practices law, may have to deal with "downstream" conflicts—personal or client conflicts that arise during or after the mediation. These are more easily resolvable if the attorney/mediator is a sole practitioner. However, if the attorney/mediator is part of a law firm, the question of imputed disqualification under DR 5-105(D) arises. Again, there appears to be no consensus among attorney/mediators. Some defer to the attorney professional responsibility rules, while some maintain that their work as a mediator cannot create a conflict for attorneys in their firms. There is no debate about the personal conflict rules—both professions require examination of a matter for personal conflicts, and withdrawal in the event of actual or potential conflicts, even if the conflict does not become evident until after the proceeding or representation begins.

Conclusion

The best way to avoid the situation in which the mediating parties force an attorney/mediator into a conflict between professional standards is to ensure that the parties clearly understand the role of the mediator. This can be established contractually as well as orally. The attorney/mediator must emphasize that he or she does not represent the mediating parties and is not participating in the process as legal counsel.

The inevitable conflict between professional standards will require a careful weighing of the circumstances and the consequences of each choice. Violations of the Code of Professional Responsibility can bring severe sanctions, including loss of license. Presently, the mediation standards are hortatory. Nevertheless, circumstances may arise in which the attorney/mediator may have to risk losing the choice.

Endnotes

1. This column was inspired by the lively repartee encountered by the author as an instructor in a mediation CLE course at Pace University School of Law.
2. SPIDR's standards can be found at its Web page, www.spidr.org.
3. The ABA's model rules can be found at its Web page, www.aba.org.
4. A copy of this set of standards can be obtained from SPIDR.
5. *E.g.,* DR 1-105(A).
6. DR 4-101.
7. DR 5-105(C).
8. *E.g.,* ABA Model Standards of Conduct for Mediators, Paragraph IV.
9. DR 6-101(A).
10. DR 6-101(A)(1).
11. NYSBA Ethics Op. No 595; *and see* Ethics Ops. Nos. 619, 687, and 711.
12. NYSBA Ethics Op. No 494.
13. N.Y.S. Judiciary Law § 486.

Marla B. Rubin is a sole practitioner in Westchester County. 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.

Section News

Minority Fellowship Winners in Environmental Law Named

Five law students were awarded Minority Fellowships in Environmental Law at the January 2001 NYSBA Environmental Law Section meeting. The fellowship winners include:

- Amanda C. Gonzalez, who is a first year law student at Pace University School of Law. Ms. Gonzalez is a graduate of Middlebury College where she majored in environmental studies and U.S. political science. Prior to law school, she worked as a research associate at the Natural Resources Defense Council in New York City.
- Kimberlee D. McGrath, who is a first year law student at the University of Buffalo Law School and a member of the school's Native American Law Student Association. Ms. McGrath is a graduate of Bucknell University where she majored in biology and anthropology.
- Amelia E. Toledo, who is a second year law student at the City University of New York School of Law. Ms. Toledo is a graduate of Brown University where she majored in biomedical ethics. She has worked with the Asian American Legal Defense and Education Fund in New York City.
- Frederick Wen, who is a first year law student at Hofstra University School of Law and a member of the school's Asian and Pacific-American Law Students Association. Mr. Wen is a graduate of Rice University where he majored in cognitive science and psychology.
- Yelann L. Yu, who is a first year law student at the University of Buffalo Law School. Ms. Yu is a graduate of the University of Buffalo where she majored in environmental studies. She has worked at the Buffalo, New York office of the United States Fish and Wildlife Service.

The Minority Fellowship Program was established in 1992 as a joint project of the environmental law committees of the New York State Bar Association and the Association of the Bar of the City of New York. The Program seeks to provide opportunities to minority law students in the environmental legal field. Past fellowship winners have worked at the Region II Office of the U.S. Environmental Protection Agency, the New York State Department of Environmental Conservation, the New York State Department of Law, and such environmental organizations as the Environmental Defense Fund and the Natural Resources Defense Council.

Left to Right: Louis A. Alexander, Co-Chair, NYSBA Environmental Law Section Environmental Justice Committee; Fellowship Winners Yelann L. Yu, Frederick Wen and Amelia E. Toledo; Gail S. Port, NYSBA Environmental Law Section Chair.

Minority law students were eligible for fellowship consideration if they were either enrolled in a law school in New York State, or were permanent residents of New York State and were enrolled in a law school in the Northeast. This year's applications were reviewed by a panel of judges that included Attorneys Evan Van Hook, Michelle Alvarez, Arlene Yang, and Louis Alexander. The five fellowship winners will receive stipends to spend the summer of 2001 working in environmental positions with the government or with environmental interest organizations.

The Fellowship recipients will also participate in meetings of the New York State Bar Association and the Association of the City Bar of New York's environmental law committees during this year, and will be assigned a mentor from the environmental bar for the summer.

Louis A. Alexander

Travel with the Environmental Law Section

Advanced Environmental Law Section Workshop

September 7-8, 2001 • Paris, France

The Environmental Law Section, in cooperation with the Association of the Bar of the City of New York's International Environmental Law Committee and several European law associations is convening an advanced environmental law workshop in Paris, France on September 7-8, 2001.

The program will permit experienced practitioners the opportunity to engage in a workshop discussion of environmental issues of current importance. It is expected that the several panelists will introduce the discussion at each session and that all participants will contribute to the discussion. Participation of practitioners from European firms and governmental entities is expected to introduce into the discussion practices about which American practitioners may not be fully apprised. There will be further opportunities for lawyer interaction at cocktail parties and luncheons during the conference.

GREAT VENUE FOR MCLE!! Be sure to join your colleagues for credit on topics such as:

Regulation of Industry—different styles in the United States and Europe;

Global Warming;

Environmental Assessment—what have we learned;

Water—variety of approaches to standards and development;

Compliance—alternatives in the regulated community.

Hotel: A block of rooms has been reserved at the Hotel Du Louvre, a four star hotel at 1 pl Andre Malraux which is directly across Rue De Rivoli from the main entrance to the Louvre Museum. We have obtained a special group rate of approximately $255 per room, including tax, based upon the current exchange rate. A one-night non-refundable deposit is necessary to guarantee a room at the group rate. Payment by check or credit card is due by June 30, 2001. Kindly contact **Roslyn Sachs at Valerie Wilson Travel, 2700 Westchester Avenue, Purchase, New York 10577, Telephone: (914) 701-3230; Fax (914) 701-3299.**

Airline Reservations: We have been able to secure discounted airfare to Paris on both American Airlines and Air France. Contact **Roslyn Sachs at Valerie Wilson Travel, 2700 Westchester Avenue, Purchase, New York 10577, Telephone: (914) 701-3230; Fax: (914) 701-3299 for current fares.** All airfares are subject to change until booked.

Please Note: ***Due to the Fall fashion shows in Paris, both hotel and airline reservations are difficult to obtain and available space will fill quickly.***

Reserve Rooms and Flights Early!

Save the Dates!

Journey to the Galapagos Islands

March 8-14, 2002

The Environmental Law Section, at the request of a number of members, will be sponsoring a once-in-a-lifetime trip to the Galapagos Islands in March 2002.

Situated 600 miles off the coast of Ecuador, and on the Equator, the Galapagos Islands contains a rare ecosystem of unusual flora and fauna made famous by Charles Darwin. Join the Section on a four-night voyage through and upon these fascinating islands. Visit the wildlife habitants, breathtaking landscapes, colored sand beaches and beautiful lava formations.

The "Journey to the Galapagos" is organized by General Tour Expeditions, the largest tour operator in Latin America. The seven-day, six-night trip features four nights aboard the MV Galapagos Explorer II, the most deluxe ship cruising the Galapagos, with accommodations for 100 passengers in spacious all outside suites, with private bath, television, VCR, refrigerator and onboard telephone. Open seating for all meals with a variety of continental cuisine. On-board naturalists licensed by the National Park Service of the Galapagos will accompany our voyage and are assigned to raft landings in groups of no more than 15 persons.

The Section-sponsored trip for the all-inclusive price of approximately $2,850 includes the following:

* Round-trip airfare between New York and Guayaquil and between Guayaquil and the Galapagos Islands. All transfers;
* Accommodations two nights at the Deluxe Hilton Hotel in Guayaquil and four nights in outside suites on the Deluxe MV Galapagos Explorer, II;
* Meals: all breakfasts; all lunches and dinners aboard the ship;
* Nightly briefings by ship's staff of naturalists;
* Raft landings at at least four islands where you are bound to see giant tortoises, marine iguanas, flightless comorants, penguins, giant tortoises, sea lions and other living creatures;
* Tour of Charles Darwin Research Station on Santa Cruz Island;
* National Park entrance fee included;
* Optional two-night extension to Quito, the capital of Ecuador, at the Deluxe Hilton Colon and visiting Otavalo Indian Market ($379 extra).

Due to the small size of the cruise ship, (which is actually the largest ship cruising the Galapagos) the tour operator may only be able to confirm reservations for 20 Section members on a first come, first serve basis. The above rate is per person, double occupancy, based upon Classic Suites and includes all land, hotel, meal, cruise and air arrangements as set forth above. Not included is a $67 per person fuel surcharge, security U.S. Departure Tax, Custom and Federal Inspection Fees and Foreign Departure Taxes.

Reservations will be accepted through Valerie Wilson Travel Inc. of Purchase, New York on a first come, first serve basis. For further information and a detailed itinerary, contact Joel H. Sachs at (914) 946-4777, Ext. 318, Fax: (914) 946-6868, email: jsachs@kblaw.com.

In Memoriam

Carol S. Knox

On March 22, 2001, our colleague Carol S. Knox passed away after valiantly battling a brain tumor for over a year. Carol is survived by her husband Lee Wasserman; her two children, Rebecca, age nine, and Jacob, age four; her parents, William E. and Diana Knox; and her sister Virginia and brother David.

Carol was a long-standing and active member of our Environmental Law Section. Carol served as Co-Chair of the Environmental Law Section's Legislation Committee from the early to mid-1990s, and spearheaded that Committee's consideration of progressive environmental legislation. She worked successfully to obtain the endorsement of the Environmental Law Section's Executive Committee for citizen suit legislation on the state level.

Carol also served as Co-Chair of the Albany County Bar Association's Environmental Law Committee from 1995 to 1996 where she fostered links between private and public sector environmental attorneys.

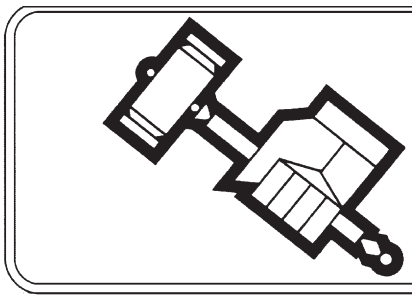
After graduating from law school in 1982, Carol moved to Albany. Her love for the Adirondack Mountains inspired her to come to the Capital District and make upstate New York her home.

Carol participated in many local civic organizations, including the New York Civil Liberties Union, the Albany County Land Conservancy and the Capital District Women's Bar Association. In 1984, she met her husband, Lee, at a New York Civil Liberties Union meeting for attorneys providing pro bono legal representation to individuals.

Carol worked for ten years in the New York Department of Law during the administration of Attorney General Robert Abrams. She initially represented the Attorney General before the State Legislature and Governor's Office, and then went on to serve as an environmental litigator in the Attorney General's Environmental Protection Bureau. Her governmental service was marked by integrity, a strong commitment to environmental protection, and boundless energy.

Carol was dedicated to family. While at the Attorney General's Office, she convinced that office to establish job-sharing arrangements that would permit attorneys to maintain a balance between their personal and professional lives.

Carol was an effective and committed advocate for environmental and social issues. She approached all things in life with a positive attitude and a generosity of spirit. Carol was a cherished friend and will be deeply missed by all who had the privilege of knowing her.



Administrative Decisions Update

CASE: *In re the Proposed Revocation of the tidal wetlands permit of JOHN PERRETTI (the "Permittee") pursuant to Articles 25 and 70 of the Environmental Conservation Law and Parts 621 and 661 of Title 6 of the New York Compilation of Codes, Rules and Regulations. (N.Y.C.R.R.).*

AUTHORITIES: 6 N.Y.C.R.R. § 621 (Revocation of Permit)

ECL Article 25 (Tidal Wetlands)

ECL Article 15 (Water Resources)

6 N.Y.C.R.R. § 661 (Tidal Wetlands)

DECISION: On January 17, 2001, the Commissioner of the New York State Department of Environmental Conservation (DEC), John Cahill (the "Commissioner"), concurred with the findings, recommendations and conclusions of Administrative Law Judge Helene G. Goldberger (the "ALJ") which held (1) that revocation of the Permittee's tidal wetlands permit was not appropriate as there was no reliable evidence to conclude that the Permittee submitted materially false and inaccurate information concerning water depth levels at the time of his application, and (2) that Permittee must remove the 18 ice pilings which were constructed at the site since the structures exceeded the scope of the project as submitted in the application of the Permittee.

A. Facts

Permittee owned property within designated tidal wetlands in Hampton Bays, New York. On August 4, 1997, En-Consultants, Inc., on behalf of Permittee, submitted an application to DEC to construct a fixed timber dock, and to install seven 9-inch mooring piles in Shinnecock Bay. The application reflected the water depth at low water to be 2.5 feet. The permit was issued on October 8, 1997 without DEC's staff performing any site inspections to verify information submitted by Permittee.

In September of 1997, Permittee submitted an application to modify the permit to construct a 40-foot wave break on the seaward end of the pier, reduce the number of mooring piles to four and to extend the dock. This request was denied by the DEC in a letter dated February 16, 1998. In the letter, DEC noted that the lengthening of the dock would have harmful results, and the wave break and piles would eventually reduce water depth.

Permittee then made a second request to modify the permit to allow construction of the wave break without extending the dock. In the second request, there was no notation of a low water depth of 2.5 feet. On April 15, 1998, the modification was granted. Permittee never requested permission to construct 18 ice pilings as part of the dock project in either the original permit application or in the subsequent applications to modify the permit.

On November 5, 1999, in response to complaints, DEC took measurements of the water depths at low tide. DEC found that the water adjacent to the pier was much less than what was reported in Permittee's 1997 application. At that time, the inspectors also noted the presence of the 18 ice pilings. Accordingly, the Department commenced a proceeding to revoke the tidal wetlands permit it issued to Permittee, and to remove the 18 ice pilings it discovered, based upon authority conveyed by 6 N.Y.C.R.R. §§ 621.14(a)(1) and (3).

B. Discussion

The findings of the ALJ, with which the Commissioner concurred, addressed the following two points.

1. Revocation of Permit Where Permittee Presents "Materially False or Inaccurate" Information in Application Pursuant to 6 N.Y.C.R.R. § 621.14(a)(1)

Pursuant to 6 N.Y.C.R.R. § 621.14(a)(1), a permit may be revoked when the application or its supporting materials, contain "materially false or inaccurate" information. The DEC asserted that the permit held by Permittee should be revoked on the basis that it contained false or inaccurate information concerning the water depths around the dock. The ALJ noted that, in 1997 at the time of the original application, Permittee did not take measurements to determine the water depths around the dock. Alternatively, Permittee relied on measurements taken by the Town of Southampton

Trustee indicating depths of about 2.5 feet. However, the ALJ declined to rely on the measurements of the Trustee since there were no reports indicating such water depth levels.

The ALJ referred to the letter of DEC, dated February 16, 1998, which clearly stated that the construction of the dock and the wave break would cause accretion at the site, reduce water depth and may require dredging. These facts, coupled with the fact that the water depths in Shinnecock Bay are generally shallow and vary depending upon location and tides, led the ALJ to conclude that it was impossible to determine the water levels at the time of Permittee's original application. Accordingly, the ALJ found no basis to revoke the permit since it was not possible to determine whether Permittee actually submitted "materially false or inaccurate" information concerning the water depth levels. The Commissioner concurred and further noted that the DEC should have verified the depths in the field at the time of the application.

2. Revocation of Permit Where Project Exceeds Scope of Project as in Permit Application Pursuant to 6 N.Y.C.R.R. § 621.14(a)(3)

In accordance with 6 N.Y.C.R.R. § 621.14(a)(3), a permit may be revoked if the project exceeds the scope described in the permit application. None of the permit applications indicated construction of 18 ice pilings. As a result, the Commissioner held that construction of the 18 pilings exceeded the scope of the permit application, and required that the pilings be removed as soon as possible in accordance with protocol and a schedule to be devised by the DEC.

C. Conclusion

The ALJ held and Commissioner concurred that the dock may remain given the lack of clear evidence to conclude that the water depths provided in the original permit application did not reflect those in existence at the time. Accordingly, there was not a sufficient basis for revocation of the permit. However, the Permittee did exceed the scope of the project as described in the permit application by installing 18 ice pilings. As such, the Commissioner required held that the Permittee remove the ice pilings.

Diane Jacques

* * *

CASE: *In re the Alleged Violation of Article 19 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations (N.Y.C.R.R.) of the State of New York by Myra Proffes d/b/a M&B Cleaners (Respondent).*

AUTHORITIES: ECL Article 19 (Air Pollution Control)

6 N.Y.C.R.R., § 232 (Dry Cleaning Industry Regulations)

DECISION: On February 7, 2001, New York State Department of Environmental Conservation (DEC) Commissioner John P. Cahill (the "Commissioner") considered the above-captioned matter and departed from the determination and recommendation of Administrative Law Judge Francis W. Serbent (the "ALJ"), finding that the penalties assessed by the ALJ were incorrectly calculated. The Commissioner moreover found the analysis and reasoning of the ALJ to be flawed and the ALJ's conclusions to be arbitrary. The ALJ recommended a $750 fine upon Respondent, and the Commissioner imposed a fine of $12,750 after further review.

A. Facts

Respondent owned and operated a dry cleaning facility in Freeport, New York which employed the use of one dry cleaning machine. Respondent failed to comport with applicable provisions of the ECL and the N.Y.C.R.R. Specifically, Respondent failed to: (1) have a general ventilation system installed on the dry cleaning machine; (2) maintain a weekly leak inspection checklist; (3) obtain a registration or permit for her facility; (4) retrofit her equipment with a ventilation control device; (5) maintain emergency preparedness checklists; (6) post required notices at her facility; (7) maintain an equipment maintenance log; (8) maintain operation and maintenance checklists; and (9) maintain a perchloroethylene usage log. Moreover, Respondent failed to appear at her pre-hearing conference in this above-captioned matter. Furthermore, Respondent failed to furnish an answer to the DEC within 20 days of receipt of the Notice of Hearing and Complaint. Respondent eventually went out of business within 15 months of DEC's initial inspection of her facility.

B. Discussion

1. Position of the DEC Staff

DEC staff inspected Respondent's site on two separate occasions. During each of the visits, the DEC staff noticed several procedural violations. Penalty guidance provides for a minimum fine of $250 per procedural violation per inspection. The DEC staff assessed fines upon Respondent for each of the separate procedural violations in the amount of $250 per violation. The DEC staff also assessed fines upon Respondent in the amount of $250 per month for her failure to install a vapor barrier on her dry cleaning equipment. Penalty guidance called for an assessment of $500 per month, in certain instances. Accordingly, a total penalty of $16,500 was recommended by the DEC staff.

2. Position of the ALJ

The ALJ initially found that the DEC staff did not demonstrate that Respondent was notified of new regulations pertaining to dry cleaning establishments enumerated at 6 N.Y.C.R.R. § 232. The ALJ concluded that while the DEC maintained a listing of dry cleaning businesses that were actually notified of the new regulations, Respondent's business was not on the list. The ALJ moreover found that Respondent attempted to comply with the ECL and the N.Y.C.R.R. even though her business failed a second inspection. The ALJ took into consideration Respondent's statements that she could not afford the required changes and Respondent's attempt to comply in a manner as best she could. Furthermore, the ALJ changed the recommended assessment of penalties promulgated by the DEC staff to a total amount of $750 based on a "fairness" standard.

3. Position of the Commissioner

The Commissioner held that the ALJ erroneously exceeded his authority and "unnecessarily delved into the appropriateness of the penalty sought by [the DEC] staff . . ." when he changed the assessment, even though the procedural requirements of the N.Y.C.R.R. were satisfied. The Commissioner moreover held that the purpose of the new regulations enumerated at 6 N.Y.C.R.R. § 232 is to better regulate the dry cleaning industry in New York State. The Commissioner referenced the deleterious effects of perchloroethylene, an integral ingredient to dry cleaning processes, as well as characterizing the historical development of 6 N.Y.C.R.R. § 232 as a cooperative discussion and interaction with the New York dry cleaning industry. Thus, the Commissioner found Respondent to be on notice of the new regulation.

The Commissioner furthermore found no excuse for Respondent's failure to answer or to appear at the hearing. While the Commissioner found the penalties recommended by the DEC staff to be in error and to be over-assessed, the Commissioner also found the ALJ's recommended assessment to be in error. Specifically, the Commissioner held that procedural violations found by the DEC staff at each inspection visit should have been bundled and fined appropriately at the level of $250 per inspection visit. The Commissioner also correctly assessed Respondent at total of $5,000 for the span of time the dry cleaning equipment at her business lacked a vapor barrier.

C. Conclusion

The Commissioner's penalty of $12,750 differed from the recommended penalty levies of $16,500 by the DEC staff and the penalty levy of $750 by the ALJ, and assessed Respondent a total civil penalty of $12,750 for violations of the ECL and the N.Y.C.R.R.

John Vero

* * *

CASE: *In re the Alleged Violations of Articles 19 and 71 of the Environmental Conservation Law of the State of New York and Parts 201 and 232 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by 111 Marinas Cleaners and Tailors (Respondent).*

AUTHORITIES: ECL Article 19 (Air Pollution Control)
ECL Article 71 (Enforcement)
6 N.Y.C.R.R. Part 201
6 N.Y.C.R.R. Part 232

DECISION: On February 7, 2001, the New York State Department of Environmental Conservation (DEC) Commissioner, John P. Cahill, issued an order adopting the findings, conclusions, and recommendations of ALJ Molly T. McBride holding that Respondent violated air pollution laws and regulations by operating a dry cleaning business without having a vapor barrier or exhaust system in place and by failing to comply with recordkeeping requirements related to the operation of the dry cleaning business.

A. Facts

Respondent, a New York corporation, owned and operated a dry cleaning business located in New York City. The dry cleaning business utilized a fourth generation perchloroethylene dry cleaning machine that was installed in 1994. Respondent's business was operated in a "mixed-use" facility as defined in 6 N.Y.C.R.R. §§ 232.2(b)(8) and 232.2(b)(42).

The DEC charged Respondent with six violations. First, 6 N.Y.C.R.R. § 232.5(a)(2)(iv) requires a vapor barrier and exhaust system be in place for fourth generation dry cleaning facilities that are co-located. DEC alleged that Respondent had been operating the dry cleaning facility in the absence of the required vapor barrier. In allegations two through five, DEC alleged Respondent violated regulations that require certain records regarding equipment inspection, use, maintenance, repair, replacement, and perc-contaminated wastewater treatment be maintained and available for DEC inspection.[1] Sixth, DEC alleged that Respondent violated 6 N.Y.C.R.R. § 232.12(g), which requires new facilities or facilities installing new equipment to submit a compliance report to certify compliance with Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) requirements. However, as no allegation was made in the DEC's supporting papers that new equipment was installed, the ALJ recommended

that the charge of violation of this section be dismissed without prejudice.

Respondent admitted to the first five allegations and thus the relevant facts were not in dispute. A motion for order without hearing was brought by DEC pursuant to 6 N.Y.C.R.R. § 622.12(d) and was granted as there were no facts in dispute.

B. Discussion

1. Liability

Although admitting the allegations regarding the lack of a vapor barrier and the failure to have the required records on site, Respondent did offer some affirmative defenses. Respondent provided two reasons why the failure to have a vapor barrier should be excused. First, Respondent claimed that a nearby dry cleaner also operated without a vapor barrier. Second, Respondent argued that it should not be required to incur the expense necessary to install a vapor barrier as its lease was set to expire in May, 2001 and had not yet been renewed. The ALJ rejected both of these arguments, finding that no exception from the requirement for a vapor barrier exists in the regulations.

Respondent also argued that the pertinent record-keeping requirements should not be applied in this case. The defense offered was, that even if such records were kept, they would not be legible as the Respondent's principal is a Russian immigrant and has poor English skills. This argument was also rejected by the ALJ as no exceptions in the regulations are applicable to the Respondent and thus the proffered defense was insufficient.

2. Penalty

ECL § 71-2103 provides for a civil penalty, in the case of a first violation, of not less than $250 and no more than $10,000 for each violation of Article 19 and the regulations promulgated thereto. It also provides for a penalty of no more than $10,000 for each day during which the violation continues. Five violations were sufficiently established. The regulations went into place on May 15, 1999 and 535 days had passed with respondent continuously failing to be in compliance with the regulations.

As a penalty, the ALJ recommended, and Commissioner Cahill ordered, $500 for each violation, for a total penalty of $2500. In addition, a penalty of $100 for each day in violation of the regulations was ordered, amounting to $53,500. In total, $56,000 in penalties was ordered. One half of the penalty, $28,000, would be due within 30 days of the Commissioner's Order, with the remaining half suspended provided that (i) Respondent either install the required vapor barrier and exhaust system within 30 days of the Commissioner's Order or cease and desist from operating the dry cleaning equipment; and (ii) Respondent immediately correct all other violations.

C. Conclusion

Based on the foregoing, the Commissioner adopted the ALJ's findings that Respondent violated the air pollution control laws and regulations by operating a dry cleaning business without a required vapor barrier and without following the required record keeping procedures. Initially, the Commissioner granted the DEC's motion for order without hearing. The Commissioner then sustained the charges against Respondent alleging violations of 6 N.Y.C.R.R. § 232 and assessed the penalty of $56,000; $28,000 payable within 30 days with the remainder suspended on the condition that Respondent either install the required vapor barrier and exhaust system within 30 days or cease and desist from operating the dry cleaning equipment, and that Respondent immediately correct all other violations. Should Respondent fail to comply with the Order, the suspended penalty would be due and owing within 60 days of service of the Order.

Scott Decker

* * *

CASE: *In re the Application for a Solid Waste Management Facility Permit; a Protection of Waters Permit; and a Water Quality Certification pursuant to Articles 27, 25, and 15 of the Environmental Conservation Law (ECL) and Parts 360, 661 and 608 of Title 6 of the New York Compilation of Codes, Rules and Regulations by American Marine Rail, LLC (AMR).*

AUTHORITIES: ECL Article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste)

ECL Article 25 (Tidal Wetlands)

ECL Article 15 (Water Resources)

6 N.Y.C.R.R. Part 360 (Solid Waste Management Facilities)

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

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

DECISION: On February 14, 2001, the Commissioner of the New York State Department of Environmental Conservation (DEC), John Cahill, issued an Interim Decision directing that emissions of particulate matter 2.5 microns in diameter or less (PM2.5) from the proposed facility need not be included in an Environmental Impact Statement (EIS) under the State Environmental Quality Review Act (SEQRA). The issues appealed

to the Commissioner primarily concerned the ALJ's rulings related to PM2.5, but also concerned (1) the ALJ's ruling as to the applicability of 6 N.Y.C.R.R. § 360-6 (permit requirements for liquid storage tanks) to solid waste transfer stations; and (2) the ALJ's ruling on yard hostler emissions and engine performance. The Commissioner's decision on each appealed issue is discussed below.

A. Facts

In December 1999, a notice of hearing and complete application of AMR to construct and operate a barge-to-rail solid waste transfer station was published. The proposed facility would be located in the Hunts Point section of the Bronx, New York and would handle up to 5,200 tons of waste per day that would be brought to the facility by covered barges from marine transfer stations in New York City. The waste from the barges would be brought into an enclosed unloading/compactor building where it would be removed from the barges, placed on a conveyor belt, and then compacted into closed containers. These closed containers of compacted waste would be driven out of the unloading/compactor building and carried to a rail yard by vehicles known as "yard hostlers." Upon arrival at the rail yard, a gantry crane would lift the containers from the yard hostlers on to flatbed railcars where the containers would be allowed to stand for up to 48 hours before being transported by rail to landfills in other states.

AMR's application sought various permits for the construction and operation of the facility, including, a Part 360 solid waste permit, a Part 661 tidal wetlands permit, a part 608 protection of waters permit and water quality certification in order to dredge certain waters. Additionally, AMR sought a determination of consistency by the co-lead agencies, the DEC and the New York City Department of Sanitation (NYCDOS), with the State's coastal zone policies and the New York City Waterfront Revitalization Program. AMR is also required to seek concurrence on a finding of coastal management consistency with the New York City Department of Planning and the New York State Department of State.

In December 1999, the co-lead agencies determined under SEQRA that the proposed project is an Unlisted Action that will not have a significant effect on the environment. Accordingly, the co-lead agencies found that no EIS was required. A subsequent review of this negative declaration at an issues conference held by ALJ Helene Goldberger revealed that DEC staff evaluated the proposed project relative to air quality impacts and determined that the applicable National Ambient Air Quality Standards (NAAQS) for the relevant criteria pollutants, including particulate matter 10 microns in diameter or less (PM10), were not exceeded.

Following the issues conference, on August 25, 2000, the ALJ issued a ruling that emissions of PM2.5 from the proposed facility should be analyzed as part of an EIS under SEQRA. On September 28, 2000, DEC staff rescinded the negative declaration for the AMR application and AMR agreed to move forward with the preparation of an EIS. As a result, the arguments on appeal that an EIS should not be required were rendered moot leaving the primary issue on appeal whether the ALJ erred in her findings related to PM2.5. These findings were appealed by the Applicant, DEC staff and NYCDOS.

DEC staff also appealed the ALJ's finding that solid waste transfer stations are subject to 6 N.Y.C.R.R. § 360-11 (permit requirements for solid waste transfer stations) and 6 N.Y.C.R.R. § 360-1 (general provisions for solid waste management facilities) only, and that Subpart 360-6 (permit requirements for liquid storage tanks) is inapplicable to transfer stations. Additionally, NYCDOS appealed from the ALJ's ruling on yard hostler emissions and engine performance holding that an EIS should include further information in addition to what has already been provided by AMR in this respect.

B. Discussion

1. PM2.5 Analysis

Pursuant to the federal Clean Air Act, the EPA is required to promulgate health-based NAAQS for certain air pollutants.[2] NAAQS have been established for six types of pollutants, including particulate matter (PM), a "generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes."[3] In 1997, the EPA promulgated final rules revising the NAAQS for PM targeting "fine" particulate measuring 2.5 microns or less in diameter.[4] However, in May 1999, the District of Columbia Circuit for the United States Court of Appeals invalidated the PM2.5 regulations finding that the EPA lacked a rational basis in promulgating NAAQS for PM2.5.[5]

In a more recent decision, one rendered after the ALJ's ruling at issue here, a New York Supreme Court held that an the absence of an analysis of the potential PM2.5 impacts of an interim waste report did not violate SEQRA.[6] The court concluded that NYCDOS appropriately limited its review to the EPA's PM10 guidelines and modeling and declined to impose a higher air quality standard, pursuant to SEQRA, than that currently enforceable under the Clean Air Act and NAAQS.[7]

In light of the facts of AMR's application and the applicable federal and state opinions discussed above, the Commissioner found no legal basis for requiring AMR to conduct a PM2.5 air quality review and further

found that DEC staff's review and analysis of the PM issues for the proposed project, including reliance on the PM10 standard, cannot be considered irrational or arbitrary. Additionally, the Commissioner noted "the present dearth of reliable baseline information and modeling techniques for PM2.5 further erodes the basis for directing a PM2.5 analysis for this project."[8]

2. Other Issues on Appeal

DEC staff appealed the ALJ's ruling that solid waste transfer stations are subject to the requirements of 6 N.Y.C.R.R. § 360-1 and 6 N.Y.C.R.R. § 360-11 only, and that 6 N.Y.C.R.R. § 360-6 regarding permit requirements for the storage of liquid waste is inapplicable to transfer stations. The Commissioner reversed the ALJ on this issue finding that, while certain solid waste management facilities, such as composting facilities and used oil facilities, are exempt from the requirements of Subpart 360-6, solid waste management facilities not expressly identified as exempt from the requirements, are subject to the provisions of Subpart 360-6. It should be noted, however, that based on the facts of this case, the ALJ's finding that the liquid storage tank provisions of Subpart 360-6 are not applicable to AMR's proposed project.

Additionally, NYCDOS appealed from the ALJ's ruling on yard hostler emissions and engine performance holding that an EIS should include further information in addition to what has already been provided by AMR in this regard. The Commissioner reversed the ALJ's ruling on this issue and found that AMR used reasonable assumptions in its modeling to evaluate the effect of yard hostler emissions. Further, the Commissioner determined that AMR's assumptions used to evaluate yard hostler emissions were not shown to be faulty and, AMR's use of its model and protocol regarding deterioration of engine performance was appropriate.

3. Conclusion

Based on the foregoing, the Commissioner reversed the ALJ's rulings concerning PM2.5. In so reversing, the Commissioner found that in view of the applicable law, the facts pertaining to AMR's application and the present state of PM2.5 research, an analysis of potential PM2.5 impacts from the proposed project need not be included in the EIS. Additionally, the Commissioner reversed the ALJ's finding that solid waste transfer stations are only subject to the requirements of 6 N.Y.C.R.R. § 360-1 and 6 N.Y.C.R.R. § 360-11 finding that the liquid storage tank permitting provisions of 6 N.Y.C.R.R. § 360-6 are applicable to solid waste transfer stations generally, but agreed with the ALJ that such permitting provisions are not applicable to AMR's proposed project. Finally, the Commissioner reversed the ALJ's ruling on yard hostler emissions and engine performance concluding that AMR used reasonable assumptions in its modeling to evaluate the effect of yard hostler emissions from this source and that such assumptions were not shown to be faulty.

Jason M. DiMarino

Endnotes

1. 6 N.Y.C.R.R. §§ 232.12(a)(1)-(7), 232.12(c)(1)-(4), 232.12(d), 232.5(g), 232.7(a), 232.8(b), (c).
2. *See* 42 U.S.C. § 7408-09.
3. Wooley, Clean Air Handbook at 1-14, n.15 (9th ed. 2000).
4. *See* 62 Fed. Reg. 38,652 (1997).
5. *See American Trucking Assoc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) *cert. granted*, 120 S.Ct. 2003 (2000).
6. *See Spitzer v. Farrell* (Sup. Ct., New York Co., Index No. 400365-00, Oct. 12, 2000).
7. *See id.*
8. *In re American Marine Rail, LLC*, DEC Commissioner's Interim Decision, February 14, 2001.

Recent Decisions in Environmental Law

Student Editor: Elizabeth Vail

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

Gould Inc. v. A&M Battery & Tire Service, 232 F.3d 162 (3d Cir. 2000)

Facts: Gould Inc., owner of a battery breaking facility, initiated a contribution action under § 113 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).[1] Appellants, Alexandria Scrap Corporation, R&R Salvage Company, Lake Recycling and American Scrap Company, appealed several District Court orders in favor of Gould. Appellants argued that the Superfund Recycling Equity Act[2] shielded them from liability to Gould. Gould countered that the Act did not apply to materials that contain non-recyclable components and could not be applied retroactively. Gould argued if it were applied retroactively, it would violate the Fifth Amendment's due process guarantee.

In early 1980, Gould acquired the Marjol Battery and Equipment Co. (Marjol), which operated its battery breaking facility from 1961 to 1980 in the Borough of Throop, Lackawana County, Pennsylvania. As early as the 1960s, the Pennsylvania Department of Environmental Resources (DER) received numerous complaints about emissions from the Marjol site. During the 1960s and 1970s, appellants sold spent lead-acid batteries manufactured with hard rubber casings to Marjol for recycling. "The lead-acid battery recycling facility is referred to as 'breaking' because it literally requires the recycler to break open the battery's outer casing and remove its lead and other recyclable components."[3] Battery casings made before the 1970s consisted of hard rubber and were not recyclable. Such casings were dumped in mining shafts located on Marjol's property or buried onsite, still contaminated with residual lead and other toxic-substances. In the late 1970s, battery manufacturers began producing lead-acid batteries with casings made out of polypropylene plastic rather than rubber. Ultimately Marjol, like other battery recyclers, found ways to recycle the plastic casings and other components from spent batteries. However, in the interim, Marjol stockpiled plastic casings contaminated with lead and other toxic substances on its property and made no effort to shield the environment from such substances. On March 7, 1967, DER's Bureau of Air Pollution Control entered an order requiring Marjol to eliminate emissions detectable beyond its property line. Marjol repeatedly violated the DER's order, refused to comply with a subsequent cease operations request, and ignored several remedial orders.

Gould Inc. of Ohio, aware of Marjol's history with the DER, agreed to acquire Marjol. The DER conducted investigations and issued an "end of the line" order. The order required Marjol to comply with the DER's remedial demands or cease operations. DER advised Gould that no further remediation of the Marjol site would be required, and no further enforcement actions would be taken, unless battery operations resumed. Gould initiated remedial measures to comply with the DER's demands. Other than some maintenance and "housekeeping" activities, Gould did not conduct any activities on the Marjol site. The Environmental Protection Agency (EPA) began investigations of the site, determining that "hazardous substances had been released, and there was an imminent and substantial endangerment to the public health, welfare and the environment."[4] Eventually, Gould had to shut down the plant.

In 1998, Gould entered into a Consent Agreement with the EPA under § 106(a) of CERCLA. The agreement required Gould to conduct site stabilization activities relating to lead and other hazardous substances at and around the Marjol site. In May 1990, Gould entered into a second consent order with both the EPA and the Pennsylvania DER. The second order the Resource Conservation and Recovery Act,[5] required Gould to perform a Facility Investigation and Corrective Measure study at the Marjol site. In December 1991, Gould initiated a civil action seeking cost recovery from approximately 240 Potentially Responsible Parties (PRPs) pursuant to § 107(a)(4)B of CERCLA, or alternatively contribution pursuant to § 113. Defendants moved for partial Summary Judgment, "arguing that because Gould was a responsible party who had entered into a consent agreement resolving its liability to the government, it was limited to asserting a contribution claim only."[6] The District Court agreed, and granted partial summary judgment in favor

of the defendants. The District Court allocated response costs among those defendants held liable to Gould for contribution and held that "Gould should bear 75% of the clean-up costs and that the Defendant's should bear the remaining 25%. The court apportioned the defendant's 25% share according to the amount of waste each contributed to the Marjol site."[7] Gould eventually settled with all the defendants with the exception of the four appellants. After appellants filed their notice of appeal, Congress passed, signed by the President, the Superfund Recycling Equity Act. Appellants pursued their claim that the Act shielded them from contribution liability to Gould.

Issue: Whether the post-judgment enactment of the Superfund Recycling Equity Act could be applied retroactively requiring reversal of judgments already entered.

Analysis: The United States Court of Appeals for the Third Circuit held that the act could be applied retroactively. The court vacated the judgment of the District Court and remanded the case to the District Court to determine whether Appellants satisfy the Act's requirements for exemption from liability. The court held "that the language of the Act reflects Congress' intent that the recycling exemption apply to pending private party actions, thus applying retroactively to, inter alia, judicial and administrative actions that were: (1) initiated prior to November 29, 1999; (2) initiated by a party other than the United States; and (3) still pending as of November 29, 1999."[8]

The court relied on the legislative history of the Act finding that relief could be granted for prospective and retroactive transactions. The legislative history illustrated that "Congress intends that any third party action or joinder of defendants brought by a private party action shall be considered a private action, regardless of whether or not the original lawsuit was brought by the United States."[9]

Gould argued that applying the Act retroactively would violate the Fifth Amendment's due process guarantee because it lacked rational basis. The Court found that in order to pass rational basis review, the Act needed to be justifiable on some rational basis. Further, it was not essential for Congress to communicate a specific rational basis. Instead, the burden fell on the one attacking the legislative makeup to negate every possible rational basis.

The court held that a distinction existed between privately and federally initiated actions that were rationally related to maintaining the public fisc. Such a distinction creates an environment where expenditures are not seen as wasted by exempting others from liability when the United States has already expended public funds to initiate a judicial action. By creating such fiscal protection, the Act rationally differentiated the United States, a non-culpable party, from a party who contributed to the contamination that was a part of his or her contribution claim. Therefore, the Act does not violate due process when applied retroactively and has a rational basis.

The court also considered whether the appellants were exempted from liability based on the Act. The Act provides that a person who arranged for recycling of recyclable material is exempt from CERCLA liability with regards to that material.[10] The Act defines "recyclable material" to include spent lead-acid batteries. The court interpreted the Act as defining the entire spent lead-acid battery as recyclable material. The parties disagreed on whether the spent lead-acid batteries at issue could have been a replacement or substitute for a virgin material as required by the fourth element of the act. Appellants argued that the requirements only applied to portions of the spent lead-acid battery that are recyclable whereas Gould asserted that the requirements applied to the whole battery and the Act did not alleviate liability unless every part of the battery at issue is recyclable. Gould argued that appellants were not covered by the Act because they sold Marjol spent lead-acid batteries made with non-recyclable rubber casings. The court found fault with Gould's argument. First, the court held that the Act does not make a distinction between spent lead-acid batteries that are entirely recyclable, and those that have non-recyclable components. This distinction is crucial when considering that one of the purposes of the Act is to remove disincentives and impediments to recycling. It was Congress's intent that the Act overrule court decisions that would hold bonafide sellers of recyclable materials liable under CERCLA. Secondly, the legislative history illustrated that Congress realized that not all components of "recyclable materials" are recyclable. Spent lead-acid batteries fall under this category. The legislative history on record states that "for a transaction to be deemed arranging for recycling, a substantial portion, but not all of the recyclable material [e.g., a spent lead-acid battery] must have been sold with the intention that the material would be used as a raw material, in place of a virgin material, in the manufacture of a new product."[11] The court interpreted the intent of Congress as having a party demonstrate the general use for which the material was utilized and not that the party show that a specific part was incorporated into a new product. The Act did not intend that coverage would only include 100% recyclable materials but the intent was to illustrate when a recycling activity would displace the use of virgin raw material.

Carol Notias '02

Endnotes

1. 42 U.S.C. § 9606.
2. Pub. L. No 106-113, 113 Stat, 1536 (November 29, 1999).

3. 232 F.3d at 166.
4. *Id.* at 167.
5. 42 U.S.C. § 6928(h).
6. 232 F.3d at 167.
7. *Id.* at 168.
8. *Id.* at 169, *relying on Morton Int'l. Inc. v. A.E. Staley Mfg. Co.*, 106 F. Supp. 2d 737, 752 (D.N.J. 2000).
9. 232 F.3d at 170.
10. *See* U.S.C. § 9627(a)(1).
11. 232 F.3d at 172.

* * *

Newell Recycling Company, Inc. v. United States Environmental Protection Agency, 231 F.3d 204 (5th Cir. 2000)

Facts: Newell Recycling Company, Inc. (Newell) appealed an administrative decision by the Environmental Protections Agency's (EPA) Environmental Appeals Board (EBA). Newell sold a recycling facility in Houston, Texas to Houston Metal Processing Company (HMPC) in 1982 after it had used the land as the site of a recycling business during the 1970s and early 1980s. As per the sale agreement, Newell assumed liability resulting from occurrences of contamination prior to the closing date of the sale. In 1985, while conducting cleanup for lead contamination, Newell found and disregarded polychlorinated biphenyls (PCB) contamination in the soil, violating Section 6(e) of the Toxic Substances Control Act (TSCA). Petitioner waited until 1995 when the EPA filed an administrative complaint against it before it properly disposed of the PCB contaminated soil pile. Following a $1.345 million fine by the EBA for the disposal violation, Newell Recycling Company, Inc. (Newell) appealed.

Issues:

1. Whether the decision by the EBA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"[1] and therefore subject to revision by the Circuit Court for the Fifth Circuit.
2. Whether the monetary judgment of $1.345 million violated either the Eight Amendment's Excessive Fines Clause, or the Due Process Clause.

Analysis: The court affirmed the EBA's judgment holding that their decision was not arbitrary or capricious and was in accordance with the law. Furthermore, the court held the monetary judgment rendered did not violate the Excessive Fines Clause of the Eighth Amendment.

In affirming the EAB's decision, the court rejected Newell's arguments that the EPA's improper disposal claim should be time-barred, that Newell did not contribute to the creation of the PCB-contaminated soil pile, and that even if Newell did contribute, Newell's subsequent involvement did not constitute an improper disposal of PCBs within the meaning of the TSCA.

Newell argued that the EPA's claim accrued when the PCBs were "taken out of service"[2] and that occurred sometime before 1990. Therefore, the EPA's cause of action accrued five years before they issued their TSCA complaint and was time-barred when they filed. However, the EBA agreed with the EPA's argument that Newell's TSCA violation of leaving the PCBs in the soil for ten years before correctly disposing of it was a "continuing" violation.[3] Therefore the cause of action did not accrue until the course of conduct complained of no longer continued, which in this case was when Newell properly disposed of the PCBs in accordance with the TSCA in 1995. The court ruled that the EBA was not violating the law in any way with its decision to allow the EPA's cause of action.

Newell's second argument was that they did not contribute to the creation of the PCB contaminated soil pile. However, the evidence reflected that although it did not create the pile (Newell's affiliate created it), Newell owned the land and assumed liability of the land after the sale to HMPC took place. Newell's president visited the contaminated site, Newell hired an environmental consultant, and Newell removed the contaminated soil out of its own expense. Therefore, the court affirmed the EBA's judgment that Newell contributed to the creation of the contaminated soil pile.

In affirming the EAB's conclusion, the Circuit Court also disagreed with Newell's contention that they did not improperly dispose of the PCBs under the TSCA because, Newell argued, disposal is a one-time event which occurs when the capacitors containing PCBs are buried and then release their contents. The courts agreed with the EAB's finding that to allow that interpretation, ". . . would subvert the environmental protections goals of the TSCA regime."[4] Thus, the EAB was correct in determining that Newell's involvement in the soil pile fit the Act's definition of 'disposal.' Newell's stockpiling of PCB contaminated soil was within the meaning of 'contain,' 'transport,' and 'confine' PCBs and leaving the waste there for years fits under the definition of disposal.[5]

The issues before the court were to decide if the judgment of the EAB was arbitrary, capricious, or an abuse of discretion, and whether the $1.345 million judgment violated either the Eighth Amendment or Due Process. The court held the judgment, although excessive, was legally sound, considering the gravity of the offense, the culpability of the company, the ability of the company to continue business after the fine and the history of the company. Due to the size of the soil pile (540

cubic feet) the violation was held to be major as the Penalty Policy defines violations involving more than 300 cubic feet of contaminated soil.[6] Furthermore, the company knew of the violation so the Presiding Officer denied mitigating Newell's penalty on culpability grounds. Newell did not submit sufficient documentation as to its ability to pay the fine, so under the Penalty Policy, the EPA assumed that absent documentation, the company could pay the fine with no problem.

The fine was well within the range set by the TSCA, so the court held that Newell's Eighth Amendment claim failed and the fine was not excessive. The court also denied Newell's Due Process claims that if Newell had a relevant matter and a genuine issue of material fact they could have asked for, and under the TSCA received, an evidentiary hearing. Newell argued that the absence of the hearing violated Newell's due process rights. However, the Presiding Officer and this court agreed that Newell did not raise any genuine issue of material fact, and therefore the judgment rendered did not violate Newell's right to Due Process.

John Di Bari '03

Endnotes

1. 5 U.S.C. § 706(2)(A).
2. 40 C.F.R. § 761.3.
3. *InterAmericas Investments, Ltd. v. Board of Governors of the Federal Reserve System*, 111 F.3d 376, 382 (5th Cir. 1997).
4. *Newell Recycling Co., Inc. v. United States Environmental Protection Agency*, 1999 EPA App. LEXIS 28 at 49, TSCA Appeal No. 97-7, slip op. at 29-30 (EAB Sept. 13, 1999).
5. *Id.* at 31.
6. *See* 231 F.3d 204, 208-09 (5th Cir. 2000) (citing Polychlorinated Biphenyls (PCB) Penalty Policy, 1990).

* * *

Olin Corporation v. Insurance Company of North America, 221 F.3d 307 (2d Cir. 2000)

Facts: Olin Corporation (Olin) acquired a fertilizer plant in 1950 in Williamston, North Carolina, producing dry and liquid pesticides on the site and releasing them into the soil. In 1968 Olin sold the property to Kerr-McGee Corporation, who sold it to Odis Whitaker in 1980. Whitaker used a former pesticide production warehouse as a dance hall from 1983 to 1985.

In 1985, in response to complaints of strong odors emanating from the site, the Environmental Protection Agency (EPA) investigated and found high concentrations of pesticides in the soil. The EPA issued an order requiring Olin to clean up and monitor the site pursuant to § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980. In response to a second EPA order, Olin began soil removal operations on the site. In 1990 the EPA issued a third order requiring further remedial work, during which time Olin and the EPA encountered a ditch and a large hole on the property with exceptionally high pesticide concentrations. They both required excavation to a depth below the water table and the water that entered the hole was contaminated. Olin collected the water in a 50,000-gallon pool and ran it through filters until the EPA was satisfied that the contamination level of the water was small enough to pose no threat. Further testing revealed pesticide contamination of surficial groundwater and the presence of pesticides were found in the Roanoke River.

Tests indicated that the concentrations in the river were not large enough to cause damage, thus Olin requested and the State agreed, that any remaining groundwater contamination would be remediated by "natural attenuation." To comply with the requirements of both the EPA and North Carolina, Olin spent $3.7 million on soil remediation and $362,000 on groundwater remediation.

Insurance Company of North America (INA) provided Olin with comprehensive general insurance from 1956 to 1973. The policy that ran through 1968 provided that INA would indemnify Olin for liability or damages arising from "injury to or destruction of property, including the loss of use thereof, caused by accident."[1] The policy defined "accident" to entail "a series of accidents arising out of one event." In 1969 the terms of the policy changed, substituting "accident" in the aforementioned clause with "occurrence." "Occurrence" was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of [Olin]."[2] The terms of both sets of policies oblige INA to provide indemnification to Olin for up to "$300,000 as the result of any one occurrence," with a $100,000 per occurrence deductible. After 1973, Olin obtained insurance from other companies with pollution exclusion clauses.

Olin brought this action appealing a judgment of the U.S. District Court for the Southern District of New York which held that the term "accident" did not only reach sudden or abrupt events; that liability incurred by Olin was a result of injury to soil, not groundwater; that the liability incurred by Olin should be prorated over the years where there was injury to the property; and the full policy deductible applied in each triggered policy year. INA cross-appealed asserting that the district court misinterpreted the term "accident" as used in their insurance policies.

Issue: Whether an insurance company has a duty to indemnify an insured for ongoing soil and groundwater pollution where the terms of the policy provide indemnification for accidents.

Analysis: The court affirmed the findings of the district court, which concluded that the term "accident" extended beyond sudden events. The court relied on the meaning of "accident" articulated by the New York Court of Appeals, as inclusive of unintentional damage regardless of when such an event occurred.[3] The court rejected contradictory definitions of the term established by lower New York rulings.

INA contended that the term "accident" did not include gradual damage; however, the court rejected this argument. The court relied on the language of the 1956 through 1968 policies where no indication existed differentiating the occurrence of gradual or sudden injury and dismissed subsequent polices as offering little help in understanding what prior policies intended. Furthermore, INA argued that the district court erred in excluding the testimony of a former INA underwriter as to the meaning of the terms in the policies. Again, the court dismissed this argument, stating that parole evidence is admissible in New York when the meaning of a written contract is ambiguous on its face. The court noted that even if the policy was ambiguous, the former underwriter was not in a position to clarify the language because he was not the underwriter on Olin's accounts when Olin purchased the policies.

The district court held, and the circuit court affirmed, that only two years of soil removal costs would be applicable as covered costs for groundwater remediation. In looking at the precise language of each of Olin's insurance policies, the court found that there was injury to the property from 1951 through 1985. The soil damage was unintentional, and therefore covered by an INA policy, only in 1956 and 1957. All groundwater damage was unintentional and Olin's liability for it was covered by INA policies of 1958 through 1985. Because the liability for property damage was not covered by INA between 1951 and 1955, nor between 1971 and 1985, only the 1956 through 1970 INA policies were triggered by the occurrence of the property damage.[4]

The court then considered what share of liability is attributable to each policy. To determine how to allocate coverage for a gradual injury that spans many years, the court looked first to the language of the insurance policies. Finding inconclusive language, the court then turned to public policy and equitable considerations, holding that these warranted using allocation and not the joint and several approach. Allocation was appropriate to prevent Olin from imposing liability on INA for injuries that occurred during those periods in which Olin was not paying for coverage. The court stated "To allow Olin to recover 'all sums' for liability incurred as a result of progressive damage to soil between 1956 and 1985, some $3.7 million, from a single policy for 1956 or 1957, the only two years which the damage was accidental (and therefore covered), would be to give Olin a windfall for uncovered damages. . . ."[5] Thus the court employed an appropriate distribution of liability to ensure fairness to the insurers and to uphold the meanings of their respective insurance policies.

Christina Manos '02

Endnotes

1. 221 F.3d at 313.
2. *Id.* at 314.
3. *McGroarty v. Great American Insurance Co.,* 36 N.Y.2d 358 (1975).
4. 221 F.3d at 322.
5. *Id.* at 324.

* * *

No Spray Coalition Inc. v. City of New York, 2000 U.S. Dist. LEXIS 13919

Facts: Plaintiffs, No Spray Coalition Inc. (NoSpray), environmental groups, and individuals, sought to enjoin defendants, New York City and its various agencies and officials, from continuing an insecticide spraying program to eradicate mosquitoes carrying the potentially fatal West Nile Virus. New York City implemented its spraying program with the approval of the Environmental Protection Agency (EPA), the Federal Center for Disease Control and the New York State Department of Health and Environmental Conservation. NoSpray alleged that New York's conduct violated the Clean Water Act (CWA),[1] the Resource Conservation and Recovery Act (RCRA),[2] and the State Environmental Quality Review Act (SEQRA).[3]

Issue: Whether in carrying out its insecticide spraying program, New York City had violated any federal statute that Congress had authorized the plaintiffs to sue to enforce.

Analysis: The court denied NoSpray's application for a preliminary injunction and dismissed all claims of NoSpray, except that NoSpray was entitled to attempt to show that defendants were spraying directly over navigable waters in violation of the CWA.

The court found that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[4] established the proper regulatory scheme governing the use of pesticide yet provided no private right of action for the plaintiffs. The plaintiffs' attempt to apply the CWA and the RCRA to the defendants' spraying was inconsistent with congressional intent and led to irrational results. Further the emergency exception to SEQRA excused the defendant's lack of an environmental impact statement.

To arrive at its holding, the court reviewed congressional intent. The court determined FIFRA was the most applicable statute but was not pursued by plaintiffs

because it does not provide for a private right of action. FIFRA implements a detailed statutory scheme to regulate pesticides, such as those being used by the City to eradicate mosquitoes. Under FIFRA, a pesticide can only be used if its Administrator determines that:

> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.[5]

The insecticides New York City used were approved by the EPA for both ground and aerial spraying. Recognizing that Congress chose to leave the enforcement of the FIFRA to government officials, plaintiffs attempted to turn alleged violation of FIFRA into a violation of CWA and RCRA. The Clean Water Act prohibits the "discharge of a pollutant from a point source into the waters of the United States."[6] Plaintiffs alleged that the spraying was a discharge; the trucks and helicopters represented point sources; and the pesticides were pollutants discharged into waters of the United States.

The court found that plaintiffs' arguments were unreasonable, conflicted with the regulatory scheme established by Congress and required a strained reading of the statute. Plaintiffs' statutory interpretation directly conflicted with the intent of Congress to leave the regulation of pesticide use to the EPA and the Attorney General under FIFRA. Thus, the approval for the spraying program by the latter organizations ensured that the defendants' actions were in the environment's best interest.

Plaintiff's contended that the drift of minuscule particles of the pesticide spray into the waters surrounding New York City violated the CWA. However, the EPA approved of spraying pesticides knowing that some of the chemicals would potentially drift into navigable waters. Furthermore the EPA has also acknowledged that the use of the pesticides for approved purposes does not necessarily require approval under the CWA.

The court strongly felt that allowing plaintiffs' cause of action under the CWA would frustrate the intent of Congress not to provide a private right of action for FIFRA violations. According to the court, the fact that FIFRA and CWA were both enacted during the same period in the late 1940s established that Congress' decision not to provide a private right of action under FIFRA was deliberate. Furthermore, Congress did not intend to permit private parties to circumvent that decision through an action under the CWA.

The Court also stated that where a pollutant might ultimately end up in navigable waters as it coursed through the environment, this did not make its use a violation of the CWA. "To so hold would bring within the purview of the CWA every emission, of smoke, exhaust fumes, or pesticides in New York City."[7] The trucks and helicopters used to spray insecticides discharged the insecticides into the atmosphere, not into navigable waters. Plaintiffs have cited no case that supports their strained reading of the language of the CWA and the cases upon which they relied involved deliberate discharges of a pollutant into navigable waters. The court did not consider the issue of whether the spraying of insecticides directly over the navigable waters would violate the CWA and gave plaintiffs the opportunity to conduct discovery on this issue. The court did note that if pilots were spraying over navigable water only to empty their tanks, then such conduct would potentially violate the CWA and RCRA.

The court also considered the plaintiffs' attempt to show that the mosquito spraying program violated and should be enjoined under RCRA. The RCRA provides for and injunction where: "The past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment. . . ."[8]

Plaintiffs asserted that once pesticides are sprayed, they become discarded solid wastes within the meaning of RCRA. The court held that pesticide that has been sprayed but has not reached the mosquitoes or their habitats is not "discarded material," and to hold in the opposite, would contort the statutory language and frustrate the intent of Congress. Therefore, the court dismissed the plaintiffs' claims under RCRA because the intended purpose of the spray is to drift through the air until coming to rest on the mosquitoes and their habitats. Thus, it cannot be stated that the insecticide is discarded when sprayed.

The final argument to enjoin the spraying program was based on New York City's failure to prepare an environmental impact statement as required by the State Environmental Quality Review (SEQRA). Under SEQRA, the City is required to prepare such a statement before engaging in any activity that may significantly effect the environment. However, an emergency exception allows actions to be taken without first preparing a statement when immediate action is necessary to preserve the life, health, property and natural resources of the population. The court found the West Nile Virus constituted such an emergency. Thus, there was no basis for granting the injunction under SEQRA and the plaintiffs' claim was dismissed.

Alex S. Cherny '03

Endnotes

1. 33 U.S.C.S. § 1251.
2. 42 U.S.C.S. § 6901.
3. N.Y. Envtl. Conserv. Law art. 8.
4. 7 U.S.C.S § 136.
5. 7 U.S.C.S. § 136-136(4).
6. 33 U.S.C.S. § 1251.
7. 2000 U.S. Dist. LEXIS 13919 at 10.
8. 42 U.S.C. § 6972(a).

* * *

Solid Waste Agency v. Army Corps. of Engineers, 121 S.Ct. 675 (2001)

Facts: Petitioner, Solid Waste Agency of Northern Cook County (SWANCC), is a consortium of 23 suburban Chicago cities and villages that challenged the United States Army Corps of Engineer's (Corps) jurisdiction over a former sand and gravel mine that petitioner plans to develop as a disposal site for baled non-hazardous solid waste. Since being abandoned, the 533-acre site has grown into a successional stage forest with the remnant excavation trenches becoming various permanent and seasonal ponds ranging from less than one-tenth of an acre to several acres and of varying depths.

SWANCC's purpose for purchasing the site was for the disposal of baled non-hazardous waste from the municipalities forming the consortium. Pursuant to applicable law, SWANCC filed for and received permits from the Cook County Board of Appeals, Illinois Environmental Protection Agency and the Illinois Department of Conservation. Additionally, SWANCC contacted the federal respondents, including the Corps, to determine if a federal landfill permit was required pursuant to § 404(a) of the Clean Water Act (CWA) which grants the Corps authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[1] As defined by the CWA "navigable waters" are "the waters of the United States, including the territorial seas."[2] Regulations issued by the Corps define "waters of the United States" as "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . ."[3]

Though the Corps initially concluded that it had no jurisdiction over the site due to the absence of wetlands or areas which support wetland vegetation, the Illinois Nature Preserves Commission informed the Corps that a number of migratory birds had been observed at the site. Having found approximately 121 species of birds at the site, including several known to depend on aquatic environments, the Corps, on November 16, 1987, formally determined that the ponds on site, while not wetlands, did qualify as "waters of the United States." The Corps determined this because the seasonal ponds were used as habitat by migratory birds that cross state lines allowing jurisdiction under subpart b of the Migratory Bird Rule.

In pertinent part, the Migratory Bird Rule, through which the Corps, in 1986, attempted to "clarify" the reach of its jurisdiction, provides that § 404(a) of the CWA extends to intrastate waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines. . . ."[4] After establishing their jurisdiction, the Corps refused to issue SWANCC a § 404(a) permit finding that SWANCC had not established that the proposal was the least damaging alternative for the disposal of non-hazardous solid waste. Further, the Corps found that the impact of the project upon the site was unmitigatable since the proposed landfill surface could not be redeveloped into a forested habitat in the future.

On writ of certiorari, SWANCC appealed the judgment of the United States Court of Appeals for the Seventh Circuit which upheld the Corps denial of SWANCC's request for a waste disposal permit and found that the Corps did have jurisdiction over the cite through the CWA.

Issues:

1. Whether the provisions of § 404(a) of the Clean Water Act may be extended by the Migratory Bird Rule to allow the United States Army Corps of Engineers to regulate wetlands that are isolated and not adjacent to open bodies of water.
2. If the answer to the first issue is in the affirmative, whether Congress can exercise such authority consistent with the Commerce Clause of the U.S. Constitution, Article I, § 8, cl.3.

Analysis: By a 5-4 decision the Court held that the provisions of § 404(a) of the CWA may not be construed to extend the Corps' jurisdiction over the wetlands on the project site as those wetlands were isolated and not adjacent to "waters of the United States." In so holding, the Court did not reach a decision with respect to the second issue regarding Congress' exercise of such authority. The Court further held that to permit respondents to claim jurisdiction over the ponds and mudflats at the site through the Migratory Bird Rule would significantly encroach upon the traditional and primary power States have over land and water use.

The Court began its analysis by distinguishing the instant case from *United States v. Riverside Bayview Homes, Inc.*[5] in which it held that the Corps had § 404(a) jurisdiction over wetlands that were adjacent to a navigable waterway even though the wetlands themselves were not navigable. The Court noted that its decision in *River-*

side Bayview Homes was based on Congress' "unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters."[6] The acquiescence of Congress to the Corps' regulation of such lands was seen by the Court as an indication that Congress wished to regulate wetlands "inseparably bound up with the 'waters' of the United States."[7] However, the Court noted that in neither *Riverside Bayview Homes,* nor in the instant case, did it wish to take the "next step" by holding that the jurisdiction of the Corps under § 404(a) extends to ponds that were not adjacent to open waters.

The Corps further attempted to demonstrate to the Court that an extension of its jurisdiction was in keeping with the intent of Congress. To support this contention respondents first cited a failed House bill[8] that, if passed, would have limited the Corps' jurisdiction by defining "navigable waters" more narrowly than in the Corps' 1977 regulations which had broadened the definition of "waters of the United States" considerably. The Corps argued that Congress, during its 1977 amendments to the CWA, was aware of this broadening of the definition. Had it passed, the aforementioned house bill would have curtailed the breadth of the definition of "waters of the United States." The Corps considered the failure of that bill as evidence of Congress's approval of the 1977 Corps' regulations. The Court's response to this argument was that, while it has recognized acquiescence by Congress of administrative interpretations in the past, it has exercised "extreme care" when doing so, particularly when such acquiescence is evidenced by a failed piece of legislation. Noting that a bill can be rejected for any number of reasons, the Court acknowledged that the Corps faced a difficult challenge in overcoming the plain text and import of § 404(a); a challenge that they failed to meet.

The Corps also cited the passage of § 404(g)(1) of the CWA which authorizes a State to apply to the Environmental Protection Agency for permission to

> administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvements as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) within its jurisdiction. . . .[9]

The Court found this evidence of a broadened definition of "navigable waters" to be unpersuasive. The Court noted that it had already conceded in *Riverside Bayview Homes* that Congress intended "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term"[10] and, as it stated in that case, it is unclear whether the broader term provided in § 404(g) is intended to apply to "water" elsewhere in the Act.

Finally, in consideration of the arguments above, the Corps contended that since Congress did not address the precise question of the scope of § 404(a), particularly as it relates to non-navigable, isolated, intrastate waters, the Court should give deference to the Migratory Bird Rule. In deciding not to give such deference, the Court noted its desire to avoid reaching constitutional issues "needlessly." If an administrative interpretation of a statute pushes the limit of Congress' power, the Court stated that it looks for a clear indication from Congress of its intention to do so. An interpretation of this statute as sought by the Corps would, in the Court's opinion, alter "the federal-state framework by permitting federal encroachment upon a traditional state power"[11] (i.e., regulation of land use). Without a clear intent on the part of Congress to push those limits, the Court was not willing to interpret a statute in such a way as to do just that. For these reasons, the Court reversed the holding of the Seventh Circuit and held for SWANCC.

The dissent emphasized that the purpose of the CWA is to be distinguished from that of earlier water protection legislation, which had concentrated on preserving the navigability of the nation's waters. The principle reason for this distinction is that the CWA is more concerned with preserving the quality of water bodies for the protection of aquatic life and wildlife, as well as recreational purposes, and less concerned with the navigability of the waters. The dissent suggested that broadening the term "navigable waters" in the CWA to include all "waters of the United States," as well as the exclusion of the word "navigable" in the definition, clearly demonstrated Congress's intent to broaden the authority of the Corps to include such water bodies as described in the instant case.

Christopher Lynch '03

Endnotes

1. 33 U.S.C. § 1344(a).
2. 33 U.S.C. § 1362(7).
3. 33 C.F.R. § 328.3(a)(3) (1999).
4. 51 Fed. Reg. 41217.
5. 474 U.S. 121 (1985).
6. *Id.* at 135-39.
7. *Id.* at 134.
8. 123 Cong. Rec. 10420, 10434 (1977).
9. 33 U.S.C. § 1344(g)(1).
10. 474 U.S. at 133.
11. 121 U.S. at 683.

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