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# The New York Environmental Lawyer

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## A Message from the Section Chair

### CARA: There Is Some Good News Despite the Disappointing Failure of Congress to Pass This Landmark Legislation

In my first column as Section Chair (Spring/Summer 2000, Vol. 20, No. 2), I happily reported that the Section had successfully weighed in on landmark federal legislation, The Conservation and Reinvestment Act (CARA). With the support of the entire New York delegation, CARA passed the United States House of Representatives (H.R. 701) in May 2000 by an impressive bipartisan margin (315 to 102). I promised that the Section would continue to monitor the Senate's efforts to enact CARA. After a 14-year effort by environmental organizations and many state conservation and recreation agencies, including New York's Office of Parks, Recreation and Historic Preservation (OPRHP) and Department of Environmental Conservation, CARA held the tantalizing promise of a guaranteed full funding to the Land and Water Conservation Fund at its authorized level, including at least $450 million of state-side funding. It would have authorized nearly $3 billion per year for 15 years for the acquisition of additional wildness areas, restoration of damaged coastlines and estuaries and for the protection of endangered species. According to OPRHP Commissioner Castro's office, which encouraged the Section to let its voice be heard on the critical need for this legislation, New York's share from CARA would have been over $100 million and would have included much-needed funding for New York's coastal programs and non-game species wildlife management. I commend the efforts of Commissioner Castro, NYSDEC Commissioner John Cahill, and Secretary of State Alexander Treadwell, who took the laboring oar on behalf of New York State, as well as Congressman Boehlert and the entire New York delegation, in the vigorous effort to have what would have been a revolutionary conservation funding measure enacted into law.

Unfortunately, just as our hopes and expectations were raised, success was snatched from our grasp. As the 106th Congress prepared to adjourn, CARA was dealt a one-two blow when the Senate failed to carry the day. Political maneuvering kept the bill from being scheduled for a vote by the Senate. In its stead, Congress authorized, what has been referred to by some as "CARA-lite," an Interior Appropriations Budget for federal fiscal year 2001 that includes funding for some of the programs and projects that were to have been included in CARA. While we share a sense of disappointment that the Senate was unable to deliver CARA to the President for signature, the news is not all that

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bad. I challenge the Section to work to make it even better in the future.

On the bright side, the tremendous bipartisan support for CARA provided an impetus that has not been present for many years to force both the House and Senate to take action in their appropriations to address conservation needs. The Interior Appropriations Budget delivered substantial state-side funding; according to Commissioner Castro's office, more money was provided than New York has seen since 1983. The federal appropriation for this fiscal year increases the nation's commitment to conservation and increases funding for land acquisition for open space on the federal, state and local levels. With respect to state-side funding, the new measure provides $90 million, a $50 million increase over last year. New York's share this federal fiscal year will be approximately $4.5 million for state and local park projects.

*". . . the tremendous bipartisan support for CARA provided an impetus that has not been present for many years to force both the House and Senate to take action in their appropriations to address conservation needs."*

In addition, Congress created the Land Conservation, Preservation , and Infrastructure Improvement (LCPII) program, which sets the stage for increased state-side funding in future federal budget appropriations and takes some of the components of CARA and folds them into a new funding package. LCPII authorizes—but does not guarantee—funding up to approximately $12 billion for each of the next six years for six categories of conservation projects, with roughly 2/3 of the funding going to states and localities. With a "use it or lose it" mandate, LCPII authorizes annual House and Senate committee appropriations of funds for these programs. In addition, the appropriators have set aside $120 million to be added to LCPII each fiscal year for the next five years, which monies can be added to any of the six "baskets" established under LCPII. The six LCPII "baskets" and their respective annual baseline funding for fiscal years 2001-2006 are:

(1) federal and state land and water conservation programs, including land acquisition and preservation ($540 million),

(2) coastal protection programs, including pollution control programs ($420 million, although, to make things more complicated, this appropriation is currently nestled in the Commerce-State-Justice Appropriations Bill (CJS), which passed both chambers of Congress and, as of this writing, awaits the President's signature),

(3) state and other conservation programs, including a variety of programs to protect wildlife, wetlands and for conservation easements ($300 million; plus, under CJS, an additional one-year appropriation of $50 million is provided to state fish and wildlife agencies for education and management),

(4) urban and historic preservation programs, which includes the Urban Park and Recreation Recovery Program, a program which authorizes matching grants for recreation projects in economically distressed urban areas and the Historic Preservation Fund, which provides matching grants to encourage private and non-federal investment in historic preservation activities ($160 million),

(5) federal lands maintenance for the repair and rehabilitation of existing facilities and roads in the nation's national parks, forests, refuges and other public lands, including our National Wildlife Refuge System ($150 million), and

(6) payments to states in lieu of taxes to offset the loss of revenue when open space is placed in community stewardship ($50 million).[1]

*"It is important, however, to remain vigilant so that we don't lose the funding that was achieved this year via the Appropriations Bills and to continue to garner public and governmental support for permanent, guaranteed funding, particularly on the state levels, that are important to our nation's conservation efforts."*

It is far too early to predict what our strategy should be next year and in the succeeding years to achieve greater and permanent state-side funding for the critically important environmental programs that were to have been included in CARA. It is important, however, to remain vigilant so that we don't lose the funding that was achieved this year via the Appropriations Bills and to continue to garner public and governmental support for permanent, guaranteed funding, particularly on the state levels, that are important to our nation's conservation efforts. We should strive for a

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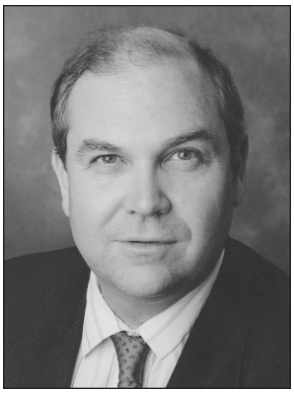
# From the Editor



The Environmental Law Section enjoyed a well-organized and well-attended Fall Meeting at Jiminy Peak Resort in the Berkshires. Jiminy Peak had also been the location for the Fall Meeting when Joel Sachs was Chair, so we knew what to expect and our expectations were fulfilled. Again, the meeting was child-friendly, and for those parents of young children—of which I am one—I heartily recommend future meeting attendances with your families. The cost typically is forgiving and I've always found ample opportunities to spend pleasurable time with my kids. Gail Port, as Section Chair, and Antonia Bryson, Kevin Healey and Robert Tyson as Program Co-Chairs, can be congratulated for putting together an enjoyable as well as profitable weekend.

During the Saturday seminar (for which we received 4 CLE credits), several speakers, including major private and public sector players, addressed global climate change. In that several balmy weeks were interspersed with a snowfall the morning of the Sunday Executive Board meeting, the topic was apt. During the Program, Kevin Healey also availed himself of the opportunity to make public something that apparently has burdened him for a significant time—that he is not Kevin Reilly. I was duly required to stand so that the assembled could observe that we were in the same place at the same time and, ergo, were different people. Hence, if prospective authors could kindly direct submissions to me, and not Kevin Healy. Now, I've just got to get Kevin Ryan in the same room with me, and I'll be able to nail down where all of those wayward articles have been going.

During the Sunday morning Executive Committee meeting, new Committee Chairs were appointed and new committees were formed. The minutes appear in this issue. Dave Markell, newly returned from Canada with experience in international dispute resolution procedures, will Co-Chair the Alternative Dispute Resolution Committee. Miriam Villani and Dave Everett will Co-Chair the Membership Committee. Both Co-Chairs are looking for ideas on expansion of the Section's membership. While our numbers are sizable, there is room to grow and additional services that might be provided. By the way, Miriam will be heading up the Environmental Practice at Long Island's Farrell Fritz as Andrew Simons leaves the firm to rejoin St. John's Law School as Academic Dean. Dave Quist will Co-Chair the Biotechnology Committee. The committee is looking at the new subject of environmental impacts caused by micro-organisms, and anticipates submitting a *Journal* article in the near future. Kevin Ryan (i.e., *not* Kevin Reilly) will Co-Chair the Environmental Impact Assessment Committee. The Executive Committee also discussed the need to direct Section efforts toward mining and other extractive industries in the state, with the result that a Task Force on Mining, Oil and Gas Exploration has been formed, which will be Co-Chaired by Laura Zeisel and Terresa Bakner. The new Co-Chairs will report on the task force at the January meeting, and an article for the *Journal* will be forthcoming. Ginny Robbins, the Section's Secretary, will also form a committee to review, and overhaul if appropriate, the Section's committee structure and governance.

The present issue of the *Journal* includes the usual features: the Administrative Decisions Update, by David Everett of Whiteman, Osterman & Hanna; and Recent Decisions, by students at St. John's Law School, for whom Jennifer Rosa serves as student editor. Galen Wilcox's article, *Jet Skis in the Adirondack Park*, is timely as we turn our gaze toward winter. Those of us who are avid skiers (personally, I admit to the addiction that others save for golf—a game that I still don't really get) of a more traditional nature (i.e., we ski, rather than roar through otherwise peaceful glades), will find much to appreciate in the article. Actually, the nuisance of jet skis will also resonate with those of us who are avid scuba divers and open water swimmers (other cravings I have). Galen's article was the first place finalist in the Section's annual essay competition. As I noted in the Fall issue, this year saw four finalists, all from Albany Law School, all urged on by Professor Joan Leary Matthews. Joan deserves accolades for her own accomplishments in this regard.

In past years, I had tried to include fairly regular committee reports in the *Journal*. The practice was not always perfect, in that different committees have various timeframes, and diligent committee work did not always lend itself to a regular reporting schedule. Nevertheless, the feature has benefits, and I am considering resurrecting it in the event that members consider it beneficial. I'm happy to hear comments and suggestions in this regard. I also once considered including tables of contents or some other form of summary of various environmental law publications, also as a service to busy readers who might benefit from having such information at their fingertips. Such a feature might be more technologically feasible (from the publisher's perspective) now. I see this as something of a clearing-

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## A Message from the Section Chair

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CARA-classic, not a CARA-lite law. The Section can and should continue to play an important role in that effort.

On other Section business, I am pleased that our Fall Meeting at Jiminy Peak, by all accounts, was a great success. Many thanks to Kevin Healy, Antonia Bryson and Bob Tyson, the Co-Chairs for the meeting, for their hard work. Our Annual Meeting on January 26, 2001, featured an interesting CLE program entitled: "Cutting Edge Environmental Strategies and Technologies" and included presentations on innovative strategies for addressing contaminated sites and the newest tools in our environmental tool boxes, such as geographic information systems, environmental data management systems and new remedial techniques. It is clear to me that on this 20th anniversary of the founding of the Environmental Law Section, much work lies ahead for us to preserve the progress we have made in the protection and enhancement of our environment. Indeed, we may well be on the precipice of a new era of environmental activism that will challenge us much in the way that the founders of the Section were challenged over 20 years ago.

I hope this New Year brings good health, happiness and peace to all our Section members and their families.

**Gail S. Port**

### Endnote

1. Most of the funding numbers used in the preparation of this column were provided to me by the New York State Office of Parks, Recreation and Historic Preservation and were not independently verified. I would like to thank Dominic Jacangelo, Director of Legislative Program Development of the NYS Office of Parks, Recreation and Historic Preservation, for his valuable assistance in the preparation of this column.

## From the Editor

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house for information on environmental scholarship. Again, if there's a demonstrated interest, I would pursue such a feature. In the meantime, I encourage readers to submit articles on areas of their particular expertise or interest. Environmental Law is such a hybridized field, and requires ready familiarity with so many ancillary skills, that seemingly exotic information is, rather, always beneficial to someone else. One of the very real benefits of membership in our Section is the access to mainstream as well as diverse information on environmental issues. At the same time, with a view toward newer or less practiced attorneys in the field, I've solicited articles in the past that serve as basic primers on environmental law or its subfields, and I continue to encourage such contributions by interested readers. To the extent that we can thus serve more of our very different constituencies, the Section, and the *Journal*, provide concrete benefits that will parallel the efforts of our Membership Committee. The last page of the *Journal* includes contact numbers and *Journal* deadlines. Articles anyone?

Please note the SEQRA 25th Anniversary conference scheduled for March 15th and 16th, 2001, in Albany. A notice for the SEQRA symposium is included on page 19.

Happy Holidays to all of our members and readers, and let's hope that the new year brings a new President (has Bill started packing yet?).

**Kevin Anthony Reilly**

# Jet Skis in the Adirondack Park

By Galen Wilcox

When the New York State Legislature created the Adirondack Park Agency, its enabling legislation declared the purpose of the Agency to be ". . . to insure optimum overall conservation, protection, preservation, development, and use of the aesthetic, wildlife, recreational, open space, historic, ecological, and natural resources of the Adirondack park."[1] It thus made a succinct statement of the competing interests that underlie all governmental attempts to set aside and protect lands for the common enjoyment of the people. What is "optimum overall conservation, protection, and preservation" and what is "optimum overall . . . development"? Since these interests often compete, which of the Adirondack Park's resources should prevail—the aesthetic, wildlife, natural, historic, and ecological ones, or the recreational one? This article will discuss these competing values as they apply to the current controversy over whether personal watercraft, commonly referred to as jet skis, have a place in the Adirondack Park.

## I. Introduction

### Jet Skis

Jet skis are typically one or two passenger watercraft powered by two-stroke gasoline engines. The engine drives a jet pump that sucks water through the bottom of the boat, pressurizes it, and expels it out the back, giving the boat its forward thrust and steering. In the early 1970s, Kawasaki introduced the first commercially successful personal watercraft—the Jet Ski.[2] Sales grew steadily until 1995, when they reached 200,000 units per year, where they have roughly remained ever since.[3] They now represent about one third of all U.S. boat sales.[4] There are estimated to be over 1,300,000 jet skis in use in the U.S.[5] A 1996 survey found that the average jet ski purchaser was a 41-year-old married male with a household income of $95,400.[6] Annual sales of jet skis are now worth $1.4 billion,[7] and the average life expectancy of a jet ski is nine years.[8] The Personal Watercraft Industry Association (PWIA) represents the five major jet ski manufacturers in lobbying at the state and federal levels. Current Environmental Protection Agency (EPA) regulation mandates that cleaner and quieter jet skis be produced in the future with two sets of pollution reduction goals, the first to be phased in by 2006, and the second in 2010.[9]

### Safety

The safety record for jet skis is striking. Although jet skis comprise only 9% of all registered boats, they are involved in 26% of boating accidents and 46% of boating injuries.[10] In New York, jet skis comprise 2% of all registered boats but are involved in 40% of the state's boating accidents.[11] From 1990 to 1995 jet ski-related injuries increased from 2,860 to 12,288.[12]

The reasons for jet skis' poor safety record is that, first of all, they are fast. The newest jet skis are designed for speeds as high as 70 mph. This type of recreational opportunity has a certain appeal for young, immature personalities, as is reflected in some of the industry advertising.[13] Excessive speed and inattention play an important role in many jet ski accidents. In 1996 in California, excessive speed was implicated in 43%, and failure to maintain a lookout accounted for 47% of jet ski accidents.[14]

Beside the speed issue, jet skis have another major safety problem, in that they don't handle like cars and bicycles. When the speed is cut, they lose directional control, so they continue to go straight.[15] Inexperienced jet ski drivers trying to dodge something in the water tend to slow down, as they have learned to do in their cars or on their bicycles, and thereby lose directional control—a real problem when trying to avoid collision. Largely for this reason, inexperienced jet ski drivers are much more likely to have accidents than experienced drivers. In Texas in 1996, 55% of the drivers involved in jet ski accidents were between the ages of 12 and 25, and 78% had less than 100 hours operator experience. In 1996, California reported that 70% of the jet skis involved in accidents in its waters were rented or borrowed.[16] Minnesota reported almost identical numbers.[17] In New York in 1998, there were 132 jet ski accidents, 92 of which involved someone other than the owner, and almost one third of which involved drivers with under ten hours experience.[18]

Another factor contributing to the safety problems associated with jet skis is the manner in which they are operated. Normal jet ski uses, such as racing and jumping other boats' wakes, are inherently risky and have led to a disproportionate number of warnings from enforcement officials and complaints from other boaters.[19]

### Noise

The noise caused by jet skis is extraordinarily loud and irritating. Noise as an environmental issue is defined as unwanted sound.[20] The National Park Service has recognized the noise problem, recently making the restoration of natural quiet to our national parks a central goal of the Service.[21] A 1995 Colorado State University survey revealed that over 70% of U.S. citizens consider peace and quiet an important feature of national parks.[22]

These efforts are based on the underlying recognition that the air into which noise is transmitted belongs to everyone. People, businesses, and organizations do not have the right to create noise as if it would remain on their property.[23] For this reason, causing noise that unreasonably interferes with another's quiet enjoyment of property has long been recognized as a valid basis for a nuisance action.[24] Control of noise is recognized as a legitimate government interest, reflected in the fact that both the DEC and the Adirondack Park Agency (APA) have the authority to write "noise" conditions into permits.[25] An APA example is *Hunt Brothers v. Glennon*.[26]

Jet skis make more noise than other motor boats in any speed category,[27] commonly generating 85-120 decibels for the rider.[28] A person standing 100 feet from a jet ski may be exposed to 80 decibels.[29] This is the same level of noise that a person standing next to a vacuum cleaner experiences.[30] Moreover, since the jet ski's noise is high pitched, and is often highly variable as the operator speeds up, slows down, jumps wakes, etc., the jet ski's noise is particularly annoying.[31] Since jet skiers tend to ride in packs,[32] their annoying mosquito-like noise is often multiplied.[33]

### Pollution

As environmental polluters, jet skis are the kings. High power two-stroke engines burning a combination of gasoline and oil pollute the air, water, and surrounding shoreline at an astounding rate, leaving no element of the environment unmarked by their passage. As air polluters, a 100 hp jet ski operated for seven hours emits more hydrocarbons and nitrogen oxides than a 1998 car driven over 100,000 miles.[34] In other words a jet ski pollutes the air more in one hour than many cars do in a year. According to the California Air Resources Board, on weekends in California the air pollution from two–stroke engines exceeds that of cars.[35]

As water polluters, jet skis are designed to pump 25% to 33% of their fuel mixture unburned into the surrounding water. It is estimated that 165,000,000 gallons of raw oil and gasoline per year wash directly through jet skis into the nation's waters.[36] This is fifteen times the petroleum spilled by the Exxon Valdez in 1989, the worst oil spill in U.S. history.[37] With consumption rates of as high as ten gallons per hour, a jet ski dumps as much as three gallons per hour of raw fuel into the water.[38] Because jet skis, with no propellers and shallow drafts, can go into areas very close to shore, they deliver their pollution directly to where it will do the most harm to nesting waterfowl and the delicate shoreline environment.[39]

### Effects of Jet Skis

A recent study conducted by Dr. Joanna Burger of Rutgers University of the effects of various types of watercraft on a nesting colony of terns found that jet skis uniquely disrupt the normal life cycles of the terns.[40] This study was the first to quantify what had previously only been observed. From the wildlife biologist in Florida who reports on nesting birds abandoning their nests during embryo development stages,[41] to the California marine biologist who reports of disturbed rest and social interaction among seals and sea lions,[42] there is growing concern of the effect of jet skis on wildlife. In the Adirondacks, observers have noted that loons, a colorful part of the local environment, tend to abandon lakes when jet skis move in.[43] As the Washington State Supreme Court, in upholding a county ordinance eliminating jet skis from all marine waters and one lake, stated: "While the effect of such [jet ski] operation on marine life in San Juan County is unknown, it cannot be beneficial and appear [sic] most likely to be deleterious."[44]

The spilled fuel from jet skis is also suspected of contaminating drinking water with gasoline and its additives, such as methyl-tertiary-butyl-ether (MTBE).[45] MTBE is a known animal, and suspected human, carcinogen,[46] and is now considered a major environmental threat nationwide due to widespread drinking water contamination.[47] For this reason, on July 27, 1999 an EPA panel recommended that its use in gasoline be reduced.[48]

Because of its extraordinary solubility in water, mobility in soils, and resistance to degradation, MTBE spreads further faster and lasts longer than other gasoline additives.[49] A survey of Maine's drinking water supply found 15.8% of private wells and 16% of public water supplies to be contaminated with MTBE.[50] A gasoline leak from a single overturned car was found to be the likely source for MTBE contamination as high as 100 parts per million of 24 domestic wells within 2,200 feet of the car.[51] This presents a real concern for the Adirondacks, where jet skis often pour their gasoline into waters bordered by private land containing private wells.

Another problem associated with jet skis is that they spread milfoil, an unpleasant, aggressive weed that grows in the water close to shore and crowds out the native species. A Department of Environmental Conservation (DEC) spokeswoman says the jet ski's ability to come close to shore enables it to chop up the milfoil, which then reseeds and propagates.[52]

### The Adirondacks

The "forever wild" clause of the New York State Constitution, enacted in 1894, capped a controversy that had raged for decades between loggers, who were busily decimating the Adirondack forests, and preservationists, including naturalists, rich landowners, doctors, sportsmen, religious leaders, and tourists.[53] The passage

of the forever wild clause was actually precipitated by a theory that had gained wide credence in the last part of the 19th century. This theory held that if the destruction of the forests were allowed to continue, and the forests' "sponge effect" were lost, the state's rivers, vital to its economy, would be devastated.[54] When business leaders from New York City added their voice to the preservationists' cause, delegates to a timely constitutional convention responded, passing "forever wild" on a 112-0 vote in the waning hours of the State Constitutional Convention of 1894.[55]

Under this provision, the state-owned lands in the Adirondacks ". . . shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed."[56]

The Adirondacks is often described as a patchwork of public and private lands. This patchwork theme manifests again in the state's administration of the Park. With the public Forest Preserve lands administered by DEC according to the State Master Plan and the private lands administered by the Adirondack Park Agency (APA) pursuant to the Adirondack Park Agency Act, and each with different categories of land and each category with separate regulations, the patchwork gets a little complicated. Additionally, various laws affecting specific issues or areas passed over the years in response to various constituencies dot New York State law. Adirondack regulation can sometimes more resemble a game of hide and seek (or a minefield) than a patchwork. This overlapping hodgepodge of jurisdictions and laws sometimes leads to inefficiencies.[57]

In New York, in a rare instance of regulatory straightforwardness, the state-owned Adirondack waterways fall under the jurisdiction of the DEC,[58] regardless of the jurisdiction of the surrounding land. DEC generally applies the Navigation Law, although it also applies the special laws where applicable. It is now often up to DEC and the courts to determine how "forever wild," passed to prevent destruction of the Adirondack forests and the state's rivers, and which the framers intended to be strictly interpreted,[59] should be applied in modern disputes concerning the proper uses of the Adirondacks' resources.[60]

Judicial review interpreting "forever wild" has evolved in the years since its passage. One New York court, tracing the history of judicial interpretation of "forever wild," noted a trend from a strict approach before 1930, to a " . . . more liberalized, or possibly more reasonable approach since ."[61] The current approach to finding the line between proper preservation and proper development requires a balancing of the benefits against the disadvantages caused by the development.[62]

In the case of jet skis in the Adirondacks, the local benefits consist of the recreational experience of the jet ski driver, and any contribution he may make to the local economy. The disadvantages of allowing jet skis on the lakes of the Adirondacks consists of their enormous discharges of pollutants into the air and water, the danger to life and limb of anyone else in the water, the disruption to natural wildlife, the danger of MTBE drinking water contamination, the severe annoyance over a wide area caused by the jet ski's noise, and the diminished recreational experience of everybody except the jet ski driver.

In other words, jet skis offer a clear case of minimum benefit to the area coupled with maximum cost to it. When the maximum economic benefit is achieved, i.e., when the jet ski is rented locally, the maximum safety hazard accompanies it, as the rental jet ski safety statistics indicate.[63] When the local economic benefit is minimized—i.e., when the jet skiers drive into the Park, use their jet skis, and then drive back home—all they leave behind are their pollutants, often their beer cans, and ringing ears.

This article takes the position that jet skis should not be allowed in the Adirondack Park because a balance of costs and benefits, as courts now perform when applying "forever wild," leads to the conclusion that their use in the Park violates the New York State Constitution. However, since neither the APA nor DEC nor the governor's office nor the legislature nor the courts have applied this construction of the Constitution to this issue, this article will now review how other jurisdictions have acted to limit the damage caused by jet skis.

## II. Current Jet Ski Restrictions

### Other Jurisdictions' Legislative Jet Ski Controls

Many governmental entities have attempted to restrict jet skis. At the federal level, there is a movement afoot in Congress to restrict jet skis by limiting their wake effects on the shoreline. A bill currently before the House of Representatives[64] would withhold federal funds available to states through the Coastal Zone Management Act of 1972 from states that fail to enact no-wake speed areas for jet skis within 200 feet of any shoreline.[65] This bill states that irresponsible jet ski operation endangers the public and damages aquatic habitat in shallow waters,[66] and that the growing number of jet skis leads to "diminished experience for all users."[67] This is the first federal legislative proposal that recognizes jet skis as legally distinguishable from other boats.[68]

Many states and localities have been active in limiting jet skis. In May of 1997, Vermont banned the use of jet skis on any body of water smaller than 300 acres,

which eliminated jet skis from all but 30 of the state's 285 lakes and ponds.[69] Maine has set a minimum size limit of 200 acres of water to support a jet ski, and Massachusetts has set its minimum at 75 acres, with the further restriction that jet skis cannot operate at high speeds within 150 feet of the shore.[70] A Monroe County, Florida ordinance prohibits jet ski operation within 1,200 feet of shore and provides a mechanism by which citizens can petition for "personal watercraft prohibited zones."[71]

Concerns about contamination of drinking water by 2-stroke engines have led to the prohibition of jet skis in the Calero and San Pablo Reservoirs in California, and high concentrations of the gasoline additive MTBE have led the California State Legislature to consider banning them on all state reservoirs.[72]

This is just a representative cross section of the many jet ski restrictions that have been taken by legislative bodies outside New York.

### New York's Legislative Jet Ski Restrictions

A review of New York State jet ski legislation shows that the state, until very recently, was tepid in its approach to dealing with jet skis.[73] The first real attempt to reduce the destructive effects of jet skis on a state-wide basis was a bill introduced in 1999 paralleling the federal legislation, focusing on reducing the wake effects of jet skis. There were serious concerns about the bill's effectiveness, since the current 100-foot speed limit is rarely enforced, but the point was moot because, despite its limited reach, the bill never made it out of committee in either house. but in 2000, the stars came into alignment[74] and the state legislature produced two significant jet ski-specific bills, both of which were passed into law by Governor Pataki.

On April 28, 1999, Bill A-8097 was introduced in the New York State Assembly, which changed New York Navigation Law to authorizes any city, or village in New York, by a super majority vote, to regulate the use of jet skis on any body of water adjacent to the municipality. On June 22, the bill was passed in the Senate and Assembly,[75] and on September 1, 2000, the bill was signed into law.[76] These restrictions can include prohibiting jet skis, restricting their speed, or regulating the manner in which they are operated.[77]

On April 13, 2000, Bill A-10851 was introduced in the Assembly. This bill adopted California's aggressively technology forcing jet ski emissions standards,[78] and was signed into law on September 8, 2000. It requires all jet skis offered for sale in New York to meet the California standards and requires DEC to review California's standards annually to assure New York's consistency with the California standards.[79]

### Other Jurisdictions' Executive Efforts

On the federal level, the National Park Service has taken a leadership role in restricting jet skis. Twenty-six national parks have banned jet skis.[80] and the Service has proposed regulations to ban them from the remainder of the national park system, which manages 91 federally owned lakes. Many park rangers and advocates argue that if these restrictions are not implemented now, it will become much more difficult to do so at a later date.[81] The U.S. Wildlife and U.S. Forest Services have considered adopting similar regulation for the remaining 1,704 federally owned lakes that it manages, but the PWIA is lobbying hard to prevent this.[82]

On the state level, California's jet ski regulations are aggressively technology forcing. Jet skis sold in California after 2001 will have to meet the federal 2006 standards, reducing emissions 70% from their current allowed levels.[83] The California Air Resources Board determined that these reductions are easily within the reach of currently available technology and would increase the cost of production by only 14%.[84] These standards will be further tightened in 2004 and 2008.

The Tahoe Regional Planning Authority, a joint California/Nevada regulatory body with authority over Lake Tahoe, chose to ban all two-stroke engines from the Lake beginning in the year 2000, finding that pollution from those engines caused increased turbidity[85] and endangered the Lake's famous clarity. This prohibition succeeded despite overlapping jurisdiction of two states and several counties and a spirited court challenge by the jet-ski industry.

### New York's Executive Jet Ski Controls

Although Governor Pataki has issued 154 press releases announcing various environmental initiatives, none deals directly with jet skis.[86] The Governor's office has made no statements and has no policy regarding jet skis in New York State or the Adirondack Park.[87] Similarly, the State Department of Environmental Conservation has no policy regarding jet skis in the Adirondack Park.[88] Although a hot topic in some states, the jet ski issue doesn't appear to have hit the radar screen in New York's executive branch.

### Judicial Review of Jet Ski Regulation

In the earliest jet ski regulation cases, the jet ski industry argued that the regulations impermissibly discriminated against jet skis.[89] In *Steier v. Batavia Park District*,[90] an Illinois appeals court agreed, and struck down a local ordinance that restricted the hours that jet skis, but not other boats, could be launched from a public boat ramp built with federal funds.[91] Although residents complained that jet skis caused excessive noise, operated at dangerous speeds, cut off and disrupted

canoeists, and regularly performed actions dangerous to the jet ski operator and others, the court found that jet skis were not solely responsible for these problems, and any efforts to solve the noise and danger problems must be equally applied to all recreational boats.[92]

In *Weden v. San Juan County*,[93] the Washington State Supreme Court dealt convincingly with this issue, holding that government could ban jet skis and not other boats even though other boats could be contributing to the same problems as those enumerated in the jet ski regulation. The court reached this decision by employing the well established theory that an agency need not "make progress on every front before it can make progress on any front."[94] In other words, regulations are not arbitrary because the regulator failed to regulate everything that could possibly contribute to a problem, but chose to reduce the scope of the problem by restricting a segment of the sources found to contribute to it.[95] The Court held in this important case that: (1) differentiating jet skis from other recreational boats was not illegal discrimination; (2) regulating jet skis is within the ambit of the government's police power; (3) the state's licensing of a jet ski does not thereby permit the operator to use every public body of water in the state; and (4) restricting jet skis' access to certain public waters, did not violate substantive due process.[96]

In *Personal Watercraft Industry Association v. Department of Commerce*,[97] which the PWIA called the " . . . most troubling judicial approval of PWC-specific regulation . . .,"[98] the D.C. Circuit found that a National Oceanographic and Atmospheric Administration regulation prohibiting jet ski use from 99% of the Monterrey Bay Marine Sanctuary was valid. The court, finding that the jet skis "interfered with the public's recreational safety and enjoyment . . . and posed a serious threat to the Sanctuary's flora and fauna," once again rejected the discrimination argument and called operation of jet skis within the Sanctuary a threat to marine resources, which justified the regulation.[99]

These cases and many others demonstrate that properly grounded regulation of jet skis survives court challenge.

**Jet Ski Industry's Strategy to Prevent and Defeat Jet Ski Regulation**

The jet ski industry, through the PWIA, has developed an organized agenda to stymie jet ski restrictions. On the federal level, for many years the jet ski industry has succeeded in having jet skis placed into the category of "Class 'A' Inboard Motor Boats" by the US Coast Guard, even though the Coast Guard had to grant ten exemptions to fit the jet skis into the definition.[100] This keeps the jet skis, many of whose manufacturers also make all terrain vehicles (ATVs), in the sole jurisdiction of the Coast Guard, and away from any meddling by the Federal Consumer Products Safety Commission, which was responsible for banning three-wheel ATVs.[101]

On the state level, the jet ski industry's strategy has been to focus potential regulators on the safety issue. In the furtherance of this cause, the PWIA has introduced model jet ski legislation, which deals exclusively with safety.[102] The industry has been so successful in diverting government intervention to this issue that the PWIA now states that "Because the Personal Watercraft Industry Association (PWIA) has actively encouraged states wishing to regulate PWC to adopt its model act, state PWC laws tend to be quite similar."[103] Of course, of the jet ski's four big problems—noise, pollution, wildlife disruption, and safety—the safety issue is the one that requires action by the state government and no investment by the jet ski industry.

An example of this dynamic at work can be found in Michigan. There, public outcry about the noise, pollution, and safety hazards of jet skis in state waters ultimately resulted in legislation that addressed only the safety issue.[104]

"Getting those bills through was a hell of a lot more difficult than we ever thought it would be," said state Sen. Jon Cisky, R-Saginaw, the Senate bill's chief sponsor and a boater himself. Cisky said talks with watercraft groups led to compromises and a wrangle that lasted nearly two years. Along the way, provisions curbing noise were dropped and other rules were blunted. "We didn't even discuss pollution," Cisky said, an air of weariness in his voice.[105]

Another example of this strategy at work can be found in the jet ski industry's attempts to prevent the recently-passed New York legislation from becoming law. The PWIA, through its parent, the National Marine Manufacturers Association (NMMA), first attempted to limit the argument to safety by asserting "It is clear . . . that safety concerns are the primary impetus of this legislation."[106] It then stated that there is already action to develop legislation that will ensure safety on New York's waterways by 2004. This argument was based on a false supposition—that the only significant issue with jet skis was safety—and followed it with a statement of highly questionable fact—that the safety issue will be resolved without further legislation.

Secondly, the PWIA asserted its constitutional claim of discrimination.[107] Although there is precedent supporting this contention, there is more recent and compelling precedent that this legal argument fails if the legislation is properly grounded.[108]

Additionally, the Empire State Recreational Marine Caucus joined in by asserting, with no explanation or support, that allowing local governments to make their

own jet ski decisions would constitute an unconstitutional taking of private property.[109] A regulatory takings claim, however, requires a finding that the challenged restriction removes all economically viable use of the property.[110] Without some explanation of how this "home rule" peg could be construed to fit into the "takings" hole, there is no clear connection between this proposal and a takings cause of action.

The beauty of this approach from the PWIA point of view is obvious. By funneling any need for progress to its chosen issue and fighting all out against any progress on the pollution, noise, or wildlife disruption issues, the state government can appear to be addressing its citizens' concerns while leaving the jet ski industry practically unaffected.

Besides these efforts, the jet ski industry has lobbied governmental entities when the time was opportune, such as by throwing an all expenses paid jet ski party on the Potomac for congressional staffers on the eve of the National Park Service's hearings on whether to pass tough new jet ski regulations.[111]

## III. The Ultimate Relief: Nuisance Suits

Reported judicial activity regarding jet skis has been almost entirely limited to resolving court challenges to jet ski laws and regulations. Strangely, there has not been a single reported case of any nuisance actions against jet ski operators, manufacturers, or lessors. None of the governmental entities with authority to restrict jet skis in the Adirondack Park has chosen to prevent jet skis from abusing the Park by applying "forever wild." This article proposes that a private citizen could bring "forever wild" to bear on the jet ski issue by bringing a nuisance action, in which "forever wild" would play a major role as one of the totality of circumstances considered by the court.

### Private Nuisance

Whether jet skis comprise a common law nuisance is arguable. Due to its inherently subjective nature, "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"[112] A private nuisance requires an unreasonable interference with the use and enjoyment of land, and is actionable by the person whose rights are disturbed.[113] Because controlling facts and circumstances are so variable, each nuisance claim must be adjudicated on its own facts.[114] The elements of a private nuisance claim are: (1) an interference substantial in nature, (2) caused by intentional conduct (3) unreasonable in character (4) of a person's property right to use and enjoy land (5) caused by a person's act or failure to act.[115]

A compelling argument regarding jet skis can be applied to each of these elements.

First, whether the property right interference is substantial enough in nature to support a nuisance claim is a purely subjective judgment. For instance, while one court on one set of facts found air conditioner noise to constitute a nuisance,[116] another court on another set of facts found air conditioner noise was not a nuisance.[117] If, to meet the "substantial interference" criteria, an annoyance must not be "fanciful, slight, or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinary, reasonable person,"[118] then jet skis in the Adirondacks could be reasonably adjudicated to satisfy the test. Certainly the damage is not theoretical or fanciful. Every time a jet ski takes off it pours its gasoline and oil into the water, pollutes the air, raises a racket, distresses wildlife, and creates fear in the hearts of reasonable swimmers and boaters. If a landowner in the Adirondacks has a legitimate interest in the serenity and purity of his environment, or in the preservation of his drinking water from threats of MTBE contamination, then a jet ski operating in his vicinity certainly could reasonably be held to substantially interfere with those interests.

Second, as to the issue of intentional conduct, "An individual's conduct becomes actionable when it is purposeful or the resulting interference is known or substantially certain to result."[119] Since people don't ride jet skis by accident, and the interference caused by jet skis is certain to result, element 2 is a given.

The third issue, "reasonableness," is the crux of many nuisance claims. In deciding whether an activity is reasonable, courts consider many factors. For instance, in deciding whether church bells were a nuisance, the Third Department compared bell noise levels to other ambient noises not complained of, and also took into account the opinions of others in the neighborhood.[120] Courts may also consider whether the nuisance existed when the plaintiff subjected himself to it[121] as well as the nature of the plaintiff and the locus of the controversy.[122]

Ultimately, "'reasonable use' of one's property, for purposes of private nuisance law, depends on the circumstances in each case."[123] One court, when ruling on "forever wild," held that reasonable cutting of timber in the forest preserve was permissible, so that campers could receive their full recreational benefit ". . . always remembering that such enjoyment must not harm or injure the wild forest nature of the preserve in any way."[124] Using this as a definition of reasonable recreation in the Adirondack Park, it is obvious that jet skis' use is unreasonable, since it harms the wild forest nature of the preserve in many ways.

Also, if ". . . people who live in a crowded urban environment must expect less than pristine, bucolic conditions and have universally been held to expect a

certain 'annoyance factor' not experienced by their country cousins . . .,"[125] then their country cousins, who have chosen to live in pristine, bucolic conditions, should reasonably expect greater protection from annoyance. A consideration of the totality of the circumstances would have to include the fact that the Adirondack residents live in an area constitutionally declared "forever wild."

Considering the fact that the average jet ski purchaser's annual income is almost $100,000, and the technology to reduce jet skis' noise and pollution is already readily available, the court might consider the question: What is more reasonable, to expect a wealthy individual to pay a little more for his water toy, or to expect society and the environment to suffer the grievous harms exacted by jet skis as currently manufactured, sold, and operated?

The fourth requirement, that the interference be with a person's property right to use and enjoy land, is met by choosing the proper plaintiff. The enjoyment of land has long included the right to prevent others from unreasonably creating noise and pollution which passes onto it.[126]

The fifth element for private nuisance is a given. Obviously jet skis don't create a nuisance without the actions of people.

To summarize, by considering the effects of jet skis, the nature and constitutional protection of the Adirondacks, and applying those facts to the private nuisance test, it is clear that a court could easily determine that jet ski use in the Adirondack Park constitutes a private nuisance.

**Public Nuisance**

In addition to the private nuisance action, a strong argument can be made that jet skis also constitute a public nuisance. In New York State, a public nuisance consists of conduct which offends, interferes with, or causes damage to the public in the exercise of rights common to all in a manner that endangers the property, health, safety, or comfort of a considerable number of people.[127] Using this as a definition, it appears that jet ski use in the Adirondack Park could be found to fit the public nuisance definition.

First, the conduct must do damage to a common right. The public has long been held to have a right to clean air and water. "Water, like air, is an element in which no person can have an absolute property right, yet it is also, like air, free for the use of all, and the law has been diligent and rigorous to maintain it in its natural purity."[128] Similarly, the public has long had a right to protection from unreasonable noise.[129] Since courts can consider the character of the location when adjudicating public nuisance,[130] these common rights should be given heightened protection in the Adirondack Park, where they have constitutional protection.

Second, the conduct must interfere with, offend, or cause damage to those rights in a manner that "endangers property, health, safety, or comfort." That jet skis damage these rights in a way that endangers people's safety is demonstrable from the jet ski's safety record. Damage to health and property is obviously inevitable from the amount of gasoline leaked from jet skis and the dawning awareness that there is a huge MTBE drinking water contamination problem in this country.[131] Damage to comfort is experienced by everyone in the Park who would rather listen to the sound of the wind in the trees or the waves caressing the shore than the intense whine of hundred horsepower two-stroke engines.

Third, the conduct must affect "a considerable number of people." Elaborating on this element in upholding a finding of public nuisance against a tavern owner whose patrons annoyed its neighbors, Judge Cardozo stated

> To be reckoned as "considerable," the number of persons affected need not be shown to be "very great." . . . Enough that so many are touched by the offense and in ways so indiscriminate and general that the multiplied annoyance may not unreasonably be classified as a wrong to the community. . . . Public is the nuisance whereby "a public right or privilege common to every person in the community is interrupted or interfered with."[132]

Since the number of people affected by jet skis in New York State every day is significantly greater than the number of people annoyed by nightly brawls outside a single tavern, and the rights abridged by jet skis are common to all, then the number of people affected by jet skis could reasonably be determined to be "considerable."

As in the case of the private nuisance action, a public nuisance inquiry is fact intensive,[133] and once again court decisions reflect the subjective nature of the nuisance claim. Noise has been found to constitute a public nuisance in a number of circumstances, from nightclub rowdiness[134] to verbal abuse of a traffic policeman,[135] while mine blasting has been found not to. Given this inherent uncertainty, however, since those who ride, manufacture, rent, and sell jet skis interfere with public rights to clean air, clean water, and freedom from unreasonable noise in a manner that endangers the property, health, safety, or comfort of a considerable number of people, those riders, manufacturers, sellers, and lessors should be liable for public nuisance claims.

Although public nuisance is actionable by government, an individual can assert a claim if he has suffered injury beyond that suffered by the community at large.[136] The New York Court of Appeals explained this principle as follows: "Although the allegation of substantial interference with the common rights of the public at large is a sufficient predicate for a private action based on public nuisance . . . it is, nevertheless, true that the harm suffered must be 'of a different kind from that suffered by other persons exercising the same public right' and that 'invasions of the rights common to all of the public should be left to be remedied by action of public officials.'"[137] Once again the courts consider the totality of the circumstances of the plaintiff to determine whether he was specially damaged. It stands to reason that, although all citizens are harmed when their interests in clean air and water are damaged by jet skiers,[138] an adjoining land owner, because his well is threatened by MTBE contamination and he has to endure the noise every day, would have standing to assert a public nuisance claim. Similarly, since courts can apply a theory that "allegations of pecuniary injury are sufficient if they allege damages for injuries not common to the entire community," then the prudent landowner, who reasonably has his groundwater tested for MTBE, incurs testing costs not shared by the general public.

Since the state has declined to assert a public nuisance action to control jet skis, private parties who have suffered special injury can take up the banner. Considering the totality of the circumstances—the constitutional designation of the Adirondack Park as "forever wild," the environmental impacts that jet skis have, the meagerness of the benefit to the Adirondack residents that offset those impacts, and the ready availability of technology that would alleviate those impacts—a court could certainly find that jet skis constitute a public nuisance.

## Conclusion

Jet skis should be banned from the Adirondack Park. If "forever wild" means anything, it must mean that activities as destructive to the Adirondack environment as jet skis, with as little offsetting benefit, must be banned from the Adirondacks. In the absence of any government action to compel this interpretation, one way of bringing "forever wild" to bear on the jet ski issue is to bring a nuisance action against those who bring jet skis into the Park.

## Endnotes

1. N.Y. Exec. Law § 801 (McKinney 1989).
2. Andrew Anderson, *Contemporary Issues in Personal Watercraft Legislation, Regulation, and Litigation*, 29 J. Mar. L. & Com. 231, 232 (1998).
3. *Id*. at 232.
4. Bluewater Network, *Jet Skis Position Paper*, (visited Jan. 18, 2000) <http://www.earthisland.org/bw/jetskipos.shtml>.
5. *Personal Watercraft in the National Parks,* (visited Jan 19, 2000) <http://www.npca.org/readaboutit/pwc_factsheet.html>.
6. *Id*.
7. *Jet Skis Position Paper, supra* note 4.
8. *Id*.
9. Anderson, *supra* note 2 at 236.
10. NPCA Guide to Personal Watercraft, *Safety Concerns of PWC Operation* (visited Jan. 18, 2000) <http://www.npca.org//pwc_safety.html>.
11. David Higby, *Crash Landing*, Envtl. Advoc. Alb. Rep., Dec. 98 at first page of article.
12. *Jet Skis Position Paper, supra* note 4.
13. For example, Business Week, *Scenery is for Saps*, noted by John Carey, *Those #!*&#! Jet Skis Roar up the Potomac*, Sept. 14, 1998. Other examples of advertising tag lines: "Dry Elbows, a Sure Sign of Weeniness" and "Kinda Makes You Wish for a Stoplight so You Could Peel Out."
14. Anderson, *supra* note 2.
15. *Jet Skis Position Paper*, *supra* note 4.
16. *Id*.
17. *Id.*
18. Scott Scanlon, *Proposed Laws Aim to Constrain Personal Watercraft*, Syracuse Herald American, May 30, 1999 at A.
19. New Hampshire Marine Patrol, "1995 data comparing Jet Skis to all registered water craft in New Hampshire," Fig. 1-4 (1995).
20. *About Noise, Noise Pollution, and the Clearinghouse*, Noise Pollution Clearinghouse (visited Jan 16, 2000) <http://www.nonoise.org/aboutno.htm>.
21. *Hearing before the House Subcommittee on National Parks and Public Lands, Committee on Resources* (May 25, 1999) Statement of Jacqueline Lowrey, Deputy Director, National Park Service, Department of the Interior, *available at* http://www.nps.gov/legal/testimony/106th/grancano.htm.
22. Laurie C. Martin and Zach Hoskins, Izaak Walton League of America. *Caught in the Wake: The Environmental and Human Health Impacts of Personal Watercraft* 13 (1999).
23. 81 N.Y. Jur. 2d, Nuisance, § 12 at 325.
24. The U.S. Supreme Court most recently recognized this in denying certiorari in *Cloer v. Gynecology Clinic*, 120 S. Ct. 862 (2000).
25. An example of court approval of DEC noise control is *In re the Application for Kim K. Whetsel,* 1998 WL 158758 (N.Y. Dep't Env. Conserv, Mar. 31, 1998).
26. 81 N.Y.2d 906 (1993).
27. Joanna Burger, *Effects of Motorboats and Personal Watercraft on Flight Behavior Over a Colony of Common Terns,* Nelson Biological Laboratories, Rutgers Univ., 1998.
28. National Parks and Conservation Ass'n, *Noise Impacts of Personal Watercraft*, (visited Jan. 18, 2000) <http://www.npca.org/whatwedo/pwc_noise.htm>.
29. *Id.*
30. *Protective Noise Levels*, *Condensed Version of EPA Levels Document*, (visited Jan. 18, 2000) <http://www.nonoise.org/library/levels/levels.htm>.
31. *Caught in the Wake, supra* note 22 at 9.
32. *Id.*

33. *Jet Skis Position Paper*, *supra* note 4.
34. *Air Board Acts to Reduce Marine Engine Pollution,* Air Resources Board News Release 98-75 California Environmental Protection Agency, Dec. 10, 1998.
35. *Caught in the Wake*, *supra* note 22 at 9.
36. *Id.*
37. *Id.* at 10.
38. *Id.*
39. *Id.*
40. Burger, *supra* note 27.
41. *Caught in the Wake*, *supra* note 22 at 11.
42. *Jet Skis Position Paper*, *supra* note 4.
43. Bill McKibben, *Rich Boy's Toy*, submitted in support of A-8097.
44. *Weden v. San Juan County*, 958 P.2d 273, 278 (1998).
45. *MTBE Contamination*, Lewis Saul & Assoc., P.C., (visited Apr. 11, 2000) <http://www.mtbecontamination.com/about.html>.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Millet v. Atlantic Richfield*, 2000 WL 359979, (Maine Superior Ct., 2000) at 2.
50. *Id.*
51. *Id.*
52. Barbara Pascarell Brown, *You either love them or hate them*, Adirondack Explorer.
53. Frank Graham, Jr., The Adirondack Park 8–88 (1978).
54. Phillip G. Terrie, Contested Terrain 90 (1997).
55. Graham, *supra* note 53 at 131.
56. *Id.*
57. For example, residents along Effner Lake sought a special law prohibiting jet skis from Effner Lake. The proponents marshaled the resources necessary to get the law passed through the Legislature, only to have it vetoed by Governor Cuomo, because another special law already on the books gave towns in Saratoga County jurisdiction over the jet ski issue on their waters.
58. N.Y. Nav. Law § 30 (McKinney, 1989).
59. *Helms v. Reid*, 394 N.Y.S.2d 987, 990 (1977).
60. *Id.*
61. *Id.* at 996.
62. *Id.*
63. *See discussion*, *supra* at 2.
64. H.R. 3141, 106th Cong. § 1 (1999).
65. *Id.*
66. *Id.*
67. *Id.*, § 2.
68. *National Jet Ski Legislation Introduced*, Bluewater Network Press Release, Oct. 25, 1999, <http://www.earthisland.org/bw/pwruactpress.shtml>.
69. *Id.*
70. *Id.*
71. Blue Water Network, *Excellent Ordinances*, (visited Jan 20, 2000) <http://www.earthisland.org/bw/excelords.shtml>.
72. *Caught in the Wake*, *supra* note 22 at 15.
73. Before these two pieces of legislation, the Navigation Law was amended three times during the 1990s especially for jet skis. First, jet skis were given their own statutory definition, the first step in regulating them separately from other recreational boats. Second, jet skis were prohibited from operating between the hours of sunset and sunrise. The third jet ski-specific law, which the PWIA cited as the solution to the state's jet ski problems, required certification of younger drivers and the use of certain safety devices.
74. "Laws are like sausages, it is better not to see them being made," Otto Von Bismark.
75. <http://legalinfo.state.ny.us:82>.
76. *Id.*
77. N.Y. Nav. Law § 46 (McKinney, 2000).
78. The Clean Air Act, 42 U.S.C.A. § 7543(e)(2)(B)(i), requires any state other than California that adopts California emissions standards for motor vehicles make such standards identical to the California's. Since the California standards apply to all outboard motorboats, and the New York adoption of the California standards apply specifically to personal watercraft, there is some question of whether this statute will stand up to challenge.
79. N.Y. ECL § 19-3036-a(1), (2).
80. NPCA Guide to Personal Watercraft, Nat'l. Parks and Conservation Ass'n <http://www.npca.org/whatwedo/pwc_stories.html>.
81. *Caught in the Wake, supra* note 22 at 12.
82. *Id.* at 13.
83. *Air Board*, *supra* note 34.
84. *Caught in the Wake, supra* note 22 at 14.
85. Dennis Pfaff, *Jet Squeeze, a Ban on Jet Skis in Lake Tahoe Fuels a Legal Challenge*, 18 Cal. Lawyer 22, (1998).
86. *Governor Pataki's Environmental Press Releases*, (visited Mar. 19, 2000) <http://www.dec.state.us/website/press/newrelgv.html>.
87. Telephone conversation with Linda, who refused to give her last name, of the Governor's office held on April 18, 2000.
88. Conversation with Dominic Jacangelo of DEC on May 30, 2000.
89. Anderson, *supra* note 2.
90. 670 N.E.2d 1215 (Ill. App. 1996).
91. *Personal Watercraft Industry Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544 D.C. Cir, 1995).
92. *Id.* at 543.
93. *Weden v. San Juan County*, 958 P.2d 273 (1998).
94. *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993).
95. *Personal Watercraft Ass'n, supra* note 91 at 545.
96. *Weden, supra* note 93 at 280.
97. *Personal Watercraft Ass'n, supra* note 91 at 540.
98. Anderson, *supra* note 2 at 239.
99. *Personal Watercraft*, *supra* note 91 at 545.
100. Kelly McMurry, *Running at Full Throttle; Peril Amid the Pleasure of Personal Watercraft*, 34 Trial 12 (June, 1998).
101. *Id.*
102. *Id*. at 14.
103. Anderson, *supra* note 2 at 237.
104. Jeremy Pearce, *Pollution Experts Target Jet Skis,* The Detroit News, July 17, 1998 at 38.

105. Anderson, *supra* note 2 at 237.

106. Memorandum in Opposition submitted by Hinman, Straub, Pigors, & Manning, P.C. on behalf of the NMMA, May 17, 1999.

107. *Id.*

108. *See* Anderson, *supra* note 2 at 236, and *supra* note 10.

109. Letter from Dick True, Executive Secretary of the ESRMC to T. DiNapoli, Chairman of the Assembly Local Government Committee, Jan. 27, 2000.

110. *Lucas v. South Carolina*, 505 U.S. 1003 (1992).

111. Carey, *supra* note 13.

112. *Copart v. Consolidated Edison*, 41 N.Y.2d 564 (1977), quoting Prosser, Torts, (4th ed.) p. 571.

113. *Id*. at 568.

114. *Puritan Holding Co. v. Holloschitz*, 372 N.Y.S.2d 500, 501 (1975).

115. *Copart*, *supra* note 111 at 570.

116. *Generally*, *Mandel v. Geloso*, 206 A.D.2d 699 (3d Dep't 1994).

117. *Generally, Adams v. Berkowitz*, 212 A.D.2d 557 (2d Dep't 1995).

118. 81 N.Y. Jur. 2d, Nuisances, § 16 at 332.

119. *Christenson v. Gutman*, 249 A.D.2d 805, 808 (3d Dep't 1998).

120. *Langan v. Bellinger*, 203 A.D.2d 857 at 858 (3d Dep't 1994).

121. *Benjamin v. Nelstadt Materials*, 214 A.D.2d 632, 633 (2d Dep't 1995).

122. *169 E. 69th Street Corp. v. Leland*, 531 N.Y.S.2d 531, 533 (1992).

123. *Benjamin v. Nelstad Materials*, *supra* note 121 at 633.

124. Helms, *supra* note 58 at 999.

125. *Id.*

126. *Stiglianese v. Vallone*, 255 A.D.2d 176, 176 (1st Dep't 1998), and *New York v. PVS Chemicals*, 50 F. Supp. 2d 171, 182 (W.D.N.Y. 1998).

127. Copart, *supra* note 111 at 568.

128. *New York v. Schenectady Chemicals*, 459 N.Y.S.2d 971, 978 (1983).

129. *Generally, People v. Rubenfeld*, 254 N.Y. 246, 247 (1930).

130. *Generally, Durand v. Board of Co-op*, 334 N.Y.S.2d 670 (1972).

131. Although the very real threat that MTBE contamination poses to drinking water would seem to fulfill the requirement of endangering public health, New York courts have interpreted this avenue to a nuisance action narrowly. While in *Nalley v. General Electric*, 630 N.Y.S.2d 452, 456 (1995) one state supreme court held that a reasonable threat to drinking water was insufficient to sustain a nuisance action lacking a showing of actual contamination; in *New York v. Fermenta ASC*, 656 N.Y.S.2d 342, 346, another held that actual pollution of a municipal drinking water supply with the herbicide TCPA far in excess of state regulated limits was not a nuisance because the plaintiff failed to demonstrate the degree of probability of actual harm from the contamination levels documented.

132. *People v. Rubenfeld*, *supra* note 128.

133. *State v. Waterloo Raceway*, 409 N.Y.S.2d 40 (1978).

134. *Generally Rochester v. 10-12 S. Washington Street*, 687 N.Y.S.2d 523 (1998).

135. *Generally New York v. Bakolas*, 59 N.Y.2d 51 (1983).

136. *Hoover v. Durkee*, 212 A.D.2d 839, 840 (3d Dep't 1995).

137. *Burns et al v. Linder*, 59 N.Y.2d 314, 334 (1983).

138. ". . . profound damage common to the entire community has been caused by the pollution of our waters." *Leo v. General Electric*, 145 A.D.2d 291, 294 (2d Dep't 1989).

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# Congressman Sherwood Boehlert (R-NY)—Press Releases

## Utica Area Congressman Receives N.Y. State Bar Association Environmental Award

**Rep. Sherwood Boehlert and Commissioner John Cahill receive awards for excellence in protecting environment**

NEW YORK—Congressman Sherwood Boehlert (R-New Hartford) chair of the House Science Committee and immediate past chair of the Transportation and Infrastructure Committees Water Resources and Environment Subcommittee January 26, 2001 received the New York State Bar Association (NYSBA) Environmental Law Section's 2001 Annual Award for his leadership and excellence in protecting the environment.

Boehlert, the longest consecutive-term serving House member from central New York, is recognized as the leading Republican environmentalist in the House. Throughout his tenure, serving a large and diverse district, he has focused his efforts on the 3 E's—environment, economic development and education. A senior member of the House Committee on Transportation and Infrastructure, he is considered a national leader in environmental policy to keep America's air, land and water clean.

As chair of the prestigious House Science Committee, Boehlert will have jurisdiction over the direction of research and development projects conducted by NASA, the National Science Foundation, the Environmental Protection Agency, the Department of Energy, and other federal agencies. His committee also has jurisdiction over math and science education in public schools throughout the country.

New York State Environmental Conservation Commissioner John P. Cahill of Albany also received the Section's Annual Award for his leadership in environmental protection and natural resource management.

This year, the Environmental Law Section marks the 20th anniversary of its founding. In a letter, Gov. Pataki lauded the section and its members for "a strong commitment to work for legislation to better effectuate protection of human health, the natural environment and the public welfare."

Boehlert delivered the keynote address at the bar group's annual luncheon. He focused his remarks on the environmental outlook for 2001.

The Section is chaired by Gail S. Port of New York.

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## Boehlert Gives Keynote Address at NYSBA's Environmental Forum in NYC

WASHINGTON, D.C—Congressman Sherwood Boehlert (R-New Hartford)—Chairman of the House Science Committee—January 26, 2001 was the keynote speaker at the New York State Bar Association's Environmental Law Section's 2001 Annual Luncheon, where he discussed the direction the 107th Congress will take on important environmental issues. Boehlert was also presented with NYSBA's environmental leadership award for his "enduring passion and effective leadership in protecting and enhancing our nation's natural environment."

The environmental law luncheon was part of NYSBA's 4-day Annual Meeting in New York City, during which more than 5,000 NYSBA members from around the state attended. The meetings were held at The New York Marriott Marquis, 1535 Broadway, New York City.

Later that day, Boehlert was scheduled to speak before the Board of Directors of Environmental Defense about the direction the 107th Congress will take on environmental policy. Environmental Defense is one of the nation's leading environmental groups.

# Keynote Address to Environmental Law Section

## January 26, 2001

By Congressman Sherwood Boehlert

It's a pleasure to be with you this afternoon and an honor to receive your award. I'm especially pleased to be here when you're also recognizing the fine work of my good friend, Commissioner John Cahill. Honoring John is a fine capstone to your first 20 years as a Section of the New York bar. The only problem is that part of his reward is having to listen to me. Presumably second prize was having to listen to two speeches by me.

*"[W]hat we face now in Washington is not so much pain, but uncertainty. This is true in general, but it's especially true about environmental policy. "*

But by the time I finish describing what we're facing in Washington, John may feel so good about Albany, by comparison, that it will have been worth any pain I might inflict.

Actually, what we face now in Washington is not so much pain, but uncertainty. This is true in general, but it's especially true about environmental policy.

Think about this lineup. We have a new President who—like his opponent—spoke relatively little about the environment during the campaign. We have diverse, even divergent, Presidential appointees whose very presence signifies either schizophrenia or remarkable breadth of vision in handling environmental issues. We have an extraordinarily closely divided House of Representatives with almost an entirely new cast of chairmen. We have the even more unlikely situation in the Senate, with party control dependent on either the vice president or the "grim reaper." We have a closely balanced and highly unpredictable Supreme Court that has before it some of the most critical environmental cases in decades. And we have business and environmental groups that can't decide whether they're braced for total warfare or serious negotiation.

It's a time when, to quote the movie mogul Sam Goldwyn, any predictions should be taken with "a dose of salts."

But, presumably, you didn't invite me here to tell you that I don't know anything, so I'll elaborate. I'll take a stab at describing where things might go—and where I hope they'll go.

I think that to talk about environmental prospects for the next year, we have to look separately at three very different—if related—types of issues, which I'll label: conservation, regulation and resources.

By conservation, I mean issues related to open space preservation, parks funding and other non-regulatory means of providing natural vistas and recreational opportunities. This is the area in which prospects are, appropriately, the least hazy and the most promising.

During his campaign, President Bush endorsed the Conservation and Reinvestment Act, or CARA, which I know your group endorsed, as did many New York environmental groups and the state government. The bill would set aside billions for a variety of uses, including protecting coasts and fully funding the Land and Water Conservation Fund—a longtime cause of mine.

Indeed, I played an important role in moving CARA forward, pressing—successfully, to a great extent—to clean up environmental problems with the bill and, less successfully, to get more money for New York State. But in the end, my work helped bring moderate Republicans into the coalition supporting the bill and muted environmental objections to it.

*"Now CARA proponents are preparing to reintroduce the bill, and we have an Administration that has endorsed it. The prognosis for CARA is quite good . . ."*

I know many CARA advocates were disappointed with the way the process ended, but they should not be.

While CARA itself was not enacted, hundreds of millions of dollars were made available for CARA programs—something that seemed like a pipe dream at this time last year. Now CARA proponents are preparing to reintroduce the bill, and we have an Administration that has endorsed it. The prognosis for CARA is quite good, although one can't predict the precise form or timing of final passage.

I'm hopeful that we'll be able to see similar movement in agricultural conservation programs, which are close to my heart. I authored the conservation title in the House version of the 1996 Farm Bill, and I've

worked hard to ensure that New York State benefits from programs like the Conservation Reserve Program (CRP), which helps farmers and protects critical waters like those in the New York City watershed.

We'll have to fight hard again for such programs as the Farm Bill is reauthorized in the next year or two because some farm interests will try to use all the money for commodity programs. But programs like CRP and the Wetlands Reserve Program are probably our best chance for conservation on private lands, and we must ensure that they thrive.

In general, though, conservation programs have a growing base of support in both Congress and the Administration and should do well in a time of budget surpluses.

In the second category of issues—regulation—the outlook is also promising, although more uncertain.

I'm most hopeful about clean air policy, although we have a lot of hurdles to clear. During his campaign, President Bush endorsed passing a bill to limit all four fossil fuel pollutants—sulfur dioxide, nitrogen oxides, mercury and carbon dioxide. Administrator Whitman should certainly be sympathetic to the idea as the former governor of a downwind state. Senator Bob Smith of New Hampshire, the rock-ribbed conservative who chairs the Senate Environment and Public Works Committee, has indicated openness to such an approach.

*"In general, though, conservation programs have a growing base of support in both Congress and the Administration and should do well in a time of budget surpluses."*

And even a number of utility executives are talking openly about the idea because the certainty of a four-pollutant approach may be easier to manage than an ever shifting set of regulations on individual pollutants.

But the path to actually enacting a bill is hardly certain. There will have to be prolonged negotiations about the specific levels of emission reductions and their timing. Regions that rely on coal mining or coal burning will resist. Conservatives who continue to believe that climate change theory is a vast left-wing conspiracy will choke at the notion of a statutory limit on $CO_2$ emissions.

Still, the Clean Air Act Amendments of 1990 were one of the greatest achievements of the President's father. This is a case in which we should try to get history to repeat itself by learning from the past.

I am certainly working actively to put that repetition in motion. On the first day of the new Congress, Congressmen John Sweeney, John McHugh and I reintroduced our bill to control the sulfur and nitrogen emissions that cause acid rain, H.R. 25.

And we're working now with environmental groups, and Republicans and Democrats in both the House and the Senate, to introduce a four-pollutant bill based on the four-pollutant measures we introduced in the last Congress. We're only at the starting line, but we're in good condition.

*"[W]e're working now with environmental groups, and Republicans and Democrats in both the House and the Senate, to introduce a four-pollutant bill based on the four-pollutant measures we introduced in the last Congress. We're only at the starting line, but we're in good condition."*

I'm also hopeful that with a new Administration we can break the deadlock that has prevented us for so long from addressing the need for Superfund reform—another issue I've put endless hours into over the past two years. I am convinced that base politics is all that has blocked agreement on this important issue.

Leaving aside Natural Resource Damages, the specific issues in Superfund reform are not politically or substantively difficult. The gaps are quite bridgeable—if people decide they want to work things out rather than scoring political points. And if we worked things out, we'd clean up more sites, we'd open brownfields in inner cities to economic development and we'd help small business avoid litigation that wastes resources and undermines popular support for our environmental regime. Those goals are too important to be sacrificed for short-term political gain.

If we can resolve some old regulatory issues like Superfund reform, then we might develop the trust to tackle some newer, more genuinely difficult matters like trying to figure out how to update our regulatory system. I've been active in a group trying to come up with a bill to create a "Second Generation" of regulation that would improve the environment by giving industry greater flexibility in deciding how to meet tough environmental standards, while expecting more timely and reliable environmental information in return.

Figuring out how to do promote genuine, pro-environment reform is a tall order. It took us two years of drafting to come up with a reform bill we introduced

late last year, and we're still not happy with the measure. But the effort is worth continuing.

Not only could a Second Generation approach help us address serious issues that we haven't yet been able to tackle—such as non-point source pollution—it could alleviate some of the backlash against environmental regulation that is preventing environmental progress.

But even the problems relating to Second Generation pale in comparison to those that await us when we attack the third category of environmental issues—resources. Here I'm thinking of questions relating to land use, particularly in the west, such as mining, timber, oil, grazing and endangered species issues.

*"My hope is that moderate attitudes will prevail in Washington in the coming years. Moderates hold the balance of power in Congress—enough power to block bad bills."*

These are by far the touchiest political issues as well as some of the most difficult intellectual issues, and they divide both parties, largely along regional lines. In recent years, we have had to fight a mostly defensive battle on these matters—and I have the battle scars to prove it. And I'm not sure that's going to change any time soon. We may face bruising battles on such issues as drilling in the Arctic National Wildlife Refuge (ANWR) and protecting roadless areas in national forests.

On the other hand, the advent of the Bush Administration opens up the possibility of moving forward with newer, more creative, centrist approaches to dealing with natural resource issues.

On the ground in the west, there are a growing number of successful collaborations between environmentalists and those who make their living extracting resources from the land. It's been hard, to say the least, to embody those ideas in legislation because of the ideological warfare in Washington. But a Republican Administration with conservative credentials has a better chance of imposing a truce in the ongoing ideological battles.

I could go on, detailing the upcoming debate on any number of issues. But by now I think you can see a general pattern emerging. My overall point is that we have the potential to make real environmental progress if we take a moderate approach.

Now I know moderation makes some people uncomfortable. Senator Eugene McCarthy once said that moderates were people who, if they saw a man drowning ten yards from shore, would throw him five yards of rope and say that they'd met the guy half way.

It's a good line, but it's a better description of what the ideologues do. They're the ones who've already decided how much rope they've got no matter what the situation. Moderates try to craft real, workable, effective solutions to genuine problems.

My hope is that moderate attitudes will prevail in Washington in the coming years. Moderates hold the balance of power in Congress—enough power to block bad bills. But Republican and Democratic leaders, environmental and business groups, the President and the Congress—in short, all the parties to the environmental debate—are going to have to work from the center, if we're going to make progress. That's doable and that's possible, but it's hardly inevitable. It will take patience, perseverance and trust—hardly the three words that first spring to mind when one mentions Washington.

But I hope groups like yours will push for such centrism. That's our best hope for ending the longstanding stalemate on environmental policy—a stalemate that may feel comfortable, but is neither healthy nor sustainable. It cripples our ability to address environmental problems and sours the public's attitude toward government.

We need to work together to break this stalemate with an attitude that long predates it. It's an attitude that was given voice by the ancient Roman playwright Terence. He's the one who wrote, "Moderation in all things." Thank you.

# Section News

## SEQRA

The Environmental Law Section of the New York State Bar Association, in conjunction with Albany Law School, the Department of Environmental Conservation and other professional groups, is sponsoring a symposium commemorating the 25th anniversary of SEQRA on March 15-16, 2001 at the Law School, 80 New Scotland Avenue, Albany. The conference will include training sessions for local government officials, round table discussions on subjects of practical importance to practitioners, presentations of the historical development and future of SEQRA and breakout sessions on topical issues (such as the substantive reach of SEQRA, the role of economics and socioeconomics in the environmental review process, and visual quality/aesthetics assessments).

The presentations and breakout sessions will involve a mixture of professionals engaged in the SEQRA process, including lawyers, planners, architects, engineers, government officials and representatives of environmental groups. The symposium should generate a variety of publications. Albany Law School has committed its Summer/Fall 2001 edition to a compilation of articles that will be written for the symposium, and it is expected that other law school publications will include material from the conference.

We invite members of the Environmental Law Section interested in preparing articles or making presentations to contact Mark A. Chertok, Co-Chair of the Environmental Impact Assessment Committee of the Environmental Law Section ((212) 421-2150 or mchertok@sprlaw.com) or Professor Patricia Salkin or Professor David Markell at Albany Law School ((518) 445-2329, psalk@mail.als.edu and (518) 472-5861, dmark@mail.als.edu, respectively).

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## Report of the Continuing Legal Education (CLE) Committee

At our meeting on January 26, 2001, we worked on finalizing the agenda for the Spring 2001 CLE program, "Practicing Environmental Law Before Local Agencies." This program will be co-sponsored with the Real Property Section. The Program Co-Chairs are Jim Rigano (from the Environmental Section) and Terry Gilbride (from the Real Property Section). Dates, locations and program chairs are:

| | | |
|---|---|---|
| April 20, 2001 | Long Island | Barry Cohen |
| May 4, 2001 | NYC | Miriam Villani |
| May 9, 2001 | Albany | Bob Feller |
| May 11, 2001 | Rochester | John Wilson |

To ensure that the CLE program does not overlap too much with the March 15th SEQRA symposium, the committee will rely on one of the committee members, Bob Feller, who is participating both in our CLE program and in the SEQRA program.

We also discussed whether we want to continue offering two CLE programs a year. Prior to 1999, the committee sponsored one CLE program a year. Since the advent of mandatory CLE in 1999, the committee has sponsored two programs a year. However, the "market" for CLE programs has evolved, as the Environmental Law Section now offers CLE credit for both its Fall and January Section meetings, and various law schools and local bar associations also offer environmental-related programs for CLE credit. The committee agreed to continue to monitor this situation, and to consider co-sponsoring CLE programs offered by other organizations as a way of alerting Section members to these opportunities for speaking as well as CLE credit.

The committee also has compiled the following ideas for future CLE programs:

- Biotechnology, suggested by Miriam Villani;
- Mining Law, suggested by Laura Zeisel of the Section Task Force on Mining and Oil and Gas Exploration;
- "Mistakes We've Made in Negotiating Enforcement Orders on Consent," suggested by Scott Fein of the Environmental Enforcement Committee;
- TMDLs, suggested by George Rodenhausen of the Water Quality Committee;
- Conservation Easements, suggested by Carl Howard of the Adirondack, Catskill, Forest Preserve; and
- Environmental Insurance, suggested by Dan Morrison.

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## Minutes of Executive Committee Meeting

## New York State Bar Association Environmental Law Section

## October 29, 2000—Jiminy Peak, MA

**Attendees:**

| | |
|---|---|
| Lisa Bataille | William Ginsberg |
| David Sampson | Connie Sidamon-Eristoff |
| John Greenthal | Daniel Riesel |
| Daniel Ruzow | Mark Chertok |
| Gail Port | Alice Kryzan |
| Virginia Robbins | Peter Ruppar |
| James Periconi | Robert Hallman |
| David Quist | Carl Howard |
| Dorothy Marie Miner | Dean Sommer |
| Jeffrey Baker | Thomas Ulasewicz |
| Alan Knauf | Arthur Savage |
| Laura Zeisel | Walter Mugdan |
| Nicholas Robinson | Miriam Villani |
| Marla Rubin | David Everett |
| Louis Alexander | George Rodenhausen |
| Mark McIntyre | Scott Fein |
| Terresa Bakner | Kevin Reilly |
| Kevin Bernstein | Philip Dixon |
| Antonia Bryson | Robert Kafin |
| Robert Tyson | David Freeman |
| James Dwyer | John Shea |

## I. Call to Order

Gail Port, the Chair, called the meeting to order at 10:10 a.m. Gail expressed the Section's gratitude to Lisa Bataille, Lori Nichol and Kathy Plog for their hard work in ensuring the success of the Fall Section meeting. In addition, she and the Executive Committee thanked Antonia Bryson, Kevin Healy and Bob Tyson for the fabulous job they did in Co-Chairing the Fall meeting and the Saturday morning CLE program.

## II. Approval of Minutes

The minutes of the May 3, 2000 meeting of the Executive Committee were unanimously approved by voice vote.

## III. Treasurer's Report

Jim Periconi reported on the excellent financial condition of the Section and reported an excess in the Section's reserves of $53,325 as of September 30, 2000. In addition, Jim reported on the Section's budget submitted in August to the NYSBA. This year's budget included funding for the government/not-for-profit attorneys subsidization program.

## IV. Old Business

### A. Report on Subsidization Program

Lisa Bataille reported that nine requests for subsidization were received for the Fall Section meeting.

### B. Report on the Planning of the Annual Meeting—Friday, January 26, 2001

The Co-Chairs of the meeting are Dave Freeman, Alan Knauf and Kevin Reilly. The program will focus on creative environmental strategies and technologies, including innovative strategies to address contaminated sites. Also, GIS and other technologies will be explored. The luncheon speaker and recipient of the Section award is The Honorable Sherwood L. Boehlert.

The Nominating Committee has been established consisting of Mike Lesser, Chair, Ginny Robbins, Joel Sachs and Marla Rubin. The Section Council Awards Committee is established: Alice Kryzan, Chair, Alan Knauf and the entire Section Council. An Awards Committee has been formed—Dan Ruzow, Barry Kogut and Peter Paden.

There was a discussion regarding a cocktail reception Thursday, January 25. A motion was unanimously approved authorizing a not-to-exceed budget of $2,000 for a cocktail reception at Proskauer Rose's conference center for members of the Executive Committee and participants in the Annual Meeting CLE program.

### C. Report on the 25th Anniversary of SEQRA Conference—March 15-16, 2001

Dan Ruzow reported that the conference will begin at 1:00 p.m. on March 15. It will be symposium style. The conference intends to integrate all legal disciplines. The late spring issue of Albany Law Review will be dedicated to the symposium. Conferences organizers will soon solicit articles and presentations. An announcement of the conference will be made in the Section *Journal*. Mark Chertok requested ideas for papers and speakers.

### D. Section *Journal*

Kevin Reilly indicated that the *Journal* would like more substantive submissions than it is currently receiving. He encouraged the submission of articles by the November 1 deadline.

### E. Report on Minority Fellowship

Lou Alexander reported that three fellowships will be offered this year. The submittal deadline for applications is December 22. The announcement of the fellowship winners will be made at the January meeting. Historically, four foundations provided support for the minority fellowships. Today, only one foundation pro-

vides financial support. Lou will be following up with the three other foundations regarding their renewal of support. Discussion ensued regarding mentoring of fellowship winners. Lou is working with Lisa Bataille to identify names and addresses of fellowship winners and to attempt to bring these individuals back into Section activities. A third Co-Chair of the Minority Fellowship Committee would be welcome, particularly since Arlene Yang is on maternity leave. The Committee will make the names and resumes of those individuals who apply for the fellowship available to private firms for consideration in summer employment.

### F. Report on Essay Contest

Miriam Villani reported that more essays were received this year than in the past two years. Thirteen essays were submitted. Although this is an improvement in the number of submissions, in prior years there have been as many as 32 submissions, and therefore, the Committee continues to identify strategies that will continue to increase participation. For example, Joan Leary Matthews, who teaches a writing clinic at Albany Law School, encouraged her students to select an environmental law topic and to submit essays in the contest. There was discussion about encouraging members through blast faxes to contact local law schools and encourage participation. Dave Markell has offered to send out a letter to other law schools. Miriam will coordinate this activity with Dave.

### G. Report from CLE Committee

Gail Port announced the upcoming real estate transaction CLE program. Jim Periconi thanked Gail for energizing the Fall weekend's CLE program and for encouraging attendance. These thanks were echoed by Executive Committee members.

### H. Report from Ad Hoc Task Force on Superfund/Brownfields Reform

David Freeman gave the Task Force report. The Task Force is maintaining contact with government staff on the status of Superfund legislation. During December and January the Committee will encourage letter writing and enclose a set of principles that have been agreed upon for Superfund reform. The Committee will circulate a copy of these principles at the January meeting. The Task Force continues to encourage the solicitation of local Bar Associations' endorsement of the Section's principles. A discussion ensued regarding the obstacles to passing Superfund reform. It was proposed that the decision-making process could be assisted by focusing attention on the four identified obstacles.

### I. Report on the House of Delegates

Gail Port introduced Jim Dwyer, Section Liaison to the NYSBA Executive Committee. Jim reported that the House of Delegates will consider the multi-disciplinary practice issue on November 4. The ABA rejected MDP for the same reasons as NYSBA. The State Bar exerted national leadership on this issue. At the core was the fear of lawyers losing independent judgment in entities where they establish relationships with engineers, accountants or hospitals. Some changes are anticipated to the professional ethics rules to allow these relationships while assuring problems do not arise. Jim Periconi reported on his attendance at the last House of Delegates meeting and the MDP discussion.

## V. New Business

### A. Committee Chairs

Gail Port announced new Co-Chairs: Dave Markell—Alternative Dispute Resolution; Miriam Villani and Dave Everett—Membership; Dave Quist—Biotechnology; Kevin Ryan—Environmental Impact Assessment. There was a discussion regarding how additional participation could be encouraged. An announcement will be placed in the *Journal* regarding Committee activity and encouraging members to participate as committee members.

### B. Mining Law

Laura Zeisel suggested the establishment of a new committee on mining. There was a discussion concerning the mining industry in New York, the importance of the case law in this area, policy concerns, and coordinated review by DEC regions of mining issues.

A motion was made to create a mining and oil and gas exploration task force. The motion passed unanimously.

There was a motion to appoint Co-Chairs to the task force and Laura Zeisel and Terresa Bakner were appointed. A *Journal* announcement regarding the creation of the task force will be made. Laura and Terresa were asked to report at the January meeting on the task force's agenda.

### C. Section's Committee Structure

Gail has asked Ginny Robbins to head up a committee to examine the Section's committee structure and governance and to determine whether any changes should be recommended to insure the continued vitality of the committees and their work. Ginny requested volunteers to serve on a committee to examine this issue. Jim Periconi, Lou Alexander, Phil Dixon, Bill

Ginsberg, Gail Port and Alice Kryzan volunteered. Ginny Robbins will e-mail committee members with suggested dates for the first committee conference call.

### D. Meeting Location for Fall 2001

Dan Ruzow discussed the options for the Fall 2001 Section meeting. Options included Cooperstown, Thayer Hotel, West Point, Lake Placid, Bear Mountain, The Equinox, Sagamore and Cornell. Dan will continue to consider the options, and the location of the Fall 2001 meeting will be announced at the January 2001 Annual Meeting.

### E. Committee Reports

#### 1. Enforcement and Compliance

**Scott Fein.** CLE proposal entitled "Mistakes We Have Made" allowing participants to learn from the experiences of environmental practitioners.

#### 2. Water Quality

**George Rodenhausen and Bob Hallman.** The Committee reported on the meeting with the New York Water Environment Association. Bob Hallman is Co-Chair of this meeting. The Committee's new focus is on watershed controls, PCBs in the Hudson River and privatization of drinking water. SPDES regulations are in the public hearing process and are not very controversial. The Committee will prepare an article for the *Journal*.

#### 3. Membership

**Dave Everett and Miriam Villani.** The Committee is brainstorming on where it is and what it should be doing. It would like to increase student membership to carry over after law school and engage law school environmental law societies. The Committee would like to make a presentation and have an information table at the law student annual meetings. It is considering involvement in the National Environmental Moot Court competition. The Committee would like to work with law professors to target students on law journals for Section membership. It will prepare letters to law professors when it distributes essay contest information to encourage involvement in the Section.

#### 4. Hazardous Site Remediation

**Walter Mugdan.** The Committee is considering topics for the Fall 2001 meeting involving dredging issues, the Passaic River and New York Harbor.

#### 5. Adirondack

**Carl Howard.** The Committee raised concern regarding archived records that NYSDEC is considering destroying. They suggested a letter to NYSDEC regarding records retention.

#### 6. Internet

**Alice Kryzan and Alan Knauf.** The Committee reported that there is a movement among some in the regulated community to get EPA to limit information provided on the EPA Web site. EPA will produce a report in January regarding information posted on its Web site. The regulated community is not happy with how information is made available.

#### 7. International

**C. Sidamon-Eristoff and Dan Riesel.** The Committee is planning a trip to Paris the last two weeks of June to discuss European community environmental law and impacts on U.S. practice.

#### 8. Air Quality & Global Climate Change

**Bob Tyson, Antonia Bryson and Kevin Healy.** Bob Tyson reported that Commissioner Cahill has requested input from these committees on the global warming action plan NYSERDA and NYSDEC are preparing. The Committees will examine the New Jersey plan discussed at the Fall Meeting.

#### 9. Pollution Prevention

**Dean Sommer.** The Committee is discussing how pollution prevention efforts might be used in Supplemental Environmental Projects (SEPs) in enforcement actions.

#### 10. Energy

**Kevin Bernstein.** Kevin has spoken to Dave Wooley and Clayton Rivet, his Co-Chairs, regarding Committee activities, in particular, Article X impact concerns. He will report back to the Executive Committee in January

#### 11. Wetlands and Coastal Resources

**Terresa Bakner.** Terresa announced a legal component will be included in the Wetlands Forum's spring meeting that will focus on new regulations, caselaw, EPA initiatives, delineation, and the administrative appeals process.

#### 12. Environmental Justice

**Lou Alexander.** NYSDEC's draft environmental justice permit policy is expected in early 2001. NYSDEC's Advisory Group on Environmental Justice has considered using SEQRA to advance environmental justice. EPA Region 2's new Coordinator for Environmental Justice is Terry Wesley.

#### 13. Ethics

**Marla Rubin.** Marla is working on a book regarding government attorneys and ethical issues.

### 14. Historic Preservation, Parks and Recreation

**Dorothy Miner and Jeff Baker.** They reported that this Committee will hold a meeting on Thursday before the January meeting. A focus of the Committee is on historic uses of places of worship. Other concerns include easements for bikeways, privatization of parks, endangered cultural landscape, reindustrialization of the Hudson River (Olana concerns). The Committee would like to increase membership with law students.

### 15. Biotechnology

**Dave Quist.** The Committee is assessing environmental impacts of organisms and will survey the current state of environmental impact analysis for biotechnology. The Committee is considering a *Journal* article.

### F. Subsidy for Government Attorneys

John Greenthal indicated disappointment with the response of government attorneys in taking advantage of the Section Subsidy Program. The Section will do more outreach for the January meeting through Carl Howard, Mike Lesser and John Greenthal.

### G. Report from CLE Committee

The Section welcomed former Section Chair Dave Sampson (formerly Executive Director of the Greenway Project), to the meeting and welcomed Dave's renewed involvement in Section activities. Dave Sampson thanked the Section officers for their support (and letter) during the recent shake-up in the staff and management of the Greenway Project.

## VI. Adjournment

The meeting was adjourned at 12:20 p.m.

*Announcing:*

# 2001 Environmental Law Essay Contest

**The Contest:**
The first prize essay will be published by the New York State Bar Association, and the second and third prize essays will be considered for publication. All three winners will also receive an invitation to the Fall 2001 conference of the Environmental Law Section.

**Topic:**
Any topic in environmental law.

**Eligibility:**
Contest open to all students enrolled in a New York State law school. Essays may have been submitted for course credit or for law reviews, but not as part of paid employment.

**Length:**
Maximum length, 35 double-spaced pages (including footnotes, which may be single-spaced).

**Format:**

Each entrant *MUST* submit a hard copy *AND* a disk (together) in either Microsoft Word or WordPerfect 5.0.

**Judging:**
Criteria for judging entries will be: organization, practicality, originality, quality of research, clarity of style. Entries will be judged by environmental law professors from throughout the state and other distinguished members of the Environmental Law Section.

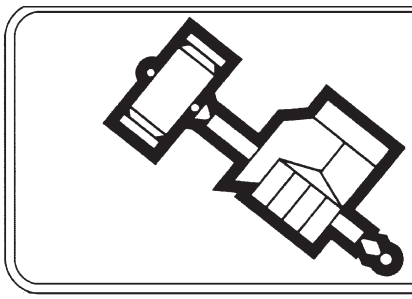
**Prizes:**

| | |
|---|---|
| First Prize – | $1,000 |
| Second Prize – | $ 500 |
| Third Prize – | $ 250 |

**To Enter:**
Send entry to Environmental Law Essay Contest, New York State Bar Association, One Elk Street, Albany, New York 12207. Put only your social security number on your entry—do not put your name or your school. Include with your entry a cover letter stating your name, mailing addresses (both school and permanent), telephone number, social security number, name of school, and year of graduation. This letter should also certify that the essay was not written as part of paid work. No more than one entry per student per year is allowed.

**Deadline:**
June 1, 2001 (Winners will be announced by September 15, 2001.)

**For Further Information:**
Contact your environmental law professor or Miriam Villani, Farrell Fritz, P.C., EAB Plaza, Uniondale, New York 11556 (516-227-0607).



# Administrative Decisions Update

Edited by David R. Everett

**CASE:** ***In re the Violation(s) of the New York State Environmental Conservation Law (ECL) Articles 33 and 71 and Part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by Tree of Life Nursery School and Raphael Wizman ("Respondents").***

**AUTHORITIES:** ECL Article 33 (Pesticides )

ECL Article 71 (Enforcement)

6 N.Y.C.R.R. Part 325 (Application of Pesticides)

**DECISION:** On October 19, 2000, the New York State Department of Environmental Conservation (DEC) Commissioner, John Cahill, issued an order adopting the findings, conclusions, and recommendations of ALJ Edward Buhrmaster holding that Respondents violated the pesticides laws and regulations by causing or allowing the commercial application of pesticides at the Tree of Life Nursery School without the services of a certified pesticide applicator.

## A. Facts

On November 5, 1999, during a DEC inspection of Respondents' nursery school in Commack, New York, the following general use pesticides were found in storage rooms: d-CON Mouse Pellets, Ortho Home Defense Indoor and Outdoor Insect Killer 2, Growers Choice Weed and Grass Killer, Raid Ant and Roach Killer, and Flower Time Premium Weed and Feed with Trimec. The pesticides for roaches and mice had been used by Respondent Rabbi Raphael Wizman and the school's custodian as necessary around the school. Additionally, Rabbi Wizman and the custodian had used weed killer on cracks in the cement walks outside. Neither Rabbi Wizman nor the custodian were certified pesticide applicators.

Respondent Rabbi Wizman admitted the pesticide applications to the DEC inspector both orally and in a signed statement. As a result of these admissions, the relevant facts were not in dispute. The ALJ held a hearing to determine whether the pesticide applications were in violation of the law.

## B. Discussion

### 1. Liability

The central issue of the ALJ's hearing was whether the undisputed activities at issue required the services of a certified pesticide applicator. This determination turned on whether the applications were "commercial" or "residential" as the ECL defines those terms.

"Commercial application" is defined as "any application of any pesticide except as defined in private or residential application of pesticides."[1] "Private application" only relates to certain applications done to produce an agricultural commodity and does not apply to this issue.[2] "Residential application" is defined as "the application of general use pesticides by ground equipment on property owned or leased by the applicator, excluding . . . any residential structure other than the specific dwelling in which the applicator resides."[3]

"Commercial" and "residential" are mutually exclusive terms under the ECL. DEC staff argued that the applications were not "residential" because they were not owned or leased by the applicator and therefore must be considered "commercial." Respondents, on the other hand, claimed that the applications were not "commercial" because a not-for-profit nursery school operated by a private religious organization cannot be considered a commercial establishment and therefore the applications must be considered "residential."

The ALJ stated that "commercial" as defined by the ECL does not necessarily connote some relation to commerce or profit-driven business. Rather, "commercial" means anything that does not fit the statutory definition of either "private" or "residential." The fact that the school is a not-for-profit entity is irrelevant. The ALJ then determined that the applications were not "residential" because they were performed on premises owned by Rabbi Wizman's congregation collectively, not on premises owned or leased by the rabbi himself. The ALJ dismissed the claim that the rabbi should be viewed as an agent of the property owner authorized to apply pesticides at the school.

The ALJ concluded that the applications were "commercial" in nature and required the use of a certified pesticide applicator. This conclusion was reached because: (1) the applications were not "private" because they were not for the purpose of producing an agricultural commodity; and (2) the applications were not "residential."

### 2. Penalty

Pursuant to ECL § 33-0905(1) and 6 N.Y.C.R.R. § 325.17(a), any person who engages in the commercial application of pesticides shall be certified by the DEC Commissioner. Additionally, ECL § 33-1301(8) prohibits the commercial application of pesticides without a pesticide applicator certificate registration, except while working under the direct supervision of a certified applicator. Respondent Wizman's application of pesticides in the absence of such a certification was a violation of the pesticide laws and regulations.

DEC staff recommended a penalty of $5,000, the maximum authorized for a first violation of the pesticide law.[4] Respondents argued that nothing more than a warning should be issued as they were not aware of the illegality of their actions. The ALJ found the law clear enough to justify a penalty since Respondents received some unwarranted economic benefit from not retaining the services of a certified applicator. Although the ALJ found the DEC's penalty request to be excessive, he recommended a fine of $300. The ALJ determined the fine to be appropriate after due consideration of the culpability of the violator and the harm resulting from his conduct. The ALJ also pointed out that Respondents appeared to have been acting in good faith, with no prior knowledge that their conduct was unlawful. Finally, the ALJ recommended that the pesticides, already ordered quarantined at the school by the DEC staff, be disposed of lawfully.

### C. Conclusion

Based on the foregoing, the Commissioner adopted the ALJ's finding that Respondents violated the pesticides law and regulations by causing or allowing the commercial application of pesticides at the Tree of Life Nursery School without the services of a certified pesticide applicator. The Commissioner then sustained charges against Respondents alleging violations of ECL § 33-0905(1), ECL § 33-1301(8) and 6 N.Y.C.R.R. Part 325, and adopted the ALJ's dismissal of Respondents' defenses, including the defense that a not-for-profit nursery school operated by a private religious organization cannot be considered a commercial establishment . The Commissioner then assessed the penalty of $300 and ordered Respondents to legally dispose of all pesticides previously quarantined at the school within thirty (30) days of service of the Commissioner's order upon either Respondent. Additionally, Respondents were ordered to file a report with the DEC immediately after the pesticide disposal indicating how the disposal occurred and ordered to immediately begin conducting all pesticide-related activities in strict conformance with federal and New York State laws and regulations.

**Jason DiMarino**

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**CASE:** *In re the Alleged Violations of Article 15 of the Environmental Conservation Law (ECL) of the State of New York by Ronald and Joanne Taylor, 52 Sherwood Trail, Saratoga Springs, New York 12866.*

**AUTHORITIES:** ECL Article 15, Title 5 (Protection of Water)

6 N.Y.C.R.R. § 608.11(a) (Mean High Water Elevations)

6 N.Y.C.R.R. Parts 645 and 646 (Lake George Park Commission)

**DECISION:** On October 18, 2000, the Commissioner of the New York State Department of Environmental Conservation (DEC), John Cahill (the "Commissioner"), concurred with the findings, recommendations and conclusions of Administrative Law Judge Robert O'Connor (the "ALJ") which determined that Ronald and Joanne Taylor (the "Taylors") had violated Article 15 of the ECL by improperly constructing a seawall in Lake George (the "Lake"). The ALJ imposed a $7,500 fine on the Taylors and ordered them to remove the seawall and restore the Lake bottom to its original condition.

### A. Facts

The Taylors own property on the Lake upon which they experienced deteriorating shoreline conditions. In 1997, the Taylors applied to the Lake George Park Commission (LGPC) for a permit to: (1) repair their existing seawall and replace it with a new one; (2) remove a deteriorating boathouse; and (3) re-stack supports underneath a dock extending into the Lake. A diagram included with the Taylors' permit application demonstrated that construction of the new seawall would be completed by placing the new wall flush against the lakeside face of the existing wall. Similarly, the diagram demonstrated that the dock in question was not to be connected to the new seawall, but rather was to extend over it.

In July of 1997, LGPC granted a permit to the Taylors to repair the dock and construct a new seawall as outlined in the permit diagrams. The permit was issued to the Taylors under a 1992 Memorandum of Understanding (the "MOU") between DEC and LGPC which outlined the authority that DEC had delegated to LGPC with regard to the issuance of certain permits and certain excavation of material in the navigable waters of the Lake.

The Taylors constructed the wall in May of 1998 without retaining an experienced contractor and in a manner that differed from their permit application. The new wall was constructed by placing concrete forms directly onto the Lake bottom without creating footings for the wall's base. Moreover, the new wall was constructed up to six feet away from the old wall in an apparent attempt to avoid certain unexpected underwater obstructions.

Upon inspection by DEC, it was found that the new wall had a crack in the middle extending from the top to the bottom which caused a portion of the wall to lean lakeward. The location of the new wall also eliminated about 220 square feet of aquatic habitat with the potential of eliminating additional habitat if the wall were to fall into the Lake. It was determined by the ALJ that the Taylors had deviated from the terms of their permit.

### B. Discussion

#### 1. Position of the Parties

DEC contended that the Taylors constructed their seawall in contravention of the permit issued to them by LGPC because the wall extended past the old wall by six feet in certain places. It was DEC's position that the Taylors deviated from the approved plans and excavated fill below the mean high water level of the Lake without a necessary permit. In response, the Taylors contended that LGPC did not have jurisdiction over the construction of their seawall in the first place and accordingly, they were deprived of the Standard Activity Permit Process (SAPP) afforded to projects by DEC.

#### 2. LGPC's Jurisdiction

In the 1992 MOU, DEC had delegated jurisdiction to LGPC over the excavation of fill below the mean high water mark of the Lake. Specifically, the MOU delegated to LGPC the authority to process, review and issue permits for, among other things, the construction of seawalls and retaining walls related to the construction and use of docks. Prior to 1992, both DEC and LGPC had jurisdiction over such projects. Under the MOU, DEC retained exclusive authority to process, review and issue permits for seawall projects not associated with dock construction or repair. Since the Taylors' plans included repair of their dock and concomitant replacement of the seawall, the ALJ held that LGPC correctly assumed jurisdiction over the project under the MOU.

#### 3. DEC Approval Under SAPP

DEC has developed a process termed "SAPP" for projects that have been previously analyzed for their potential environmental impacts and for which a standard set of permit conditions have been developed. If a project qualifies as one of those previously analyzed projects, the applicant will receive a permit subject to the standard permit conditions. SAPP allows agency discretion with regard to permit deviations in order to successfully complete certain projects. According to the Taylors, their project, if processed and reviewed by DEC, would have been subject to SAPP.

In practice, LGPC usually allows construction spacing variances of up to 24 inches from approved construction plans if the variance is necessary for the successful completion of a project. The variance is not automatic, however, and an applicant must appear before LGPC and explain the necessity for the deviation before it is issued. The Taylors never appeared or sought a variance.

LGPC's policy further provides that any project which extends more than three feet into the Lake will necessitate a permit holder to receive permission from DEC to proceed with the project. In such a case, all variance modifications must be granted by DEC and not solely by LGPC. The plans, as submitted by the Taylors, never called for the seawall to extend three or more feet into the Lake. If the Taylors' plans had called for such an extension, they would have been required to apply to DEC for a variance. Thus, the Taylors were never entitled to DEC processing or review, and accordingly, SAPP would not have applied to their project, according to the ALJ.

#### 4. Removal of the Wall

The Taylors argued that they were entitled, under LGPC policy, to an additional separation of 18 to 24 inches from the old wall in order to properly complete their project and thus should be allowed to maintain the new wall in the Lake. The ALJ found, however, that the Taylors never stopped work when they encountered underwater obstructions and never applied for a permit modification. Moreover, the Taylors' steadfast refusal to remove the wall led the ALJ to recommend ordering its complete removal.

### C. Conclusion

Based on the foregoing, the Commissioner concurred with the findings of the ALJ who determined that the Taylors had violated of ECL Article 15 and should pay a $7,500 fine as well as remove the wall and restore the Lake bottom to its original condition. The Commissioner ordered remediation without prejudice to the Taylors' right to submit a new application for a seawall permit. If the Taylors are granted a new permit, the Commissioner ordered that they retain an experienced contractor to construct the wall.

**John Vero**

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**CASE:** ***In re Alleged Violations of Articles 17 and 71 of the Environmental Conservation Law and Part 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by Town of Riverhead (the "Respondent").***

**AUTHORITIES:** ECL Article 17 (Water Pollution Control)

ECL Article 71 (Enforcement)

6 N.Y.C.R.R. Part 750 (State Pollutant Discharge Elimination System)

6 N.Y.C.R.R. Part 622 (Uniform Enforcement Hearing Proceedings)

**DECISION:** On November 20, 2000, the Commissioner of the State Department of Environmental Conservation (DEC) denied a petition by the Peconic BayKeeper to intervene in a DEC administrative enforcement proceeding concerning an alleged violation by the Town of Riverhead ("Town") of its State Pollutant Discharge Elimination System (SPDES) permit. In reversing the ALJ's ruling, the Commissioner held that the Peconic BayKeeper failed to meet the standards for intervention as set forth in 6 N.Y.C.R.R. Part 622.

### A. Facts

On April 5, 2000, a DEC administrative enforcement proceeding was held concerning alleged violations by the Town of its SPDES permit related to effluent discharges from its sewage treatment plant. The Peconic BayKeeper sought to intervene in the proceeding based upon the BayKeeper's protective role with regard to the natural resources of the Peconic Bay. The BayKeeper identifies and investigates problems that may adversely affect the Peconic Estuary and works to resolve environmental conflicts on behalf of the community. On April 10, 2000, the ALJ granted the BayKeeper's motion to intervene. The Town and DEC staff appealed the ALJ's ruling and sought reversal. For the reasons set forth below, the Commissioner rejected the ALJ's ruling and directed that the intervention be denied.

### B. Discussion

In reversing the ALJ's ruling allowing BayKeeper to intervene in the enforcement proceeding, the Commissioner determined that BayKeeper had failed to meet the requirements for intervention as set forth in 6 N.Y.C.R.R. § 622.10(f). This regulation provides:

> (1) At any time after the institution of a proceeding, the commissioner or ALJ upon receipt of a verified petition in writing and for good cause shown may permit a person to intervene as a party.
>
> (2) The petition of any person desiring to intervene as a party must state with precision and particularity:
>
> (i) the petitioner's relationship to the matters involved;
>
> (ii) the nature of the material petitioner intends to present into evidence;
>
> (iii) the nature of the argument petitioner intends to make; and
>
> (iv) any other reason the petitioner should be allowed to intervene.
>
> (3) Intervention will only be granted where it is demonstrated that there is a reasonable likelihood that the petitioner's private rights would be substantially adversely affected by the relief requested and that those rights cannot be adequately represented by the parties at the hearing.[5]

The Commissioner noted that persons seeking to intervene in an enforcement proceeding under 6 N.Y.C.R.R. § 622.10(f)(3) must satisfy three essential requirements: (1) that they have private rights; (2) that such rights would be substantially adversely affected by the relief requested; and (3) that such rights cannot be adequately represented by the parties at the hearing. The Commissioner explained that while this standard for intervention is stringent, it is not unreasonable in light of the primary enforcement role charged by statute to DEC.[6] The Commissioner also noted that since the 1993 amendment of Part 622, which included the addition of § 622.10(f)(3), interventions in enforcement proceedings have been rare and limited.[7]

In this case, the Commissioner determined that BayKeeper failed to meet the three essential requirements of 6 N.Y.C.R.R. § 622.10(f)(3). The Commissioner noted that BayKeeper did not possess private rights in the proceeding based upon the fact that BayKeeper's submissions did not articulate how it would suffer an environmental impact that was in some way different from that of the public at large. Even accepting the existence of such private rights, the Commissioner determined that these rights were indeed adequately represented by DEC staff in the proceeding since the goal of protecting the Peconic Estuary is shared by both DEC and BayKeeper. Lastly, the Commissioner determined that BayKeeper's petition and supporting papers did not demonstrate how its private rights would be substantially *adversely* affected by the relief requested by DEC staff.

### C. Conclusion

Based on the foregoing, the Commissioner reversed the ALJ's ruling and denied the petition of BayKeeper to intervene in the enforcement proceeding.

**Dafni Kiritsis**

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**CASE:** ***In re Fire Island Property Owners Association and Certain Property Located in the Area Designated on the Final Coastal Erosion Hazard Area Map Adopted July 27, 1998 Covering Certain Properties in the Towns of Brookhaven, Suffolk County.***

**AUTHORITIES:** ECL Article 34 (Coastal Erosion)

6 N.Y.C.R.R. Part 505
(Coastal Erosion Management)

**DECISION:** On December 6, 2000, the Commissioner of the State Department of Environmental Conservation (DEC) upheld the Coastal Erosion Hazard Area designation as it applied to the oceanfront properties of Fire Island, New York. The Commissioner upheld the designation as proper pursuant to ECL Article 34 and 6 N.Y.C.R.R. Part 505.

### A. Facts

On September 10, 1997, a public hearing was held before DEC to receive public comment on the preliminary Coastal Erosion Hazard Area Map for oceanfront property located on Fire Island within the Town of Brookhaven, Suffolk County. On July 27, 1998, DEC staff finalized the map after considering the public comments. Thereafter, the Fire Island Pines Property Owners' Association (the "Pines") challenged the designation of certain ocean front properties within the Pines' community as a Coastal Erosion Hazard Area. The Pines' appeal to the Commissioner was based upon two assertions: (1) that DEC did not correctly identify the shoreline's average annual recession thereby resulting in a methodology that erroneously identified the boundary of the erosion hazard area; and (2) that DEC erroneously identified a pre-existing dune in the Pines' community as the hazard area's boundary instead of using a new dune constructed by the Pines on the seaward side of the boundary. For the reasons set forth below, the Commissioner rejected these assertions and held that the Coastal Erosion Hazard Area designation for Fire Island was proper.

### B. Discussion

#### 1. Identification of Erosion Hazard Areas

In upholding the Coastal Erosion Hazard Area designation for Fire Island, the Commissioner determined that DEC used the proper methodology for identifying erosion hazard areas pursuant to ECL Article 34. ECL § 34-0103(3) defines coastal erosion hazard areas as areas of the coastline identified as either: (a) likely to be subject to erosion within a 40-year period as determined by a shoreline recession analysis; or (b) which constitute "natural protective features." Natural protective features are further identified in ECL § 34-0103(8) as "beaches, dunes, shoals, bars, spits, barrier islands, bluffs and wetlands. . . ." Either method of identification is valid under the statute. The Commissioner noted that DEC's regulations followed this same dual identification system.[8]

The Commissioner determined that DEC properly utilized the "natural protective feature" designation to identify erosion hazard areas on Fire Island. The Commissioner noted that this method was used exclusively along Long Island's south shore, including the Fire Island's Atlantic Ocean shoreline.

#### 2. Identification of a Natural Protective Feature

The Commissioner, relying upon 6 N.Y.C.R.R. Part 505, determined that DEC properly identified the pre-existing dune as a "natural protective feature" and that the new dune constructed by the Pines' renourishment project was not such a feature. 6 N.Y.C.R.R. § 505.2(1) defines a "dune" as a "ridge or hill of loose, windblown or artificially placed earth the principal component of which is sand." The Commissioner noted that the term "dune" is more comprehensively defined to include "primary dune" and "secondary dune" and it was these more expansive definitions which were utilized in the process of identifying the "natural protective feature" in the Pines' community.[9]

The Commissioner explained that the definition of "primary dune" specifically recognizes that less significant dunes can exist seaward of the primary dune and that such dunes are to be considered part of the primary dune.[10] The Commissioner noted that it was the opinion of DEC staff, who had observed the Pines' dune renourishment project, that the fill material used by the Pines did not constitute a primary dune because it was a less significant dune form. The existing primary dune rose significantly higher than the fill material and extended inland considerably farther than the Pines' renourishment project. The Commissioner noted that the height, width and volume of the fill material actually strengthened and restored the protective capacity of the existing primary dune. Moreover, the Commissioner determined that it was the intent of the Pines to help restore the protective features of the existing primary dune and that was DEC's understanding when it issued a permit for the renourishment project. Nowhere in the permit application did the Pines indicate that its goal was to establish a new primary dune seaward of the existing one.

### C. Conclusion

Based on the foregoing, the Commissioner denied the appeal of the Fire Island Pines Property Owners' Association and upheld the designation on the Coastal Erosion Hazard Area map for Fire Island.

**Dafni Kiritsis**

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**CASE:** ***In re Application for a State Pollutant Discharge Elimination System (SPDES) permit Pursuant to Environmental Conservation Law (ECL) Article 17 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 N.Y.C.R.R.) Parts 750 et seq. By Athens Generating Company.***

**AUTHORITIES:** 33 U.S.C. § 1326(b) (Best Technology Available (BTA) Standard)

Public Service Law Article X (Siting New Major Electric Generating Facilities)

ECL § 8-0111

ECL Article 17 (State Pollutant Discharge Elimination System)

6 N.Y.C.R.R. § 617

6 N.Y.C.R.R. § 624.4 (c) (Standards for Adjudication)

6 N.Y.C.R.R. §§ 750 *et seq*. (State Pollutant Discharge Elimination System)

6 N.Y.C.R.R. § 704.5 (Water Quality Standard)

N.Y.S. DEC Organization and Delegation Memorandum No. 85-40 (Water Quality Anti-Degradation Policy)

**DECISION:** On June 2, 2000, the Commissioner of the New York State Department of Environmental Conservation (DEC), John Cahill, issued an Interim Decision directing that the Athens Generating Company be issued a SPDES permit. The following issues were appealed to the Commissioner: whether (i) the ALJ properly ruled on the party status of certain intervenors; (ii) the Applicant was employing the "best technology available" (BTA); (iii) the state's federally approved water quality antidegredation policy may be appropriately applied to Public Service Law (PSL) Article X applications; (iv) the regulatory exemption of PSL Article X actions from the State Environmental Quality Review Act (SEQRA) exceeds the scope of the statute; and (v) Athens' record of compliance was sufficient to warrant the permit. The Commissioner's decision on each issue is discussed below.

### A. Facts

In August 1998, Athens Generating Company ("Athens") applied for a Certificate of Environmental Compatibility and Public Need, pursuant to Article X of the PSL, to build and operate a 1080 megawatt combined cycle electric generating facility. The proposed facility would be located on 150 acres two miles west of the Hudson River in the Town of Athens, Greene County. The facility would include three Westinghouse advanced combustion turbine generators, three heat recovery steam generators, and three steam turbine generators with other plant systems and facilities. The facility would primarily use natural gas with low sulfur fuel oil for back-up.

Athens' Article X application for certification included a request for a SPDES permit. The proposed facility would, on average, draw 4.2 million gallons per day of water from the Hudson River for cooling purposes. Some of this water would evaporate into the atmosphere through plant processes, while the balance would be returned to the river. To transport the process water, Athens would build an intake/discharge facility, or pumphouse, on the Hudson's west shore.

In November 1999, Governor Pataki signed legislation that amended Article X and sections of ECL Article 17. These amendments clarified DEC's authority to issue SPDES permits for new major electric generating facilities. DEC reviewed Athens' application and developed a draft SPDES permit. In January 2000, DEC issued an Announcement of Public Comment Period, and Combined Notice of Complete Application, Public Hearing and Issues Conference (the "Announcement and Notice"). The Announcement and Notice stated that the evidentiary record from the PSL Article X hearing would be incorporated by reference into the record of this proceeding.

In February 2000, Riverkeeper, Inc., a local, community-based group, Stand Together Oppose Power Plants (STOPP), and others (collectively, "Riverkeeper") filed a joint petition seeking to adjudicate certain issues and request full party status. Scenic Hudson also filed a similar petition. Legislative hearing sessions commenced to receive public comments regarding the draft SPDES permit. The ALJ, Daniel P. O'Connell, also held an issues conference to consider proposed issues for adjudication and the petitions for party status.

The various issues that petitioners proposed for adjudication, among others, included: (i) determining the Best Technology Available (BTA) for minimizing potential adverse aquatic impacts associated with cooling water intake structures; (ii) determining the adequacy of the proposed "Gunderboom" technology; (iii) DEC's anti-degradation policy and its application to the instant matter; and (iv) the record of compliance of Athens and its affiliates.

In April 2000, ALJ O'Connell issued a Ruling on Proposed Issues for Adjudication and Petitions for Party Status. The ALJ determined that the BTA issue was "substantive" and "significant," and granted Riverkeeper and Scenic Hudson full party status with respect to that issue only. However, based on the information from

the PSL Article X hearing record and the issues conference, the ALJ decided that additional adjudicatory hearings were unnecessary, and denied all other issues that petitioners had proposed. DEC and Athens appealed from the ALJ's grant of full party status to Riverkeeper and Scenic Hudson.

### B. Discussion

#### 1. Party Status of Intervenors

This matter concerned an issue of first impression regarding the party status of intervenors in a DEC hearing where the material facts are the same as those in the PSL Article X proceeding. 6 N.Y.C.R.R. § 624.4(c) states that an issue is adjudicable if a potential party raises it, and it is both "substantive" and "significant." The ALJ is required to consider the proposed issue in light of the application and related documents, the draft permit, any petitions filed for full party and amicus status, the issues conference record and subsequent written arguments authorized by the ALJ.[11] A finding that an issue is "substantive" is based on facts subject to adjudication, and cannot be based on speculation.[12] Likewise, a "substantive" issue can be found by identifying a substantive defect in the application materials.[13] An issue is considered "significant" if the adjudicated outcome could result in a permit denial, a major change in the proposed plan, or the addition of significant conditions to the draft permit.[14] 6 N.Y.C.R.R. § 624.4 (c)(4) provides that when the DEC and the applicant agree on the terms and condition of the draft permit, the burden of persuasion to show an adjudicable issue shifts to the intervenor.

In this case, DEC argued that further inquiry was unnecessary as an adequate record already existed from the PSL Article X hearing, and therefore; (i) no issue was raised; and (ii) party status should be denied. Similarly, Athens argued that no further factual inquiry was necessary when looking at the entire record, and that if no issue is raised, then party status must be denied. The Commissioner stated that neither commonality of the parties with the Article X proceeding nor the mere existence of water quality information from that proceeding would alone support a finding of party status. The standard for party status in a DEC proceeding exists and must be satisfied separately from prior related proceedings. Accordingly, the Commissioner held that since the ALJ found that there were no issues raised during the issues conference, then party status must be denied to Riverkeeper and Scenic Hudson.

#### 2. The BTA Standard Under the Clean Water Act

The Clean Water Act, 33 U.S.C. § 1326(b), establishes a mandatory "best technology available" (BTA) requirement for cooling water intake structures. This provision is mirrored in 6 N.Y.C.R.R. § 704.5 which requires, as conditions to a SPDES permit, that the location, design, construction and capacity of cooling water intake structures must reflect the BTA to minimize any adverse environmental impact. Application of the BTA requirements is site-specific, and such a determination turns on a variety of factual issues, such as cost, age of facility, the number of fish killed, and any additional energy needed to support improved technology. Agency permit writers have discretion to impose conditions on a case-by-case basis in the absence of regulations. These conditions must be imposed with a view that "best available" does not mean "perfect." The Commissioner stated that the importance of the case-by-case method is evident due to a lack of federal regulations, which causes permit writers to use their best professional judgment when making individual BTA determinations. The Commissioner concluded that what might meet the BTA mandate for a new power plant on one site may not meet the statutory mandate on another site.

The Commissioner applied a four-step analysis, pursuant to the Clean Water Act, to determine whether Athens is using the BTA. The Commissioner considered: (i) whether the facility's cooling water intake structure may result in an adverse environmental impact; (ii) if so, whether the location, design, construction, and capacity of the cooling water intake structure reflects the BTA in order to minimize adverse environmental impact; (iii) whether practicable alternate technologies are available to minimize the adverse environmental effects; and (iv) whether the costs of practicable technologies are wholly disproportionate to the environmental benefits conferred by such measures.[15]

The Commissioner addressed the ALJ's ruling that the proposed hybrid cooling system using a "Gunderboom" met the BTA requirements. The Gunderboom, which was agreed to by Athens as an additional mitigative measure, is an elongated structure fitted over the coolingwater intakes with side panels made of filter fabric to reduce impingement and entrainment (where smaller organisms, including larval fish and fish eggs, are carried through the screens with the intake water into the system where they are damaged or killed). Although the Gunderboom was successfully deployed in 1999 in the Lovett Generating Station at Tompkins Cove, Rockland County, the Commissioner found that deployment of the Gunderboom in the Athens facility was premature. He held that despite the successful 1999 deployment, such deployment involved a different site and a different application, and was used in an older facility to retrofit different intake units. The Commissioner found that this particular application contained insufficient evidence to conclude that the technology used was suitable for this project and location.

Next, the Commissioner addressed the intervenors' arguments that "dry cooling" technology is the *only* acceptable BTA for cooling water at the proposed plant. With a dry cooling system, steam from generating units

is piped directly to an air-cooled condenser where fans continuously blow air across condenser coils. The dry cooling system is contained in towers which do not emit any thermal plumes or steam clouds. The Commissioner rejected the assertion that dry cooling technology is the only BTA in this case, stressing the site-specific nature of BTA determinations. However, the Commissioner then concluded that, based on the administrative record, the application of dry cooling technology, in this case, met the standards of CWA § 316(b) and 6 N.Y.C.R.R. § 704.5. The Commissioner also noted that this determination should not be construed to mean that hybrid cooling with a Gunderboom could not meet the BTA standard for another site.

The Commissioner expanded on of each step in his BTA determination. First, he considered whether the cooling water intake structure's capacity, or volume of water withdrawal, met the BTA standard with regard to the minimization of adverse environmental impacts and the protection of aquatic communities. He stated that although hybrid cooling represented a vast improvement over the older "once-through" cooling with respect to water usage, dry cooling would withdraw significantly less water then hybrid cooling. In addition, dry cooling would better reduce the adverse effects of entrainment.

The Commissioner next addressed the cost factor. He stated that the BTA determination based on this factor must go beyond whether the costs outweigh the environmental benefits. Rather, the determination must rest on whether the costs were "wholly disproportionate" to the environmental benefits to be gained. The Commissioner noted that this standard gives presumptive weight to value of the environmental benefits and places the burden on the permit applicant to demonstrate that the relative costs are unreasonable. The Commissioner then held that the minimization of impacts to aquatic organisms, coupled with the relatively insignificant increase in the total cost of the facility, led to his determination that the dry cooling system costs were not wholly disproportionate to the environmental benefits gained.

The location, design, and construction of the cooling water intake structures must also reflect the BTA to minimize any adverse environmental effects. The intervenors contended that the Athen's SPDES permit should be denied because the intake and outfall structures would be located near significant aquatic habitat areas. The Commissioner rejected this argument and held that using a dry cooling system would have a minimal adverse impact because the system requires a reduced level of water withdrawal. Neither the issues of design nor of pumphouse construction, the Commissioner held, were at issue in this case. Finally, the Commissioner concluded that the capacity of the cooling water intake structures should be reduced further still to minimize any adverse environmental effects, and called for the draft SPDES permit to reflect this reduction and the elimination of the Gunderboom.

### 3. New York State's Water Quality Anti-Degradation Policy

Addressing the relevance of the state's water quality anti-degradation policy in relation to Article X applications, the Commissioner stated that the anti-degradation policy relies upon the SPDES permit process for its implementation. Riverkeeper argued that state law prohibits the application of SEQRA to the certification of major electric generating facilities, and therefore, the non-application of SEQRA is inconsistent with the anti-degradation policy. The Commissioner rejected their position, stating that Article X review "is as rigorous and thorough, and even more stringent in certain aspects, than a SEQRA review." He stated that an Article X application requires the equivalent of an environmental impact statement (EIS) because the project's environmental significance is presumed by the PSL.

As with the SEQRA process, based upon information contained, in part, in the Article X application, DEC determines whether a proposed lowering of water quality would occur and would be allowable pursuant to this project. It was also stated that if the existing quality of the water exceeds levels necessary to support recreation and propagation of fish, shellfish and wildlife, and the record demonstrates that there will be a lowering of water quality, then the DEC must find that such lowering is necessary to accommodate important social and economic development in the area where the waters are located. The Commissioner held that it is well established that the Hudson River's water quality can sustain fish propagation, wildlife and recreation, and the administrative record indicated that the Hudson River's water quality and water quantity will not suffer degradation here.

The Commissioner next weighed the nature of the probable environmental impacts to determine whether the proposed facility would: (i) minimize the adverse environmental effects; (ii) contravene water quality standards or applicable DEC regulations; or (iii) be compatible with public health and safety. The PSL requires that the state of available technology, the nature and economics of reasonable alternatives, State interests regarding aesthetics, preservation of historical sites, forests and parks, fish and wildlife, and viable agricultural lands be considered.[16] In addition, the facility must not emit air pollutants in contravention of applicable air emission control requirements or air quality standards, and must control its hazardous waste disposal and runoff and leachate from its solid waste disposal facility. PSL § 168(d) further requires the facility to be designed to operate in compliance with applicable state and local

environmental and public health and safety laws. After weighing such considerations, the Commissioner concluded that the Article X application process is as broad and comprehensive as a SEQRA review. He found the Article X review process to be fully consistent with the state's federally approved SPDES program and, accordingly, directed DEC to follow the Article X procedures for environmental review.

### 4. SEQRA-Statutory Construction

The Commissioner rejected the ALJ's conclusion that exempting PSL Article X from SEQRA exceeds the scope of the statute. ECL § 8-0111(5) expressly excludes Article X proceedings from mandatory preparation of an EIS for the clear purpose of avoiding redundant environmental review. The Commissioner stated that such exclusion also exempts such projects from the preparation steps for an EIS. He further noted that the EIS is the core of SEQRA and limiting the SEQRA exemption to the EIS requirement serves no legitimate purpose, inasmuch as once the EIS requirement is removed, only miscellaneous components are left. In addition, it was decided that the clear language of 6 N.Y.C.R.R. § 617 prohibits a contrary holding.

Also, the Commissioner concurred with the ALJ's conclusion that the potential cumulative impacts that the proposed facility may contribute have been fully considered here. Likewise, the Commissioner agreed with the ALJ's determination that additional studies concerning the potential impacts that the Athens facility may have are not necessary because the facility does not yet exist (and which may never exist).

### 5. Record of Compliance

Athens' record of compliance (ROC) was also of issue here, to address this issue, the Commissioner was required to review the company's history of compliance, as well as that of other entities in which it holds a substantial interest. ALJ O'Connell relied on DEC's ROC Enforcement Guidance Memorandum (ROC EGM), which advises that the suitability of an applicant to receive a permit must be considered in order to assure that the applicant will comply with the terms and conditions thereof. The ALJ considered Athens' compliance history and the compliance history of other entities in which Athens held a substantial interest.[17]

Upon a review of Athens's affiliates, the most serious transgressions seemed to lie with the California regulated U.S. Generating Company (now PG & E Generating Company). However, it was found that the information in this regard was insufficient to support a denial of Athens's permit. As such, the Commissioner upheld the ALJ's finding that Athens and its affiliates did not raise sufficient doubts regarding their ROCs to justify a permit denial in this instance.

### C. Conclusion

The Commissioner held that no further DEC review was necessary to render a decision. He stated that the extensive Article X record and all record information obtained and reviewed for this SPDES matter was sufficient to meet the applicable statutory requirements needed to render a final decision. For the reasons stated above, the Commissioner held that the SPDES permit could be issued, subject to his comments and findings contained in the Interim Decision.

**Robert M. Gach**

## Endnotes

1. ECL § 33-0101(11).
2. ECL § 33-0101(38).
3. ECL § 33-0101(41).
4. ECL § 71-2907(1).
5. 6 N.Y.C.R.R. § 622.10(f).
6. *See* ECL §§ 3-0301, 71-0301, 71-2727, 1-0101.
7. *See In re Terminex*, DEC Ruling on Petition to Intervene, February 9, 1999.
8. *See* 6 N.Y.C.R.R. Part 505.
9. *See* 6 N.Y.C.R.R. §§ 505.2(dd), 505.2(kk).
10. *See* 6 N.Y.C.R.R. § 505.2(dd).
11. See 6 N.Y.C.R.R. § 624.4(c)(2); *In re Adirondack Fish Culture Station*, DEC Commissioner's Interim Decision, August 19, 1999, *aff'd, In re Upper Saranac Lake Association, Inc. v. Cahill* (Supreme Court, Albany Co., Index No. 6027-99, March 24, 2000).
12. *See Concerned Citizens Against Crossgates v. Flacke*, 89 A.D.2d 759 (3d Dep't 1982), *aff'd*, 58 N.Y.2d 919 (1983).
13. *See In re Oneida County Energy Recovery DEC Commissioner's Facility*, DEC Commissioner's Interim Decision, July 27, 1982; *In re Halfmoon Water Improvement Area*, Interim Decision, April 2, 1982; *In re Broome County Department of Public Works DEC*, Commissioner's Decision, June 11, 1984.
14. *See* 6 N.Y.C.R.R. § 624.4(c)(3); *In re Jay Giardina*, DEC Commissioner's Interim Decision, September 21, 1990.
15. *See In re Brunswick Steam Electric Plant*, Region 4, EPA (Nov. 7, 1977).
16. PSL § 168(c).
17. *See In re Waste Management of New York, LLC.*, DEC Commissioner's Interim Decision, May 15, 2000.

**David R. Everett, Robert M. Gach, Jason DiMarino, Dafni Kiritsis and John Vero are attorneys in the Environmental Practice Group of Whiteman Osterman & Hanna in Albany, New York.**

# Recent Decisions in Environmental Law

Student Editor: Jennifer S. Rosa

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

***Bonide Products, Inc. v. John Cahill & David Clarke*,** 2000 U.S. App LEXIS 21131 (2d Cir. 2000)

**Facts:** On February 29, 1996, David Clarke, an Environmental Conservation Officer (ECO), responded to a fire at plaintiff's pesticide manufacturing plant after receiving permission from his superior officer, John Cahill, to do so. Clarke had been trained for such circumstances but he never acted in this capacity as an ECO before this incident. Although there is a factual dispute as to what Clarke actually saw upon his arrival at the plant, the court viewed the facts in the light most favorable to Bonide because the defendants were appealing a denial of summary judgment. Bonide maintained that no smoke escaped from their plant and that water seen pouring out of the loading dock could only have been clean city water, as the plant is designed to be a zero charge wastewater facility.

There was no dispute as to what happened after Clarke arrived. The fire chief informed Clarke that there was a "bad fire" at the plant and that because of the smoke, he was considering evacuating a nearby village. A Bonide employee made Clarke aware of the presence of acetone in the plant, a highly flammable chemical that can cause significant health risks to someone exposed to it.

Through further investigation, Mr. Clarke discovered that Bonide employees consistently mixed flammable chemicals near a stove's open flame against the wishes of Tom Wurtz, a Bonide corporate officer, who considered the practice a safety hazard. Furthermore, the standing water contained in the basement tested positive for the presence of acetone.

Clarke then pursued an administrative settlement by issuing an ACAT with his supervisor's permission. Bonide alleged that Cahill, Clarke's supervisor, granted an adjournment, but when Bonide failed to appear, Clarke filed an Environment Conservation Appearance Ticket (ECAT) formally charging Bonide under the Environmental Conservation Law § 71-2711(3). This statute states that "a person is guilty of the misdemeanor of endangering public health when 'he knowingly or recklessly engages in conduct which causes the release of a substance hazardous to public health, safety or the environment.'"[1] The state court dismissed this claim because there was no release into the environment.

Upon the dismissal of the criminal suit against Bonide, they filed the current suit alleging a § 1983 violation against Clarke and Cahill. Plaintiff, Bonide Products, Inc., charged defendants with violation of 42 U.S.C. § 1983, violations of the Fifth and Fourteenth Amendments and requested injunctive and declaratory relief asserting that the Department of Environmental Conservation's (DEC) Administrative Conservation Appearance Ticket (ACAT) was unconstitutional. The District Court granted summary judgment for the defendants, DEC Commissioner and Conservation Officer, denied Bonide's motion for leave to amend their complaint to allege a violation of the Fourth Amendment, and held that Bonide lacked standing to claim injunctive relief. The Court of Appeals for the Second Circuit affirmed.

**Issue:** Whether Clarke was entitled to qualified immunity on Bonide's § 1983 claim for malicious prosecution.

**Analysis:** The court determined that Bonide failed to establish a violation of § 1983 because Clarke had a reasonable belief that Bonide violated ECL § 71-2711(3).

Bonide needed to establish four elements to prove a § 1983 or state law claim of malicious prosecution: (1) that the defendant either commenced or continued a criminal proceeding against him; (2) that the proceeding terminated in his favor; (3) that there was no probable cause for the criminal proceeding; and (4) that the criminal proceeding was instituted with actual malice.[2] Furthermore, the plaintiff must show a violation of his rights under the Fourth Amendment to succeed on a § 1983 claim. On the other hand, a defendant is entitled to qualified immunity "if it was objectively reasonable for

them to believe that their actions did not violate that right."[3] If it was objectively reasonable for Clarke to believe that he had probable cause to file the ECAT against Bonide, the court did not need to look at other elements of the malicious prosecution claim.

The court then considered the elements of the ECL § 71-2711(3) to determine if Clarke had an objectively reasonable belief that there was a violation of the provision. The elements are: (1) reckless conduct resulting in (2) the release of (3) a hazardous substance.[4] The Court found that violations of the first and last elements were uncontestable, as acetone is a hazardous substance and mixing flammable chemicals near an open flame disregarding previous warnings was reckless. The question then became whether it was objectively reasonable for Clarke to believe that an actual release had occurred. Bonide emphasized that no release had occurred. The court refuted Bonide's claims, stating that the test is whether it was reasonable to believe a release could have occurred, not if a release actually occurred.

Clarke was unaware of safety features inherent in the plant, so when considered with the actual explosion, fire and when water was pouring out of the plant, even if uncontaminated, it was objectively reasonable to believe a release had occurred. Additionally, the court held that Clarke reasonably had probable cause to believe ECL § 71-2711(3) had been violated.

The court quickly solved the remaining claims. The court stated that because the DEC had used the ACAT form for years without ever being found to have violated constitutional rights, Clarke and Cahill were protected by qualified immunity.

The court also dismissed Bonide's claims for an injunction barring the DEC from using the ACAT and a declaratory judgment of the ACAT's unconstitutionality because "Bonide did not suffer the kind of actual harm required by Article III of the United States Constitution." The court applied the rest from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L.Ed.2d S. Ct. 2130 (1992) that the violation of the protected interest must be (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical. Therefore, since Bonide had not paid the fine demanded by the ACAT and the ACAT did not initiate the criminal proceeding or seize Bonide's property, Bonide did not have standing to argue violations of the Fourth, Fifth, or Fourteenth Amendments.

Therefore, the District Court's judgment granting summary judgment to the defendants and denying the plaintiff's motion for summary judgment, to amend its complaint, and its remaining state claims was affirmed.

**John M. Di Bari '03**

## Endnotes

1. *Bonide Products Inc. v. Cahill* 2000 U.S. App LEXIS 21131 at *7 (2d Cir. 2000) (quoting Envtl. Conserv. Law § 71-2711(3)).
2. *Id.* at *8 (quoting *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991)).
3. *Id.* at *8 (quoting *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995)).
4. *Id*. at *9.

* * *

## *Briarcliff Associates, Inc., et al., v. Town of Cortlandt*, 708 N.Y.S.2d 421

**Facts**: The plaintiff, Briarcliff Associates, Inc., purchased a 128-acre parcel in the town of Cortlandt for $400,000 in 1985, which was vacant except for a small emery mine. The plaintiff intended to convert the parcel into a crushed stone quarry with a projected yield of 500,000 tons per year. Then in 1988, the defendant, Town of Cortlandt, rezoned the plaintiff's parcel as residential, and prohibited any prospect for mining on the site. Further, the zoning amendment prohibited heavy trucks access to the single road leading to plaintiff's parcel.

The plaintiffs sought damages in an action for a judgment declaring that the rezoning by the defendant resulted in an unconstitutional regulatory taking without just compensation. The Supreme Court concluded that a regulatory taking occurred by virtue of defendant's rezoning of the plaintiff's parcel. The judgment of the Supreme Court entered December 15, 1998, awarded the plaintiffs damages of $9,054,331 plus interest of $5,862,679.44. The defendants appealed from the amended judgment, and argued that no regulatory taking occurred, but if a taking had occurred, the trial court's award should have been based on the parcel's highest and best use.

**Issue(s)**: 1. Whether the plaintiff met its burden of proof in establishing that defendant's rezoning resulted in an unconstitutional regulatory taking.

2. Whether the court used a proper method of valuation for plaintiff's parcel.

**Analysis**: The court concluded that the plaintiff failed to meet its heavy burden of proof and, therefore, no regulatory taking of property occurred. The court based its holding on the established principal that the plaintiff cannot merely show that a regulation deprives the property of its most beneficial use,[1] but the evidence must show "that under no permissible use would the parcel as a whole be capable of producing a reasonable return."[2] The court reasoned that plaintiff could have continued to legally operate the emery mine that was located on the parcel at the time of purchase, and therefore was not deprived of earning a reasonable return on the original $400,000 investment in the parcel. The

plaintiff could not establish that a taking occurred merely because it expected to develop the land for an increased economic benefit as a crushed stone quarry.

Plaintiffs were also unable to prove that the property was devoid of any economic value as they "failed to meet their heavy burden of proving that any residential development on this 128 acre parcel had been precluded by the Town's zoning amendments."[3] The court noted that the plaintiffs never tried to develop the parcel residentially and never proved at trial that they would be precluded from doing so because residential septic systems were unavailable on the site. The court also dismissed the plaintiffs' argument that the Town zoning regulations prevented the residential development by denying heavy trucks access to the site. The Town of Cortlandt established that under provisions in the zoning amendments, it had twice permitted construction vehicles to access the roads affected by zoning restrictions for the purpose of residential development. By citing exceptions to the heavy trucking restrictions, the Town effectively demonstrated that the plaintiff had the option of residential development of its parcel, which provided a way for plaintiffs to earn a reasonable return on their investment.

Although the court concluded that a regulatory taking of property did not occur, it did review the trial court's method of valuing the plaintiffs' parcel. The court stated that an arms length sale would constitute the best evidence of the value of the property. The court reasoned that since the plaintiffs purchased the parcel for $400,000 in 1985, the trial court should not have ignored this fact. The court concluded that it was an error to award damages to plaintiff based on projections about the parcel's worth, had it been developed as a crushed stone quarry. The Appellate Division found the trial court's assumptions highly speculative and not supported by any evidence in the record.

**Claudia Karabedian '01**

## Endnotes

1. *Briarcliff Associates, Inc., v. Town of Cortlandt*, 708 N.Y.S.2d 421, 425 (2d Dep't 2000) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962)).
2. *Id.* at 425 (quoting *In re Smith v. Williams*, 560 N.Y.S.2d 816 (1990)).
3. *Id.* at 425.

* * *

## *Committee for Environmentally Sound Development, Inc. v. The City of New York*, 1999 U.S. App. LEXIS 34230

**Facts**: Under the citizen suit provision of the Clean Air Act (CAA), plaintiffs may bring a suit to enforce either a specific provision of the CAA or a specific provision of an applicable State Implementation Plan (SIP). SIPs are developed by each state in order to determine how to achieve National Ambient Air Quality Standards (NAAQS) of various pollutants as promulgated by the United States Environmental Protection Agency (USEPA) under the CAA. New York State's current SIP (developed in 1992, replacing the 1984 SIP) requires an environmental impact statement (EIS) to assess projects that may have significant impacts on environmental quality.

Plaintiffs brought this action alleging that they will be adversely impacted by increases in carbon monoxide (CO) levels caused by a proposed redevelopment project of the area bounded by West 58th Street, West 60th Street, Ninth Avenue and Columbus Circle (formerly the New York City Coliseum). The original redevelopment initiative of the sight (the 1985 Project) was dismissed and the current proposal was designed in which a Final Supplemental Environmental Impact Statement (FSEIS) was accordingly prepared. Plaintiffs allege violations of the CAA and New York's Uniform Land Use Review Procedure (ULURP), N.Y. City Charter § 197-c as a result of CO NAAQS exceedances near the site.

In an unpublished opinion and order, the U.S. District Court for the Southern District of New York declined to exercise supplemental jurisdiction over the state law claims because pursuant to Fed. R. Civ. P. 12(b)(6) the plaintiffs failed to state a federal claim upon which relief could be granted. The District Court noted that if the plaintiffs submitted a proposed amended complaint which identified each provision in the New York SIP they were alleging to be violated, particularly describing the shortcomings in compliance, the court would assess whether leave to amend should be granted. The plaintiffs submitted a proposed amended complain that identified the defendant's violations of §§ 4.0(2) and 4.4 of the 1992 SIP. The District Court, on the basis of the amended complaint, denied leave to amend the plaintiffs' complaint. The Court of Appeals for the Second Circuit affirmed.

**Issue**: Whether allegations in plaintiffs' amended complaint that the SIP was violated state a claim for relief.

**Analysis**: The District Court concluded, and the Second Circuit Court of Appeals affirmed, that the proposed amended complaint did not state a claim upon which relief could be granted. "When a district court has 'found [a] proposed amended complaint legally insufficient and denied plaintiffs any opportunity to further amend their pleading . . . [the] decision [is reviewed] as if the amended complaint had been filed and then subjected to review under Fed. R. Civ. P. 12(b)(6)."[1] As established by Fed R. Civ. P. 12(b)(6), the district court's dismissal of a complaint is reviewed de

novo. The Second Circuit Court of Appeals accordingly applied this standard of review.

Plaintiffs alleged violation of § 4.0(2) of the SIP which indicates that New York State and the City of New York are committed to:

> Follow a specified procedure for the ongoing identification and mitigation of hot spots. This procedure entailed a commitment by the City to review Environmental Impact Statements (EIS) and assure that any site at which an EIS identifies a violation or exacerbation of the carbon monoxide standard is brought into attainment of the standard.[2]

The District Court held, as affirmed by the Second Circuit Court of Appeals, that this claim was inadequate because as a description of commitments, there is no specific provision of the 1984 SIP upon which plaintiffs could base a suit. Additionally, plaintiffs had based their claim that § 4.0(2) was violated upon exceedances of the CO NAAQS not identified in the EIS.

Plaintiffs also alleged violations of § 4.4 of the SIP, which declares that:

> The City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process. The City will continue to assure that project sponsors or the City will mitigate potential exceedances caused by a project. . . .

The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including modeling, data collection and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.[3]

The District Court held, and the Second Circuit Court of Appeals affirmed, that this was also insufficient to state a claim because there could not be a violation of "potential" exceedances unidentified in the EIS. Furthermore, the City's obligation to develop an alternative procedure is triggered only after a request is made by New York State to redesignate New York City as a nonattainment area. Since this has yet to occur, no duty has been triggered.

The Second Circuit Court of Appeals went on to address two further arguments asserted in the plaintiffs' proposed amended complaint. First, plaintiffs' claim that the defendants are required to perform an environmental review above and beyond that of the EIS according to § 4.4 of the SIP. The plaintiffs refer to the language of § 4.4 stating that "the City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process."[4] The Court of Appeals rejected this argument, concluding that the language of § 4.4 refers to a section of the former SIP which does not require anything more than the EIS.

Second, plaintiffs contended that under § 4.4 they only needed to allege an exacerbation of CO levels, not a level of CO exceeding the NAAQS, in order to state a cause of action. The Second Circuit Court of Appeals found this argument to be without merit, stating that "under this provision, the City's obligation to mitigate CO levels is triggered only where an exceedance of the CO standard is created or an already existing exceedance is exacerbated, not where CO levels increase but stay below the standard."[5] Acceptance of plaintiffs' argument "would establish an entirely standardless obligation, requiring mitigation for any increase in CO levels."[6] The Court of Appeals accordingly affirmed the District Courts denial of plaintiffs' motion to amend their complain.

**Jason Capizzi '03**

## Endnotes

1. *Committee for Environmentally Sound Development, Inc. v. The City of New York*, 1999 U.S. App. LEXIS 34230 at *7 (2d Cir 1999).
2. *Id.* at *4.
3. *Id.* at *4-5.
4. *Id.* at *4.
5. *Id.* at *9.
6. *Id.*

* * *

## *Vermont Agency of Natural Resources v. United States, ex. rel. Jonathan Stevens*, 120 S. Ct. 1858 (2000)

**Facts:** Respondent Jonathan Stevens brought a *qui tam* action under the False Claims Act (FCA) against petitioner, his former employer. A *qui tam* action imposes civil liability upon "any person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false and fraudulent claim for payment. . . ."[1] Respondent alleged that petitioner had submitted information to the Environmental Protection Agency (EPA) pertaining to a

federal grant program that was falsified. Respondent specifically claimed that by overreporting the number of hours spent on a federal project, petitioner received more funding than it was entitled to receive.

**Issue:** Whether a state government agency is a "person" subject to liability under the FCA.

**Analysis**: According to the terms of the FCA, a private person can bring a *qui tam* action against a person who presents fraudulent information to the government for payment.[2] The person, or "relator," bringing the action must deliver a copy of the complaint and evidence to the government, who has 60 days to decide whether it will intervene in the action. If the government chooses to intervene, it assumes the responsibility for its prosecution; however, if the government does not intervene, the relator has the right to conduct the action. In either case, the relator receives a share of the proceeds from the action, ranging from 15 to 30 percent, plus attorney's fees and costs, depending upon the extent of the relator's participation in the action.

To establish standing under article III, a plaintiff must prove three elements: injury in fact, or concrete injury whether actual or imminent; causation between the alleged injury and defendant's conduct; and redressability, or the substantial likelihood that the relief requested will remedy their injuries.[3] Spending the majority of its standing analysis addressing the requirement of injury in fact, the Court rejected the theory that plaintiff, as an agent for the government, has sufficient standing based on his interest in the bounty. "[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."[4] The Court concluded that this element had been met under a theory of assignment. "We believe . . . that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can be regarded as effectuating a partial assignment of the Government's damages claim."[5] To satisfy the remaining two elements of standing, the Court relied upon the history of *qui tam* actions as sufficient to confer article III standing to this plaintiff.[6]

Petitioner successfully argued that a state agency is not a "person" subject to liability under the FCA. In adopting the FCA in 1863, the legislature sought to curtain fraud perpetuated by Civil War contractors. However, the original legislation "bore no indication that the States were subject to its penalties."[7] While the legislation has undergone revision, the court maintained, there has been no expansion of the term "person" to include a state.

In addition to legislative intent, the court looked to language in the other sections of the FCA. For example, 31 U.S.C. § 3733 regarding civil investigative demands, defines a "person" "for the purposes of this section to include States."[8] The Court reasoned, therefore, that outside of this particular section, a state is not a "person" for the purposes of *qui tam* liability. Furthermore, as the FCA imposes punitive damages, holding states liable would violate the presumption against imposition of punitive damages on governmental entities.[9]

The majority concluded its analysis citing the general rule of statutory construction that if Congress intends to alter a federal-state balance, it must do so clearly and unmistakable in the statute.[10] The court also cited the doctrine "that statutes should be construed so as to avoid difficult constitutional questions."[11]

The dissent, written by Justice Stevens and joined by Justice Souter, argued that the FCA was intended to cover fraud from all sources, including states. Citing § 3733(l)(1)(A) that includes a state as a person for the purposes of the civil investigative demand provision, the dissent maintains that Congress intended to include states within the definition of "person" throughout the statute. The dissent also cited instances where federal courts accepted jurisdiction in *qui tam* cases brought by states, thereby indicating that the judiciary is accepting of a state as a "person" within the FCA's meaning.

**Christina Manos '02**

## Endnotes

1. 31 U.S.C. § 3729(a).
2. *Id.*
3. *Vermont Agency of Natural Resources v. United States*, 120 S. Ct. 1858 at 1861-62.
4. *Id.* at 1863.
5. *Id.*
6. *Id.* at 1865.
7. *Id.* at 1867.
8. 31 U.S.C. § 3733(l)(4).
9. *Vermont Agency of Natural Resources*, 120 S. Ct. at 1869.
10. *Id.* at 1870 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)).
11. *Id.*

* * *

## ***Waste Management of New York, LLC v. Doherty***, 700 N.Y.S.2d 494 (2d Dep't 1999)

**Facts**: The New York City Department of Sanitation (DOS), the respondents, were to acquire a parcel of land in Brooklyn through condemnation. In 1987, DOS initiated the condemnation by issuing a conditional negative declaration that contained four conditions. The time which allowed DOS the authority to acquire the parcel lapsed.[1] In 1998, DOS renewed its interest in con-

demning the parcel and issued a negative declaration. On this parcel, DOS planned to construct two garages, one salt storage facility, and one parking facility. It is an undisputed fact that the proposed condemnation qualifies as a Type I action under the State Environmental Quality Review Act (SEQRA).[2] The petitioner, Waste Management of New York, LLC (Waste Management), brought this proceeding under EDPL 207, to review the DOS's determination following a public hearing.

Waste Management asserted its claim based on two arguments. First, that DOS issued its 1998 negative declaration on the modified project which incorporated the 1987 conditions. As a result, Waste Management argued, a full environmental review is mandated under 6 N.Y.C.R.R. 617.2(h), which prohibits conditional negative declarations in Type 1 actions under SEQRA.[3] Second, that because the project has the potential to create significant environmental harm, the DOS failed to take a "hard look" at the project's effects upon its issuance of the negative declaration.

The Supreme Court, Appellate Division Second Department, held: (1) that the project to construct on the parcel was possibly modified to conform to the 1987 conditional negative declaration, did not mandate a full environmental review, and (2) that the DOS did take a "hard look" at the environmental effects of the proposed plan when it issued the 1998 negative declaration.

**Issues**: (1) Whether the DOS's 1998 project to construct on the parcel mandated a full environmental review because it was modified to incorporate conditions imposed in a 1987 conditional negative declaration.

(2) Whether DOS took the requisite "hard look" at the environmental effects of the proposed project upon its issuance of the 1998 negative declaration.

**Analysis**: In response to Waste Management's first contention, the Appellate Division held that although the project was possibly modified to include conditions placed on the 1987 conditional negative declaration, it did not mandate a full environmental review. The Court based its decision on the reasoning of *In re Merson v. McNally.*[4] There, it was held that "modifications made to a project . . . should not necessarily be characterized as impermissible conditions."[5] Additionally, even though modifications may have been made, it is still not an adequate basis to nullify an otherwise properly issued negative declaration. Here, because the 1998 negative declaration was properly issued, thus, any modifications made to the proposed project did not nullify the negative declaration, nor mandate a full environmental review, according to the Court.

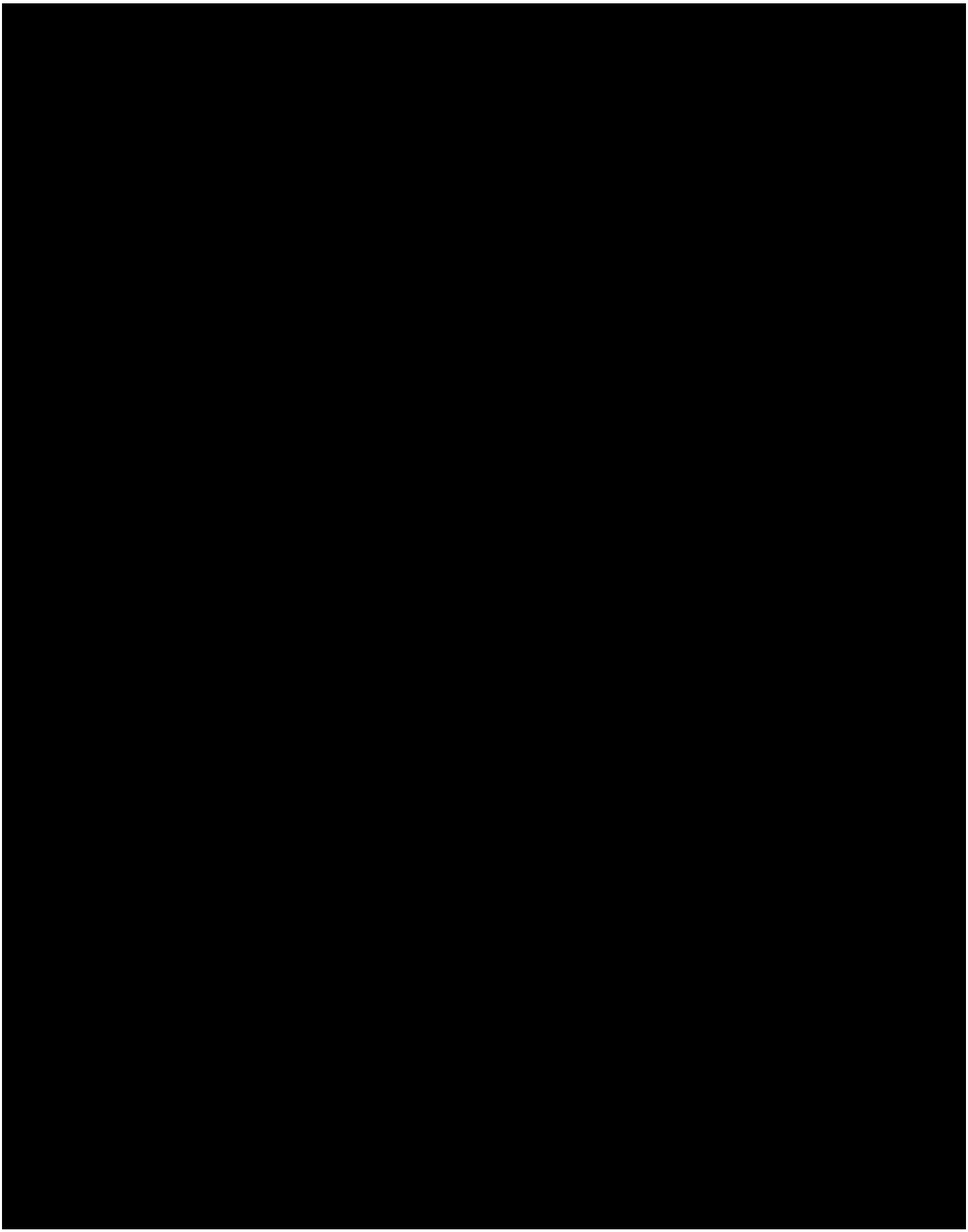
In response to Waste Management's second contention, the Appellate Division held that Waste Management failed to sufficiently show that the project had the potential to create significant environmental harm. Upon its issuance of the 1998 negative declaration, the DOS did take the requisite "hard look" at the project's effects. It was established, through the record, that the project would have a minimal environmental impact on that parcel. Furthermore, the Court cited *In re Merson*, in holding that the negative declaration was not affected by any other error of law.[6]

The Second Department confirmed the DOS's determination, denied the petition, and dismissed the proceeding.

**Holly Giordano '02**

## Endnotes

1. *See* EDPL 401(A).
2. *See Waste Management of New York, LLC v. Doherty*, 700 N.Y.S.2d 494, 495 (2d Dep't 1999) (citing Envtl. Conserv. Law art. 8; 6 N.Y.C.R.R. 617.4(b)(6)(v)).
3. *See id.* at 495 (citing 6 N.Y.C.R.R. 617.2(h), 617.7(d)).
4. 90 N.Y.2d 742.
5. *Id.* (quoting *In re Merson v. McNally*, 665 N.Y.S.2d 605, 688 (1997)).
6. *See id.*



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