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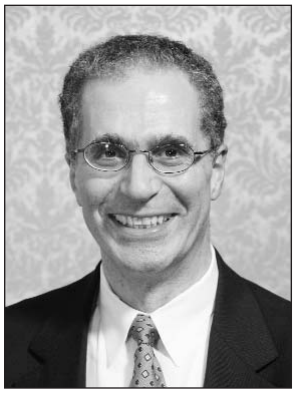
A Message from the Chair



It is not for want of imagination that so many new Chairs of this Section begin their first column by declaring that they are honored to be the Chair of the Environmental Law Section. It *is* a great honor, but even more than that, I am looking forward to serving as the Section's Chair because it will be a great *pleasure*. In no other part of my professional life have I found a group of such intelligent but also incredibly congenial, thoughtful lawyers, utterly respectful of each other's views on all subjects within the intellectual and moral framework of an area of endeavor—environmental law—that I find so deeply satisfying as my life's work. The Section has given me this great gift.

I want to acknowledge, at the outset, an immense debt to the departing Chair, my dear friend and colleague of many years, John Greenthal. He not only embodies, but also epitomizes the professional and personal virtues to which I refer. As Section Chair, John set a standard of strong leadership in making decisions and consensus building, always with great deference to the views of others. It's an extraordinary leadership talent; I hope I've learned enough from him to maintain and encourage a continuation of the enormous dedication and positive tone of my fellow officers and other Section members in this year to come. I am lucky enough, as well, to have inherited a veritable "dream team" of fellow officers—any of you who have worked on Committee or other assignments with Ginny Robbins, Miriam Villani, Walter Mugdan or Lou Alexander know exactly what I mean. Even the Yankees haven't known such depth.

Let me give one example of what it's like to work with other Section members on a project: starting about two years ago, Gail Port (then Chair) encouraged the Executive Committee (EC) to discuss what worked and what didn't work in Section activities. We were concerned about the plateau we seemed to have reached in the 1300-1400-member range, after a somewhat larger membership in the salad days of environmental law, in the early-mid 1990s. The EC discussed a full-blown retreat to look at everything about the Section, to soul search and examine in detail the relevancy of the Section's work to its members' needs. (I was a proponent of this approach.) But for most, it seemed too large (or too amorphous) a topic or project to get our arms around. Gail suggested that we focus on the heart of Section work—the Committee structure—because we all agreed that while the best of the Committees do great work that contribute to the professional dialogue about environmental law issues, the Section had some inactive Committees. Gail Port wisely appointed Ginny Robbins to head the "Committee on Committees."

Inside

Ginny did an incredible job of preparing a first meeting of this Committee on the Thursday evening before the annual meeting in January 2001. We reviewed a large number of committees and discussed those activities that separated the great ones from the others; and we discussed what, in the volunteer context of a Bar Association, we could ask people to "commit" to as Committee Chairs to ensure a minimal (and higher) degree of professional functioning. This would provide prospective Committee Chairs with a blueprint of minimal expectations that the officers had of them. The very talented Phil Dixon agreed at that meeting to prepare a draft of what these requirements would look like. Several months later, parallel with the work of this Committee, a Section By-Laws Committee was formed to review and, as needed, to revise our Section's by-laws, which had not undergone revision since they were

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first adopted in 1985. Led by our dynamic, then-outgoing Chair, Gail Port, and one of the hardest working and versatile members of the Section, Lou Alexander, this Committee prepared significantly revised by-laws designed to renew and clarify our sense of purpose and mission. These two committees met to consider how to dovetail their efforts at the Section's first retreat, in November 2001. The result was a Committee Chair manual that all EC members have. We even prepared a one-page summary for prospective Chairs, which set out the bare bones of our expectations, so that prior to a real commitment to the Section, they wouldn't have to review the entire Manual. They could read that one-pager and consider how to fulfill the requirements we were now placing on Committees for the first time, or decide the Section was asking too much of them.

We've just begun to implement this new plan, but the real story is the tremendous teamwork and dedication—we worked that Friday night in November 2001 until about 10:30 p.m. and all day Saturday, without any flagging of attention or energy! The State Bar Association staff were very impressed with the result—the Manual—but what they don't know is the inspiring process that led to this product. A second Section retreat was held in March. The outcomes of that meeting provide a platform for my areas of focus as Chair, or, in the rhetoric of our time, my "agenda," as described below.

First, I want to see the renewed Committee structure really work, so that many more members find enhancement of their professional development beyond what client work can bring them. Many new Committee Chairs have been appointed in recent months, with a special emphasis on bringing new "blood"—whether young in age or young in Section experience—to these positions.

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Second, we need to and can increase the size of Section membership. I want, especially, to build on John's efforts to increase the diversity of the Section; this includes more government and not-for-profit members, women and minorities. The Minority Student Fellowship Committee is making a particular effort to track the careers of past Fellowship winners to determine where our efforts have paid off with increased minority representation in the environmental bar. There are several hundred members of the State Bar Association whose membership forms indicate that environmental law is at least some part of their law practice, but who do not belong to the Section. Since before becoming an officer (when I co-chaired that committee), and continuing through the present, I have worked with our talented Membership Committee (Eric Most and Dave Everett, Co-chairs) to increase membership; this includes

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encouraging people to join, and then making them feel welcome and valued the moment they join the Section. That means getting them involved in a Committee or other Section project right away. (Quite intentionally, you see, all these concurrent efforts are connected!) It also means that I would like seasoned Section members to make a special effort at Section gatherings to get to know new members, as much as they do to catch up with old friends.

Third, terribly important though rather more mundane than the above issues: we need to pay more attention to budgeting. The Section has for the last few years been spending more than it has earned in revenue, though all for good purposes, *e.g.*, to support the large number of government and not-for-profit speakers at our Fall meeting last year, and to pay for the increased number of conference

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From the Editor

With this issue, we welcome Jim Periconi to the Chairmanship. As long as I've known Jim, he has been passionate about that which interests him and committed to Section activities. In this, his enthusiasms run the professional, but also the academic, gamut, an eclecticism that seems to find a home in the Environmental Law Section. More recently, he has been an ardent proponent of expanding our scope of activities as well as our membership. In this, Jim joins efforts by many members of our Executive Committee to more particularly expand involvement by existing members rather than just expanding the membership roll. Additionally, Jim has become something of a budget hawk, a not uncommon instinct in the present economy, but he also is instrumental in devising creative ways of doing more things, but more economically.

The timing of the change of Chairs has itself changed a bit with our Section's amended by-laws and structural changes, so that the new officers actually take office in June rather than in April. However, the prospective welcome for Jim and retirement for John Greenthal is not entirely premature. We have developed a very close working relationship between present Chairs and incoming Chairs, and past Chairs have remained a supportive presence, so that the transfer of authority is invariably seamless. Hence, if we're a bit early, so be it; I'm sure that John is looking forward to returning his full attention to his many other responsibilities. On that note, John's own efforts in the past year have been extensive. He has invariably been pleasant, unflappable and supportive yet at the same time quietly zealous, on a personal level to all of his partners on the Section's Executive Committee—and he really did treat his colleagues as partners in the Section's activities. On a professional level, he was always very attentive to continuing traditional activities, yet also to moving new initiatives forward. We've been going through a very interesting period of creativity and restructuring over the past couple of years, and that process has certainly cohered under John's leadership. Of course, several other people also deserve credit, but John would be the first to say that. Jim's column summarizes some of these contributions and, insofar as I cannot say it better than Jim, I won't, but will refer readers to his column.

I'll add my own personal observations: this has been a wonderful group of people to work with on both a personal and on a professional level. I've always been involved in a number of civic and professional groups and activities, which has probably occasioned more meetings in my life than are beneficial or enjoyable, involving more time than my family appreciates. Nevertheless, I really find myself looking forward to get-togethers with the many people involved in the Section's leadership. It's a rare thing to see creative juices, intellectual rigor and at the same time social congeniality merge at the same time. Yet it seems to have become a routine occurrence with the Section's meetings. I recommend increased involvement to our readers. I especially recommend that those who have not done so, join committees or even seek to chair committees, develop a project, advance the project through our own processes and if necessary nurture whatever other public and private resources are necessary, seek the support of our leadership, and reap the professional satisfactions. With this pitch for increased participation by our membership, I'll turn the podium, figuratively speaking, over to Jim.

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In this issue, Angela Demerle, of Harter, Secrest & Emery, submits an article on the New York Navigation Law. As readers likely know, this is the New York analogue of the federal CERCLA, as well as the New York Oil Spill Law. Angela comments on a recent Court of Appeals decision (*State v. Green*, 96 N.Y.2d 403), and provides some retrospective on the vexing question of a landowner's liability for a third party's discharge. Christopher Rizzo submits an article that focuses on New York City's Special District system. He analyzes this on its own merits, but also as a model of controlling environmental impacts, while also coordinating aesthetics and land use, at the local level. Although New York City, like any municipality, has its unique circumstances, and while New York City in its sheer size and complexity may seem atypical of other municipalities, nevertheless the New York City experience is invaluable if only for trouble-shooting experience: if it

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A Message from the Section Chair

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calls for Section business, especially for the Section Cabinet (the officers, Section Delegate to the House of Delegates, and Section Council member). While we need to increase Section revenue to maintain the current level of programming, we do not want to make attendance at Section programs more expensive for members. John Greenthal made exploring new sources of revenue one of the hallmarks of his tenure as Chair, and I will continue it. An Audit Committee of the Section Cabinet has been working very hard of late to identify the root causes of the fiscal concerns and made recommendations to the EC at the April 30, 2003 meeting (following the Legislative Forum and Government Attorneys Luncheon).

I will save for future columns discussion of other issues of relevance to the Section: on the aspirational level, for example, while we are a group of New York environmental lawyers, we need to reach out more to our colleagues outside of New York and, indeed, outside of the country. At the same time that the Chair of the Environmental Law Section of New Jersey's State Bar Association, Ed McTiernan, reached out to this Section, we named a former Chair of that Section, Lisa Bromberg, a Member-at-Large of our Executive Committee. We also intend to reach out on international environmental law issues to enhance the fine work of our Committee on International Environmental Law.

I expect to be a very active Section Chair, so do not be surprised if e-mails and phone calls from me or other officers arrive in your office from time to time. My door, my phone and my e-mail will be open all the time. I've cleared the decks for you, and I strongly encourage you to make suggestions and observations, including critical ones, to me. Thank you for the great privilege of being able to serve you in this coming year.

James J. Periconi

From the Editor

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can happen anywhere, it has probably already happened in New York City. This comprehensive article is well worth reading. The article was originally published by the *Fordham Environmental Law Journal*. The article also was a finalist in the Section's environmental law essay competition last year. Chris is the Menapace Fellow at the Municipal Art Society in New York City.

The case summaries have been provided, as usual, by members of the Environmental Law Society at St. John's Law School. Phil Weinberg has always actively participated in shepherding this process. The Administrative Update was prepared by Peter M. Casper of Whiteman, Osterman & Hanna.

Finally, please make plans to attend the Fall Meeting at Jiminy Peak. This location has worked wonderfully. It is family friendly and makes for a great weekend, in addition to a great program. Details are on pp. 28-29.

Kevin Anthony Reilly

REQUEST FOR ARTICLES

If you have written an article and would like to have it published in *The New York Environmental Lawyer* please submit to:

Kevin Anthony Reilly, Esq.
Editor, *The New York Environmental Lawyer*
Appellate Division, 1st Dept.
27 Madison Avenue
New York, NY 10010

Articles should be submitted on a 3½" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information, and should be spell checked and grammar checked.

New York's Navigation Law Gets CERCLA'd: Trend or Misstep?

By Angela M. Demerle

Introduction

Article 12 of New York's Navigation Law (the "Oil Spill Law")[1] was enacted in 1977 to address liability and cleanup for oil spills on land and water in New York State. The Oil Spill Law bears similarity to subsequently enacted federal and state "Superfund" statutes by imposing strict liability on certain categories of responsible parties, providing for cleanup financed by a government fund, and authorizing private parties to sue for cost recovery.

The federal Superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[2] explicitly imposes strict liability on the current owners of property on which a release has occurred. The owner's control over disposal activities is irrelevant.

Liability of the current landowner under the Oil Spill Law, the New York Court of Appeals recently decided in *State v. Green*,[3] should not be based on mere ownership alone. Rather, the determining factor is whether the landowner had knowledge of and control over activities related to petroleum on its property. In the same breath, however, *Green* set such a narrow definition of a current landowner who may *not* have control over such activities as to obviate its original premise. In other words, while mere "status" as current landowner is not enough to declare an owner of contaminated land liable under New York's Oil Spill Law, it is hard to envision very many circumstances where mere ownership wouldn't suffice.

The question explored in this article is whether the Court of Appeals has, for all practical purposes, decided that a current landowner is by definition a "discharger" under the Oil Spill Law and thus subject to strict liability for cleanup costs on the property no matter by whom it was contaminated. This discussion can only guess at the answer. The only true indication of the Court's direction lies in future litigation involving a genuinely innocent landowner who has the backbone (and litigation fund) to insist he is not a discharger by virtue of mere title ownership alone. But beware—even the most innocent of landowners may not escape the oft-used premise raised time and again in environmental litigation that the Oil Spill Law is remedial in nature, with a statutory purpose to clean up the environment, and if the landowner doesn't clean up the mess, who will? Most courts, in the end, seem to agree.

The Landowner's Liability Under CERCLA

CERCLA was enacted in 1980 to provide for the cleanup of inactive hazardous waste disposal sites. CERCLA includes in its definition of those who may be held liable for cleanup costs, commonly referred to as potentially responsible parties (PRPs), current owners and operators of the facility.[4] While CERCLA does not specify that it is a "strict liability" statute, a PRP will be held liable, without fault, if its waste is found on site.[5]

Escape from CERCLA's strict liability scheme is extremely limited; only acts of God, war, and releases caused by the acts and omissions of third parties will suffice.[6]

The third defense, commonly referred to as the "third party" or "innocent landowner" defense, excludes from liability under CERCLA landowners who acquire the contaminated property without having reason to know that hazardous substances had been disposed there. These defendants must prove in conjunction with this defense that they undertook all appropriate inquiry into the previous ownership consistent with good commercial practice,[7] a task easier said than done.[8]

To summarize, CERCLA imposes liability on the current owner of a contaminated facility regardless of fault. The landowner is exempted from such liability only by acts of God, war, or by qualifying as an "innocent owner." Accordingly, "status" is the significant determining factor when examining the current landowner's liability under CERCLA. Control over the activities that caused the contamination in the first instance is irrelevant.

The Landowner's Liability Under New York's Oil Spill Law

The Oil Spill Law was enacted to prevent the unregulated discharge of petroleum which may result in damage to the environment and to effect the prompt cleanup and removal of discharges by providing for liability for damage sustained within the state as a result of such discharges.[9]

The Act provides for strict liability, without regard to fault, for any person who discharges petroleum into the waters of the state or onto lands "from which it might flow into said waters."[10] These responsible par-

ties (RPs) are liable for all cleanup and removal costs and all direct and indirect damage.[11] A discharge is any "intentional or unintentional leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto the lands from which it might flow into said waters."[12] Section 181(5) of the Act allows for private causes of action to be brought directly against the discharger by any "injured person" for the costs of cleanup and removal and direct and indirect damages.[13]

Defenses under the Oil Spill Law are even more limited than CERCLA and include only acts or omissions "caused by war, sabotage, or government negligence."[14] Cleanup should be consistent with the National Contingency Plan (NCP).[15]

CERCLA explicitly provides that a current owner of property on which a release has occurred is liable; the Oil Spill Law does not. Thus, New York courts have, over the years, issued a number of opinions on the matter, culminating in 2001 with the case of *State v. Green*.[16]

Unity of Ownership: Property and Tanks

A landowner generally owns both the property and the tanks and/or equipment from which a discharge has occurred. In such a case, liability is clear. But is the landowner a "discharger" under the Oil Spill Law, if, for example, the landowner does not own the tanks or has leased the premises to a tenant whose operations resulted in a discharge?

The first significant case to explore the issue of fragmented ownership/operations was *State v. Wisser Co.*[17] *Wisser* held that a property owner whose only association with the discharge on the property was that its tenant operated leaking underground storage tanks on the property was strictly liable under the Oil Spill Law. The court's opinion was premised on the property owner's mere ownership of the system from which a discharge occurred. "[Navigation Law §181(1)] has been construed to impose liability on, among others, the owner of a system from which a discharge occurred. . . ."[18] The *Wisser* court relied on *State v. New York Cent. Mut. Fire Ins. Co.*,[19] where the Third Department held that a homeowner whose residential heating oil tank discharged into the environment was strictly liable under the Oil Spill Law by virtue of ownership and control of the heating system from which the fuel oil leaked.

Subsequent Third Department opinions grappled with the same issue in different contexts.[20] For example, in *310 South Broadway Corp. v. McCall*,[21] the landlord of a gas station applied to the New York State Department of Environmental Conservation's Oil Spill Compensation Fund for damage to property and loss of income caused by its tenant's operation of gas stations. The Fund denied the application concluding the owners of the real property were also the owners of the tanks and thus were strictly liable under the Oil Spill Law and ineligible for compensation from the Fund.

In *State v. Speonk Fuel*,[22] the purchaser of petroleum-contaminated property was presumed liable under the Oil Spill Law as the owner of a system from which a discharge had occurred. The court held that even though the offending tanks, pipes and fixtures were removed prior to purchase, there was no evidence the system was not included in the purchase. The *Speonk* court noted that in most cases the property owner and system owner are one and the same.[23] But, according to *Speonk*, when there is no such unity of ownership, liability without regard to fault is properly imposed on the system owner and not on the faultless property owner. *Speonk* referenced for support of its holding an opinion the Third Department decided the same day, *State v. Green*.[24]

In *Green*, the property owner, Lakeside, leased a mobile home site to Vanessa Green, who used an above-ground oil tank that she owned and maintained to heat her home. The tank collapsed, a spill occurred, the state cleaned it up and sued Green, Lakeside, and the company that had supplied the oil and serviced the tank. Lakeside, the owner of the mobile home park, but *not* the system from which the discharge occurred, convinced the Third Department that it was not a discharger because it did not own, maintain or install the tank. In other words, its mere status as owner was not enough to deem it a discharger.

Prior to *Speonk* and *Green*, other New York courts weighed in on the matter with similar results. For example, the Fourth Department decided in *Drouin v. Ridge Lumber*,[25] that plaintiff landowners could recover under the Oil Spill Law from their long-term tenant on the property. The tenant was found to be the exclusive owner of the tanks and the court refused to hold plaintiffs liable as "dischargers" under the Oil Spill Law merely by virtue of their status as landowners. Another example is *Popolizio v. City of Schenectady*[26] where the Third Department refused to impose liability on a defendant based solely on his status as a former owner of the property; the court wanted to see proof that the former owner actually caused or contributed to the discharge. Finally, in the same year the Third Department decided *State v. Green*, the Federal District Court, Southern District of New York, held in *Bologna v. Kerr-McGee Corporation*[27] that it could not rule without further fact finding that a former landowner who had no involvement in the delivery of petroleum to a property was liable under the Oil Spill Law.

Thus, until the appeal of *Green* to the Court of Appeals there was a comforting symmetry to the vari-

ous opinions addressing a landowner's liability under the Oil Spill Law. Courts refused to be "CERCLA'd," understanding that the Oil Spill Law pre-dates and cannot be presumed to operate like CERCLA. The Oil Spill Law does *not* contain language stating that a current owner of contaminated property is by definition a "discharger," liable under the Oil Spill Law. This understanding is not hard to come by: the definition of "discharger" under the Oil Spill Law, that is, the "status" that makes one liable under the statute, requires more than mere title to the contaminated property; rather it takes an "act or omission" that causes a discharge to occur.[28]

Nor is it difficult to identify an "act or omission" of an *owner of a system* which could result in a discharge. Examples are lack of maintenance, failure to close the tanks or the abandonment of tanks knowing that they would surely deteriorate over time, *et cetera*. The "act or omission" of a mere property owner with no ownership interest in the tanks is much harder to envision.

But we must again return to the premise that the Superfund statutes and the Oil Spill Law are remedial statutes and are subject to liberal interpretation by the courts to fulfill the purpose for which they were intended.[29] Indeed, a close reading of *Green* reveals that this is the premise used to hold Lakeside, the landowner, to be a discharger under the Navigation Law. The Court held Lakeside liable because it could control the activities occurring on its property and had reason to believe petroleum would be stored there.[30] In this regard, the Court of Appeals' opinion makes clear two things: first, Lakeside could have done more to respond to the spill, and second, the State should not be responsible for cleaning up a mess on Lakeside's property. But recall that the contamination was from a system which Lakeside did not own and, in reality, did not control. The Court of Appeals, in its liberal interpretation of the remedial statute, held the property owner liable despite its "innocent" status precisely because it felt the landowner was not so innocent in its *response* to the spill.

The Court of Appeals did acknowledge the symmetry of the previous line of appellate cases where mere ownership was not considered sufficient indicia of "discharger" status so as to impose liability, stating that while

> . . . we refuse to impose liability based *solely* on ownership of contaminated land, we nonetheless conclude where, as here, a landowner can control activities occurring on its property and has reason to believe that petroleum products will be stored there, the landowner is liable as a discharger for the cleanup costs.[31]

If a landowner is not liable merely because of its "status," what might occasion an escape from the onerous confines of the statute? The Court was not that helpful, mentioning that a "midnight dumper" or "errant oil truck" might be situations where a landowner lacks control and knowledge.[32] These extremely rare occurrences mentioned by the Court of Appeals make it almost impossible for any current owner of land where petroleum activities are occurring or with knowledge of past activities to escape liability under the Oil Spill Law. Indeed, it seems for now, at least, that *Green* has "CERCLA'd" the Oil Spill Law.

But there still remains the sticky "technical" problem that the Oil Spill Law was drafted five years *before* CERCLA and requires something more than status, i.e., an "act or omission" resulting in a discharge, to impose liability for cleanup costs. This may come as small solace to the truly innocent landowner in the future who, for example, purchases property with absolutely no knowledge that there are leaking underground tanks there, and who, absent this knowledge, cannot "control" the contamination, until, of course, it is discovered at some subsequent point in time.

What does *Green* say about this owner? CERCLA at least provides a defense if the owner can show himself to be truly "innocent" under its stringent statutory requirements. The Oil Spill Law has no such defense written into its liability scheme, probably because the legislature, when the Act was drafted in 1977, did not foresee how broadly the courts would paint the definition of a discharger. No doubt, such a landowner may be tempted to question its liability under *Green*. After all, no knowledge and no control should give the truly innocent landowner shelter from "discharger" status if *Green* holds true to its premise.

This landowner may prevail if the litigation reaches the Court of Appeals with the plaintiff as a private party, for example, a neighbor seeking reimbursement from the innocent property owner for contamination the unknown tanks caused to the neighbor's property. In such a case, it's much easier for the Court to forget the remedial purpose of the statute and let each property owner deal with cleaning up its own investment.[33] But if such a case reaches the Court of Appeals with the state as plaintiff, the Oil Spill Law may finally find itself "CERCLA'd" in its most pure form: the landowner declared liable based on status alone. Is this where we are going? Only time will tell whether *Green* did indeed "CERCLA" the Oil Spill Law.

Endnotes

1. Oil Spill Prevention, Control and Compensation Act, N.Y. Navigation Law 170-202 (Nav. Law) (McKinney's 2002).
2. 42 U.S.C. 9601-9675 (2002).
3. 96 N.Y.2d 403 (2001).
4. 42 U.S.C. 9607(a)(1).
5. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042-44 (2d Cir. 1985).
6. 42 U.S.C. 9607(b)(1-3) (2002).
7. 42 U.S.C. 9601(35)(B) (2002).
8. *See, e.g., United States v. Shell Oil Co.*, 841 F. Supp. 962 (C.D.Cal. 1993); *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996).
9. Nav. Law 181(1).
10. *Id*.
11. *Id.*
12. Nav. Law 172(8).
13. The Oil Spill Law did not originally specify whether a private party could sue others for damages caused by the discharge of petroleum. *Snyder v. Jessie*, 565 N.Y.S.2d 924 (4th Dep't 1990), *appeal dismissed,* 569 N.Y.S.2d 613 (1991) held that the Oil Spill Law did not create such a cause of action. That same year the legislature amended the law to allow for private causes of action. This amendment applies retroactively to spills that occurred before the amendment. *Snyder v. Newcomb Oil Co., Inc.*, 603 N.Y.S.2d 1010 (4th Dep't 1993).
14. Nav. Law 181(4) (2001).
15. *Id.* at 176(4).
16. *See supra* note 3.
17. 566 N.Y.S.2d 747 (3d Dep't 1991).
18. *Id.* at 748.
19. 542 N.Y.S.2d 402 (3d Dep't 1989).
20. The Third Department is called upon more often than other Appellate Courts to decide appeals under the Oil Spill Law because this is the Appellate Division where the State of New York generally brings suit for reimbursement for expenses it incurs in remediation of oil spills.
21. 712 N.Y.S.2d 206 (3d Dep't 2000).
22. 710 N.Y.S.2d 652 (3d Dep't 2000).
23. *See, e.g., State v. Arthur L. Moon,* 643 N.Y.S.2d 760 (3d Dep't 1996), *lv. denied,* 653 N.Y.S.2d 282 (1996); *State v. Tartan Oil Corp.*, 638 N.Y.S. 2d 989 (3d Dep't 1996).
24. 709 N.Y.S.2d 704 (3d Dep't 2000).
25. 619 N.Y.S.2d 433 (4th Dep't 1994).
26. 701 N.Y.S.2d 755 (3d Dep't 2000).
27. 95 F. Supp. 2d 197 (S.D.N.Y. 2000).
28. Nav. Law 172(8).
29. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996).
30. 96 N.Y.S.2d at 407.
31. *Id.* (emphasis added).
32. *Id.*
33. *See, e.g., Roosa v. Campbell*, 737 N.Y.S.2d 461 (4th Dep't 2002), where the Fourth Department held a former owner and former operator liable under the Oil Spill Law. They both denied any knowledge of the leaking abandoned USTs on the property.

Angela Demerle is an associate at Harter, Secrest & Emery, and has concentrated her practice in environmental law since 1989. She has worked extensively on a broad range of environmental issues including hazardous and solid waste, Superfund litigation, environmental criminal defense, state and federal permitting, underground storage tanks and spill liability, bankruptcy and environmental law, and land use development.

Protecting the Environment at the Local Level: New York City's Special District Approach[1]

By Christopher Rizzo

I. Introduction

New York City's vast land area requires special zoning tools to preserve its unique natural environments. Urban areas, like New York City, require special land use protections due to the scarcity of natural resources and open space.[2] With 321 square miles of land area[3] and 578 miles of coastline,[4] New York City has had to develop a complicated zoning code to address the competing needs of its populace.[5] It must foster commercial and industrial development, while preserving suburban neighborhoods and unique natural areas. New York City is world-renowned for its skyscrapers. In reality, the city has strikingly different communities. Manhattan Community District 7, the "Upper West Side," has less than seven percent of its land area vacant and only one percent of its lots are used as one- and two-family homes.[6] Conversely, Community District 3 on Staten Island, the "South Shore," has almost one quarter of its land vacant and almost half of the lots are occupied by one- and two-family homes.[7] It is this striking contrast of character that has led the city to develop its unique Special District approach to zoning. This article details the environmental protection aspects of this zoning scheme and the challenges faced in recent years.

The Special Districts are created to serve multifarious community needs, from promoting business to protecting sensitive hillsides.[8] New York courts have recognized the novelty of the approach and said "[s]pecial district zoning . . . represents a significant departure from traditional Euclidean zoning concepts."[9] The Court of Appeals also calls the approach "one of the several imaginative schemes intended to encourage, or even coerce, private developers into making the city a more pleasant and efficient place to live and work."[10] These districts are actually overlay zones, supplementing the underlying zones and in some circumstances permitting development by special permit only.[11]

Cities can fashion overlay districts to address a wide array of community concerns and New York City has done just that.[12] The New York Court of Appeals has described the wide purview of Special Districts by stating that a wide array of physical and natural characteristics of neighborhoods can be considered.[13] With over forty Special Districts, such important concerns as business retention, housing development, scenic view, cultural, and natural area preservation have been addressed.[14] Despite legal challenges in the 1980s,[15] the Special District technique has repeatedly been found legal, as long as it is applied fairly and uniformly.[16]

Recent opposition, rather than coming from Special District opponents, has come from preservationists who call New York City's Zoning Resolution desperately inadequate in its treatment of the city's less dense communities.[17] While sprawl is the concern of suburbs and edge cities, the same basic problems, loss of neighborhood character and open space, exist in New York City.[18] Some communities can mitigate sprawl by acquiring sensitive parcels; this is not economically feasible in the high-priced New York City real estate market.[19] Critics of the Zoning Resolution also say it makes development too unpredictable.[20]

"Cities can fashion overlay districts to address a wide array of community concerns and New York City has done just that."

The results of these criticisms have been a general reevaluation of the zoning laws and a movement to strengthen the protections of the environment contained in the Special Districts.[21] There is also considerable criticism of the enforcement of zoning laws. Despite all these changes and continuing update of the Zoning Resolution, a comprehensive proposal to address these enforcement issues does not yet exist.[22]

This article will discuss four types of Special Districts in New York City: the Hillside Preservation District, the Special Natural Area District, the Special Natural Waterfront Areas created by the city's Comprehensive Waterfront Plan, and the South Richmond Special Development District.[23] Part II will analyze the source of, and limitations on, New York City's power to create Special Districts to protect open space and the environment. Part III will briefly explain how each district works. Part IV will survey the challenges to the Special Districts along with the city's responses. Part V will look at the remaining challenge of implementing better enforcement of the district regulations.

II. The Legality of Special Districts

Special Districts are a special urban response to the need to preserve or enhance a community's desirable characteristics. Zoning laws can be created to discour-

age "premature and unnecessary conversion of open space land to urban uses."[24] Outside of New York City, communities are able to dramatically increase the lot area required for a home.[25] Goals of large-lot zoning include both open space and aesthetic preservation.[26] In the city reducing density is permitted as well, even if the value of the property is correspondingly reduced.[27] Given this broad zoning power courts have repeatedly upheld and enforced the Special Districts of New York City.[28]

There are also constraints on the power to create Special Districts. Under New York's City Environmental Quality Review (CEQR) a hard look must be given to the potential impacts of a proposed district on the surrounding community.[29] For example, New York City was able to create a Special Garment District, to preserve manufacturing space for its clothing industry only after the CEQR review showed that the character of the neighborhood would not be harmed.[30] A preservation district's formation must be accompanied by a consideration of the socio-economic impacts, which in this case indicated the character of the community would actually be preserved by an overlay zone.[31]

Another type of district is one that seeks to change, rather than preserve, the character of the community, sometimes called an incentive overlay zone.[32] For example, the Special Manhattan Bridge District, in Chinatown, was created after a study found the area was plagued by substandard housing.[33] The district allows increased density in exchange for community amenities like senior citizen centers, day-care, low-income housing, or deteriorated housing redevelopment.[34] A challenge to this district was defeated.[35]

While special zoning districts that protect the environment have not been challenged in New York City, they have been upheld when challenged in other parts of New York State.[36] The Town of Islip on Long Island created an Oceanfront Dune District with the purpose of preserving "the ecology of the dunes and grasses and to safeguard life and property on the barrier beach known as 'Fire Island.'"[37] The court upheld the Dune District without requiring a comprehensive study saying that "judicial notice must be taken of the fragility of the ecology of Fire Island."[38] This district is comparable with those of New York City.[39] Consider the basis for the Special Natural Area Districts:

> Special Natural Area Districts may be mapped only in areas where outstanding natural features or areas of natural beauty are to be protected. The preservation of such areas is important because they contain areas of special ecological significance: interesting geologic formations such as rock outcrops, . . . tidal wetlands . . . important plant life . . . or because they serve as habitats for native flora and fauna.[40]

Another example upheld by the courts is a natural district in Albany created in a pine barren with "a number of distinct environmental characteristics worthy of protecting."[41] It balances commercial development with natural protection.[42] Other legitimate concerns include wetland and scenic view protection.[43] In sum, courts in New York are willing to support special environmental districts as valid exercises of municipal police power when they are substantiated by legitimate environmental concerns.[44]

A. Once a District Is Created Its Provision Must Be Enforced

Whether created to preserve community character or natural resources, municipalities in New York must enforce the Special Districts they create. When New York City attempted to allow a luxury high-rise in Chinatown's Special Manhattan Bridge District, the court admonished the city for not adequately considering the impact of the high-rise on the community under both the State Environmental Quality Review Act (SEQRA) and CEQR.[45] This Special District had been created to preserve the low-rise character of Chinatown while simultaneously improving the housing stock.[46] Similarly, the city of Albany was required to enforce the provisions of its natural area, the "Pine Bush."[47] The Court of Appeals found that Albany should have considered the cumulative impact that several multi-story developments would have on the district before approval.[48]

B. Limitations on Municipal Power to Create and Implement Special Districts

Overlay districts have occasionally been found to exceed permissible municipal authority.[49] The most readily available basis for challenging Special Districts is the "takings" doctrine.[50] A two-part test is applied to a zoning technique to determine if a taking is occurring: (1) does it substantially advance a legitimate state interest and (2) does it deny an owner all economically viable use of his land?[51]

The special environmental districts discussed in this article do advance a legitimate state interest.[52] As discussed in this article, modification provisions are built into the Special District texts to ensure that no landowner is completely deprived of an economic return on his land.[53] These modification provisions allow for waivers of the regulations to avoid unduly harsh results for landowners.[54]

This was not always the case with Special Districts. In 1993, New York City attempted to preclude development entirely with a "Special Park District," which was

composed of private residential property.[55] In *Fred French Investing Co. v. City of New York*[56] the city's designation of privately owned land as open space was challenged.[57] The court found that the city was attempting to commit land for a public use without taking title to it.[58] The "City's action, in rezoning the areas of the private parks into public recreational areas, has totally destroyed the economic value of such plots."[59] This case stands as an important limit on the ability to restrict development with Special Districts.[60]

Elsewhere in New York State, on Fire Island, a regulation restricting waterfront development in an Oceanfront Dune District had destroyed the value of the plaintiff's 6,400-square-foot parcel of land.[61] His legal challenge was also successful.[62] It is important to recognize that when development is precluded on only part of the Special District parcel, a taking has not occurred.[63] The above cases are concerned with destruction of value, not reduction.[64] Thus the Oceanfront Dune District and Special Park District were declared invalid.[65]

III. Four Special Districts Dedicated to Natural Resource and Open Space Preservation

A. Special Hillside Preservation District

This overlay zone covers 1,900 scenic acres in the northern hills of Staten Island, the city's southernmost borough.[66] This area of single-family homes on quarter- and half-acre parcels presents a stark contrast to the majestic towers of Manhattan that lie across New York Harbor. It contains numerous steep and undeveloped hillsides. This unique physical setting led to the creation of the Hillside District.[67] Its goals are to prevent erosion, preserve aesthetic qualities, preserve outstanding natural beauty, and maintain neighborhood character.[68]

The basic scheme of the district is to divide the hills into "tiers."[69] Tier 1 includes slopes of less than 10 percent grade.[70] Tier II includes slopes from 10 to 24 percent.[71] Tier I developments are less stringent than Tier II.[72] Tier III includes slopes of a 25 percent grade.[73] All development is prohibited on Tier III slopes except by special permit from the New York City Department of City Planning ("City Planning").[74] For each of the tiers there are regulations concerning tree preservation, erosion control measures, maximum lot coverage, and building height.[75] The underlying zoning scheme for the Hillside District contains none of these protective measures.[76] This scheme is distinguishable from the steep-slope protections in the Special Natural Area Districts (SNAD) which are discussed below.[77] The Hillside regulations only designate grades of 25 percent or more as "steep slopes," in contrast to the 15 percent in the SNAD.[78]

The Hillside District contains a variety of zoning classifications, including single-family homes, attached houses, and even apartment complexes in some places.[79] So long as the basic provisions of Tier I and Tier II regulations are followed, development can proceed as-of-right after approval from the Department of Buildings.[80] Tier III regulations have the most impact on the underlying zoning because they mandate that City Planning approve all development on steep slopes; there is no as-of-right development.[81] The Hillside District also eliminates certain density bonuses that can be granted for large-scale residential development.[82]

1. Strengthened Lot Controls

In addition to the above specialized regulations relating to the tiers, the Hillside District also uses traditional lot controls, strengthened to minimize the impervious surfaces.[83] The chart below illustrates the theory behind the hillside regulations: that as the grade increases more of the land's natural drainage and absorption capacity must be preserved. This approach is different from the city's underlying zoning which relies on minimum lot sizes, rather than lot coverage, to control development.[84]

Table I[85]

Lot Coverage(%) Permitted as the Slope (in percent grade) Increases

NYC Zoning District	R1-1, R1-2	R2	R3-1, R3-2	R4	R5	R6, 1-2 Family	Other
Tier 2: 10-14.9% slope	22.5	22.5	22.5	36	45	48.6	32.6
Tier 2: 15-19.9	20	20	20	32	40	43.2	28.8
Tier 2: 20-24.9	17.5	17.5	17.5	28	35	37.8	25.5
Tier 3: "steep slope"	12.5	12.5	12.5	20	25	27	18

As the slope of the parcel increases, the lot coverage permitted by the dwelling unit decreases.[86] Denser residential districts, like the R5 attached housing zone, still have more generous lot coverage requirements than the single family R1-1 zone.[87] But if development is permitted on a steep slope, the lot coverage controls become very strict.[88]

2. Tier I

Subject to the special regulations of the overlay zone, development can proceed as-of-right on property of less than a ten percent grade.[89] Existing trees must be preserved to the "maximum extent possible."[90] One tree must be planted for every 1,000 square feet of the zoning lot and for each 25 feet of street frontage.[91] Trees play an important role in the Hillside District, helping to prevent erosion. Recent changes to the district have strengthened these protections. In all construction in the Tier I zone, fences must protect areas of "no disturbance,"[92] builders must submit a tree preservation plan, and all exposed surfaces must be covered with straw, jute matting or geotextiles.[93] Subdivisions must go further, they must present a survey with their application for a building permit, indicating the grade of the parcels, all impervious surfaces (present and planned) and a tree planting plan from a registered landscape architect.[94] No certificate of occupancy can be issued by the Department of Buildings in either Tier I or II zones unless a certificate is filed by a registered architect, surveyor, or professional engineer indicating that the provisions of the Special District have been complied with.[95]

3. Tier II

Tier I requirements are largely mirrored in Tier II with added protections. For example, controls on new construction require that no construction equipment go beyond 15 feet from the perimeter of the new building.[96] Vegetation must be fenced off to ensure that it is not trampled.[97] Construction vehicles can pack down the soil around trees causing quickened death and the loss of their erosion-preventing root system.[98]

Recognizing that paved surfaces increase run-off and erosion, special controls have been created. The area of private roads is excluded from the area of zoning lots.[99] The slope and length of driveways and private roads is limited.[100]

4. Tier III

No as-of-right development is permitted on lots or portions of zoning lots with a slope of 25 percent or greater, a recent change from the previous 35 percent.[101] However, building may proceed with City Planning authorization.[102] City Planning may also grant waivers when development or enlargements are totally precluded by regulations.[103] Without this clause the Hillside District would have rendered some parcels valueless.[104]

B. Special Natural Area District

There are four Special Natural Area Districts (SNAD) in New York City, existing to guide development around natural beauty: the Riverdale section of the Bronx (SNAD 2), the Fort Totten section of Queens (SNAD 4), Shore Acres on Staten Island (SNAD 3), and a large area in the Central Hills of Staten Island (SNAD 1).[105]

The Riverdale District encompasses once of the least densely developed neighborhoods in New York City, which features rock outcroppings, mature trees, brooks, and marshes along the Hudson River.[106] The Central Hills of Staten Island are similar except that their natural resources are far more extensive and contained in several preservation areas.[107] The Shore Acres District protects a unique spring-fed pond and its immediate ecosystem.[108] Fort Totten, in Queens, has fewer natural features and exists mostly to preserve scenic open space adjacent to Long Island Sound.[109] In addition to protecting these natural features, guiding development to prevent erosion and preserve the ecology of the city's least-dense communities has protected property values and hence the city's tax base.[110]

SNAD regulations apply broadly to developments, site alterations, subdivisions, and public projects.[111] They do not apply to existing private homes on less than 40,000 square feet.[112] This is an important exemption because the regulations impose a significant regulatory burden on landowners.[113] It is this exception, however, that has been criticized recently by preservationists and may one day be eliminated.[114]

When SNAD regulations do apply they eliminate as-of-right development, requiring all significant site alterations and new developments to acquire a special permit from City Planning.[115] This agency must consider the development's effects on natural features including rock outcroppings, steep slopes above a 15 percent grade, aquatic features, and botanic environments.[116] To protect these districts' biodiversity, new plantings must be chosen from a list of native vegetation included in the Zoning Resolution.[117] Other provisions of the district limit the height of buildings and protect erratic rock outcroppings.[118]

1. How the Special Natural Area Districts Function

The most significant feature of the SNAD is that it eliminates as-of-right development on lots with existing residences above the 40,000-square-foot threshold, on all new development and subdivisions.[119] City Planning is given discretion, much more than in the Hillside District, to consider what effect the development will have

on the natural environment, especially the natural drainage.[120] Even "when it is not necessary for the applicant for a development or site alteration to apply for an authorization or special permit, the City Planning Department shall certify to the Department of Buildings that no authorization or special permit is required pursuant to this Chapter" and may require a maintenance plan for natural features.[121]

This broad discretion extends to maintenance of natural features, where City Planning can require a maintenance plan for developments and site alterations.[122] Certain bonuses, which might have been granted for large-scale residential developments, are eliminated.[123]

The tree planting requirements are mandatory, requiring all developments to plant one four-inch caliper tree for every 1,000 square feet of lot area and preservation of all six-inch caliper trees.[124] These regulations are not as stringent as those that apply in the South Richmond Development District (SRDD),[125] discussed below, where a tree must also be planted for every 20 feet of street frontage and for every four parking spaces.[126] But the difference in the regulations can partly be explained by their goals: the SNAD is concerned with erosion and soil stability,[127] whereas the SRDD was created to maintain the verdant suburban atmosphere of the South Shore of Staten Island.[128] In both districts the Department of Buildings (DOB), the agency that issues building permits, can authorize the removal of trees that are unsafe.[129] These clauses are of concern to community members who feel that the DOB issues such authorizations *pro forma* to all applicants.[130]

2. Modifications for Landowners

There are two important provisions available to permit development in sensitive areas. In the steep-slope areas of the SNADs, City Planning can permit the clustering of homes in the area of the lot that will least disturb the environment.[131] This is done by increasing the density permitted in one part of the tract, leaving the other parts as open space.[132] This means that attached houses may be built in a single-family home district.[133] The lot area required for each unit is not reduced, the units are just clustered in one area of the land.[134] Developers can escape the provisions of the SNADs altogether by doubling the maximum lot requirement, building homes on 25,000 square feet, approximately one half acre, in an R1-1 zone.[135] This provision is used when City Planning rejects the developer's plan and he chooses not to modify his plans to conform with the SNAD provisions.[136]

C. The Waterfront

> *The comprehensive plan capitalizes on the size and diversity of the City's waterfront to address the historic competition between commerce and recreation for use of waterfront land.*[137]

1. Competition for Land in Waterfront Areas

In 1982, New York City became the first municipality in the state to submit a Waterfront Revitalization Plan pursuant to New York State's Waterfront Revitalization and Coastal Resource Act[138] and the federal Coastal Zone Management Act.[139]

The goals of the city's plan are to foster a wide array of waterfront projects including parks, open space, natural areas protection, as well as housing and employment opportunities.[140] Pursuant to this plan the city created three Special Waterfront Areas, which represent the last three intact waterfront ecosystems in the city.[141] While some 40 percent of the coastline consists of public parkland,[142] the city has actually lost the vast majority of its coastal ecosystems to development.[143] Of the 224,000 acres of freshwater wetlands that originally existed in the city, only 3,000 remain.[144] Of the 16,000 acres of tidal wetlands that existed in the unique Jamaica Bay area of Queens, 4,000 remain.[145]

A dilemma developed for the city as its traditional working waterfront declined, leaving vast stretches derelict.[146] In 1961, when the last zoning amendments were enacted, large segments of the waterfront were actively industrial.[147] Since then, there has been a 75 percent loss of manufacturing in the city.[148] The city's share of New York Harbor's cargo has dropped from 75 percent to 15 percent,[149] with New Jersey facilities now handling the bulk of the cargo entering the harbor.[150] The Comprehensive Waterfront Plan, enacted in 1992, mandates a balance between protection of the coastal environment and promotion of the remaining industry, like the ports.[151]

Environmental and industrial demands must also compete with renewed residential development. Increased water quality and better sewage treatment should generate a renewed interest in building on the coastline.[152] Another outgrowth of cleaner waters has been a renewed commitment by the city to provide public access to the waterfront, as evidenced by the stringent requirements placed on all new developments within the South Richmond Development District's waterfront.[153]

Overall, as-of-right development in the 300-foot coastal zone is not affected.[154] Only when a developer must obtain City Planning's approval anyway, do the considerations of the Waterfront Revitalization Plan (WRP) become mandatory.[155] The considerations that apply to the Special Natural Waterfront Areas (SNWAs) were recently updated and revised (from the 1992 plan) in "The New Waterfront Revitalization Program."[156] They guide City Planning in the approval process for uses that are not as-of-right, as well as other govern-

mental entities.[157] Generally, they call for a balanced approach to development, preserving industrial uses, expanding recreation and respecting the integrity of significant natural features.[158]

Following this reasoning, the WRP could be considered an overlay zone if it had been completely integrated with the Zoning Resolution. This has not occurred and it is simply a guidance document for City Planning, becoming a mandated consideration only when a variance or non-as-of-right process occurs.[159] Only a few concepts of the WRP are reflected in the Zoning Resolution. For example, in the 300-foot-wide "coastal zone," in R1-1 and R1-2 zones, density is capped at 35 percent lot coverage and a 0.5 Floor-to-Area Ratio (FAR).[160] Height is also limited to 35 feet.[161] But these provisions, which have been incorporated into the zoning resolution, have less to do with environmental conservation than with scenic view preservation.[162]

2. The Three Special Natural Waterfront Areas

The general goals for these areas are to preserve as parkland sensitive parcels and reduce run-off.[163] The three areas are the (1) Long Island Sound/ Upper East River Area, (2) the Northwest Staten Island Area, (3) and the Jamaica Bay area.[164] The Long Island Sound Area includes the North Shore of Queens, several islands east of Manhattan, and the Eastern Shore of the Bronx.[165] Like the other two areas, it is dominated by publicly held land, low-density residential development and some industrial pockets.[166]

The Staten Island Area is sometimes called the "Harbor Herons Complex" because it is home to a surprisingly large bird population.[167] This area is important, not just as a bird sanctuary, but also because its wetlands filter storm water.[168] The decline of industrial waterfront uses has been a boon for the migratory bird population here.[169] For example, Shooter's Island, zoned and once used for manufacturing, has recently been acquired as a bird sanctuary by the city.[170] While the provisions of the SNWAs have not been incorporated into the Zoning Resolution, the city has been slowly acquiring the most sensitive parcels.[171]

The Jamaica Bay SNWA is the most notable of the three areas because it is the most intact coastal ecosystem of the three. The uplands surrounding it are largely publicly owned.[172] Leachate[173] from long-closed landfills pollutes the water, and the John F. Kennedy (JFK) Airport's run-off fouls the water in the eastern bay.[174] City Planning must consider, in its discretionary approvals, the need to maintain buffers for non-point source pollution, wetland preservation, and mitigating the effects of the JFK Airport when discretionary zoning requests arise.[175]

D. The South Richmond Development District (SRDD)

Of all the five boroughs of New York City, Staten Island contains the most open space and the least-dense housing.[176] As usable land is consumed elsewhere in the city, development pressures on the less-developed South Shore of Staten Island increases. The goal of the SRDD is to promote "balanced" growth, while avoiding destruction of irreplaceable natural and recreational resources.[177] This overlay zone supplements the existing zoning, eliminating as-of-right development for subdivisions and other development with "designated open space," implementing yard-size modifications, prohibiting the use of non-native planting material, and guiding development along the designated waterfront esplanade.[178]

A general purpose of the SRDD, unlike the Hillside District, is to preserve open space for aesthetic purposes as well as to preserve natural flood drainage capacity.[179] To that end, the SRDD incorporates several unique zoning tools, including designated open space and a waterfront esplanade.[180] Traditional open space preservation techniques are also incorporated, including minimum lot sizes and minimum side, rear and front setbacks.[181]

1. The Waterfront Esplanade

New York City is creating a waterfront esplanade for several miles along the Atlantic coast of Staten Island, with a right of public access.[182] City Planning must certify a waterfront lot owner's waterfront esplanade plan, which will be built and maintained by that private owner.[183] If a subdivision is approved along the waterfront but its construction is delayed, a $400 bond must be posted with the city for each 100 square feet of esplanade required and a $200 bond for a pedestrian access-way to the waterfront.[184]

2. Open Space

Several zoning techniques are used in the SRDD to preserve open space. Minimum setbacks are the most basic provision, requiring a setback of 20 feet from arterial roads, and 30 feet from expressways and railways.[185] In this setback, one tree must be planted for each 400 square feet of land.[186]

Lot sizes and coverage are controlled by a special sliding scale developed for the SRDD.[187] These controls preserve the aesthetic characteristics of communities by increasing the required lot width as the height of the home increases.[188] For example, a detached home in an R1-2 zone must have a minimum lot size of 5,700 square feet, a lot width of 40 feet, if it is two stories tall.[189] For three- and four-story homes the lot width increases to 50 feet, and to 60 feet for a four-story home.[190] These sliding scales control bulk and density in all residential zones.[191]

The most unique open space preservation technique is the Designated Open Space (DOS) network consisting of land to be preserved in its natural state whether publicly or privately held.[192] Lot area in the DOS can be used to calculate lot sizes and to meet the minimum lot area for dwelling unit, with certain limitations for counting driveways and parking spaces.[193] Homeowners are restricted from building on DOS areas by zoning regulations.[194] When all reasonable development is precluded this rather harsh result can be mitigated by an exchange of other city land for that parcel.[195] The boundaries of the swaths of open space can also be altered to permit development but never closer than 60 feet from a watercourse.[196]

3. Preserving Trees

The third component of the SRDD is its tree regulations, an important component of the SNAD and Hillside Districts as well.[197] In the SRDD, trees are used to screen development.[198] Consider the planting requirements for parking areas: one tree for every four parking spaces and a four-foot-high dense evergreen screen for parking areas for ten or more cars.[199] When a residential area abuts a commercial or manufacturing district, a six-foot-high evergreen buffer must be maintained by the developer, be it a commercial or residential site.[200] In general, the Department of Buildings must approve the removal of all large trees and builders who do not comply will lose their building permit.[201] To re-obtain it, they must post a bond to assure restoration of the land.[202]

4. Topographic Alterations, Lot Size and Bulk

Even outside the DOS, topography alterations are limited. The grade cannot be reduced by more than two feet. This does not apply to area for foundations, driveways or utilities. No buildings can exceed four stories without a special permit from City Planning.[203] Floor area bonuses for community facilities are eliminated. These represent just a portion of the alterations in the underlying zoning which the SRDD effects.

IV. Challenges and Solutions to the Special Districts' Shortcomings

> *There are so many loopholes to the rules, some are big enough to drive a bulldozer through . . . literally.*[204]

Inadequate protections, unclear rules, and underenforcement have led to considerable discontent within the Special Districts of the Bronx, Staten Island and Queens.[205] In response to the criticisms and challenges, the Hillside District's landscape protections were made more stringent.[206] Changes are currently underway for SNAD areas.[207] Finally the purposes of the three SNWAs have been frustrated by New York City's failure to incorporate them into the Zoning Resolution.[208]

A. Revising the Protections in the Hillside District

The catalyst for the revisions to the Hillside District was a proposed development that would have resulted in 19 townhouses per acre in excess of the underlying and Special District-enhanced zoning.[209] Community members cried foul play and a grand jury was impaneled to investigate the process of obtaining a building permit from the Department of Buildings.[210] Through 1997, the Grand Jury heard testimony from 19 witnesses who testified about the process of obtaining building permits in the Hillside District. [211] Even City Planning's own study found the rules and enforcement in the district inadequate.[212] Ideally, the process for obtaining a building permit should work as follows: an application should be filed with the Department of Buildings containing plans drawn up by a licensed architect.[213] For six to eight weeks the plan should be reviewed for conformity with both the underlying and overlay zoning.[214] If the plans are in order, a building permit will be issued.[215]

What the Grand Jury found was a very different reality. A self-certification process allows architects to bypass the stricter scrutiny that would normally be performed by the Department of Buildings.[216] Developers are able to hire professionals to certify that the zoning and hillside regulations were conformed with and DOB inspections are not required. Thus, this process is not properly overseen by any government officials.[217] The Grand Jury criticized the as-of-right development that proceeds in contrast to the SNAD and SRDD.[218] Another concern was the "Expediters, "hired by developers to steer the plan through the Department of Buildings, tainting the process in unnamed ways.[219] In addition to rectifying the above problems, City Planning was called upon to create a uniform system of site inspections.[220]

Outside of the self-certification issue, several important protections have been added.[221] A steep slope is now classified as a slope of 25 percent.[222] As discussed above, if development is permitted at all, it can cover only 12½ percent of the 12,500-square-foot lot, maintaining the stability of the hills.[223] In the Tier I and II areas, a 15-foot buffer zone must now be left vegetated at the crest of a steep slope.[224] Tree preservation and other erosion control measures were added.[225] The exemptions granted to publicly assisted housing developments and senior citizen housing are gone as well.[226]

B. Changes in the Natural Area Districts

Apparently the changes to the Hillside District have been successful because both the communities covered by the Bronx and Central Staten Island Natural Area Districts are eager to incorporate some of its provisions.[227] It is notable that the changes currently being called for largely mirror those called for, but never implemented, in 1983.[228] A 1983 City Planning

report suggested reducing the permitted density of development on portions of Staten Island's SNAD by increasing minimum lot size in the underlying zoning scheme.[229] The 1983 study also warned against the continued expansion of the large institutions, like nursing homes, in the SNADs, still a concern today.[230] A local environmental organization, the Protectors of Pine Oak Woods, recently succeeded in their lawsuit to require the city to complete an Environmental Impact Assessment before disposing of a 50-acre parcel of open space for senior citizen housing.[231]

One of the problems is that significant tracts of privately and city-owned land remain. The above lawsuit, and future controversies, might have been avoided if the greater use of conservation easements occurred or the remaining open space was transferred to the Department of Parks. The 1983 study called for increased use of conservation easements that restrict development on parcels even when privately owned.[232]

Staten Islanders have repeatedly expressed frustration about the languid pace at which the above concerns have been addressed.[233] For example, de-mapping the un-built Richmond and Willowbrook Expressways, a procedural item, has yet to be completed 30 years after the proposal to construct the highway was defeated.[234] A bill to do this has recently been introduced in the legislature but its future is far from certain.[235] The highways' rights of way, amounting to a staggering 400 acres, would be added to New York City Department of Parks and Recreation under the proposal. Curiously, community districts have expressed hesitation to permit the de-mapping, fearful that the highways might have to be built one day to accommodate the Island's traffic.[236]

C. Maintaining a Balance in the Coastal Zone

The 1992 Comprehensive Waterfront Plan noted that the "success of the plan will rest in large part on adoption of the proposed zoning text . . . as modified after public review and discussion."[237] Yet, the Special Natural Waterfront Areas have not been incorporated into the New York City Zoning Resolution.[238] There are two plausible reasons for this: 1) they need less protection from development since they consist largely of mapped park land,[239] and 2) the city recognizes that it needs to "ensure retention of sufficient land zoned for manufacturing to accommodate future needs."[240] Greater protections for the special waterfront areas could preclude job creation in the future.[241] These dual goals, preservation and economic development, are amply demonstrated in the city's Revised Waterfront Revitalization Plan which calls for increased commercial and residential development, as well as protection and restoration of the coastal ecosystems.[242]

V. Enforcement Problems

Citizens and public officials involved with the Special Districts agree that lack of enforcement is the greatest threat to the districts' success.[243] City Planning and the DOB rely on citizen complaints to bring attention to violations.[244] In fact the DOB considers the district regulations complex and tedious to enforce.[245]

The primary cause of enforcement problems is the lack of inspectors.[246] The DOB on Staten Island, with population of 400,000, had only five inspectors to monitor the construction of 2,262 new housing units in 1999.[247] To deal with this problem the DOB has resorted to "self-certification."[248] This process allows builders and architects to certify that their developments comply with the district regulations, based on licensed professional inspection ensuring that the project conforms to the law.[249]

Furthermore, with only five inspectors, the complexity of the regulations is overwhelming. For example, the tree-cutting regulations permit trees to be removed in Natural Area Districts only when they are hazardous or dying, a subjective decision that is beyond the skill of the DOB.[250]

The DOB and City Planning once had another tool to limit development in the SRDD, the school-seat restriction.[251] City Planning, as set forth in the Zoning Resolution, allowed development only if there are adequate school seats to accommodate the new residents.[252] A recent court ruling, *Building Industry Association of New York City, Inc. et al. v. City of New York et al.*,[253] however, found that City Planning needed to release the building permits when a new school is proposed, not when the school seats are actually available.[254] This means that homes can be built before the school capacity actually exists.[255] The decision cleared the way for 1,300 new homes on the South Shore of Staten Island.

A possible solution to these problems is to eliminate as-of-right development in the Hillside District and SRDD.[256] City Planning, more adept at enforcing its own regulations than the DOB, would need to review all significant developments.[257] The 1997 Grand Jury Report also called for the elimination of self-certification; a step not taken due to the lack of inspectors.[258] Finally, some community members have called for a citizen-suit provision that would help make up for the lack of enforcement and inspection capacity within the city government.[259] This would have a significant impact on the process since the New York State Appellate Division has recently found that City Planning approvals in the SNAD are "ministerial" and thus not subject to environmental review under the State Environmental Quality Review Act.[260]

VI. Conclusion

New York City's public transportation system and concentration of services make it an ideal place for high densities. The districts discussed above have had some measure of success in preserving critical natural features while permitting higher densities than those allowed in a typical suburban community.

However, the district approach leaves out natural features found elsewhere in the city. There are wetlands and hillsides that need to be protected outside the narrow confines of the districts. The district approach also disregards two important and innovative tools of environmental protection, large-scale clustering to preserve open space and conservation easements. These tools would permit the city to allow developers and institutional landowners to realize the value of their land, while protecting natural areas and open space with greater success. With the greater use of innovative land use protections and a renewed emphasis on enforcement, the Special Districts can actually "guide development in areas of outstanding natural beauty" while still permitting growth.[261]

Endnotes

1. This article is published with the permission of the *Fordham Environmental Law Journal* where it was previously published. *See* Christopher Rizzo, *Protecting the Environment at the Local Level*, XII Fordham Envtl. L.J. 225 (2002).
2. *See* Jill Ilan Berger Inbar, *A One Way Ticket to Palookaville, Supreme Court Takings Jurisprudence After Dolan and Its Implications for New York City's Waterfront Zoning Resolution*, 17 Cardozo L. Rev. 331, 369 (1995).
3. N.Y. City Dep't. of City Planning, Community District Profiles (2003) [hereinafter Land Use Facts] at http://www.nyc.gov/html/dcp/html/lucds/cdstart.html (visited Feb. 28, 2003).
4. N.Y. City Dep't of City Planning, New York City Comprehensive Waterfront Plan: Reclaiming the City's Edge 1 (1992) [hereinafter Comprehensive Waterfront Plan]. In 1999, the city created The New Waterfront Revitalization Program to build on the 1992 plan. This article will refer to the original Comprehensive Waterfront Plan with references to the updates contained in the 1999 plan.
5. *See generally* N.Y. City Dep't of City Planning, Zoning Resolution (amended 2001) [hereinafter Zoning Resolution].
6. *See* Land Use Facts, http://home.nyc.gov/html/dcp/html/lucds/mn7lu.html.
7. *See id.* http://home.nyc.gov/html/dcp/html/lucds/si3.html.
8. *See* Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-00.
9. *Asian Americans for Equality v. Koch*, 581 N.Y.S.2d 782, 786 (1988).
10. *Id.*
11. *See generally* John R. Nolon, Well Grounded: Shaping The Destiny of the Empire State, Local Land Use and Practice 184 (1998). "The term 'overlay district' refers to the superimposition of the new district's lines on the zoning map's district designations. An overlay district can be coterminous with existing zoning districts or contain only parts of one or more such districts." *Id.*
12. *Id.* at 185-187.
13. N.Y. ECL § 8-0105(6) (McKinney 1997); *See also Chinese Staff and Workers Ass'n v. City of New York*, 509 N.Y.S.2d 499, 502 (1986). Because the proposed development in the Special Manhattan Bridge District was larger than of that permitted in this district, an environmental impact analysis was required. The character of that community was a concern such that The Board of Estimate (no longer in existence) had to consider the environmental impacts of the project as defined in the State Environmental Quality Review Act (SEQRA). *Id.*
14. *See*, e.g., Zoning Resolution, *supra* note 5, art. I, § 11-12 (listing the chapters within the Zoning Resolution that provide for the functions and regulations of the Special Districts). The Special Districts listed include, but are not limited to, the Midtown District, Manhattan Bridge District, Scenic View District, Little Italy District, and Special Natural Area District. *Id.*
15. *See*, *e.g.*, *Asian Americans for Equality*, 581 N.Y.S.2d at 784 (challenging the Special Manhattan Bridge District in Chinatown); *Chinese Staff and Workers Ass'n*, 509 N.Y.S.2d at 499 (challenging the City Planning Commission and board actions approving special permit for construction of proposed high-rise luxury condominiums); *Agins v. City of Tiburon*, 447 U.S. 255, 257 (1980) (challenging city takings without just compensation); *Park Avenue Tower Assocs. v. City of New York*, 746 F.2d 135, 136 (1984) (challenging zoning changes, which reduced maximum floor area ratios from 18 to 13, depriving them from "reasonable return"); *In re Save the Pine Bush, Inc., et al. v. City of Albany*, 70 N.Y.2d 193, 200 (1987) (challenging zoning regulations); *Allingham v. City of Seattle*, 749 P.2d 160, 161 (1988) (challenging zoning ordinances that required large percentages of privately owned lots to be retained in natural state); *Corrigan v. City of Scottsdale*, 720 P.2d 513, 514 (1986) (challenging zoning ordinances).
16. *Asian Americans for Equality*, 581 N.Y.S.2d 782, 786 (1988); *See also Agins*, 447 U.S. at 262 (standing for the legality of special zoning techniques so long as they are uniformly applied).
17. *See generally* Zoning Resolution, *supra* note 5. The Zoning Resolution is the compilation of New York City's land use rules. *Id.*
18. Sprawl defined: where it is "difficult to formulate a cohesive physical image or picture of the community, to identify tangible elements-public spaces, buildings, civic landmarks, streets. . . . " *See* Roger K. Lewis, *A Call to Stop Buying Into Sprawl*, Washington Post, Jan. 23, 1999, at G3.
19. *See* Haya El Nasser, *Residents Chip in to Protect Land*, Detroit News, Aug. 29, 1999, at A15. In Warren Township, New Jersey residents all chipped in to purchase a seven-acre parcel, at $125,000 per acre. In New York City an acre of property can cost over $1,000,000. *Id.*
20. *See* David W. Dunlap, *A Complex Plan's Aim: Simpler Zoning Rules*, N.Y. Times, Jan. 30, 2000, at 11-1, 11-6.
21. *See e.g.*, N.Y. City Dep't of City Planning Special Hillsides Preservation District Zoning Study: Findings and Recommendations 1, 4-7 (1998) [hereinafter Special Hillsides Preservation].
22. *See* Natural Area District Task Force, Minutes from January 11, 2000 Meeting (discussing the general zoning concerns of the residents) (on file with *Fordham Environmental Law Journal*) [hereinafter Jan. 11, 2000 Meeting]; Natural Area District Task Force, Minutes from March 20, 2000 Meeting (discussing the general zoning concerns of the residents) (on file with the author) [hereinafter Mar. 20, 2000 Meeting].
23. *See generally* Zoning Resolution, *supra* note 5; Comprehensive Waterfront Plan, *supra* note 4.
24. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).
25. *Id.*
26. *Rivervale Realty Co. Inc. v. Town of Orangetown*, 816 F. Supp. 937, 940-41 (S.D.N.Y. 1993).

27. *See Park Avenue Tower Assocs. v. City of New York*, 746 F.2d 135, 139 (1984). The court called mere reduction in value a "slender reed upon which to rest a takings claim." *Id.*

28. *See Neville v. Koch*, 583 N.Y.S.2d 802 (1992) (upholding the Special Clinton District); *Asian Americans for Equality v. Koch*, 581 N.Y.S.2d 782, 788, 790 (1988) (upholding the Special Manhattan Bridge District).

29. *See Real Estate Bd. of N.Y. v. City of New York*, 556 N.Y.S.2d 853, 854 (1st Dep't 1990) (*citing* 6 N.Y.C.R.R. 617.11; CEQR § 6[a]).

30. *Id.* at 854.

31. *Id.* at 855. Finding that the district at issue conformed with the standard enunciated in *Chinese Staff and Workers Ass'n v. City of New York,* 509 N.Y.S.2d 499 (1986).

32. *See generally* Nolon, *supra* note 11.

33. *See Asian Americans For Equality*, 581 N.Y.S.2d at 785.

34. *Id.* at 786.

35. *Id.* at 786, 790.

36. Two cases have dealt with the Special Natural Districts, one type of district discussed in this paper. Both summarily recognized City Planning's special review powers. *City of New York v. Delafield* 246 Corp., 662 N.Y.S.2d 286 (1st Dep't 1997); *Coppotelli v. Comm'r of the Dep't of Buildings of the City of New York*, 646 N.Y.S.2d 773 (1996) (quoting the town ordinance).

37. *Lemp v. Town Bd. of Islip*, 394 N.Y.S.2d 517, 523 (1977).

38. *Id.* at 523.

39. *See generally* Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-01 (describing the Special Districts of New York City).

40. *Id.*

41. *In re Save the Pine Bush, Inc., et al. v. City of Albany*, 70 N.Y.2d 193, 200 (1987).

42. *Id.* The court found that Albany's district appropriately balanced commercial development with environmental protection through its Pine Bush Site Plan Review District. Multi-story buildings were permitted only after a careful analysis of the development proposal. *See id.* at 201. However, in this case the court found that while the district was valid, Albany had not adequately considered a proposal under its own process: the impact a five-building two-story office complex would have on the Pine Bush. *See id.* at 206.

43. *See Basile v. Town of Southampton*, 89 N.Y.S.2d 877, 879 (1997); *Wal-Mart Stores, Inc. et al. v. Planning Bd. of the Town of North Elba*, 238 A.D.2d 93, 98 (1998).

44. *See generally Basile*, 89 N.Y.S.2d at 877; *Wal-Mart Stores, Inc*., 238 A.D.2d at 93.

45. *Chinese Staff and Workers Ass'n v. City of New York*, 509 N.Y.S.2d 499, 500 (1986). The court noted that the proposed development, permitted by City Planning by special permit, could cause long-term secondary displacement of residents and business. *See id.* at 504.

46. *See id.*

47. *In re Save the Pine Bush, Inc*., 70 N.Y.2d at 200.

48. *Id.* at 206.

49. Nolon, *supra* note 11, at 187.

50. *See generally Fred French Investing Co. v. City of New York,* 352 N.Y.S.2d 762 (1973).

51. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980); *See also Penn Central Transportation Co. et al. v. New York City et al*., 438 U.S. 104 (1978).

52. *See generally*, *supra* notes 14-24 and accompanying text.

53. *See infra* § III.B.2.

54. *See* Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-50(l).

55. *See id.* at 764.

56. *Id.*

57. *Id.* at 765.

58. *Id.* at 766.

59. *Fred French Investing Co. v. City of New York,* 352 N.Y.S.2d 762, 766 (1973).

60. *Id.*

61. *Lemp*, 394 N.Y.S.2d at 519.

62. *Id.* at 523.

63. *Presbytery of Seattle v. King County,* 787 P.2d 907, 911 (1990) (discussing Seattle's hillside preservation area, a zoning law that was struck down and contrasts with New York City's less restrictive approach). In *Presbytery* the owner of a 4.5-acre parcel claimed a taking. He claimed that if he subdivided the property three of the five lots would be un-buildable. *Id.* at 910. The court rejected this approach. *Id.* at 911.

64. *Fred French Investing Co.*, 352 N.Y.S.2d at 766.

65. *Lemp*, 394 N.Y.S.2d at 517.

66. Special Hillsides Preservation, *supra* note 21, at 1.

67. Special Hillsides Preservation, *supra* note 21, at 1.

68. *See id.* at 1; *See* also Zoning Resolution, *supra* note 5, art. XI, ch. 9, § 119-00(a)-(d). Purposes include:

    (a) to reduce hillside erosion, landslides, and excessive water runoff associated with development, by conserving vegetation and protecting natural terrain;

    (b) to preserve hillsides having unique aesthetic value to the public;

    (c) to guide development in areas of outstanding natural beauty in order to protect, maintain, and enhance the natural features of such areas; and

    (d) to promote the most desirable use of land and to guide future development in accordance with a comprehensive development plan, and to protect the neighborhood character of the district. *Id*.

69. *See generally*, Special Hillsides Preservation, *supra* note 21.

70. *Id.* § 119-02.

71. *Id.* § 119-01.

72. Compare Zoning Resolution, *supra* note 5, art. IX, ch. 59, § 119-10 (regulating Tier I developments), with § 119-20 (regulating Tier II developments).

73. *Id.*

74. Zoning Resolution, *supra* note 5, art. XI, ch. 9, § 119.

75. *See generally id.* §§ 119-113, 119-313.

76. *Id.* (implementing these protective measures).

77. *See generally* Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105 (regulating the Special Natural Area Districts).

78. Compare Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-11(b), with Zoning Resolution, *supra* note 5, art. XI, ch. 9, § 119-01.

79. Special Hillsides Preservation, *supra* note 21, at 1.

80. *See id.* at 2.

81. Interview with Doug Brooks, New York City Department of City Planning, in Staten Island, New York (April 4, 2000) [hereinafter Doug Brooks Interview].

82. *See* Zoning Resolution, art. XI, ch. 9, § 119-03.

83. *See* Zoning Resolution, art. XI, ch. 9, §119-03. Zoning Resolution, *supra* note 5, art. XI, ch. 9, § 119-21l.

84. *See generally id.* § 119-02 (outlining the Special Natural Area Districts protections).

85. *Id.* § 119-21l.

86. *Id.*

87. *Id.*

88. *Id.*

89. *See generally* Zoning Resolution, *supra* note 5, art. XI, ch. 9, §§ 119-10, 119-13 (regulating Tier I).

90. *Id.* § 119-11l.

91. *Id.* § 119-112.

92. *See id.* § 119-113. These are protection areas for trees and vegetation. *Id.*

93. *Id.*

94. Zoning Resolution, *supra* note 5, art. XI, ch. 9, § 119-12.

95. *See id.* § 119-13 and § 119-23.

96. *Id.* § 119-217.

97. *Id.*

98. *Id.*

99. *See id.* § 119-211.

100. *See id.* § 119-214.

101. Special Hillsides Preservation, *supra* note 21, at 2.

102. *Id.*

103. *See* Zoning Resolution, *supra* note 5, art. XI, ch. 9, § 119-314.

104. *See supra* notes 42-48 and accompanying text.

105. *See* Zoning Resolution, *supra* note 5, art. X, ch. 5, §§ 105-941, 105-944.

106. *Id.* § 105-942.

107. *Id.* § 105-941.

108. *Id.* § 105-943.

109. *Id.* § 105-944.

110. *See id.* Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-944.

111. Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-02.

112. *Id.* § 105-01.

113. *Id.* § 105 (setting forth regulations for landowners).

114. *See* Doug Brooks Interview, *supra* note 81.

115. *See generally*, Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-944.

116. *Id.* §§ 105-41, 105-42, 105-424.

117. *See* Zoning Resolution, *supra* note 5, art. X, ch. 5, Appendix B.

118. *See* Zoning Resolution, *supra* note 5, art. X, ch. 5, §§ 105-422, 105-432.

119. *Id.* § 105-01 (excluding lots of 40,000 or less from regulations).

120. *Id.* § 105-421.

121. *Id.* § 105-41.

122. *See id.* § 105-50.

123. *See id.* § 105-701.

124. Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-30.

125. *See generally infra* § III.D.

126. *Id.* § 107-322.

127. Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-00.

128. Zoning Resolution, *supra* note 5, art. X, ch. 7, § 107-00.

129. *Id.* § 107-32.

130. *See* Mar. 20, 2000 Meeting, *supra* note . In the meetings of the Task Force for the Special Natural Area District on Staten Island, community members have criticized the city's under-enforcement of the tree regulations. *Id.*

131. *See* Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-431.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.* § 105-20.

136. *See* Mar. 20, 2000 Meeting, *supra* note 22.

137. Comprehensive Waterfront Plan, *supra* note 4, at 2.

138. *See* N.Y. Executive Law § 915-(1) (3) (McKinney 2001).

139. *See* N.Y. City Department of City Planning, The New Program 3 (1999) [hereinafter Waterfront Revitalization]. New York State approved the original plan in 1982. *See id.* at 4.

140. Comprehensive Waterfront Plan, *supra* note 4, at i. "The plan envisions a 21st Century Waterfront . . . including parks, open spaces, fishing, swimming, natural areas, maritime industries, ferries, scenic views, housing and job opportunities." *Id.*

141. These are not "Special Districts" in the Zoning Resolution, but are recognized by City Planning. Comprehensive Waterfront Plan, *supra* note 4, at 35 (using three Special Districts: Jamaica Bay/Rockaway Pennisula, Portions of Staten Island Coastline and Sections of the Long Island Sound Shoreline of Queens and the Bronx).

142. Waterfront Revitalization, *supra* note 139, at 51.

143. *See id.* at 18.

144. *See id.*

145. *See id.*

146. *See* Comprehensive Waterfront Plan, *supra* note 4, at i.

147. *See id.* at 145.

148. *See id.* at 85.

149. *Id.*

150. *See id.*

151. *See id.* at i.

152. *See* Comprehensive Waterfront Plan, *supra* note 4, at 26.

153. Zoning lots along Staten Island's Atlantic shore must provide for a waterfront esplanade with public access rights. *See* Zoning Resolution, *supra* note 5, art. X, ch. 7, § 107-23.

154. Waterfront Revitalization, *supra* note 139, at 5. The waterfront plan covers the following areas of the city: significant maritime and industrial areas, significant coastal fish and wildlife habitats, "Special Natural Waterfront Areas," Staten Island Bluebelts, Tidal and Freshwater Wetlands, Coastal Floodplains and Flood Hazard Areas, Erosion Hazard Areas, Coastal Barrier Resources Act Areas, steep slopes, parks and beaches, visual access . . . , historical . . . sites . . . , special zoning districts and the area within 300 feet of the Mean High Tide Line when these special features aren't present." *See generally id.*

155. Discretionary in New York City means approvals subject to the Uniform Land Use Review Procedure (ULURP), City Environmental Quality Review (CEQR), variance proceedings, and 197-

a plans. Each of the above must be reviewed for consistency with the WRP. Waterfront Revitalization, *supra* note 139, at 4.

156. *Id.* at 7-8, 16-17 (discussing why the SNWA's were updated and what the new polices are with respect to those areas).

157. *See* Waterfront Revitalization, *supra* note 139, at 3. Under the Federal Coastal Zone Management Act federal actions must be, to the maximum extent possible, consistent with approved state coastal zone programs. *See* U.S.C.S. 1451 *et. seq.* Similarly, under the New York State Waterfront Revitalization and Coastal Resource Act, actions by State agencies must be consistent with local coastal plans, like New York City's Comprehensive Waterfront Plan and the Waterfront Revitalization Plan. *See* NY CLS Exec. § 912 *et seq*.

158. The "policies":

(1) Support and facilitate commercial and residential redevelopment in areas well-suited to such development.

(2) Support water-dependent and industrial uses in New York City coastal areas that are well-suited to their continued operation.

(3) Promote use of New York City's waterways for commercial and recreational boating and water-dependent transportation centers.

(4) Protect and restore the quality and function of ecological systems within the New York City coastal area.

(5) Protect and improve water quality in the New York City coastal area.

(6) Minimize loss of life, structures and natural resources caused by flooding and erosion.

(7) Minimize environmental degradation from solid waste and hazardous substances.

(8) Provide public access to and along New York City's coastal waters.

(9) Protect scenic resources that contribute to the visual quality of the New York City coastal area.

(10) Protect, preserve and enhance resources significant to the historical, archaeological and cultural legacy of the New York City coastal area. *Id.*

159. *Id.* at 4, 8.

160. *See* Zoning Resolution, *supra* note 5, art. VI , ch. 2, § 62-332.

161. *See id.* § 62-351.

162. Dunlap, *supra* note 20, at 11-1.

163. Comprehensive Waterfront Plan, *supra* note 4, at 49.

164. *Id.* at 35.

165. *See id.* at 45.

166. *Id.*

167. *See id.* at 42.

168. *See id.*

169. Comprehensive Waterfront Plan, *supra* note 4, at 42.

170. *See id.*

171. *Id.*

172. *Id.* at 36; *See also* N.Y. City Department of City Planning, Waterfront Revitalization Program, Coastal Zone Boundary Appendix (1997) [hereinafter Coastal Zone Boundary].

173. *Id.*

174. *See id.*

175. *See id.* at 39.

176. *Id.* at 42.

177. New York City Zoning Resolution, Article X. Ch. 7, § 107-00(a)-(d): The general goals of the SRDD are to "guide future development . . . promote balanced land use . . . avoid destruction of irreplaceable natural and recreational resources such as lakes, ponds, watercourses, beaches and natural vegetation and . . . to promote the most desirable use of the land . . . and thereby protect the City's tax revenues." Zoning Resolution, *supra* note 5, art. X, ch. 7, § 107-00.

178. *Id.* § 107-50.

179. *Id.* § 107-00.

180. *Id.* §§ 107-22, 107-23.

181. *Id.* §§ 107-42, 107-46, 107-662.

182. *See generally* Inbar, *supra* note 2 (discussing the problems inherent in requiring private landowners to create public shore-front access). This problem will be discussed more fully later in this paper.

183. Zoning Resolution, *supra* note 5, art. X, ch. 7, § 107-23.

184. *See id.* § 107-24.

185. *See id.* § 107-251(b).

186. *See id.*

187. *See generally* Zoning Resolution, *supra* note 5, art. X, ch. 7, Table A.

188. *Id.* § 107-42.

189. Zoning Resolution, *supra* note 5, art. X, ch. 7, Table A.

190. *See id.*

191. *See generally id.* §§ 107-223–107-226.

192. *Id.* § 107-01 (definitions for the SRDD).

193. *Id.* § 107-224.

194. *See generally Id.* §§ 107-223–107-226.

195. Pursuant to the New York City Zoning Resolution, the city may exchange parcels or it may modify the rules to allow some encroachment on the open space. Zoning Resolution, *supra* note 5, art. X, ch. 7, §107-226.

196. *See id.* § 107-21.

197. *Id.* § 107-32.

198. *Id.* §§ 107-321–107-322.

199. *See id.* § 107-322.

200. *See id.* §§ 107-481, 107-482. The rules suggest that a developer building residences near a commercial or manufacturing area is responsible for the buffer and vice-versa. *Id.*

201. Zoning Resolution, *supra* note 5, art. X, ch. 7, § 107-321.

202. *See id.*; *see also City of New York v. Delafield 246 Corp.*, 662 N.Y.S.2d 286, 294-95 (1st Dep't 1997) (creating restoration plan).

203. Zoning Resolution § 107-432.

204. Jim O'Grady, *Hills, Trees, and Maybe a New Park*, N.Y. Times, July 18, 1999, sec. 14 at 8 (A disgruntled community leader describing the Hillside District, which was later revised to address some of these concerns.)

205. *See generally supra* note 22 and accompanying text.

206. O'Grady, *supra* note 204, at 8.

207. Natural Area District Task Force, Minutes from Jan. 29, 2000 Meeting.

208. *See generally* Zoning Resolution *supra* note 5 (which does not include these Special Districts).

209. *See* O'Grady, *supra* note 204, at 8.

210. *See* In the Matter of a Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings 1 (1997).

211. *Id.*

212. Special Hillsides Preservation, *supra* note 21, at 3.

213. *See* In the Matter of a Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings at 2.

214. *See id.* at 6.

215. *Id.* at 3.

216. *See id.*

217. *See id.*

218. *See id.* at 3-4.

219. *See* In the Matter of a Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings, at 1, 5 (1997).

220. *See id.* at 6. Unfortunately, the report's drafters failed to realize it is the Department of Buildings that conducts site inspections.

221. *See* Special Hillside Preservation, *supra* note 21 at 3-4.

222. *See* Zoning Resolution, *supra* note 5, art. X, ch. 9, § 119-01.

223. *See* Mar. 20, 2000 Meeting, *supra* note 22.

224. *See* Special Hillsides Preservation, *supra* note 21, at 4. Recommended in the Special Hillsides Preservation District Zoning Study and implemented in the New York City Zoning Resolution § 119-02. *See generally id.*; Zoning Resolution, *supra* note 5, art. XI, ch. 9 § 119-02.

225. *See, e.g.*, § 119-216 (requiring larger trees be planted to replace those removed); *see also* § 119-22 (requiring a drainage plan for all development in Tier II).

226. *See id.* § 119-211.

227. *See generally* Mar. 20, 2000 Meeting, *supra* note 22 (discussing implementation of Special Natural District Areas zoning provisions).

228. New York City Department of City Planning, The Staten Island Greenbelt 66 (1983) [hereinafter Staten Island Greenbelt].

229. *Id.*

230. *See id.* at IV-16; Staten Island Greenbelt, *supra* note 228 at 80.

231. *See Protectors of Pine Oak Woods Inc. et al. v. Giuliani*, Index No. 12508/99 (Sup. Ct. Richmond Cty. 2002).

232. *See* Staten Island Greenbelt, *supra* note 230 at 80.

233. *See generally* Natural District Area Task Force, Minutes from February 5, 2000 Meeting [hereinafter Feb. 5, 2000 Meeting].

234. This issue was raised by a community member at the Mar. 20, 2000 Task Force meeting. Removing the Expressway from city maps would mean the project was formally negated.

235. A.2211 and S.1432, 2003 (N.Y. 2003).

236. Press Release, Staten Island Community Board 2 (with CB1 and CB3), All Staten Island Community Boards Want Traffic to Move (Feb. 3, 2003).

237. *See* Comprehensive Waterfront Plan, *supra* note 4, at 185.

238. *See generally* Zoning Resolution, *supra* note 5.

239. *See id.* at 36.

240. *See id.* at vi.

241. *See id.*

242. *See* Waterfront Revitalization, *supra* note 139, at 11, 16.

243. *See* Interview with George Bramwell, Chair of the Task Forces for the Hillside Preservation and Special Natural Area Districts on Staten Island, Conducted at New York City Councilman Jerome O'Donovan's Office, in St. George, Staten Island (April 13, 2000); *see also* Doug Brooks Interview, *supra* note 81; Interview with Terrence Lin, New York City Department of Buildings, in Staten Island, N.Y. (April 28, 2000) [hereinafter Terrence Lin Interview] (on file with Author).

244. *See* Interview with Doug Brooks, *supra* note 81.

245. *See* Interview with Terrence Lin, *supra* note 243.

246. *Id.*

247. *Id.*; *See also* Karen O'Shea, *Gentlemen, Start Your Bulldozers: Green Light for 1,300 Homes*, Staten Island Advance, May 1, 2000 at 1.

248. Interview with Terrence Lin, *supra* note 243.

249. *See* In the Matter of a Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings at 3. Compounding the problem is that there is no review process for the self-certifications. *See id.* at 4. Terrence Lin at the DOB says, however, that 20 percent are audited, randomly. *See* Interview with Terrence Lin, *supra* note 243.

250. *Id.*; *see also* Feb. 5, 2000 Meeting, *supra* note 233, at 2.

251. *Id.*

252. *See* Zoning Resolution, *supra* note 5, art. X, ch. 7, § 107-123.

253. *See id.* at A1.

254. *Building Association of New York City, Inc. v. City of New York*, 23290/98 (Sup. Ct. of NY Cty. 1999); *see* also O'Shea, *supra* note 247, at A1, A4.

255. *Id.* at A4.

256. In the Matter of a Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings at 7.

257. *See id.*

258. *See* In the Matter of a Grand Jury Investigation Into the Zoning District Known as the Hillside Preservation District and the New York City Department of Buildings; *See also* Interview with Terrence Lin, *supra* note 243.

259. *See* Mar. 20, 2000 Meeting, *supra* note 22.

260. *See Lighthouse Hill Civic Association v. City of New York*, 712 N.Y.S.2d 558 (App. Div. 2000). Governmental actions deemed "ministerial" are not subject to review under the State Environmental Quality Review Act. *See* N.Y. E.C.L. § 8-0103 (McKinney 2002).

261. *See* Zoning Resolution, *supra* note 5, art. X, ch. 5, § 105-00.

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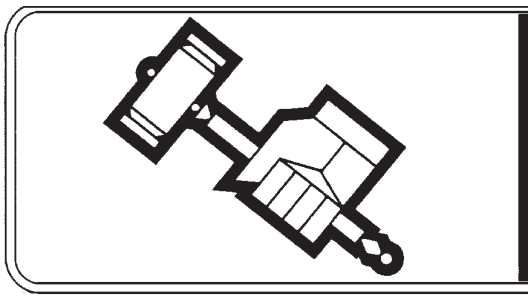


Administrative Decisions Update

Prepared by Peter M. Casper

CASE: ***In re the application of Waste Management of New York, LLC for permits to construct and operate a solid waste management facility, the Towpath Environmental and Recycling Center, in the Town of Albion, Orleans County.***

AUTHORITIES: ECL Article 27 (Solid Waste)

ECL Article 19
(Air Pollution Control)

ECL Article 15 (Water Resources)

ECL Article 8
(Environmental Quality Review)

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

6 N.Y.C.R.R. Part 617 (SEQR)

DECISION: On February 10, 2003, the New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (the "Commissioner") adopted the conclusions of the Administrative Law Judge's (ALJ's) report with regard to hydrogeology and noise. The Commissioner also determined that the requirements of the State Environmental Quality Review Act (SEQRA) were satisfied and that the proposed project complied with all applicable laws and regulations. As such, she directed DEC staff to issue the requisite permits to construct and operate the Towpath Landfill.

A. Facts

Waste Management of New York, LLC (WMNY or the "Applicant") seeks to expand the closed Orleans Sanitary Landfill (Landfill) in the Town of Albion. In addition to the Landfill, the facility would include administration and maintenance buildings, scale house, leachate storage tanks, surface water collection and storm water management facilities, and a recycling center for drop-off and separation of recyclables.

The Landfill would be constructed on a 204-acre parcel and has a design capacity to accept approximately 1,800 tons of solid waste per day. It is estimated that there exists sufficient capacity to accept solid waste at the Landfill for 16 years. At full capacity, the landfill would be approximately 200 feet above the surrounding ground level and approximately 90 feet higher than the existing closed Orleans landfill.

To construct and operate the Landfill the Applicant sought various permits from the DEC, including a Part 360 permit, a dam safety permit (for construction of a sedimentation basin), an air control permit (landfill gases), and a water quality certificate. The Applicant also sought two variances from Part 360 regulations. One variance would be from the requirements of 6 N.Y.C.R.R. § 360-2.7(b)(9)(iv), which states that separately functioning subcells be maintained so that a nonfunctioning subcell can be made inoperable to allow for investigation and remediation while another subcell continues to receive solid waste. The Applicant intends to operate the first subcell of the landfill before the second is constructed. The Applicant proposes to divert inbound solid waste to another facility should the first subcell become inoperable.

The second variance is from the requirements of 6 N.Y.C.R.R. § 360-2.12(a)(1)(v) and (vi) which requires that unconsolidated deposits underlying the landfill be 20 feet or greater in thickness as measured from the base of the constructed liner. The Applicant intends to provide a subgrade of approximately 10 feet thick which exhibits performance characteristics at least as equivalent to the required 20-foot layer. To justify this variance the Applicant argued that the additional 10 feet of soil would unduly increase construction costs and raise the liner elevation, which would unnecessarily reduce the overall capacity of the Landfill.

The DEC designated itself lead agency under SEQRA and determined that the Landfill project was a Type I action and issued a Positive Declaration. In response the Applicant prepared a Draft Environmental Impact Statement (DEIS), which DEC accepted for review on March 24, 1999.

B. Discussion

During the legislative public hearing the DEC received oral and written comments which were overwhelmingly negative about the project and its impacts

on the surrounding community, citing among other things, negative impacts on the environment and tourism along the Erie Canal. A few letters were received which supported the project citing to the Applicant's future role in cleaning up the existing Orleans Landfill, provided the project was approved.

Several organizations, municipalities and individuals sought full-party status at the issues conference. Ultimately the ALJ decided that the Towns of Albion and Murray (the "Towns") and the citizen's group Stop Polluting Orleans County (SPOC) raised substantive and significant issues and were given full-party status. The three issues identified were as follows: (1) whether the Applicant was suitably fit to receive the permits requested by DEC; (2) anticipated noise impacts from the Landfill operations; and (3) the reliability of the hydrogeologic investigation conducted by the Applicant. Appeals on the ALJ's rulings were made to former Commissioner John P. Cahill.

In an Interim Decision, former Commissioner Cahill determined that the first issue with respect to the Applicant's suitability did not require further consideration and since this was the only issue raised by SPOC, he rescinded their party status. Mr. Cahill agreed with the ALJ that the hydrogeologic issue and noise issue should be adjudicated. However, prior to the adjudication hearing the Applicant, DEC and the Towns reached an agreement resolving the noise issue, eliminating the need for its adjudication. The agreement requires, among other things, that the Applicant amend its operations and maintenance manual, and DEC amend its draft permits, to help ensure that future noise levels from the site will remain at acceptable levels.

Hydrogeology Issues

The Applicant and DEC argued that the application should be approved because the hydrogeologic investigation confirms that groundwater monitoring and remediation can be conducted at the site, despite its proximity to the old Orleans landfill and McKenna landfill. They argue that the computerized groundwater flow model used was appropriate and confirmed the conceptual model developed by the Applicant's consultants. They further argued that the Landfill site is not in an area where bedrock would be subject to rapid or unpredictable groundwater flows (which could pose certain environmental problems) and that the proposed monitoring well array is adequate to detect leachate releases.

The Towns argued that the application should be denied because the Applicant failed to demonstrate compliance with key provisions in Part 360 concerning groundwater monitoring. For example, 6 N.Y.C.R.R. § 360-2.12(c)(5) provides that new landfills must not be located in areas where environmental monitoring and site remediation cannot be conducted. Identification of monitoring areas must also be based upon several factors including: ability to detect and characterize groundwater and surface water flow to locate up-gradient and down-gradient directions; ability to place environmental monitoring points which will detect releases from the landfill; ability to characterize and define a release from the landfill and determine what corrective actions may be necessary; and the ability to carry out those corrective actions.

The Towns, in part, are concerned that the monitoring well spacing is inadequate to detect and monitor leachate release before they move off-site. The Towns argued that the Applicant would not be able to differentiate leachate impacts from the proposed landfill from those associated with the closed Orleans and McKenna landfills. They were also concerned about the underlying bedrock of the site and argued that the Applicant failed to show that the bedrock is not subject to rapid or unpredictable groundwater flow.

The ALJ ruled and the Commissioner concurred in her decision that the Applicant's experts and DEC staff adequately demonstrated that the Landfill site is indeed independently monitorable and as such is not inconsistent with section 360-2.12(c)(5), despite contrary testimony from the Towns' two experts. The ALJ attributed the ability to monitor the Landfill to several important factors, including the design of the landfill, existing knowledge of groundwater flow directions, and the placement of monitoring wells.

C. Conclusion

Based upon the foregoing determination, the Commissioner directed DEC staff to issue the requisite permits subject to one non-substantive change to one special permit condition, which requires the Applicant to hire a third-party environmental firm to conduct monitoring at the site.

Peter M. Casper, Esq. is a second-year associate in the Environmental Practice Group of Whiteman, Osterman & Hanna in Albany, New York.

Recent Decisions in Environmental Law

Student Editor: Wesley O'Brien

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

***Patricia Bragg v. West Virginia Coal Association*,** 248 F.3d 275 (4th Cir. 2001)

Facts: This action was brought under the auspices of the Surface Mining Control and Reclamation Act (SMCRA),[1] alleging that the Director of the West Virginia Division of Environmental Protection violated his non-discretionary duties under both SMCRA and the state regulatory scheme, by issuing surface mining permits for mountaintop-removal coal mining.[2] The complaint alleges that permits were issued without the requisite findings, which included the maintenance of a 100-foot buffer zone around any perennial and intermittent streams and any mining activities.[3] The plaintiffs primarily sought an injunction preventing the issuance of any further mountaintop-removal mining permits.

The practice of mountaintop-removal for coal extraction involves the actual removal of the rock comprising the mountaintop, placing it in the adjacent valley, and then extracting the exposed coal. Once the rock is broken up, it "swells" as much as 25 percent its original volume, and thus cannot all fit back where it came from originally. The excess rock, or "overburden," is left in the valley, and thus changes the environment. This practice buries many intermittent and perennial streams, along with the associated drainage areas.[4] This leads to great changes in the land, more frequent flooding, pollution in streams and rivers, as well as disrupting the wildlife.[5]

In July 1998, Patricia Bragg, eight other citizens of West Virginia, and the West Virginia Highlands Conservancy commenced this action in the United States District Court for Southern District of West Virginia against the United States Army Corps of Engineers and the Director of the West Virginia Division of Environmental Protection.[6] The District Court issued an injunction,[7] which was stayed pending this appeal, as well as a consent decree approving settlement of several other claims.[8]

Issues: Whether the Federal District Court may enjoin the West Virginia State Director of Environmental Conservation from issuing permits under the SMCRA, without violating the Eleventh Amendment state immunity doctrine and in the alternative, whether or not West Virginia waived Eleventh Amendment protection. Further, whether the court had subject matter jurisdiction to enter a consent decree concerning negotiated settlements between the parties on other issues pertaining to this matter.

Analysis: The issue of whether the Eleventh Amendment protected the Director of the West Virginia Division of Environmental Protection ultimately revolved around the source of the controlling legislation. While it was true the SMCRA is a federal piece of legislation, the Director did not derive his powers from this legislation. Rather, the SMCRA was the controlling legislation until West Virginia passed its own version approved by the Secretary of the Interior. Thus, the SMCRA acted as a blueprint, but then dropped out as effective law.[9] West Virginia law exclusively regulates coal mining in the state and the Director was acting under state law in his official capacity, so he was immune from suit in federal court under the Eleventh Amendment.

In the alternative, the plaintiffs contended West Virginia waived its Eleventh Amendment protection by submitting to federal jurisdiction under the SMCRA. However, here as well, the SMCRA was the controlling legislation until the state produced its own version. Once the state enacted its own version, the federal government dropped out of the regulation of coal mining, allowing the state to hold exclusive power over all regulation of coal mining in the state. There is no shared regulation, and as such, the Director is not operating under any federal law, strictly state law. In this situation, West Virginia did not waive its Eleventh Amendment protection by submitting to federal regulation.[10] As a result, the case was remanded, with directions to dismiss the unsettled claims, although the case may be pursued in West Virginia State Court.

Finally, the parties entered into a settlement agreement on several issues and submitted it to the District Court for approval through a consent decree. Even though the coal companies later challenged the validity of the decree and settlements, the District Court was well

within its power to issue such a consent decree. The real question here was subject matter jurisdiction over the case, which the District Court clearly had in this matter. Even though the Director ultimately was immune from the injunction under the Eleventh Amendment, in regard to the settlements, the Director waived such immunity by having entered into a settlement. The Director chose not to invoke this defense in the settled matters, and it is now too late to do so.[11] Accordingly, the consent decree entered by the Federal District Court was affirmed.

William A. Makin '03

Endnotes

1. Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (2003).
2. *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 285 (4th Cir. 2001).
3. *Id.* at 286-87.
4. *Id.* at 286.
5. *Id.* at 286-7.
6. *Id.*
7. *Bragg v. Robertson*, 190 F.R.D. 194, 196 (S.D.W.Va. 1999).
8. 248 F.3d at 288.
9. *Id.* at 289-90.
10. *Id.* at 293.
11. *Id.* at 299-300.

* * *

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 207 F. Supp. 2d 3 (N.D.N.Y. 2002)

Facts: Plaintiffs sued the City of New York and its Department of Environmental Protection in a citizen's suit under the Clean Water Act[1] seeking to enjoin defendants from polluting a world-class trout creek with contaminated water. Defendants contended that the pollution resulted from compliance with New York State regulations requiring Defendants to release enough water into the creek to maintain a minimum water flow. Accordingly, Defendants impleaded third-party defendants, the state of New York, the New York State Department of Environmental Conservation and its Commissioner seeking contribution and indemnification for any civil penalties which might be imposed, as well as a declaration that the Clean Water Act preempted the state release requirements. Plaintiffs moved to strike this third-party complaint.

Issue: Whether the New York State release requirements were preempted by the federal Clean Water Act and the Supremacy Clause.

Analysis: The court first addressed Defendants' contention that since state regulations required the release of water into the creek, the state should be liable for some or all of the penalties imposed. The court pointed out that the citizen suit provisions of the Clean Water Act did not abrogate state sovereign immunity.[2] Therefore, since the state defendants could not be held liable under the Clean Water Act for monetary damages, the court held that Defendants did not have a viable claim for indemnification and contribution under the Clean Water Act. Consequently, the court granted Plaintiffs' motion to strike the third-party claims for indemnification and contribution.

The court next considered Defendants' claim that state release requirements were preempted by the Clean Water Act and the Supremacy Clause. According to the court, compliance with state release requirements was irrelevant to the issue of liability. While such compliance could be relevant in determining what penalties should be imposed, any such penalties were not "dependent on, or derivative of, the Plaintiffs [sic] action against the [] Defendants."[3] Since any declaratory relief regarding preemption was relevant only to the state law claims the state asserted in its answer to the third-party complaint, such relief was not appropriate. Therefore, the court granted Plaintiffs' motion to strike the third-party complaint's claim for declaratory relief.

Robert Scott Gonzales '03

Endnotes

1. 33 U.S.C. § 1365 (2003).
2. *See Burnette v. Carothers*, 192 F.3d. 52 (2d Cir. 1999).
3. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 207 F. Supp. 2d 3, 6 (N.D.N.Y. 2002).

* * *

General Electric Co. v. Environmental Protection Agency, 290 F.3d 377 (D.C. Cir. 2002)

Facts: Unless the United States Environmental Protection Agency (EPA) determines that no "unreasonable risk of injury to health or the environment"[1] will result, the manufacture, process, distribution, and unenclosed use of polychlorinated biphenyls (PCBs) is prohibited under the Toxic Substances Control Act (TSCA).[2] Generic methods for sampling, cleaning up or disposing of PCB remediation waste and for the sampling or disposing of PCB bulk product waste are prescribed under 40 C.F.R. sections 761.61 and 761.62 respectively; the use of alternative cleanup and disposal methods are permitted upon application to the EPA under sections 761.61(c) and 761.62(c) provided the proposed alternative will "not pose an unreasonable risk of injury to health or the environment."[3] Neither section 761.61 nor section 761.62, however, provide any guidance as to how an applicant is to conduct the necessary risk assessment of a proposed alternative.

The EPA issued the PCB Risk Assessment Review Guidance Document ("Guidance Document"), which governs applications made under sections 761.61(c) and 761.62(c), and provides, *inter alia*, two approaches to risk assessment. An applicant may either calculate cancer and non-cancer risks individually, with a cancer potency factor already recognized by the EPA ranging from .04 to 2.0 (mg/kg/day)-1 depending upon the exposure pathway and upon the composition of the PCB mixture, or collectively, using a total toxicity factor of 4.0 (mg/kg/day)-1.[4] The collective calculation "reduce[s] the time and expense associated with the risk assessment [since the EPA] is willing 'to accept [the total toxicity factor] . . . without requiring further justification.'"[5]

The General Electric Company (GE) petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Guidance Document. GE claimed, *inter alia*, that the Guidance Document was a legislative rule within the meaning of the TSCA,[6] and that it was promulgated by the EPA without following the procedures required by the TSCA and the Administrative Procedures Act (APA).[7]

Issue: Whether the Guidance Document is a legislative rule within the meaning of the TSCA such that the manner of its promulgation is subject to judicial review.

Analysis: The United States Court of Appeals for the District of Columbia Circuit held that because the Guidance Document appeared on its face to create binding legal obligations, it was a legislative rule within the language of the TSCA.

Under the TSCA, "[n]ot later than 60 days after the date of the promulgation of a rule under section . . . 2605(e) . . . of this title, . . . any person may file a petition for judicial review of such rule with the United States Court of Appeal [sic] for the District of Columbia Circuit."[8] To determine whether the Guidance Document was a legislative rule, the court considered whether it purported to change substantive policy by imposing further obligations that bound affected parties with the force of law. The court noted that "[i]f a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures."[9] If "affected parties are reasonably led to believe that [the] failure to conform [with the language] will bring adverse consequences, such as [the] denial of an application,"[10] the document will have practical binding effect.

The court found that although the EPA had previously used the toxicity factor of 4.0 (mg/kg/day)-1 in generic PCB cleanup standards, further legal obligations were imposed on affected parties because the Guidance Document unequivocally stated that applicants must use this toxicity factor in calculating the risk from both cancer and non-cancer endpoints. Additionally, although the Guidance Document included a provision which permitted the use of nonstandard methods for estimating risks on a case-by-case review, the court concluded that the overall binding effect the Guidance Document had on general applicants was not altered. Furthermore, it appeared to the court from the language of the Guidance Document that the EPA was not willing to accept applications utilizing risk assessment techniques other than the two prescribed.

The United States Court of Appeals for the District of Columbia Circuit held, as a matter of law, that the Guidance Document was a legislative rule under the TSCA because on its face it purports to bind both applicants and the EPA with the force of law; therefore, the manner of its promulgation was subject to judicial review. The EPA conceded that it failed to meet the procedural requirements of the TSCA and the APA because it failed to publish notice of the proposed rulemaking, give interested parties an opportunity to comment, or hold an informal hearing on the issues. As a result, the court ordered that the Guidance Document be vacated since it was a legislative rule promulgated by the EPA without following the procedures required by the TSCA and the APA.

Wesley O'Brien, '05

Endnotes

1. 15 U.S.C. § 2605(e)(2), (3) (2003).
2. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (2003).
3. 40 C.F.R. §§ 761.61, 762.62 (2003).
4. *General Electric Co. v. Envtl. Prot. Agency*, 290 F.3d 377, 379 (D.C. Cir. 2002).
5. *Id.*
6. 15 U.S.C. § 2618(a)(1)(A) (2003).
7. Administrative Procedures Act, 5 U.S.C. §§ 551-559 (2003).
8. 15 U.S.C. § 2618(a)(1)(A) (2003).
9. *Envtl. Prot. Agency*, 290 F.3d 382-383 (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Materials, and the Like—Should Federal Agents Use Them to Bind the Public?*, 41 Duke L.J. at 1328-29 (1992)).
10. *Id.* at 383.

* * *

***League of Wilderness Defenders—Blue Mountains Biodiversity Project v. Zielinski*,** 187 F. Supp. 2d 1263 (D.Or. 2002)

Facts: Pursuant to the Timber Basin Wildfire Rehabilitation and Timber Salvage Plan (Plan), the Bureau of Land Management for Washington and Oregon (BLM) contracted with a commercial logger for the logging of

land affected by the wildfires of 2001. The Plan called for "cutting 4.4 million board feet of burned trees and 2.5 million board feet of unburned trees from over 900 acres."[1] Prior to implementation, the BLM released an Environmental Assessment (EA) for the Plan, and issued a Finding of No Significant Impact (FONSI).

Plaintiff environmental activists, after having been denied a Protest seeking a stay of the Plan and amendment of the FONSI "so as to ensure compliance with the National Environmental Policy Act"[2] and rebuffed in their effort to obtain a temporary restraining order, were instead granted a hearing for their preliminary injunction motion. Ultimately, this motion was granted in part and denied in part, as the court halted further logging, but allowed the removal of timber which had already been cut.

Issue: Whether the plaintiffs "established the existence of serious questions going to the merits of whether the BLM complied with NEPA"[3] and had a fair chance of success on the merits, and whether the "balance of hardships tip[ped] in the plaintiffs' favor."[4]

Analysis: The serious questions raised by the plaintiffs and acknowledged by the court pertain to four areas. The first is the "adequacy of the EA's consideration of opposing scientific evidence."[5] The plaintiffs convinced the court that the BLM's EA failed to address differences between its own view of impacts likely to result from implementation of the Plan, and the view of the wider scientific community. The court found that the inclusion of scientific references in the court-ordered Administrative Record (AR) filed by the BLM failed to provide the "public information . . . of 'high quality'"[6] that is so essential to the implementation of NEPA. The court held that the plaintiffs raised serious questions as to the adequacy of the manner in which the BLM addressed opposing viewpoints.

Secondly, the plaintiffs succeeded in raising serious questions as to whether the BLM should have prepared a detailed Environmental Impact Statement (EIS). The court determined that the BLM's primary reliance in its EA on a 1975 study analyzing snow cover failed to satisfy its duty under NEPA to evaluate the effects and risks inherent in implementing the Plan, presenting a serious question as to the necessity of an EIS.

Thirdly, the plaintiffs raised additional serious questions regarding "the adequacy of the consideration of cumulative impacts"[7] in the BLM's EA. These "[c]umulative impacts may result from 'individually minor but collectively significant actions taking place over a period of time.'"[8] The court agreed with the plaintiffs' assertion that serious questions existed as to whether the EA adequately addressed any applicable activities resulting in a potentially cumulative impact, such as fire-fighting.

Lastly, the court acknowledged that the plaintiffs raised serious questions as to whether the BLM's EA "adequately provided the public with a restoration alternative."[9] Although the AR revealed that the BLM initially considered a "'rehabilitation-only' alternative"[10] which was ultimately dismissed as "'inconsistent' with the applicable Resource Management Plan"[11] calling for commercial logging in the area, the BLM failed to dispel the plaintiffs' serious questions on the issue. Ultimately, the court found "a serious question as to whether the BLM's failure to include a restoration-only alternative thwarted NEPA's two primary goals: insuring the agency has fully contemplated the environmental effects of its action; and insuring the public has sufficient information to challenge the agency."[12]

Finally, the court determined that the balance of hardships tipped in the plaintiffs' favor in granting the partial preliminary injunction. In analyzing the hardships, the court adhered to Supreme Court precedent in assuming that "the kind of potential environmental injury" in question "can seldom be adequately remedied by money damages and is often permanent or irreparable."[13] Because much of the logging had already taken place, the court allowed removal of any timber already cut, but did grant the partial injunction halting any further cutting, pending resolution of the serious questions raised by the plaintiffs.

Matthew Heinz '03

Endnotes

1. *League of Wilderness Defenders—Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1266 (D.Or. 2002).
2. *Id.*
3. *Id.*
4. *Id.* at 1272.
5. *Id.* at 1270.
6. *Id.* (quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998)).
7. *League of Wilderness Defenders—Blue Mountains Biodiversity Project*, 187 F. Supp. 2d at 1270.
8. *Id.* at 1271 (quoting 40 C.F.R. § 1508.7 (2003)).
9. *League of Wilderness Defenders—Blue Mountains Biodiversity Project*, 187 F. Supp. 2d at 1272.
10. *Id.*
11. *Id.*
12. *Id.* (citing *Idaho Sporting Congress*, 137 F.3d at 1151).
13. *League of Wilderness Defenders—Blue Mountains Biodiversity Project*, 187 F. Supp. 2d at 1272 (citing *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).

NEWS flash

Environmental Law Section News

Recipients of Environmental Law Minority Fellowships Named

Three law students were awarded Minority Fellowships in Environmental Law at the January 2003 NYSBA Environmental Law Section meeting. The fellowship recipients include:

- Jessica Ortiz, who is a first-year law student at the University at Buffalo Law School and a member of the Latin-American Law Student Association, Puerto Rican Bar Association and Black Law Student Association. Ms. Ortiz is a graduate of Syracuse University (Crouse-Hinds School of Management) where she received a Bachelor of Science in Management Information Systems and a Bachelor of Science in Managerial Law and Public Policy. She has also worked as a Senior Technology Security Associate at PricewaterhouseCoopers, LLP.
- Cindy Pean, who is a first-year student at Fordham University School of Law. Ms. Pean received a Bachelor of Arts from Barnard College of Columbia University, with a double major in psychology and political science. She was a corporate legal assistant at a major New York City law firm working on environmental due diligence issues.
- Andre Shiromani, who is a second-year law student at Tulane University and a member of the school's Public Interest Law Foundation, Human Rights Law Society, and Environmental Law Society. Mr. Shiromani received a Bachelor of Arts from the University of Georgia and worked as a legal intern at the Los Alamos Study Group in Santa Fe, New Mexico.

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 recipients 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 Environmental Defense and the Natural Resources Defense Council.

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 United States. This year's applications were reviewed by a panel of judges that included Attorneys Eileen Millett, Arlene Yang, Nelson Johnson, and Louis Alexander. The three fellowship winners will receive stipends to spend the summer of 2003 working in environmental positions with the government or with environmental interest organizations.

Left to Right: 2003 Fellowship Recipients Jessica Ortiz, Andre Shiromani, and Cindy Pean at the 2003 Environmental Law Section Annual Meeting

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
Eileen D. Millett
Arlene R. Yang

* * *

Environmental Law Section Fall Meeting, September 19-21, 2003

The Section's Fall Meeting will be held on **September 19-21, 2003**, at one of the Section's most popular meeting venues, Jiminy Peak, in Hancock, Mass., about 40 minutes from Albany.

The Saturday morning program, for which CLE credit will be given, is about Promoting Better Land Use Decisionmaking: the Attorney's Role. A wide spectrum of panelists from both the private and the not-for-profit and academic sectors, from upstate and downstate, will address new approaches to environmental review, permitting and planning issues, especially collaborative project planning for community-friendly, environmentally sound development. Open space preservation techniques, such as farmland protection programs, overlay zoning, conservation easements and land acquisition, will be a focal point. How comprehensive planning and land use law reforms can promote a better balance between preservation and development; and the various roles that attorneys play in this process, as counsel for municipalities, or developers, or community groups, and the issues confronting them, will be discussed.

The program Co-chairs are Paul Gallay, Judith LaBelle and David Sampson, who have developed the program with the advice and input of the Co-chairs of the Section's Land Use Committee, John Kirkpatrick and Rosemary Nichols.

There are dinner speakers for both Friday and Saturday evening, and a first-time entertainment committee has plans for a Friday evening program after dinner.

* * *

Notice

The Environmental Law Section's Pollution Prevention Committee has undertaken an initiative to assist the New York State Hotel industry in learning about and implementing pollution prevention and waste reduction measures. Such measures have environmental and economic benefits. The Committee's first task was to gather pollution prevention and waste reduction information that would be helpful to the industry. Once this task was accomplished, the Committee was able to share the gathered information with The Otesaga, the resort used by the Environmental Law Section for its 2002 Fall retreat. The Otesaga was genuinely receptive and gave us a tour of the hotel to show us their accomplishments in this area. For information on the resort's Audubon golf course please visit www.dmcom.net.

The Committee's immediate goal is to create a model handbook for distribution to all facilities used by the Environmental Law Section for its meetings by searching for any additional helpful information on the subject, consulting the New York State Department of Environmental Conservation, and compiling such information in a manner that is inviting and easy to read and digest. The Committee's ultimate goal is to have such handbook be available for distribution by all NYSBA Sections and to create a NYSBA, Environmental Law Section Seal Program consistent with the Section's commitment to protect New York's environment.

Larry Schnapf receiving Section Council Award from Joel Sachs

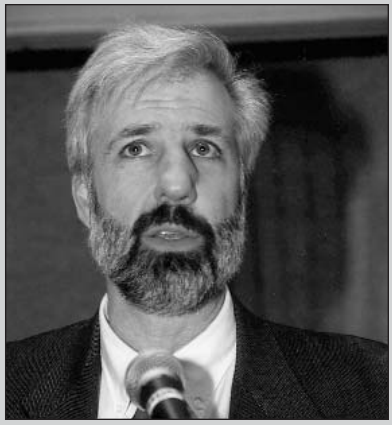
Joan Matthews receiving Section Council Award from Joel Sachs

Environmental Law Section *Annual Meeting* January 24, 2003 New York City

Keynote Speaker Hon. J. P. Suarez

Dan Ruzow, then immediate Past Chair, receiving Section Chair's Award

Speaker Marla Rubin



Nominating Comm. Chair Walter Mugdan

Speaker Robert Johnson

Lou Alexander announcing Fellowship Awards

Barry Kogut receiving CLE award for long-term service

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The Environmental Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

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