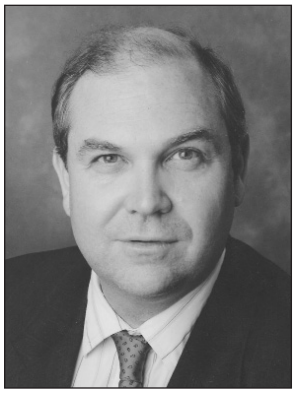
NYSBA SUMMER 2001 | VOL. 21 | NO. 3

The New York Environmental Lawyer

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

From the Editor



As I am writing this column, the U.S. Supreme Court has just issued another important environmental ruling on the cusp of a holiday season—the last one, over the winter break, basically eviscerated the migratory bird rule. The present, more restrained, decision (*Palazzolo v. Rhode Island*, 2001 U.S. LEXIS 4910 (June 28, 2001)) adds to the takings analysis that started with *Penn Central*, which the decision directly referenced, and has continued over the ensuing years with a number of landmark decisions clarifying the boundary between private property rights and public regulation. Several of those decisions, notably *Lucas v. South Carolina Coastal Commission*, have been analyzed in this *Journal* by many of our attentive readers. *Hint Hint!*

In this issue, William Helmer of the New York Power Authority and Andrew Gilchrist submit articles on oil spill remediation. Bill's article addresses the relationship between CERCLA §§ 107 and 113, which has been the subject of much jurisprudence over the years, while Andy's article analyzes remediation under New York law. Read together, both articles provide an excellent primer on the subject. In view of the ubiquity of remediation liability issues and their particular relevance to our readership, articles such as these are always helpful. Section members may recall that we have been looking to expand Section interest in legal issues regarding mining and other extractive activities, and recently formed a task force for that purpose. As such, John Caffry's and Inga L. Fricke's article, "Municipal Control Over Mining in New York," is particularly timely. John is, among other responsibilities, the Village Attorney for the Village of Argyle. Robert Panasci of Albany Law School submits an article that broadly discusses the construction of new electrical generating facilities in the state, the need to make New York a more competitive market for such endeavors, and the effect of state regulations. With the spate of recent litigation over the proposed construction of new power plants in the New York City metropolitan area, this article should prove especially interesting. The article was a finalist in the Section's Environmental Essay competition. Rusty Pomeroy, of Whiteman, Osterman & Hanna, submitted the administrative decisions update. Elizabeth Vail, student editor at St. John's Law School, has again sheparded the student case summaries. We at the *Journal* wish all of our readers a safe and pleasant summer.

Kevin A. Reilly

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The Parsing of Section 107 of CERCLA

By William S. Helmer

Despite over a decade of pressure for "reform" of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[1] the basic structure of the Superfund statute, as revised by the Superfund Reform and Reauthorization Act of 1986 (SARA),[2] remains unchanged more than 20 years after the Love Canal event. Yet, recent activity in Congress and the courts indicate that the pressure may still be building. As usual, the two sections of CERCLA that are drawing the most attention are § 106, which empowers the government to issue unilateral cleanup orders, and § 107, which establishes the liability for costs and damages associated with releases of hazardous substances.

With respect to § 107, the U.S. House of Representatives in May voted to exempt small businesses and other insignificant contributors of hazardous substances from the Superfund liability system when it passed the Small Business Protection Act,[3] a bill which admittedly may face a hostile reception in the recently reorganized Senate. More ominous, perhaps, is the challenge mounted in the District of Columbia Circuit by the General Electric Company to the constitutionality of § 106 of CERCLA.[4] When commencing the suit, Professor Tribe of Harvard University asserted that the section was a patent violation of the due process clause.[5]

It has often occurred to me that much of the discontent with § 107 stems from the unfortunately convoluted language employed by the drafters struggling to put the bill before President Carter before he left office in January of 1981. The problem was compounded when SARA explicitly recognized a "contribution" remedy available to parties made liable under § 107.[6] This article briefly discusses the relationship of these sections in the context of a thorough analysis—a parsing—of the crucial first sentence of § 107 itself. As an aid to this analysis, the article provides a new graphic presentation of the operation of § 107.

CERCLA is a very complicated and often obscure statute. As one court noted, the law was "hastily and inadequately drafted."[7] Yet certain overriding legislative objectives seemed clear enough. For instance, Congress was determined to ensure that the cost of any governmental action responding to a release of hazardous substances ultimately would not be borne by the public at large.[8] Instead, four categories of persons bearing particular connections with the contaminated location would be subjected to liability.

Two of these categories relate to those who own or operate a place or thing subject to a remedial or removal action—the current owner or operator and the owner or operator "at the time of disposal of any hazardous substance." In the case of a different owner or operator intervening between the current owner or operator and the owner or operator "at the time of disposal," it would appear that liability is not triggered.[9] The other two categories relate to those who engage in certain activities—those who "arrange" to have others handle their hazardous substances and those who "transport" hazardous substances.

Environmental practitioners sometimes refer to the "CERCLA 107(a) cause of action," but this is really a misnomer. The section contemplates four kinds of recovery: (1) for costs associated with government removal or remedial actions; (2) for private party costs; (3) for natural resource damages; and (4) for costs associated with health assessments. And it contemplates recovery from the four categories of liable persons: current owners and operators, former owners and operators, those who arrange to have others handle their hazardous substances, and those who transport hazardous substances. Thus, § 107(a) of CERCLA on its face really creates 16 causes of action, each of which can stand upon its own. For instance, a private party in theory can proceed against a transporter, just as the government can proceed against a facility's current owner.

Perhaps the best way to appreciate the complexity of this section is through a graphic presentation. The chart on page 4 tracks the language of the section into its various conceptual compartments, the four types of recovery appearing along the top half of the page left-to-right, and the four types of liable parties appearing along the bottom half of the page left-to-right. Following the statute, the later four are identified by the arabic numerals "1" through "4," and the former four are identified by the roman capitals "A" through "D." Thus, the private party pursuing the transporter is using the "B-4" cause of action, and the government pursuing a facility owner is using the "A-1."

Of the four types of recovery, types "C" and "D" (health assessment costs and natural resource damages), have been infrequently made the subject of litigation. By contrast, types "A" and "B" (government recoveries of removal or remedial action costs and private party recoveries) have been the subject of continuous litigation for over two decades. Indeed, the extent to which the Type B case remains available in the aftermath of SARA's creation of a contribution remedy has not yet been finally resolved.[10] In the Second Circuit, at least, it is now settled that the Type B case is available only to those private parties who are not liable themselves under § 107(a), either because an element of liability under that section is absent (presumably, the applicability of one of the four categories of liable parties) or because one of the defenses afforded by § 107(b) is applicable.[11]

So, for those private parties escaping liability under § 107(a) who nevertheless incur costs arising out of a response to a release of hazardous substances, the Type B case may still be pursued. But it would be a crucial error to assume that a private party pursuing a Type B case simply "steps into the shoes" of a governmental plaintiff pursuing a Type A case. The important differences between these two types of § 107(a) actions become clear upon a review of the rules of liability developed by the courts when confronting public, as opposed to private, CERCLA plaintiffs.

Government Actions—The "Type A" Case

Courts have refined the basic elements of the government's cause of action to four. The government must establish by competent proof that (1) the place or thing in question is one of the locations identified by the statute; (2) a release or threatened release of a hazardous substance from the location has occurred; (3) the release or threatened release caused the incurrence of response costs; and (4) the defendant falls within one of the four classes of liable parties. If there are undisputed facts establishing these four elements and the defendant fails to make out an affirmative defense, the government will be entitled to summary judgment as to the issue of liability.[12] To make out its *prima facie* case, the government plaintiff has no obligation to link any conduct of a particular defendant to the release itself,[13] and it has no obligation to show that its own conduct was consistent with the National Contingency Plan (NCP) the regulatory blueprint for all Superfund cleanups.[14]

Private Party Actions—The "Type B" Case

The federal common law of strict liability has moved in a somewhat different direction when the § 107(a) plaintiff is a private party. Private parties have learned that they must prove that their actions were consistent with the NCP and that the costs for which they seek reimbursement were "necessary."[15] There may also be a greater emphasis on causation in the Type B case. For instance, one court noted that, in a private party § 107(a) action, the plaintiff must prove not only the elements of CERCLA liability, but also the "accountability" of the defendant.[16] And the U.S. Supreme Court, of course, has held that attorney's fees are not recoverable in the Type B case.[17]

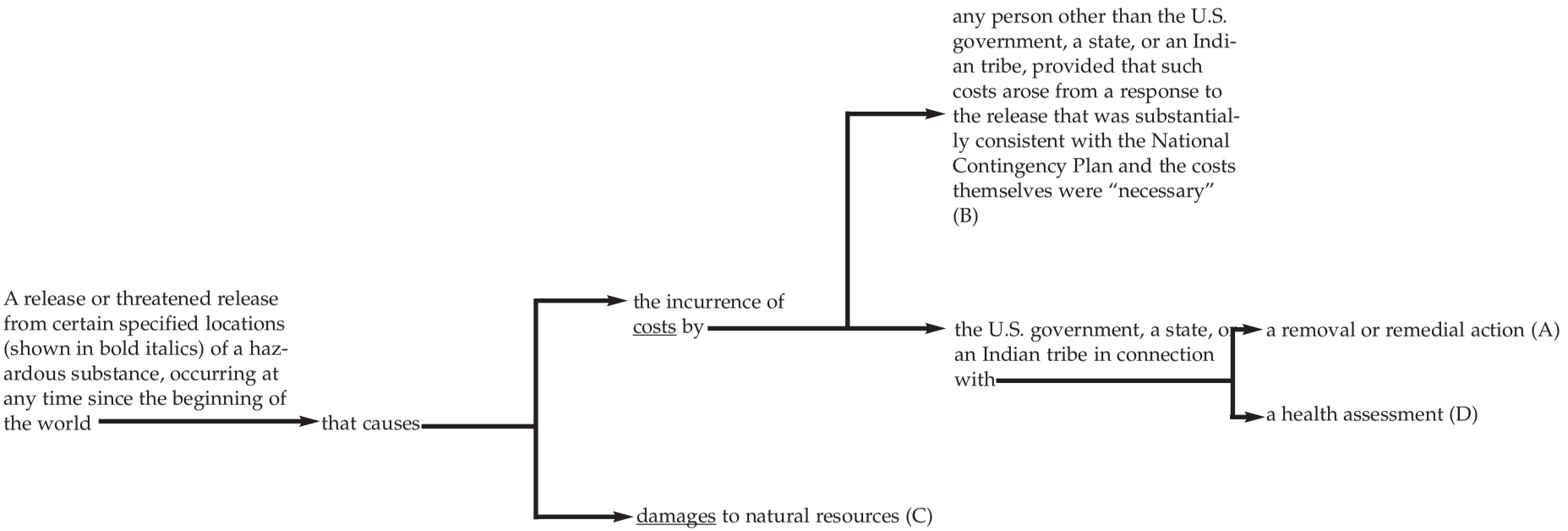
At the same time, certain decisions have afforded some comfort to private party plaintiffs. Compliance with the NCP does not require that the site at which the costs were incurred be on the National Priorities List.[18] A cleanup conducted entirely under state auspices will support a private party cost recovery action.[19] When a revised NCP was issued in 1990, the EPA acknowledged that a "substantial compliance" standard would generally apply in such cases.[20] Perhaps the most intriguing question is whether the private party plaintiff pursuing the Type B case will continue to enjoy the enormous benefit of joint and several liability among the defendants.[21] In any event, it remains clear that the private party cause of action afforded by CERCLA § 107(a) will continue to be a fruitful source of the evolving federal common law of liability for releases of hazardous substances.

Endnotes

1. 42 U.S.C. § 9601 *et seq.*
2. Pub. L. 99-499, 100 stat. 1613 (1986), §§ 1-405.
3. H.R. 1831, passed by a vote of 419-0 on May 22, 2001.
4. *General Electric Co. v. Browner*, 00 CV 2855 (D.C. Cir.), filed November 28, 2000.
5. Professor Tribe asserted that § 106 orders allow the Environmental Protection Agency to "skew the evidence, ignore other points of view, and order action without independent review." He also described the use of § 106 orders as "an Alice in Wonderland regime of punishment first, trial afterwards–even in a non-emergency setting." More of the Professor's comments are reported at p. 2515 of vol. 31 of the BNA *Environment Reporter* (December 1, 2000).
6. 42 U.S.C. § 9613(f) was added by § 113(b) of SARA.
7. *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984).
8. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 111-1112 (D. Minn. 1982).
9. *Cadillac Fairview/California v. Dow Chem. Co.*, 21 E.R.C. 1108, 1113 (C.D. Cal. 1984), *rev'd*, *in part*, 840 F.2d 691 (9th Cir. 1988).
10. The circuit courts are divided. The Sixth Circuit in 1993 held that the Type B case was unimpaired by SARA. *Velsicol Chemical Co. v. Enenco, Inc.*, 9 F.3d 524, 528-530. Thereafter, circuit courts have been unanimous in ruling to the contrary. *See*, *e.g.*, *Redwing Carriers, Inc. v. Savaland Apts.*, 94 F.3d 1489, ___ (11th Cir. 1996).
11. *Bedford Affiliates v. Sills*, 156 F.3d 416, 423 (2d Cir. 1998); *see also*, *Volunteers of America of Western New York v. Heinrich*, 90 F. Supp 2d 252, 257 (W.D.N.Y. 2000).
12. *United States v. Conservation Chemical Co.*, 619 F. Supp. 162 (D.C. Mo. 1984).
13. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1153 (1st Cir. 1989); *see also United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 992, n.5 (D.S.C. 1984).
14. *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1486 (E.D. Pa. 1989). Governments enjoy a rebuttable presumption that they act in accordance with regulatory requirements.
15. *Id.*
16. *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1290 (D.Minn. 1987), *appeal dismissed,* 871 F.2d 1091 (8th Cir. 1988). One could cite a host of cases in which the court's analysis of familiar § 107(a) elements like "release" or "facility" take on a decided "accountability" slant. *See e.g.*, *White v. County of Newberry, S.C.,* 985 F.2d 168, 174 (4th Cir. 1993); *Amoco Oil Co. v. Borden*, 889 F.2d 664 (5th Cir. 1989); *J.S. Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633 (D.C. Ca. 1991).
17. *Key Tronic Corp. v. United States*, 511 U.S. 809, 823 (1994).
18. *Interchange Office Park, Ltd. v. Standard Industries, Inc.*, 654 F. Supp. 166, 168-169 (W.D. Tex 1987).
19. *Wickland Oil Terminals v. Asarco*, 792 F.2d 887 (9th Cir. 1986).
20. The NCP, as revised and repromulgated on April 19, 1990, adopts a substantial compliance standard, and "immaterial or insubstantial deviations" from the NCP will not bar private party recovery. 40 C.F.R. §§ 300.700 (c)(3)(i) and (4).
21. Courts that permit the Type B private party action have exonerated the plaintiff from any liability for the "orphan share." *See*, *e.g. Pneumo Abex Corp. v. Bessemer & Lake Erie Railroad*, 921 F. Supp. 336, 348 (E.D. Va. 1996).

The elements of a § 107 cause of action.

CERCLA § 107(a)(1-4)(A)
§ 107(a)(1-4)(B)
§ 107(a)(1-4)(C)
§ 107(a)(1-4)(D)



subjects the following persons (shown in regular italics) to liability to the party bearing such damages or costs in the first instance *eo instanti* for any and all such damages or costs:

1. the *"current" owner and/or operator of a* ***vessel or facility.***
2. any *past owner or operator of* ***a facility*** whose period of ownership or operation coincided with the disposal of any hazardous substance or substances at ***the facility.***
3. any person who *owned or possessed any hazardous substance or substances and, by contract, agreement, or otherwise, arranged* to have it or them disposed of or treated at ***a facility or incineration vessel*** or transported to a ***facility or incineration vessel*** for those purposes.
4. any person *who accepts or accepted any hazardous substance or substances for transport to* ***disposal or treatment facilities, incineration vessels, or sites*** selected by such person.

Fundamentals of Liability for Oil Spills in New York State Following *State v. Green*

By Andrew W. Gilchrist

This article offers the fundamentals on liability for oil spill remediation in New York State. A discussion is presented on the sources of the law on oil spill liability, who is liable, the standard of liability, contractual allocation of liability, and contribution among responsible parties. Attention is likewise directed to the recent expansion of the class of liable parties, as enunciated by the Court of Appeals in *State v. Green*,[1] handed down July 5, 2001.

Where Is the Law?

The law in New York concerning liability for oil spills is found at Article 12 of the Navigation Law, entitled Oil Spill Prevention, Control and Compensation.[2] The general scheme under Article 12 is similar to many statutes concerning environmental remediation: certain parties are deemed strictly liable[3] for cleaning up oil spills; if such a party fails or refuses to perform the cleanup, the Government will perform the cleanup through the use of a state fund[4] and thereafter seek cost recovery from the responsible party or parties.

This statutory scheme under the Navigation Law places emphasis on the *immediate* cleanup of oil spills. Once the cleanup is underway or complete, the emphasis shifts to responsibility for the cost of that cleanup. As one court has explained:

> When a spill is discovered, response must be swift. If the Government must bear the cost of cleanup, there must be a ready pocket for reimbursement. It is the owner or operator at the time the spill is first discovered who has control of the site and the source of discharge. He is readily identifiable. He is most likely to be in position to halt the discharge, to effect an immediate cleanup, or to prevent a discharge in the first place. If the onus of cleanup falls on the Government, he is the clearest and most expeditious source of reimbursement.[5]

Thus, the policy in New York is to protect the environment through prompt and effective remediation of oil spills upon discovery. Scrutiny is heightened when private drinking water supplies are at risk. The issue of who pays for the cleanup, while critical, is secondary to getting the cleanup started and completed. Ultimately, the question of who is responsible for the cost of the oil spill cleanup implicates both statutory liability and common law principles of allocation and contribution. These issues are discussed below.

Also, in those cases where a private party fails or refuses to perform the cleanup and the state performs the cleanup through the State Spill Fund, the state will not only commence a cost recovery action for reimbursement (including interest and penalties, as well) but also has the authority to file an environmental lien upon the real property on which the discharge occurred as well as any other real property owned by the responsible party.[6] The Navigation Law presents a statutory scheme where defenses are few and liability is broad.

Indeed, the Navigation Law provides affirmative defenses only to owners and operators of major facilities or vessels, generally defined under the Navigation Law as a petroleum facility with total combined aboveground or underground storage capacity of 400,000 gallons or more.[7] The affirmative defenses are limited to acts or omissions caused solely by war, sabotage, or governmental negligence.[8] Even these limited statutory affirmative defenses are unavailable to the general commercial or industrial operation with on-site petroleum storage.

The practitioner should also be aware that the New York State Department of Environmental Conservation (NYSDEC) has adopted regulations concerning petroleum bulk storage, including tank and container requirements, registration requirements, and spill reporting requirements. These regulations are found at Parts 612-614 of Title 6 of the New York Code of Rules and Regulations (N.Y.C.R.R.).[9] Attention to these regulations is important for ongoing facility operations as well as spill incidents.

Who Is Liable?

Navigation Law § 181(1) provides "Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained."[10]

The Navigation Law defines "discharge" as:

> any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state

> or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state where damage might result to the lands, waters or natural resources within the jurisdiction of the state.[11]

Further, "waters" is defined under the Navigation Law as including all "bodies of surface or groundwater, whether natural or artificial."[12]

Prior to *State v. Green*, the courts in New York had applied these statutory provisions to accord strict liability[13] primarily to owners and operators of petroleum systems from which releases have occurred, as well as additional third parties based upon the facts of each circumstance.[14] *State v. Green* expands the class of liable "owners." This is discussed below.

a. Owners

1. Owners of the Petroleum System

The Navigation Law imposes strict liability for oil spill remediation upon the owner of the petroleum system from which the release occurred.[15] This principle was reiterated by the Appellate Division, Third Department[16] in its decisions in *State v. Green*[17] and *State v. Speonk Fuel Inc.*[18] While the Court of Appeals ultimately reversed the Third Department in *State v. Green* on the issue of landowner liability, the Third Department's treatment of system ownership remains good law:

> In State of New York v. New York Cent. Mut. Fire Ins. Co. (147 A.D.2d 77, 542 N.Y.S.2d 402), this court was first faced with the question of whether the owner of residential property could be held liable under Navigation Law article 12 for a petroleum spill occurring on the premises, holding that "by virtue of ownership and control of the heating system from which the fuel oil leaked, the homeowner is strictly liable for the clean-up costs of the spill; proof of a wrongful act or omission is not required" (id., at 79, 542 N.Y.S.2d 402 [emphasis supplied]). Next, in State of New York v. Wisser Co. (170 A.D.2d 918, 566 N.Y.S.2d 747), we considered a claim of liability against the owner of a gasoline service station that had been leased and subleased to other entities and was apparently under the control of the lessee or sublessee at the time of the discharge. Our analysis focused on the issue of ownership of the underground petroleum storage tanks and, finding as a matter of law that the defendant had retained ownership, we upheld the imposition of liability against it as "the owner of a system from which a discharge occurred * * * regardless of a lack of proof of any wrongful act or omission by such owner directly causing the discharge" (id., at 919, 566 N.Y.S.2d 747 [citation omitted]; see, Domermuth Petroleum Equip. & Maintenance Corp. v. Herzog & Hopkins, 111 A.D.2d 957, 958-959, 490 N.Y.S.2d 54).
>
> Likewise, in Matter of White v. Regan [171 A.D.2d 197, 575 N.Y.S.2d 375, *lv. denied* 79 N.Y.2d 754] and State of New York v. Tartan Oil Co. [219 A.D.2d 111, 638 N.Y.S.2d 989], we imposed liability against the current owners of leaking underground storage tanks, despite evidence that the discharges may have taken place before they took title to the property, based upon their ownership of the buried tanks. In Matter of White v. Regan (supra, at 199-200), we noted that "[t]his court has consistently construed Navigation Law §181(1) so as to impose liability on the owner of a system from which a discharge occurred" (emphasis supplied).[19]

Critically, the practitioner must be aware that strict liability attaches to the system owner without regard to intent or fault. No evidence is needed showing such owner caused or contributed to the petroleum release. Mere title is the ticket to liability. Such Draconian rules make for particularly disgruntled clients.

Further, strict liability attaches to the petroleum system owner regardless of when the petroleum release occurred. Indeed, strict liability will be imposed against the current owner of a petroleum system from which a release has occurred, despite evidence that the releases occurred before the current owner took title.[20] In such cases, the current owner cannot shift its primary liability for remediation to the prior owner of the petroleum system; rather, its remedy lies with its secondary claim against that prior owner for indemnification or contribution.[21]

2. Owners of the Contaminated Property

Prior to Court of Appeals decision in *State v. Green*, New York courts were clear that Navigation Law liability attached only to the owner of the petroleum system from which the release occurred, not the owner of the impacted property. Thus, the Third Department held in *State v. Speonk Fuel, Inc.*:

> This court has consistently construed Navigation Law § 181(1) so as to impose liability on the owner of a system from which a discharge occurred in the absence of evidence that the owner caused or contributed to the discharge *** (Matter of White v. Regan, 171 A.D.2d 197, 199-200, 575 N.Y.S.2d 375, 1v. denied 79 N.Y.2d 754 [citations omitted]). In most cases, the property owner and system owner are one and the same (see, e.g., State of New York v. Arthur L. Moon Inc., 228 A.D.2d 826, 643 N.Y.S.2d 760, lv. denied 89 N.Y.2d 861, 653 N.Y.S.2d 282, 675 N.E.2d 1235; State of New York v. Tartan Oil Corp., 219 A.D.2d 111, 638 N.Y.S.2d 989), but where there is no such unity of ownership, liability without regard to fault is properly imposed on the system owner and not on the faultless property owner (see, State of New York v. Green, __ A.D.2d __ [decided herewith]).[22]

On this issue, the law in New York changed on July 5, 2001. In *State v. Green*,[23] the Court of Appeals ruled that owners of property contaminated by an oil spill are likewise strictly liable under the Navigation Law in those cases where the owner is deemed to have *control* over the activities occurring on its property which led to the petroleum release. Thus, the owner of contaminated property, which neither owns nor operates the petroleum system from which the release occurred, will nonetheless be held strictly liable for remediation costs *if* that owner had the ability to *control* the activity which led to the petroleum release.

The facts of *State v. Green* are instructive. In *State v. Green*, the owner of a trailer park leased a trailer pad to Defendant Green. Green owned and maintained a 275-gallon aboveground kerosene tank, which she used to heat her mobile home. The park owner neither owned nor operated that tank, and had no responsibility for its maintenance. In January 1992, the tank fell, spilling kerosene on the ground. Following its cleanup of the site, the state commenced a cost recovery action in which the park owner was named as a Navigation Law defendant. The park owner moved for summary judgment dismissing the complaint, and the state cross-moved for summary judgment under the Navigation Law against the park owner. The Albany County Supreme Court denied the park owner's motion, and granted the state's cross-motion. The Third Department reversed, holding that Navigation Law liability attaches only to the owner of the petroleum system from which the release occurred, not to the owner of the impacted real property.[24] The Court of Appeals granted the state leave to appeal.[25]

The Court of Appeals reversed the Third Department, and accorded strict liability upon the park owner. In its decision, the Court of Appeals focused on the definition of "discharge" at Navigation Law § 172[8] *"any* intentional or *unintentional action or omission* resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might or flow into said waters . . . (emphasis added)." The Court of Appeals focused on the statutory language of "unintentional action or omission," concluding that is was sufficiently broad to include owners who have control over activities occurring on their property and reason to believe that petroleum products will be stored and/or used on the property. Thus, the Court of Appeals held:

> As the owner and lessor of the trailer park, [the park owner] had the ability to control potential sources of contamination on its property, including Green's maintenance of a 275 gallon kerosene tank (*see, White v. Regan*, 171 A.D.2d 197, 199-201, *leave denied* 79 N.Y.2d 754; *fg., State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050-1051 [2d Cir]). [The park owner's] failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders it liable as a discharger (*see, Huntington Hosp. v. Anron Heating & Air Conditioning, Inc.*, 250 A.D.2d 814, 815; *State v. Montayne*, 199 A.D.2d 674, 675; *Domermuth Petroleum Equip. and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 958-959).

The Court of Appeals cautioned that not all landowners will be caught in the strict liability loop, only those with the ability to control the oil-spilling activities. Thus, "[a] landowner, for example, who falls victim to a midnight dumper, or an errant oil truck that spills fuel, will not be liable as a discharger because, in those cases, the landowner could not control the events resulting in the discharge."

Accordingly, after *State v. Green*, strict liability under the Navigation Law will attach to landowners which neither own nor operate the petroleum system from which the release occurs *if* that landowner had the ability to *control* the activity on its property that led to the oil spill.

b. Operators of the Petroleum System

The Navigation Law likewise imposes strict liability upon those parties operating the petroleum system at the time of the release. Here, the statute imposes strict

liability upon the operator as a "person who has discharged petroleum."[26]

c. Other Third Parties

Even prior to *State v. Green,* New York courts had imposed strict liability upon parties who neither owned nor operated the petroleum system from which a release had occurred. Thus, liability has been imposed upon contractors who have improperly installed underground storage tanks,[27] the owner of an oil truck involved in a motor vehicle accident,[28] the deliverer of oil,[29] the repairer of an oil tank,[30] and even upon firefighters who damaged an aboveground petroleum tank while fighting a fire.[31] The rationale for finding these parties within the purview of the Navigation Law is that they set in motion the events which resulted in the discharge,[32] and that they were in a position to halt the discharge, to effect an immediate cleanup or prevent the discharge in the first place.[33] In this regard, the Court of Appeals decision in *State v. Green* appears consistent.

The Third Department has also addressed the question of whether the stockholders or officers of corporations which own or operate petroleum systems can be held individually liable in the event of a release. The court declined to attach the liability to stockholders or officers based on that status alone.[34] However, the court went on to hold that if such a stockholder or officer is directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated, strict liability under the Navigation Law as a "discharger" will attach regardless of corporate title.[35] On this issue, the Third Department opined that such an approach "strikes the appropriate balance between holding only culpable individuals personally liable for wrongful corporate activities leading to a discharge and protecting those individual stockholders and officers who remain uninvolved in corporate wrongdoing who are entitled to rely on the corporate form to insulate them from personal liability."[36]

Having been accorded strict liability without regard to fault for the cleanup of an oil spill under the Navigation Law, are there any remedies for a faultless yet statutorily responsible party? This is discussed below.

Remedies

a. Contractual Allocation

Although a party may be deemed a "discharger" under the Navigation Law, and thus strictly liable for cleanup costs in the first instance, parties may determine ultimate responsibility for such costs through contract. Thus, contracts shifting ultimate responsibility for cleanup costs from owner to tenant[37] and vendor to vendee[38] will be upheld. These claims, however, are secondary in nature; primary liability under the Navigation Law will remain with the "discharger," subject to subsequent indemnification or contribution under private contractual allocation. In other words, and consistent with the overall scheme of the Navigation Law, even the faultless yet statutorily liable party is required to immediately effectuate the cleanup, leaving the ultimate cost responsibility therefor to be determined later.

b. Common Law and Statutory Contribution

As liability under the Navigation Law is joint and several, the common law equitable principle of contribution may be used to mitigate the harshness of statutory responsibility for full cleanup costs despite limited or no involvement in actual releases. In addition to common law equitable claims for contribution, Article 14 of the CPLR should be consulted as a claim for statutory contribution as against a joint tortfeasor may be asserted.[39]

Further, Navigation Law § 181(5) provides for a private right of action for anyone damaged by an oil spill: "Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section [Navigation Law § 181] may be brought directly against the person who has discharged the petroleum."[40] Certainly, an innocent party damaged by an oil spill may use this provision in a claim against a discharger. However, may a party itself deemed a "discharger" under the Navigation Law use this provision to seek contribution from other "dischargers"? The Court of Appeals in *White v. Long* held that such a claim does exist:

> The Navigation Law provides for a private cause of action without denying standing to a property owner deemed a discharger to sue another discharger in strict liability for clean-up costs. The plain language of section 181(1) imposes liability on any discharger for clean-up costs "no matter by whom sustained," and subdivision (5) permits "any injured person" to bring a claim against a discharger for clean-up costs and damages. In fact, subdivision (5) was added by amendment in 1991 specifically to establish a private right of action under the statute in response to an Appellate Division decision (*Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924) which rejected such lawsuits.
>
> In that same year, the Legislature added the definition of "claim" with the limitation that persons "responsible for the discharge" could not bring a

> claim. Although even faultless owners of contaminated lands have been deemed "dischargers" for purposes of their own section 181(1) liability, where they have not caused or contributed to (and thus are not "responsible for") the discharge, they should not be precluded from suing those who have actually caused or contributed to such damage. To preclude reimbursement in that situation would significantly diminish the reach of section 181(5).[41]

Therefore, the practitioner is advised to investigate both common-law and statutory contribution claims when clients are caught in the strict liability snare of the Navigation Law.

c. Practical Approach: Early Negotiation

Due to the strict liability scheme of the Navigation Law and policy of effecting immediate cleanups, oil spill cases generally focus not on defense on the liability issue but rather on allocation of cost. In cases where the private discharger initiates cleanup, private contribution litigation is common. In those cases where the state performs the cleanup and has commenced a cost recovery action, third-party practice by the discharger defendant is likewise common. Not surprisingly, the facts of each case will determine ultimate allocation of cleanup costs, based primarily upon each party's relative role in the events causing the petroleum release.

Given the strict liability scheme of the Navigation Law, it makes practical sense in oil spill matters to engage in discussions with NYSDEC immediately upon knowledge of the release. These discussions should not focus strictly upon liability issues, but on the scope and extent of required remediation. These discussions will necessarily include technical consultants, who should be retained early on as well. The practitioner is also advised to immediately investigate to determine if there are other sources of contribution, or other parties responsible for releases. If other parties are available, engage them in discussion early on in an effort to bring them to the table and participate in remediation. The goal of these efforts will be to limit the scope and extent of remediation and bring other parties into the process, all of which in turn will save your client money both in terms of remedial expenses and transactional costs. An early and cost-effective practical resolution is often a more realistic strategy in oil spill cases than litigation.

Conclusion

When confronted with an oil spill matter, attention must be brought to the matter immediately upon knowledge of the release. The liability scheme under the Navigation Law is Draconian, and efforts toward limiting the scope and extent of remediation to appropriate standards are often advantageous and cost-effective for your client. Additionally, an investigation into the release may uncover additional responsible parties to which some of the remedial costs may be allocated.[42]

Endnotes

1. __ N.Y.2d __, 2001 WL 747873, 2001 N.Y. Slip Op. 06070 (July 5, 2001).
2. Navigation Law, §§ 170 *et seq.* (McKinney's 2000).
3. Navigation Law § 181(1). The standard of liability for oil spill releases is further discussed below.
4. The State Fund dedicated to oil spill remediation is known as the New York Environmental Protection and Spill Compensation Fund. *See* Navigation Law § 179.
5. *White v. Regan*, 171 A.D.2d 197, 200-201, 575 N.Y.S.2d 375, 377 (3d Dep't 1991) (*citing Quaker State Corp. v. United States Coast Guard*, 681 F. Supp. 280, 285 (W.D. Pa. 1988)).
6. Navigation Law § 181-a. As to the form of state cost recovery actions, *see State v. Stewart's Ice Cream Co., Inc.*, 64 N.Y.2d 83, 484 N.Y.S.2d 810, 473 N.E.2d 1184 (1984). *See also State v. Gorman Bros., Inc.*, 166 A.D.2d 859, 563 N.Y.S.2d 187 (3d Dep't 1990).
7. Navigation Law § 172(11).
8. Navigation Law § 181(4).
9. 6 N.Y.C.R.R. Parts 612-614. The practitioner should also be aware that these regulations include immediate reporting requirements of any discovered oil spill. *See* 6 N.Y.C.R.R. § 613.8.
10. Navigation Law § 181(1). *See, e.g., White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989, 650 N.E.2d 836 (1995).
11. Navigation Law § 172(8).
12. Navigation Law § 172(18).
13. The standard of liability imposed by statute is strict liability, regardless of fault. Navigation Law § 181(1). No proof is required of a specific wrongful act or omission which directly caused a spill in order to impose liability under the Navigation Law for spill remediation. *See, e.g., Hilltop Nyack Corp. v. TRMI Holdings, Inc.*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999); *Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dep't 1985); *Premier National Bank v. Effron Fuel Oil Company*, 182 Misc. 2d 169, 698 N.Y.S.2d 434 (Sup. Ct., Dutchess Co. 1999).
14. Indeed, the provisions of Article 12 of the Navigation Law are accorded liberal construction. Navigation Law § 195. *See 145 Kisco Ave. Corp. v. Dufner Enterprises, Inc.*, 198 A.D.2d 482, 604 N.Y.S.2d 963 (2d Dep't 1993); *State v. Montayne*, 199 A.D.2d 674, 604 N.Y.S.2d 978 (3d Dep't 1993); *Premier National Bank v. Effron Fuel Oil Company*, 182 Misc. 2d 169, 698 N.Y.S.2d 434 (Sup. Ct., Dutchess Co. 1999). *See also State v. New York Central Mutual Fire Insurance Company*, 147 A.D.2d 77, 78, 542 N.Y.S.2d 402, 403 (3d Dep't 1989) ("the straightforward and expansive language of Article 12 fastens strict liability upon anyone, large or small, commercial or residential, responsible for a discharge of petroleum which threatens the state's waters").
15. *See, e.g., Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep't 1995); *State v. Montayne*, 199 A.D.2d 674, 604 N.Y.S.2d 978 (3d Dep't 1993); *State v. Wisser Company, Inc.*, 170 A.D.2d 918, 566 N.Y.S.2d 747 (3d Dep't 1991); *State v. New York Central Fire Insurance Company*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep't 1989).

16. The Appellate Division, Third Department has addressed the provisions of the Navigation Law on a number of occasions, as many cost recovery actions commenced by the state of New York against "dischargers" are venued in Albany County Supreme Court, from which appeals are heard at the Third Department.

17. 271 A.D.2d 11, 709 N.Y.S.2d 704 (3d Dep't 2000).

18. 273 A.D.2d 681, 710 N.Y.S.2d 652 (3d Dep't 2000).

19. *State v. Green*, 271 A.D.2d 11, 12-13, 709 N.Y.S.2d 704, 705 (3d Dep't 2000).

20. *See, e.g., State v. Tartan Oil Corporation*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996); *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991).

21. *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991). *See also White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989, 650 N.E.2d 836 (1995). The issue of indemnification and contribution claims is further discussed below.

22. *State v. Speonk Fuel, Inc.*, 273 A.D.2d 681, 682, 710 N.Y.S.2d 652, 654 (3d Dep't 2000).

23. __ N.Y.2d __, 2001 WL 747873, 2001 N.Y. Slip Op. 06070 (July 5, 2001).

24. *State v. Green*, 271 A.D.2d 11, 709 N.Y.S.2d 704 (3d Dep't 2000).

25. The slip opinion notes in a footnote that the state discontinued its cause of action against Green, the owner of the kerosene tank. Also, the slip opinion notes that the state discontinued its cause of action against the fuel delivery company, which it had commenced under the Navigation Law. Given that the Court of Appeals focused its decision on *control* over activities leading to the petroleum release as triggering strict Navigation Law liability, the state may not be as willing to discontinue cases against fuel deliverers in the future.

26. Navigation Law § 181(1); *See, e.g., Berens v. Cook*, 263 A.D.2d 521, 694 N.Y.S.2d 684 (2d Dep't 1999); *Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dep't 1985).

27. *Huntington Hospital v. Anron Heating and Air Conditioning, Inc.*, 250 A.D.2d 814, 673 N.Y.S.2d 456 (2d Dep't 1998); *Mendler v. Federal Insurance Company*, 159 Misc. 2d 1099, 607 N.Y.S.2d 1000 (Sup. Ct., New York Co. 1993).

28. *Merrill Transp. Co. v. State of New York*, 94 A.D.2d 39, 464 N.Y.S.2d 249 (3d Dep't 1983) *lv. denied*, 60 N.Y.2d 555, 467 N.Y.S.2d 1030, 455 N.E.2d 487 (1983).

29. *Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dep't 1985); *see also Premier National Bank v. Effron Fuel Oil Company*, 182 Misc. 2d 169, 698 N.Y.S.2d 434 (Sup. Ct., Dutchess Co. 1999).

30. *Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dep't 1985).

31. *Nicol v. Jenkins Fire Company*, 192 A.D.2d 164, 600 N.Y.S.2d 519 (3d Dep't 1993).

32. *Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 958-959, 490 N.Y.S.2d 54, 56 (3d Dep't 1985)

> First, under the Navigation Law, no proof is required of a specific wrongful act or omission which directly caused the spill in order to impose liability. It is sufficient and uncontested that . . . the deliverer of the oil and repairer of the tank set in motion the events which resulted in the discharge.

33. *State v. Montayne*, 199 A.D.2d 674, 604 N.Y.S.2d 978 (3d Dep't 1993); *see also Domermuth Petroleum Equipment and Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54 (3d Dep't 1985).

34. *State v. Markowitz*, 273 A.D.2d 637, 710 N.Y.S.2d 407 (3d Dep't 2000).

35. *Id.*, 273 A.D.2d at 642, 710 N.Y.S.2d at 412.

> Consistent with the relevant Federal and State statutes and developing case law, we hold that in order to hold a corporate stockholder, officer or employee personally liable under the Navigation Law for a discharge occurring at a site owned or operated by the corporation, that individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated.

36. *Id*.

37. *Star Nissan, Inc. v. Frishwasser*, 253 A.D.2d 491, 677 N.Y.S.2d 145 (2d Dep't 1998).

38. *Umbra USA, Inc. v. Niagara Frontier Transportation Authority*, 262 A.D.2d 980, 693 N.Y.S.2d 371 (4th Dep't 1999).

39. *See Idylwoods Associates v. Mader Capital, Inc.*, 915 F. Supp. 1290 (W.D.N.Y. 1996), for a discussion on the interplay between CPLR Article 14 and CERCLA, a strict liability environmental statute with similar liability provisions as the Navigation Law.

40. Navigation Law § 181(5); *see generally Wheeler v. National School Bus Service*, 193 A.D.2d 998, 598 N.Y.S.2d 109 (3d Dep't 1993). The practitioner must be aware that the damages which are recoverable in private actions under the Navigation Law are limited to economic damages only. *See Wever Petroleum, Inc. v. Gord's Ltd.*, 225 A.D.2d 27, 649 N.Y.S.2d 726 (3d Dep't 1996). Of course, non-economic damages may be recoverable under other common law remedies. Further, the practitioner should be aware that attorneys fees incurred by a party injured by a petroleum release are considered an "indirect damage" and recoverable in a Navigation Law claim. *See Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep't 1996).

41. *White v. Long*, 85 N.Y.2d 564, 568-569, 626 N.Y.S.2d 989, 991, 650 N.E.2d 836 (1995). The practitioner should be aware, however, that while a "discharger" can use Navigation Law § 181(5) as the basis for a claim against another private "discharger," a "discharger" does not have a claim under the Navigation Law against the State Spill Fund for reimbursement. *See White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991). Thus, in those situations where a private party undertakes oil spill remediation, its only claim under the Navigation Law is against other private parties and not against the State Spill Fund for reimbursement.

42. While beyond the scope of this article, an investigation into insurance coverage should also be immediately undertaken, and notices of claim timely sent to all carriers.

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Municipal Control Over Mining in New York

By John W. Caffry and Inga L. Fricke

Introduction

There are currently almost 2,500 mines with current operating permits in the state of New York, in nearly every county.[1] The New York State Department of Environmental Conservation (DEC) receives approximately 150 new mining permit applications each year, and approximately 500 permit renewal, modification and/or final reclamation inspection applications.[2] According to DEC's Mined Land database, the great majority of these mines are aggregate mines, either sand and gravel pits, or hard rock quarries producing crushed stone.[3]

While mines can provide essential products, they can also create significant adverse impacts such as noise, dust, heavy truck traffic and visual impacts. Mines resulted in the loss of over 2,000 acres of wetlands in New York from the mid-1980s to the mid-1990s.[4] With so much mining activity occurring in so many different locations, it is not surprising that conflicts often arise between would-be miners and the communities in which they seek to locate their mines.

New York State law limits the extent to which municipalities may restrict or regulate mining operations proposed to be undertaken within their borders. Although municipalities may not directly regulate most mining operations and/or reclamation of mine sites, they do retain a significant measure of authority to exclude mines or control the location of mining through the enactment of local laws and ordinances, such as zoning ordinances, that incidentally affect mining projects. This article explores the extent of permissible local regulation of mining in New York.

I. Overview of New York State Law and Major Court Rulings

New York's Mined Land Reclamation Law (MLRL), Environmental Conservation Law (ECL) Article 23, Title 27, governs virtually all extractive mining activity in the state, including hard rock quarries, sand and gravel pits, and topsoil stripping operations.[5] The MLRL and its implementing regulations[6] establish detailed rules governing the operation of mines throughout the state. These rules are meant to be the sole source of law governing the operation and reclamation of mines, and are specifically intended to supersede all other state and local laws directly regulating mining activity.[7]

Not all laws impacting mines have been preempted by the MLRL, however. Each provision of each state or local law affecting mines must be individually evaluated to determine whether it remains valid and enforceable despite the MLRL's preemptive language. Practically speaking, most zoning provisions that affect mining are not preempted, and may be fully enforced by municipalities. Many others may be only partially preempted.

In 1987, the Court of Appeals ruled in *Frew Run Gravel Products, Inc. v. Town of Carroll*[8] that the MLRL does not supersede other laws that may have an incidental effect upon mining, such as zoning ordinances, if they have purposes other than the regulation of mining. This is so even if the "incidental" effect blocks the opening of a proposed mine.

In *Frew Run*, the prospective mine operator sought to locate its mine in a zoning district in which gravel mining operations were prohibited. The applicant argued that the preemptive language of the MLRL prohibited the municipality from applying its zoning ordinance in such a manner as to prevent the development of the proposed mine. The Court of Appeals disagreed, holding that because the zoning ordinance sought to regulate land use generally, and was not established specifically to regulate mining, it was not preempted by the MLRL.[9] In arriving at this decision, the Court appeared to be reluctant to construe the MLRL as overriding the traditional land use controls which are the province of municipalities.[10]

In 1991, the Legislature codified the *Frew Run* decision in amendments to the MLRL (the "1991 Amendments").[11] The 1991 Amendments provided in part that the supersession clause of ECL § 23-2703(2) does not prevent local governments from:

a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or

b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts . . .; or

c. enacting or enforcing local laws or ordinances regulating mining or the reclamation of mines not required to be permitted by the state.[12]

In 1993, following the adoption of the 1991 Amendments, the Court of Appeals reaffirmed the *Frew Run* holding in the case of *Hunt Brothers, Inc. v. Glennon*.[13] In *Hunt Brothers*, the Court ruled that the MLRL did not supercede the Adirondack Park Agency's land use planning powers under the Adirondack Park Agency Act.[14] Declining to broaden the scope of the MLRL's

supersession clause, the Court held that "only those laws that deal 'with the actual operation and process of mining' are superceded."[15]

Accordingly, despite the fact that the MLRL's preemption clause appears to give DEC the exclusive power to regulate the operation of mines,[16] municipalities retain broad authority to enact zoning ordinances and other land use controls which regulate the location and certain off-site impacts of mines, including prohibiting mining entirely, either within designated zoning districts, or throughout the entire municipality. The extent and limitations of this authority are examined in greater detail below.

II. Zoning Ordinances Governing the Location of Mining Activity

A. Permissible Regulation

1. Prohibition Within Zones

It is permissible for municipalities to dictate the location of mines by prohibiting mining activity in certain zones and allowing it in others.[17] For instance, mines may be banned in all zones except industrial zones or special resource extraction zones. Alternatively, they may be allowed in most zones, but expressly prohibited in residential or business zones.[18] So long as the ordinance can be construed as a valid effort to control land use, rather than an attempt to control particular mining activities and procedures, the MLRL's preemptive provision has no impact on the local ordinance.

The *Frew Run* decision, described above, was the first case to definitively affirm municipalities' right to use their zoning authority to dictate in which zones mines will be permitted or prohibited within their borders. The Legislature's codification of this holding in the 1991 Amendments removed any lingering doubt as to municipalities' authority in this regard.

A number of cases have revisited the issue and reaffirmed this authority. In *Preble Aggregate, Inc. v. Town of Preble*,[19] for example, the Appellate Division, Third Department, upheld a local law which prohibited all mining in a particular zone:

> A municipality retains general authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of the mining activities or reclamation process. Control over permissible uses in a particular zoning area is merely incidental to a municipality's right to regulate land use within its boundaries.[20]

If the rezoning is an otherwise valid exercise of the municipality's lawful authority to govern land use within its borders, a zoning change which eliminates mining from certain districts is not preempted by the MLRL.[21]

2. Town-wide Prohibition

Frew Run made it clear that municipalities have the authority to create zoning ordinances of general applicability that have an incidental effect on mining. However, the question still remained whether this authority to control land use within specified zones would be extended to permit municipalities to ban mining from within their borders altogether.

In 1992, the Fourth Department addressed this issue in the case of *Valley Realty Development Co. v. Town of Tully*.[22] In that case, the town rezoned the sole district which had permitted mining, effectively eliminating mining activity from its borders completely. The Fourth Department upheld the rezoning because it found a substantial relationship between the elimination of the sole mining district in the town and the municipality's valid interest in protecting the public health, safety and general welfare.[23]

Four years later, in 1996, the Court of Appeals confirmed the Fourth Department's holding in *Valley Realty*. In *Gernatt Asphalt Products v. Town of Sardinia*, the prospective mine operator applied for a permit to conduct mining operations on a new 400-acre site. Concerned about the impact that this newest mine would have on the community, the town of Sardinia amended its existing zoning ordinance and eliminated mining as a permitted use throughout the town. The Court determined that neither the MLRL, the 1991 Amendments, the legislative history of those 1991 Amendments, nor the Court's decision in *Frew Run*, limited a municipality's power to govern land use, even if that meant eliminating mining from within its borders entirely.[24]

The *Gernatt* court found that municipalities are not obligated to permit the exploitation of all of their natural resources. So long as the exclusion is reasonable and is designed to protect the rights of residents and to promote the interests of the community as a whole, the rezoning will be upheld. There is nothing improper, according to the *Gernatt* decision, about a municipality's exclusion of industrial uses such as mining from its borders.[25]

3. Conditional Zoning

A municipality may also establish a zoning ordinance which restricts mining activity solely to certain zones under one or more forms of conditional zoning.[26] For example, a zoning ordinance may allow mines in only certain zones and only by special use permit or site plan review.[27]

In *Town of Throop v. Leema Gravel Beds, Inc.*,[28] for example, the town brought suit to enjoin a mining operation that was being conducted in contravention of local laws which required the operator to obtain a zoning permit, as well as to undergo site plan review and approval. The operator argued that such conditional zoning provisions were preempted by the MLRL. The Appellate Division, Fourth Department, decided in the town's favor, finding that the local laws at issue were "'addressed to subject matter other than extractive mining and . . . affect the extractive mining industry only in incidental ways,'" and were therefore not preempted.[29]

A municipality may also enact ordinances requiring that mines meet certain specific criteria that apply generally to all land uses in that particular zone, such as compatibility with surrounding land uses or limitations on impacts to the environment.[30] The ability of a local planning board or zoning board of appeals to deny permits to mines based upon these special criteria varies, depending upon the type of permit involved and the particular provisions of the zoning ordinance.

For example, in *Schadow v. Wilson*, the zoning ordinance at issue provided that a special use permit could be granted only upon a finding that a proposed land use was, *inter alia*, in harmony with the appropriate development of the adjacent neighborhood and served the public convenience and welfare.[31] Because these criteria were of general applicability, and were not intended to only regulate the operation of extractive mining activities within the town, the Court held that they were not superseded by the MLRL, and could provide the basis for a denial of a permit for a mine.[32]

From the decision in *Schadow* it is apparent that issues such as traffic, pedestrian safety and a mine's potential effects upon property values may provide the factual basis for a municipality's denial of a permit.[33] Similarly, an "undue adverse impact" upon other resources can be grounds for a denial,[34] as can a determination that the proposed mine will have "a significant adverse effect upon the environment."[35]

It is also permissible for a municipality to have specific regulations affecting the location of mines, such as those prohibiting mines within 500 feet of churches or residences, so long as they do not regulate the operation of a properly sited mine.[36] If the grounds for granting or denying a special use permit are generally applicable to all permit applications, and are not specific to mines and mining related activities, local governments are expressly permitted by ECL § 23-2703(2)(b) to require applicants to obtain such a permit.[37]

Once a municipality decides to issue a special use permit for a mine, the MLRL restricts the conditions that can be placed on such a permit to the following:

1. ingress and egress to public thoroughfares controlled by the local government;
2. routing of mineral transport vehicles on roads controlled by the local government;
3. requirements and conditions as specified in the permit issued by [DEC] under [the MLRL] concerning setback from property boundaries and public thoroughfare rights-of-way natural or man-made barriers to restrict access, if required, dust control and hours of operation, when such requirements and conditions are established pursuant to [the MLRL]; and
4. enforcement of reclamation requirements contained in mined land reclamation permits issued by the state.[38]

However, under *Schadow*, these limitations do not apply when a municipality decides to deny the permit outright, as long as the considerations used in denying the permit are not unique to mining activity.[39]

Presumably, in certain circumstances, limitations on mining operations outside of the four listed in ECL § 23-2703(2)(b) can also be enforced in certain cases after a special permit has been approved. If the permit application included certain operating parameters upon which the municipality relied in issuing its approval, such as the volume of materials to be extracted or the hours of operation, the municipality should be able to require that the mine be operated in conformance with those promised parameters, even if they are outside of the limits of ECL § 23-2703(2)(b). While this notion has not as yet been tested in the appellate courts, the applicant should not be permitted to have it both ways and violate the very promises that led to the granting of the permit.

Ironically, the limitations of ECL § 23-2703(2)(b) could lead a municipality to deny a permit application where it otherwise might have granted the permit with conditions. For example, a local board may conclude that a mining project could be made acceptable under the criteria of the zoning ordinance by attaching what would ordinarily be deemed to be appropriate permit conditions on non-mining permits in order to mitigate the potential adverse impacts. However, if such conditions are not among those permitted by the MLRL at ECL § 23-2703(2)(b), and the applicant will not voluntarily agree to modify the project, the municipality may have no choice but to deny the application, if the mine, as proposed, violates the local ordinance.

It should be noted that the limitation on permit conditions set forth in ECL § 23-2703(2)(b) applies expressly only to special use permits, and not to site plan reviews.[40] It remains to be seen whether the courts will extend this limitation to site plan reviews, or

whether municipalities whose zoning ordinances provide for site plan reviews instead of special use permits may attach a wider variety of conditions to permits.[41]

4. Specific Land Use Restrictions

Mining projects can also permissibly be affected by any type of non-zoning ordinance that governs land use generally and only indirectly impacts mining. In the case of *Seaboard Contracting v. Town of Smithtown*, for example, the Appellate Division, Second Department, upheld a "Tree Preservation and Land Clearing Law" that restricted the clearcutting of trees in order to prevent erosion and to provide cover for wildlife because it applied equally to all landowners within the community, despite the fact that it had the incidental effect of prohibiting mining activity.[42] Similarly, in *Patterson Materials Corp. v. Town of Pawling*, the Second Department upheld a number of local laws regulating timber harvesting and restricting construction-related activities on steep slopes, wetlands and other environmentally sensitive areas, declaring them to be "of general applicability that, at best, would have an incidental burden upon mining."[43]

The MLRL also does not preempt enforcement of a local code requiring a building permit for a structure located at a mine, if the structure is not regulated by DEC as part of the mining plan.[44]

B. Impermissible Regulation

Under no circumstances may a municipality regulate the actual operation of a mine which is subject to the MLRL, such as the steepness of the mine slopes or the depth of excavation.[45] The supersession clause of the MLRL[46] sweeps aside all such regulation by all entities, both state and local, other than DEC.[47]

Several cases have examined the extent and limitations of municipalities' authority to regulate mining operations. In *Philipstown Industrial Park, Inc. v. Town Board of the Town of Philipstown*,[48] for example, the town enacted a local law designed to require a special use permit for activities designated as "soil extraction operations,"[49] including grading, removal of sand and other materials, and most other types of excavations. The Appellate Division, Second Department, declared the local law to be preempted by the MLRL because the specific criteria to be used in evaluating whether a special permit should be granted, including requiring screening and prevention of sharp declivities, pits and depressions, were within the exclusive purview of the MLRL. The court held that: "While a locality retains general authority to regulate land use, and has the authority to determine that mining will not be a use within its confines, it may not regulate the specifics of the extractive mining or reclamation process."[50]

In a number of other cases, the courts have prohibited municipalities from imposing requirements related to setbacks, dust control and suppression, screening, blasting activities or hours of operation.[51] For example, in *Town of Odgen v. Manitou Sand and Gravel Co., Inc.*, a local prohibition on using blasting as a method of mining within the town was rejected.[52]

The courts have also rejected limitations on the term of the mine's operations to a period of years less than that provided for in the mine's MLRL permit.[53] Since this type of restriction is specifically targeted at regulating the operation of mines, as opposed to just restricting the geographical location of mines within the municipality, it is considered to be preempted by the MLRL and is therefore unenforceable.[54]

III. Other Methods of Exerting Control Over Mining Activity

A. State Environmental Quality Review Act (SEQRA)

The State Environmental Quality Review Act (SEQRA)[55] provides an additional source of municipal authority to deny an application or impose conditions upon mines that are subject to discretionary local permit review. Since SEQRA is a state law of general applicability, and is not a law relating exclusively to the extractive mining industry, it is not preempted by the MLRL.[56] The suggestion that it should be preempted was expressly rejected by the Appellate Division, Third Department, in *Sour Mountain Realty, Inc. v. New York State Department of Environmental Conservation*.[57] In that case, the court ruled that "SEQRA, like a local zoning ordinance, is a law of general applicability and does not regulate actual mining operations, activities or processing and, as such, does not frustrate the MLRL's purposes or conflict with its provisions and is not preempted."[58]

DEC generally assumes lead agency status for SEQRA reviews of proposed mines. If the municipality has no local ordinance giving it jurisdiction over the mine, it may nevertheless take the opportunity to voice its concerns about the proposed project during the comment period on the draft environmental impact statement (EIS).[59] Involved agencies other than the lead agency may also submit comments.[60] The lead agency must respond to all comments made on the EIS, in writing.[61] Submitting comments on the EIS, therefore, is a way for the municipality to bring its concerns to the attention of the lead agency and the applicant, and see that specific responses to those concerns will be issued by the lead agency.

If the municipality has a non-superseded local ordinance requiring a permit for any aspect of the mine, then it will be an involved agency under SEQRA.[62] Upon completion of the SEQRA process, each involved

agency must make findings regarding the mine's potential environmental impacts.[63] These findings may provide a basis to condition or deny an application.[64]

SEQRA requires that before approving a project such as a proposed mine, agencies, including municipalities, shall impose as permit conditions those mitigation measures deemed necessary to minimize or avoid any adverse environmental impacts identified in the draft EIS to the "maximum extent practicable."[65] This requirement applies to all "involved agencies" as well as the "lead agency."[66] These conditions need not necessarily relate to the issues or criteria which gave rise to the agency's jurisdiction over review of the proposed project in the first place.[67] Thus, municipalities may use SEQRA as a basis to impose permit conditions on a mine, even where the local ordinance in question may not expressly cover a certain issue.

SEQRA also provides a basis for the denial of a zoning application for a proposed mine, if there will be significant unmitigatable adverse impacts, such as visual impacts.[68] In *Lane Construction Corp. v. Cahill*, for example, the Third Department upheld a DEC Deputy Commissioner's decision to deny a mining permit based on his conclusion "that the project's impacts on the historical and scenic character of the community including visual and other impacts on the community cannot be sufficiently mitigated."[69] The Deputy Commissioner's decision to deny the permit on SEQRA grounds was upheld despite the absence of specific DEC regulations governing visual impacts of mines, with the court holding that SEQRA alone provided adequate authority for the denial.[70] This broad interpretation of the scope of the authority granted by SEQRA should apply to municipalities, as well as to DEC.

B. Participation in the DEC Permitting Process

ECL § 23-2711(3) gives municipalities another avenue to provide input on mining project applications that are under review by DEC. This section of the MLRL requires DEC to notify the "chief administrative officer" of the local government in which a proposed mine is to be located that an MLRL permit application for the mine has been submitted.[71] The municipality may suggest additional limitations on the project that DEC may incorporate into its MLRL permit.[72] If DEC does not agree that these conditions are justifiable, it must provide a written explanation of the reason for its refusal to incorporate them into the permit. The municipality may also participate in any DEC legislative hearing that is held under 6 N.Y.C.R.R. Part 624, or may intervene as a party in the Part 624 adjudicatory hearing, if one is held.

A local zoning ordinance which prohibits or restricts mining will not affect DEC's permit processing procedures. ECL § 23-2711(2) requires that an application for a mining permit include "a statement by the applicant that mining is not prohibited at that location."[73] However, so long as the applicant does not expressly acknowledge that mining is prohibited at the proposed location, DEC will not look any further into the issue of whether or not a mine will comport with local laws.

Even if the municipality does prohibit mining at the proposed location, either at the time of the application or by a zoning amendment adopted during the pendency of the application, DEC must continue to process the mining permit application as though the mine were a permitted use. The courts have expressly stated that DEC is obligated to continue processing an application without regard to the existence of local zoning, or its effect on the site.[74] Neither a municipality's zoning ordinance, nor its land use master plan, are grounds to suspend DEC's processing of an application.[75] Likewise, DEC is under no independent obligation to evaluate the applicability of the local zoning ordinance in determining whether to deem the application complete.[76]

C. Local Enforcement of the MLRL

Municipalities can enforce the provisions of a DEC-issued MLRL permit in court, and can also redress violations of the conditions of a local permit through their zoning enforcement procedures. ECL § 71-1311(2) contains a citizen suit provision for enforcement of the MLRL by municipalities and private persons. This provision provides that if DEC, acting by the Attorney General, fails to bring suit to enjoin a violation or threatened violation of "any provision of article 23, . . . any person who is or will be adversely affected by such violation" may bring a citizen's suit in any court of competent jurisdiction to restrain the violation.[77] Such relief is available to municipalities as well as to private individuals.[78]

In addition, as discussed above, municipalities are expressly authorized to attach conditions to special use permits that they issue to mines to enforce certain operating and reclamation requirements contained in MLRL permits issued by the state.[79] A municipality can enforce those conditions through its zoning enforcement procedures independent of the citizen suit provision of the ECL.

D. Small Mines

Very small mines are not within the scope of the MLRL. Mines involving the extraction of 1,000 tons of material per year or less do not need a permit from DEC, and are not regulated by DEC.[80] Therefore, the preemption language of the MLRL does not apply to these mines and municipalities are free to impose their own rules and regulations on their siting and operation, or ban them entirely.[81]

IV. Effect of a DEC Permit on a Municipality's Zoning Authority

It is within a municipality's authority to deny an application for a special use permit or other necessary local permit despite the fact that the applicant has already obtained a permit from DEC. The courts have repeatedly held that simply having obtained a MLRL permit from DEC does not exempt the mining applicant from obtaining all necessary permits from the municipality, nor does the issuance of a permit by DEC mean that the municipality is required to approve the project.[82] A municipality, therefore, is free to make its own findings and determinations about a proposed mine and whether the requisite local permits should be issued, regardless of whether or not the applicant has obtained a permit from DEC.

As is discussed further at VI., below, the existence of a MLRL permit or permit application does not confer on the applicant any vested rights, either in the project or the current zoning designation governing its property, that would oblige the municipality to issue the necessary approvals. Therefore, municipalities must exercise their own jurisdiction regarding proposed mining projects, and need not accede to an applicant's demand that it be given local approvals simply because it has acquired an MLRL permit from DEC.

V. Regulation of Expansion of Pre-existing Mines

Mines which are pre-existing nonconforming uses, and which have not been abandoned, are generally considered to be "grandfathered" under local ordinances and can permissibly expand to their logical limit on the owner's property without being affected by subsequent changes in local zoning ordinances.[83] However, if a municipality does change its zoning ordinance to restrict or eliminate mining activity within its borders, the burden rests on the mining applicant to show that it qualifies as a pre-existing, grandfathered use.[84]

The limits of grandfathered approval are to be determined on a case-by-case basis. Changes in the volume of mining, hours of operation, or types of equipment used are generally considered to be grandfathered.[85] However, adding new uses to a mine, such as manufacturing asphalt or mixing cement, might be considered to be changes in use and may not be included, depending upon the terms of the applicable local ordinance. A change from sand and gravel mining to hard rock mining, for example, might also be a change in use, requiring a new permit.[86]

VI. Rezoning: Takings and Vested Rights Claims

Municipalities are frequently faced with claims that a local ordinance permitting mining may not be amended to prohibit mining or more stringently control its location because an applicant has a right to mine its property. Frequently, such arguments are couched as either a claimed vested right in the zoning as it existed at the time that the applicant purchased its property, or else that the rezoning constitutes an unconstitutional taking of the applicant's property. However, so long as the municipality's rezoning efforts were procedurally proper, and there remains another economically viable use of the property, such arguments are not likely to succeed.

Vested rights are only acquired once substantial construction has been undertaken and the property owner has made substantial expenditures on the project pursuant to a lawful permit.[87] In *Preble Aggregate* the Appellate Division, Third Department, addressed the issue of whether applicants have a vested right in zoning that permits mining activity. In that case, more than a year after the applicant had filed its application for a MLRL permit with DEC, the town adopted a local law prohibiting all mining in the area of a proposed mine. By that time, the applicant had expended over $240,000 in furtherance of its permit application, expenditures which were made in reliance on the old zoning code which permitted mining on the property.

Nevertheless, the Court rejected the applicant's argument that it had a vested right to mine, finding that it had willingly proceeded with its permitting efforts despite the town's objections thereto and that it:

> failed to show that it had effected substantial changes and incurred substantial expenses to further development pursuant to a legally issued permit, or that its activities in furtherance of its pursuit of the required permits—notwithstanding the existence of the Local Law—were such that enforcement of the amended law would be inequitable (citations omitted).[88]

Therefore, *Preble Aggregate* confirms that applicants are not entitled to continuance of the zoning that previously existed, even at the time that they initiated the MLRL application process. Within limits, municipalities are free to amend their zoning ordinances long after a new mine has been proposed.

In the recent case of *Briarcliff Associates, Inc. v. Town of Cortlandt*,[89] the Appellate Division, Second Department, held that the applicant did not have a valid constitutional takings claim against a municipality for rezoning its property to prohibit mining thereon. Briarcliff Associates purchased a small emery mine with the intention of converting the parcel into a large crushed stone quarry. Some three years later, the town rezoned the parcel to a residential designation which prohibited

mining, and also excluded heavy trucks on the single town road leading to the property. The Second Department concluded that this was not a taking of the applicant's property interest because the land still had some economically viable potential for use as a residential development. This was so despite the fact that the applicant was prohibited from using the parcel for what it considered to be its most economically productive use, aggregate mining.[90]

Therefore, a municipality is well within its authority to rezone a piece of property or deny a necessary permit or approval, even if the prospective operator is pursuing a mining permit pursuant to the zoning currently in effect, or has already obtained a mining permit from DEC, so long as the actual construction of the project has not proceeded so far as to create vested rights, and so long as another economically viable use of the property remains.

VII. Conclusion

There are many actions which a municipality can permissibly take in order to minimize what may be regarded as the adverse impacts of unrestricted mining within its borders. While the MLRL preempts a municipality from regulating the technical aspects of the operation of a mine, the Court of Appeals and lower courts have unquestionably upheld the traditional powers of municipalities to determine appropriate land uses within their borders through the enactment of zoning ordinances. Even to the extent of a complete ban on all mining within their borders, municipalities are free to enact, apply and enforce zoning ordinances which restrict the location of mining activity, or which reserve to the municipality discretionary authority to review and evaluate impacts of mining activity within particular districts. Municipalities may also employ SEQRA and additional local ordinances for similar purposes. Moreover, opportunities exist for municipalities to participate directly in the MLRL permitting process in order to ensure that their concerns are taken into account by DEC.

Endnotes

1. N.Y.S. DEC Division of Mineral Resources, Statewide Mined Land Reclamation Summary Report, May 25, 2001.
2. Gregory H. Sovas, *Sustainable Development and Mining: Perspectives on New York's Mined Land Reclamation Law*, Albany Law Environmental Outlook, Vol. 4, Issue 3, Spring 1999, p. 1.
3. www.dec.state.ny.us/website/dmn.
4. Huffman & Associates, Inc., *Wetlands Status and Trend Analysis of New York State, Mid-1980's to Mid 1990's,*" prepared for N.Y.S. DEC, June 2000, pp. 12-13.
5. *See* ECL §§ 23-2701 *et seq*.
6. 6 N.Y.C.R.R. Parts 420-425.
7. ECL § 23-2703(2). DEC is the agency charged with regulating mining operations pursuant to the MLRL. ECL § 23-2709.
8. 71 N.Y.2d 126 (1987).
9. *Id.* at 131.
10. *Id.* at 133-34.
11. Laws of 1991, Ch. 166, § 228. This was part of a 250-page budget bill with 406 sections, only 11 of which related to mining. It appears that the mining industry agreed to certain amendments to the legislation, as a trade-off for higher mining program fees payable to DEC, which were also contained in the bill.
12. ECL § 23-2703(2). In a letter to Governor Cuomo dated June 7, 1991 that urged approval of the amendments, the principal lobbying group for New York's mining industry, the Empire State Concrete and Aggregate Producers Association, Inc. (ESCAPA), while conceding that municipalities retained the power to zone property, asserted that the 1991 Amendments preempted "all other types of zoning controls which go beyond merely designating permissible uses . . . such as floating zones and aquifer and mining overlay districts . . . as do other typical special use provisions, such as consideration of neighborhood character . . ." and that ". . . site plan review would also be superceded." ESCAPA letter to Hon. Mario M. Cuomo, June 7, 1991, pp. 5-6. These predictions did not hold up in subsequent court decisions.
13. 81 N.Y.2d 906 (1993).
14. Executive Law §§ 800-820.
15. *Hunt Brothers*, *supra* at 909, *quoting Frew Run*, *supra*, at 133.
16. *See* ECL §§ 23-2703(2), 23-2709; ESCAPA letter, *supra*.
17. ECL § 23-2703(2)(b); *Frew Run*, *supra*.
18. The Court of Appeals has recognized that a municipality may properly protect residential areas from the impacts of mining. *See Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668 (1996).
19. 263 A.D.2d 849 (3d Dep't 1999), *app. den.*, 94 N.Y.2d 760 (2000).
20. *Id.* at 850. *See also Patterson Materials Corp. v. Town of Pawling*, 264 A.D.2d 510 (2d Dep't 1999), *app. den.*, 95 N.Y.2d 754 (2000) (local laws which removed mining from the list of approved uses in residential districts upheld); *Village of Savona v. Knight Settlement Sand and Gravel, Inc.*, 88 N.Y.2d 897 (1996); *Hunt Brothers*, *supra*.
21. The enactment of a moratorium while a municipality considers changes to its zoning law is a valid exercise of a municipality's power, provided its restrictions are reasonable and are related to the public health, safety, or general welfare of the community. *See Cellular Telephone Co. v. Village of Tarrytown*, 209 A.D.2d 57 (2d Dep't 1995), *app. den.*, 86 N.Y.2d 701 (1995); *Dune Associates, Inc. v. Anderson*, 119 A.D.2d 574 (2d Dep't 1986). Therefore, a moratorium enacted in contemplation of changes which would affect the location of mining activity should not be preempted.
22. 187 A.D.2d 963 (4th Dep't 1992), *lv. den.*, 81 N.Y.2d 880 (1993).
23. *Id.* at 964.
24. *Gernatt*, *supra*, at 682-683.
25. *Id.*; *See Village of Savona*, *supra*. *See also Town of Washington v. Dutchess Quarry & Supply Co., Inc.*, 250 A.D.2d 759 (1998), *app. den.*, 93 N.Y.2d 810 (1999) (zoning ordinance which prohibited mining in all zones except small scale mining (less than 1,000 tons or 750 cubic yards per year) in agricultural districts upheld because it banned all large-scale commercial mining evenly throughout the town and was consistent with the town's comprehensive plan); *Vineyard Estates, Inc. v. Town of Lloyd*, No. 55-96-02110 (Sup. Ct., Ulster Co. 1997).
26. *Gernatt*, *supra*. *See also Hunt Brothers*, *supra*, at 909 (under the Adirondack Park Agency Act, Executive Law Article 27, there are no as-of-right uses in any land use area but the Court of

Appeals found that the Act was not preempted); *Town of Washington*, *supra*; *Schadow v. Wilson*, 191 A.D.2d 53 (3d Dep't 1993).

27. *Town of Riverhead v. T.S. Haulers, Inc.*, 275 A.D.2d 774 (2d Dep't 2000) (applicant must abide by local zoning regulations requiring special use permit for mining, despite the fact that DEC permit had already been issued); *Frew Run*, *supra*, at 130 (ordinance provided no zones in which mines were allowed as-of-right).
28. 249 A.D.2d 970 (4th Dep't 1998).
29. *Id.* at 971, quoting *Hunt Brothers*, *supra*, at 909. *See also Town of Ogden v. Manitou Sand & Gravel Co., Inc.*, 252 A.D.2d 964 (4th Dep't 1998), *app. den.*, 92 N.Y.2d 819 (1999); (zoning ordinance requiring a special exception permit from the town was not preempted by the MLRL, despite the fact that the special exception permit requirement stemmed from the rezoning of the property from a district in which mining was permitted as-of-right to one in which mining was prohibited without a special exception permit after the mine was first proposed.)
30. *Hunt Brothers, supra*, at 909; *Schadow, supra*, at 57.
31. *Schadow*, *supra*, at 56-58.
32. *Id.* at 57-58.
33. *Id.* at 56-58. *See also Cipperley v. Town of East Greenbush*, 262 A.D.2d 764, 765 (3d Dep't 1999); *A&G Associates v. Town of Colesville Planning Board*, N.Y.L.J., March 24, 1999, p. 33 (Sup. Ct., Broome Co. 1999); ECL § 23-2703(2).
34. *See Hunt Brothers*, *supra*, at 909 (Adirondack Park Agency Act held not superseded; Act requires all land uses to have no "undue adverse impact." Executive Law § 809(10)(e)).
35. *Seaboard Contracting & Material, Inc. v. Town of Smithtown*, 147 A.D.2d 4, 6 (2d Dep't 1989), *app. den.*, 75 N.Y.2d 707 (1990).
36. *Id.* at 6-7.
37. *See Hunt Brothers*, *supra*; *Schadow*, *supra*.
38. ECL § 23-2703(2)(b). In a case that pre-dated the 1991 Amendments, one court ruled that the town's specifications concerning hours of operation affected the operation of the mine and held that the condition was preempted by the MLRL. *Charlton Suburban Services, Ltd. v. Town of Glenville*, 142 Misc. 2d 313 (Sup Ct., Schenectady Co. 1988).
39. *Schadow*, *supra*. *See also Charlton Suburban Services*, *supra*.
40. The authority to issue special use permits is given by Town Law § 274-b while site plan review is authorized by Town Law § 274-a.
41. In upholding the denial of a special use permit, the Appellate Division, Third Department, stated in *dicta* in *Schadow*, *supra*, at 56, that the limitations were applicable only to special use permits.
42. *Seaboard Contracting, supra*, at 8.
43. *Patterson Materials, supra*, at 512.
44. *Town of Parishville v. Contore Company, Inc.*, 237 A.D.2d 67 (3d Dep't 1998) (requiring building permits for shack and truck scales at mine). *See also Town of Cortlandt v. Santucci*, 163 Misc. 2d 483, 495 (Sup. Ct., Westchester Co. 1994).
45. *Hoffay v. Tifft*, 164 A.D.2d 94 (3d Dep't 1990) (local ordinance impermissibly delineated mine truck routes and specified hours of operation and use of particular equipment); *Hawkins v. Town of Preble*, 145 A.D.2d 775, 776 (3d Dep't 1988) (zoning ordinance prohibiting mining below the water table is an "express limitation of the mining process" and is superseded by the MLRL). *See also Northeast Mines v. New York State Department of Environmental Conservation*, 113 A.D.2d 62 (3d Dep't 1985) (zoning ordinance regulating the depth of excavation is superseded by the MLRL).
46. ECL § 23-2703(2).
47. *See Hunt Brothers, supra*.
48. 247 A.D.2d 525 (2d Dep't 1998).
49. *Id.* at 525.
50. *Id.* at 527.
51. *See Philipstown Industrial Park*, *supra*; *Briarcliff Associates, Inc. v. Town of Cortlandt*, 144 A.D.2d 457 (2d Dep't 1988), *app. den.*, 74 N.Y.2d 611 (1989); *Hawkins*, *supra*; *Northeast Mines*, *supra*.
52. *Town of Ogden*, *supra*.
53. *See Town of Ogden*, *supra*; *Gernatt*, *supra*.
54. *See Briarcliff Associates*, *supra*.
55. ECL Article 8; 6 N.Y.C.R.R. Part 617.
56. *See Hunt Brothers, supra*, at 909.
57. 260 A.D.2d 920 (3d Dep't 1999), *app. den.*, 93 N.Y.2d 815 (1999).
58. *Id.* at 923 (citations omitted).
59. 6 N.Y.C.R.R. § 617.9(a).
60. 6 N.Y.C.R.R. § 617.3(e).
61. 6 N.Y.C.R.R. § 617.9(b)(8).
62. 6 N.Y.C.R.R. § 617.2(s).
63. 6 N.Y.C.R.R. § 617.3(e).
64. *Lane Construction Corp. v. Cahill*, 270 A.D.2d 609 (3d Dep't 2000), *app. den.*, 95 N.Y.2d 765 (2000); *Wal-Mart Stores v. Planning Board of North Elba*, 238 A.D.2d 93 (3d Dep't 1998); *Town of Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215 (2d Dep't 1980).
65. ECL § 8-0109(8).
66. 6 N.Y.C.R.R. § 617.3(e).
67. *Lane Construction, supra; Town of Henrietta, supra*; 6 N.Y.C.R.R. § 617.3(b).
68. *See Lane Construction, supra; Wal-Mart, supra.*
69. *Lane Construction, supra*, at 610.
70. *Id*. The Deputy Commissioner's denial was also based, in part, on a finding that the project's potential noise impacts would violate SEQRA. *In re Lane Construction Company*, N.Y.S. DEC, Decision of the Deputy Commissioner, June 26, 1998.
71. ECL § 23-2711(3).
72. *Id*.
73. ECL § 23-2711(2). *See Valley Realty Development Co. v. Jorling*, 217 A.D.2d 349 (4th Dep't 1995) (holding that DEC must continue the permit process and declare the permit application complete even though mining is prohibited by local ordinance).
74. *Valley Realty*, *supra*.
75. *See In re Application of Lane Construction Co.*, N.Y.S. DEC Interim Decision of the Commissioner, November 27, 1995.
76. There is a statutory exception for mining in Nassau and Suffolk Counties which prohibits DEC from processing an application for a mining permit within counties with populations of one million or more which draw their primary drinking water from a designated sole source aquifer if a local law prohibits mining. ECL § 23-2703(3).
77. ECL § 71-1311(2); *Stephentown Concerned Citizens v. Herrick*, 223 A.D.2d 862 (3d Dep't 1996).
78. *See Town of Cortlandt, supra.*
79. ECL §§ 23-2703(2)(b)(iii), (iv).
80. ECL § 23-2711(1).

81. ECL § 23-2703(2)(c). *See Town of Washington*, *supra*.

82. *See Town of Riverhead*, *supra* (town authorized to permanently enjoin defendant from operating mine despite the fact that DEC mining permit had been issued); *Voorheesville Sand & Stone Co., Inc. v. Town of New Scotland*, 136 A.D.2d 849 (3d Dep't 1988) (town was within its authority to require a special use permit notwithstanding the fact that the applicant already had a DEC permit); *Town of Throop*, *supra* (town's authority to issue a stop work order against a mining operating under a MLRL permit, and to obtain a preliminary injunction to enjoin further mining in violation of provisions of the local laws, upheld). *See also Frew Run*, *supra*; *Town of Washington*, *supra*; *Town of Parishville*, *supra*.

83. *Hoffay*, *supra*. *See also Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278 (1980).

84. *Skenesborough Stone, Inc. v. Village of Whitehall*, 272 A.D.2d 674 (3d Dep't 2000), *app. dism'd*, 95 N.Y.2d 902 (2000).

85. *Id*.

86. *Town of Cortlandt*, *supra*; *Hunt Brothers*, *supra*.

87. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996); *Ellington Constr. Corp. v. Zoning Bd. of Appeals of the Incorporated Village of New Hempstead*, 77 N.Y.2d 114 (1990); *Natchev v. Klein*, 41 N.Y.2d 833 (1977); *Pokoik v. Silsdorf*, 40 N.Y.2d 769, 773 (1976).

88. *Preble Aggregate*, *supra*, at 851.

89. 272 A.D.2d 488 (2d Dep't 2000), *app. dism'd*, 95 N.Y.2d 886 (2000), *app. den.*, 96 N.Y.2d 704 (2001).

90. *Id.* at 491-492. *See also Clearwater Holding, Inc. v. Town of Hempstead*, 237 A.D.2d 400 (2d Dep't 1997).

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Save the Date:

Friday, October 12, 2001

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

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

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

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

Program Chairs:

John Armentano, Esq.
Farrell Fritz

Mark Chertok, Esq.
Sive Paget and Riesel

Professor Philip Weinberg
St. John's Law School

The Amended Article X and New York's Competitive Market: An Overview

By Robert Panasci

I. Introduction

Will New York State's effort to deregulate the power-generating industry make New York more competitive in the market for companies to build new electric generating facilities? In the last decade, New York has tried to make it more attractive for companies to provide additional electricity in the state, but no plants have been built since the enactment of Article X, of the Public Service Law, in 1992. Recently, New York fine-tuned Article X with amendments. However, an issue that remains after the amendments is whether the new Article X will help or hinder New York's notion of free-market electricity.

This article will explore the status of New York's competitive market and discuss the possibility of its success. Article X and the previous decisions of the Public Service Commission (PSC) may have been a hindrance to competitiveness in New York, but there may be help. If the public, both residential and large electric consumers, understand the benefits the new facilities will provide and understand the concept of "green power," they may buy electricity from a facility that uses a more environmentally friendly fuel source.[1] This greater demand for "green power" may require the industry to increase the use of natural gas and phase out the use of coal as a fuel source. If outside companies, desiring to build a facility in the Northeast, see the change in New York, they may want to build in this state instead of a neighboring state.[2] This may make the state more competitive, therefore reducing the cost of electricity, but the environment may pay the steepest price.

The first part of this article will explore the methods New York used to implement its policy of deregulating the industry. The second part will discuss Article X and its recently enacted amendments. Next, this article will show the present industry with respect to the power that coal-burning facilities generate and the pollution they emit. The fourth part explains the Athens Generating Facility application and the possibility of its approval by the Siting Board. The fifth part discusses the concept of "green power" and the likelihood of New Yorkers embracing it. The article will conclude that New York should become more competitive in the electric generating industry, which may lower electricity costs in the years to come, however, the environmental costs will continue to climb if New York remains dormant towards this issue.

II. New York's Deregulation Process

New York's push towards deregulating electricity generation began after Article X was enacted.[3] The intent of restructuring the utility industry in New York was "premised on the expectation that a competitive market for the supply of electricity . . . [would] result in lower electricity prices for all classes of consumers."[4] PSC approved utility plans would give electric customers access to new energy suppliers known as energy service companies, or ESCOs. The plans allow the consumer to choose the electric generator but the delivery of electricity to homes and businesses will remain the job of the local utility and continue to be regulated by the PSC.[5]

The first principle, in the PSC's Opinion and Order, is to guide the transition from a regulated monopoly to a competitive market for the sale of electricity. The Opinion and Order asserts that "the economic and environmental well-being of New York State is of paramount concern . . . [and it] cannot be compromised to accommodate the others."[6] Incorporating the economy and the environment into one guiding principle is seen in both the New York Public Service Law and New York Energy Law. This requires the PSC to not only encourage economic development in New York but also to protect the environment.[7] PSC's Web site states that "[i]n a competitive market, electricity prices should be lower than they would be under government regulation. Competition should also produce innovation and new technologies that promote services."[8]

With the information regarding the deregulation process in New York, including the amendments of Article X, the question that still exists is whether companies will seek to build a new electric generating facility in New York. In a *New York Times* article, the director of an out-of-state company declared that, "[w]e are not going to jump into the New York market and lose money."[9] While it may be true that New York does not have the competition that other states enjoy, New York's system has laid the groundwork for more competition in the future.[10] PSC Chairwoman Helmer believes that when electric generating companies look at New York's electricity market in the next few years, they will see a different picture.[11] The answer to these problems may be answered when the Siting Board issues its final decision on the Athens Generating Facility.[12]

III. Article X

The original siting law was Article VIII, of the Public Service Law, enacted in 1972 to create a multi-agency state siting board that would consider all issues regarding the siting of power plants in a single forum. The intent of the legislation was to provide a quicker review for siting a new power plant by allowing all matters, including municipal law, to be conducted in one proceeding.[13] In 1978, Article VIII was amended to streamline the decision process and create certain deadlines that the board would have to follow. One of the deadlines required the board to make a final decision within two years.[14]

In 1992, the New York State Legislature enacted Article X of the Public Service Law, "Siting of Major Electric Generating Facilities."[15] It attempted to consolidate the approval process by "establishing the Siting Board as a one-stop approval body that convenes public hearings, gathers evidence and data, and makes decisions regarding proposals for new power plants."[16] Governor Mario Cuomo's administration recommended a new free-market system of power production that it hoped would help reduced New York State's electric rates.[17] The business community said that the electric rates make New York less economically competitive with other states competing for the investment of these companies in their state.[18]

In Governor Cuomo's State of the State in 1988, he stated that "[b]y examining the need for new generating facilities . . . the economics addressed through a competitive bidding system, [will allow] individual licensing proceedings to be substantially streamlined."[19] Cuomo envisioned that permits would be awarded to the facility that offered to produce electricity at the cheapest rate, but New York's Public Service Law does not contain that notion. In fact, the potential builder has the ability to bypass the requirement of public need if it meets certain standards.[20] The notion that the application process would be streamlined is an integral part of Article X, but whether New York has achieved a streamlined application process is open to debate.[21]

Before an electric generating company can build a facility in New York, it must comply with the requirements of Article X. Section 162 states that "no person shall commence the preparation of a site for, or begin the construction of a major electric generating facility [of 80 megawatts or more[22]] in the state without having first obtained" a certificate of environmental compatibility and public need.[23] Any application under Article X will be decided by the State Board of Electric Generation Siting and the Environment (hereinafter "Siting Board"). The Siting Board consists of four commissioners, one each from the New York State Departments of Public Service, Environmental Conservation, Health and Economic Development.[24] For each proposed facility, the Governor will add two more *ad hoc* members to the Siting Board after an application has been filed, one from the judicial district and the other from the county where the facility is proposed.[25]

In applying for a certificate, the applicant shall file an application with the Chairperson of the Siting Board. The application must include, *inter alia*, descriptions of the site and of the facility to be built, "including . . . present and proposed development, source and volume of water required for plant operation and cooling, and as appropriate, geological, aesthetic, ecological, tsunami, seismic, biological, water supply, population and load center data."[26] In addition, the Siting Board may prescribe a description and evaluation of the reasonable alternatives to the facility, and if these alternatives are not selected pursuant to an "approved procurement process," the applicant shall include a description and evaluation of reasonable energy supply source alternatives.[27] Facilities that are not approved for the procurement process must also include estimated cost information, such as fuel costs, plant service life and capacity factor, and total generating cost per kilowatt-hour.[28]

The applicant must produce evidence that will allow the Siting Board [now the Commissioner of Environmental Conservation after the amendment to Article X] to:

> evaluate the facility's pollution control systems and to reach a determination to issue there for, subject to appropriate conditions and limitations, permits pursuant to federal recognition of state authority in accordance with the Federal Clean Water Act, the Federal Clean Air Act, and the Federal Resource Conservation and Recovery Act.[29]

Initially, the Legislature intended that the Siting Board issue all permits that would be required for the facility to be built.[30]

Even though Article X delegates the authority to Siting Board to issue permits in accordance with federal law, it is questionable whether the federal government will allow the Siting Board to issue these permits. The United States Environmental Protection Agency (EPA) denied the Siting Board the authority or delegation to "implement a 'one stop' permitting process."[31] Jeanne M. Fox, the Regional Administrator of EPA, stated that "any certificate issued by the Siting Board . . . does not represent a permitting action under an authorized National Pollution Discharge Elimination System (NPDES) program."[32] The EPA suggested that the state could, if allowed under state law, transfer the authority to issue NPDES permits for these facilities back to the Department of Environmental Conservation (DEC).[33]

In response to EPA's determination, the New York State Legislature amended Article X during the 1999 session.[34] The purpose of the amendment was to permit the Commissioner of DEC to issue environmental permits in connection with the process of siting certain electric generating facilities."[35] As indicated by this letter, the EPA was unwilling to delegate or authorize the Siting Board the power to issue federal permits, which would make it impossible for a new electric generating facility to be sited in New York.[36] Section 164(f) of the amended Article X gives the Commissioner of DEC the power to issue these permits along with the Siting Board, which would allow the Siting Board to issue a valid certificate of environmental compatibility and public need that EPA would approve.

The opponents of Article X claim that it continues to exempt newly proposed plants from review under the State Environmental Quality Review Act (SEQRA). The Environmental Advocates, an opponent of the amended Article X agree that fast tracking the process of siting new power plants will make it easier for the applicant, however, there are no provisions in the amendment that ensure the existing plants will lower emission levels.[37] The legislation may lead to lower costs and innovation, the "typical attributes of a competitive market," but it will not be advantageous to society to lose "the environmental protection that the regulated monopoly brought us."[38] According to the Environmental Advocates, the older power plants are receiving preferential treatment; "[m]ost coal- and oil-burning power plants in New York State are taking advantage of a loophole in the Federal Clean Air Act that allows them to avoid meeting modern air pollution standards."[39] These older power plants are allowed to emit pollution levels four to ten times the amount that a new facility would be required by the Clean Air Act. If this trend continues, the concern is that there may not be a competitive market because the older plants will charge lower electric rates due to lower costs of meeting the standards set forth by the Clean Air Act.[40]

When there is a proposal to construct a new electric generating facility in someone's backyard, there will be parties that are opposed to the construction. The legislature recognized this and required that an applicant submit a fee of $1,000 per megawatt of generation capacity, but not to exceed $300,000.[41] This "intervener fund" will pay for public studies of the proposal, but can not be used for attorney's fees. Section 164(6) states that any money left in the fund after the Siting Board has made its decision on an application and the time has expired for applying for a rehearing or judicial review, will be returned to the applicant. New York is the only northeastern state to require the intervener fund, which would be used by those who are opposed to the proposal.[42]

The proposed power plants are called "merchant plants" because New York's deregulation policy requires companies other than regulated monopolies to submit applications for approval by the Siting Board.[43] The companies seeking to enter the market in New York, however, are not guaranteed any return on their investment. Because of this, Article X does not require a key component of Article X is that these "merchants" are not required to show there is a need for a new power plant. In other words, it is the company's choice to build and their money to lose.[44]

In the northeast, there are 48 proposed power plants,[45] of which 11 have filed an application in New York.[46] That does mean that all 48 proposals will eventually become a running power plant. Companies "routinely make applications at several sites in different states simultaneously."[47] The decision by the company where to eventually build the plant depends on a variety of issues including the ability to get site approval, the amount of taxes, and the amount of time it takes for a final decision.[48]

The time period for a final decision varies from state to state. Under Article X, the Siting Board is required to issue a decision for a certificate within 12 months from the date the Chairman of the Siting Board determines that the application was in compliance with Article X.[49] However, this requirement has not been followed during the application process for the Athens Generating Facility.[50] Three adjoining states that compete for new generating facilities have a time requirement that is shorter than New York's: Massachusetts has 12 months, Connecticut has six months, and New Jersey has no limit.[51]

IV. Industry Standards

Twenty-five percent of the electric generating facilities in New York are run on fossil fuels.[52] However, the United States, as a whole, relies on the "older and dirtier coal-fired plants that emit the most NOx and SO2."[53] Provisions in the Clean Air Act permit older power plants to continue to emit air pollutants at levels that are similar to the levels when the plant first opened, which may be up to 30 years ago. These older units, however, are subject to acid rain requirements. Moreover, if the facility is located in a nonattainment area for sulfur dioxide, it is subject to Title 1 Reasonably Available Control Technology (RACT) standards.[54] However, the standards that are prescribed for the older facilities are not as stringent as the new source performance standards (NSPS) which is the best available control technology (BACT), or the lowest achievable emissions rate (LAER).[55]

New power plants that were established after the Clean Air Act are required to meet more stringent emis-

sions standard than the older plants. If an older plant modifies its existing structure, it must also meet NSPS, unless it falls within one of six exceptions.[56] The statutes and regulations "translate . . . to an advantage in terms of required emissions level or, to put it another way, avoided pollution control costs, for the older . . . utility [facilities]."[57] If these facilities were subject to more stringent standards, then their cost per kilowatt hour would increase anywhere from ten to 100 percent. In sum, the older facilities have an advantage over new facilities because the older facilities will be able to produce and sell electricity at a lower rate because they have a much lower production cost.[58]

Newer facilities are more energy efficient and environmentally friendly than the older facilities. New gas-fired generation technology is able to produce electricity at a much lower cost and this progress in technology could lead to more efficient smaller-scale technologies, including the natural gas-fired combined cycle generating plants.[59] "The greater efficiency of . . . [gas-fired] technology over conventional coal generation, coupled with the cleaner-burning quality of natural gas, means that . . . [the gas-fired] systems [will] produce less . . . CO2 per kilowatt-hour [than] produced by conventional coal-fired stations."[60]

V. Proposed Athens Facility

PG & E Generating (hereinafter "Athens Generating") filed an application, under Article X, to build a 1,080 megawatt gas-fired electric generating plant in the town of Athens, Greene County, New York.[61] Athens Generating began the Article X review process by filing a Pre-Application Report on September 9, 1997. On November 7, 1997, Athens Generating distributed proposed stipulations to all statutory and interested parties to define the scope and specific details for studies that support its application for the facility.[62]

On August 28, 1998, Athens Generating filed its application for a Certificate of Environmental Compatibility and Public Need pursuant to Article X of the PSL. On October 22, 1998, the Chairman of the Siting Board determined that Athens Generating's application complied with the requirements of Article X, thus commencing the time period within which the Siting Board has to make its final decision whether to allow the new electric generating facility to be built. [63] If the Athens' application is accepted, the facility's production of electricity will emit less pollutants into the air compared to the older power plants that use coal.

VI. Green Power

"Green power" has the ability to affect how competitive the market for electricity will become. PSC has ordered that power providers disclose, in bills sent to customers, beginning in April 2000, the fuel sources the companies use to generate their power. The information contained in the bill will show the percentage of the company's power that comes from coal, oil, natural gas, or nuclear sources. Also included will be an indication of how much pollution each fuel created. PSC Chairwoman Helmer declared that "[e]nvironmental disclosure not only will empower consumers and facilitate customer choice, but also will encourage clean power generators to compete in New York's energy market."[64] The disclosure requirement will have an impact on every type of electric retailer, including the old investor-owned utilities, merchant plants, like Athens Generating, and municipal utilities.[65]

Environmentalists predict that companies who market green power will be able to develop a consumer base even if they charge slightly more for electricity. This is a theory that has been attempted in other states.[66] The hope is that consumers will decide to pay more for electricity from a facility that emits less pollutants in the environment than the old coal burning facilities[67] Research Data International reported that 80 percent of Americans consider themselves to be environmentalists, compared with 35 percent in 1973. It showed that between 1990 and 1997 the sale of organically grown food increased by 23 percent, despite its high cost. The report "predicts a similar pattern in power buying," in which, Mr. Myers asserted that "[b]ecause of deregulation, green electricity will become mainstream like recycled paper, even if it costs more, and our air will become cleaner."[68] Myers predicted that the green power market will gain up to $37.5 billion of the $75 billion in annual sales of residential electricity in the US by the year 2003.[69]

In recent polls conducted on electricity production, the public has mistakenly believed that most of the electric generating facilities in the U.S. no longer use coal, but instead use hydro power or renewable resources.[70] In the same study, 72 percent concluded that they believed environmental improvement is more important to society than economic development.[71] The above shows that the public is unaware how much the U.S. relies on the coal-burning facilities.[72] With 72 percent of consumers believing that the environment is more important than industrial growth, there is a possibility that the public will choose green power if given the chance.

Along with environmentalists calling for green power, Wall Street has also gone green. Mainstream utilities investors have become interested in environmental performance because the utilities with the best environmental record have consistently achieved better stock market performance than its less environmentally friendly competitors.[73] Of 26 electric utilities trading on the stock market, the 13 with the highest environmental ratings achieved more than 600 basis points higher than

the bottom environmental performers during 1998.[74] This correlation is due to the direct relationship between environmental performance and management control, which is the primary determinate that investors sue to determine financial performance.

While some believe that the market will change with the advent of green power, there are others who believe it is not plausible. Jacquelyn Ottman, consultant with the U.S. Environmental Protection Agency, questioned, "[d]oes the green product offer meaningful benefits beyond appeals to true altruism?"[75] Bruce W. Radford, the author of *We Got Green? Not Hardly*, agreed and analogized green power to a car purchaser trying to decide between a Honda Accord and a Ford Taurus. If the car salesman for the Accord told the purchaser that the Accord is built with recycled steel and the Taurus is built with new steel from an eco-destructive iron mine in a Third World country, the purchaser, if an ordinary American consumer, would probably laugh in his face. A car buyer does not want recycled steel, she wants a CD player, leg room, cup holders, and anti-lock brakes. Radford called these value-added products; they change the way the car works, but that is what products do. "On the other hand, recycled steel is not a consumer product, but more properly described as a manufacturing process. The same goes for coal, uranium, wind, sunshine or natural gas, when used as boiler fuel."[76] The bottom line to their argument is that the public wants electricity with the cheapest rates; they will not care where it comes from, just as long as it is cheap.

VII. What Happens Next

New York, in its effort to deregulate the electric industry successfully, must incorporate two policies: (1) the search for least-cost power and environmental protections, and (2) protecting environmental objectives.[77] The construction of gas-fired generation plants will have less impact on the environment and they can also produce electricity at a lower cost. To further its objectives under deregulation, PSC encourages companies to develop innovative ideas that may create cheaper prices for the customer.[78] However, the language of Article X is silent on the use of innovative ideas, it only deals with fasttracking the siting of new electric generating facilities.

California's and Massachusetts's deregulation legislation seems to incorporate the twin policy objectives of least-cost power and environmental protections articulated in federal regulatory statutes.[79] California maintains that the goal of its siting board shall be to minimize the cost of electricity to the public and improve the environment. It had been predicted that competition will lead "California businesses and homeowners . . . [to] feast from a table set with products and services."[80] Reform proponents seem to see blue skies in the future. Pointing to the benefits provided by the deregulation of other industries, "they expect electric restructuring will drive down costs, better allocate and manage risks, promote innovation and bring an increasing and diverse array of products and services to all customers."[81]

The authors' report looked at the green power products that were available to the residential customers and the range of product offers and cost savings. At first, customers switching to green power did not start fast. After the first six months, only .8 percent of residential customers switched to a new service provider. The authors stated that the "'diffusion' of new products is rarely immediate, but typically starts slowly before accelerating."[82] One of the problems that caused the slow start was the switching process itself, which required large transaction costs for smaller customers. Even with the dismal start, by the end of the summer of 1998, only months after Californians were able to switch producers, at least 16 merchant plants planned to offer electricity to residents.[83]

An easier way to understand the process of deregulation is by looking at the experience of the telephone industry after the 1984 breakup of the Bell system. AT&T's share of the interstate telephone market only declined by less than 4 percent, despite aggressive marketing by its competitors. Even though AT&T still has over 50 percent of the long-distance market, over time, consumers have developed an understanding of their ability to switch carriers, which will continually lower AT&T's share of the market.[84] With this experience, the slow beginning in California of switching power companies should not be considered to be a failure for the competitive market.

Even if new competitors are able to offer significant savings and other benefits, however, the large transaction costs will continue to be problematic for the competitive market. Due to high start-up and customer acquisition costs, signing up residential customers costs over $100 per customer during the early years of restructuring.[85] As of August 1998, it appeared virtually impossible for new electricity servers to offer price-based electricity to residential consumers at a profit.

While these merchant plants realized they would not make a profit in the early years of business, they hoped that if they could establish a brand identity and attract new customers over time, they would be able to make a profit in the long run.[86] Due to the difficulties of merchant plants to offer real cost savings to residential customers, these companies offer value-added products and services, for example, green power products. In California, of the 16 new companies that were to begin offering products by the end of the summer of 1998, 11 of them were to sell green power and to market their

company as a green power company, and not try to establish themselves as a costs savings provider.[87]

An additional barrier for the competitive market to sway consumers to the least-cost and environmentally friendlier options is informational costs. It takes a consumer a considerable amount of time to gather all the cost-saving alternatives and the environmental benefits of switching to a different supplier and determine whether the switch will cause the consumer to have additional costs.[88] The failure of consumers to buy energy-efficient lighting, refrigerators, and other appliances in the 1980s, even where there would have been cost savings to the consumer is an example of the failure of market mechanisms in the electric industry. It has been shown that consumers will opt to pay for the additional electricity rather than installing the energy and cost-efficient technology.[89] To correct the informational barriers that prevented market investments, Massachusetts required utilities try and correct these market failures with direct involvement with marketing and implementing conservation options.[90] With the report indicating that 80 percent of Americans consider themselves environmentalists, there may be hope that once the informational barriers are broken, consumers will choose the cleaner source.[91]

If New York's campaign for a competitive market is to be successful, it will have to follow the lead of California and Massachusetts and learn from the early problems that plagued them. Also, if New York is to make its state truly competitive, it must develop a plan to deal with the existing power plants. One of the concerns of many environmental groups, including Environmental Advocates,[92] and the energy industry, including companies that want to enter the competitive market, is the deregulation legislation on both, the national and state level, failed to address the problem with the older power plants, thus hindering their replacement with newer, cleaner plant technology.[93]

The "grandfathering" of these older coal burning plants[94] will hurt the competitiveness of the deregulated industry because these facilities are able to produce electricity at a much lower rate than the new generating facilities.[95] Eliminating the grandfathering exemptions will create higher costs for the older plants and the emergence of a market-based wholesale market for electricity, cleaner energy sources could become more economically competitive.[96] In addition, the subsidy for the older, dirtier power plants creates disincentives for innovations in new cleaner energy production technologies because the merchants willing to produce their innovative ideas will not be able to compete with the lower prices of the old plants.[97]

In 1999, New York State Governor George E. Pataki took action that may help newer facilities become more competitive with the older facilities.[98] The Governor directed DEC Commissioner John P. Cahill to require electric generators to reduce emissions of acid rain causing pollutants. Under the Governor's initiative, New York will cut its emission levels of sulfur dioxide by another 50 percent on top of the reductions that were created by "Phase II" of the Federal Clean Air Act, which required a 50 percent reduction of sulfur dioxide from electric generators by 2000. The Administration hopes this initiative, along with the amendments to Article X, will create an environment that will foster competition and create a market for more efficient and environmentally sound power plants.[99]

While the Governor's initiative will require the old power plants to reduce emission levels, this alone will not lead to a competitive market. As demonstrated above, New York has to address the problems associated with informational costs and renewable resources or green power products. Proponents of renewable resources contend that without some form of compulsion or subsidy by regulators, these resources will not be able to compete in the energy market based on least cost. However, the utilities do not want to be the only ones burdened with bringing renewables to the market.[100]

While it remains uncertain what New York will do to remedy this situation, one possible solution would be for the legislature to increase the funding for energy conservation and energy efficiency or, at the very least, stop decreasing the amount of funds allocable. As of April 1998, funding for energy conservation and efficiency has been reduced by more than two-thirds from the 1992-1994 levels.[101] Other possible alternatives to aiding the success of renewables would be to create a nonprofit quasi-public funding source using independent funding unrelated to retail rates[102] or allow for an expedited state approval process or remove financial, siting or other barriers for companies seeking to produce renewable resources.[103]

VIII. Conclusion

The advent of retail competition in New York brings both opportunities and risks for the environment. As discussed above, the technological improvements in energy generation have lead to the use of the combined-cycle generation plants, which produce only a fraction of the pollution that the coal burners do, and with renewable resources, like the fuel cell,[104] the industry may be heading in the right direction. Some believe that the fuel cell is as important to the general public as was the electric refrigerator, the room air-conditioner and the fluorescent light.[105] At this point, fuel cells may be expensive, but the emphasis of researchers has shifted from making them work to making them cheaper.[106]

Retail competition also offers consumers the opportunity to choose green power sources instead of other energy sources that are lower priced but less environmentally compatible. However, industry's continuation of an increased emphasis on short term price considerations, may result in the old, coal-burning power plants to increase their production.[107]

For New York's competitive market to be successful, it will have to make New York more attractive for merchants to construct new electric generating facilities. The approval of Athens Generating's application may be a starting point for competition, but New York will have to do much more. These facilities will need incentives to build in this state instead of a neighboring state. The introduction of green power to New York's market, along with changes in the grandfathering of older power plants, will hopefully foster competition. However, the X factor for success is the general public and how they will embrace the idea of paying more for "cleaner" power. While New York has made great strides to become competitive in the electricity production market, it must follow the lead of California and Massachusetts, and increase the public awareness of the damage that the "old dirties" are causing. For sure, if New York does not make any policy changes in the siting of power plants, it will have neither a competitive market nor an environmentally friendly state.

Endnotes

1. Ryan Wiser, William Golove, and Steve Pickle, *California's Electric Market; What's in Is for the Customer,* Pub. Util. Fortnightly, August 1998, at 38. Wiser, Golove, and Pickle are research associates at Lawrence Berkeley National Laboratory. Their research was funded by the Assistant Secretary for Energy Efficiency and Renewable Energy, Office of Utility Technologies of the U.S. Department of Energy.
2. Richard Perez-Pena, *Depite Deregulation, Utilities Avoid New York*, N.Y. Times, April 17, 1999, at 37.
3. *See* G.S. Peter Bergen, *Electric Generating Facility and Siting and Licensing in New York State's Restructured Electric Utility Industry*, Env. Law in New York, July 1999, at 109. Mr. Bergen specialized in environmental and energy law at LeBoeuf, Lamb, Greene & MacRae between 1962 and 1995 and was Assistant Commissioner at DEC from 1995-1999. *See also* James Elliott, *Electric Utility Regulation Reform* 13 Pace Envtl. L. Rev., 281, 288 (1995) (noting that the Public Service Commission issued its Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition).
4. *Id*. at 110 (*quoting The Electric Utility Restructuring in New York: A Status Report*, (visited March 17, 2000), <http://www.abcny.org/energy.html>).
5. *See Your Energy . . . Your Guide* (visited March 17, 2000) <http://www.dps.state.ny.us/yourenergy.htm> (noting that the transmission lines will continue to be owned by the previously regulated utilities) This is the official Web site containing information regarding PSC's plan to open the electric industry to competition.
6. *See* Elliott, *supra,* note 3, at 288. *See Also In re Competitive Opportunities Regarding Electric Service*, No. 94-E-0952 (N.Y. Pub. Serv. Comm'n Dec. 22, 1994).
7. *Id*. at 300 (explaining that "[t]his common theme requires the PSC, acting on behalf of the public good, to protect the environment while fostering economic development within New York State").
8. *See Your Energy . . . Your Guide* (visited March 17, 2000) <http://www.dps.state.ny.us/yourenergy.htm> (stating that with competition, "[y]ou as a consumer, and the state as a whole, will benefit").
9. Richard Perez-Pena, *Depite Deregulation, Utilities Avoid New York*, N.Y. Times, April 17, 1999, at 37 (*quoting* Howard Fromer, the director of government affairs in New York for Enron Corporation of Houston).
10. *Id*. (paraphrasing PSC's Chairwoman Maureen Helmer's comments regarding the lackluster amount of competition in the electric generating industry).
11. *Id.* (stating that "when you look [at New York] in one or two years, you're going to see a very different picture").
12. *See* Proposed Athens Facility, *infra* notes 59-62 and accompanying text.
13. *See* Article VIII, Pub. Serv. (1972), Governor's Memorandum, *reprinted in* New York State Legislative Annual 1972, at 248-49, (1972) (stating that the "purpose of the bill is to establish a unified procedure for determining the location and need for new major steam electric generating facilities in manner assuring the production of adequate and reliable power consistent with environmental values and without undue delay").
14. *See* Article VIII, Pub. Serv. (1972) (amended 1978) Governor's Memorandum, *reprinted in* New York State Legislative ANNUAL 1978, at 392-93, (1978) (explaining that the amended version "consolidates . . . all long range energy forecasting and planning responsibilities . . . [including] a 24 month deadline for a decision to be rendered on any application to construct a new power plant").
15. *See* Bergen, *supra* note 3, at 111 (Article X was enacted in 1992 and was amended by A.9039 on Nov. 11, 1999, Ch. 636).
16. Jim Gordon, *On or Off*, Empire State Rep., August 1999 at 41.
17. *Id*. (asserting that the "administration sought to pave the way for a new free-market system of power production that, theoretically, would help reduce New York State's electric bills from among the highest in the nation"). *See also* Richard Perez-Pena, *Despite Deregulation, Utilities Avoid New York,* N.Y. Times, April 17,1999, at 37 (stating that New York's electric rate is 50 percent above the national average).
18. *See* Perez-Pena, *supra* note 9, at 37.
19. *See NY Governor Pushes Competitive Bidding to Boost Power Supply*, Journal of Commerce, January 7, 1988 at 1.
20. *See* Gordon, *infra* notes 43-44 and accompanying text.
21. *See* Gordon, *infra* note 51.
22. *See* Article X, N.Y. Pub. Serv. § 160(2)—Definition of Electric Generating Facility. *See also* Perez-Pera, *supra* note 9, at 37. *See also About the New York State Board on Electric Generation Siting and the Environment* (visited March 17, 2000) <http://www.dps.state.ny.us/sitingboard.htm>.
23. *See* Article X , N.Y. Pub. Serv. § 162—Board Certificate. *See also* Perez-Pera, *supra* note 9, at 37.
24. *See* Perez-Pera, *supra* note 11, at 37 (noting that the Chairman of the Public Service Commission serves as the Chairman of the Board) and (stating that § 160(4) also named the Commissioner

of the State Energy Office as a member but the office has since been abolished.) However, A-9039, amends this section to repeal the reference to the Commissioner of the State Energy Office and add the chairman of the New York State Energy Research and Development Authority. Also, § 161 allows each commissioner to select alternatives to sit on the board.

25. *See About the New York State Board on Electric Generation Siting and the Environment,* (visited March 17, 2000) <http://www.dps.state.ny.us/sitingboard.htm>. *See also* § 160(4) (asserting that "the term of the *ad hoc* members shall continue until a final determination is made in the particular proceeding for which they have been appointed").

26. Article X, N.Y. Pub. Serv. § 164(a)—Application for a Certificate.

27. Article X, N.Y. Pub. Serv. § 164(b). *See also* Bergen, *supra* note 3, at 112 (noting that the "'approved procurement process'" is from § 66-I of the Public Service Law which was enacted in the same legislation as Article X." Bergen explained that § 66-I requires "any electric utility, prior to making substantial investments in new generating facilities or new purchase agreements, should consider reasonably available alternative sources, taking into account impacts on rates, environment, reliability and other factors." It also authorizes the Public Service Commission to require each facility to "conduct competitive bidding auctions" or procurement programs that would satisfy the "electric capacity needs." Since these new facilities have already undertaken economic and environmental reviews for the bidding process, it is not necessary for them to conduct a complete review under SEQRA).

28. Article X, N.Y. Pub. Serv. § 164(d) (stating that if the application is denied the procurement process, they must include "all expenses by categories including fuel costs, plant service life and capacity factor and total generating cost per kilowatt-hour").

29. Article X, N.Y. Pub. Serv. § 164(f). *See* Bergen *infra,* notes 30-31 (noting that the "Commissioner of Environmental Conservation" was added by A-9039).

30. *See* Bergen, *supra* note 3, at 112 (stating that "[t]he drafters of Article X intended that a siting board's determination to issue a certificate for the facility would also resolve all issues related to . . . permits").

31. *See id. See also* Letter, dated February 11, 1999, from Jeanne M. Fox, Regional Administrator of EPA, to Lawrence G. Malone, General Counsel for the Siting Board, p. 1 [hereinafter *Letter*] [filed with author].

32. *See Letter, supra* note 31, at 2.

33. *Id*. (asserting that DEC is "the approved State agency for the remainder of the NPDES program").

34. Siting of Major Electric Generating Facilities Act of 1999, ch. 636, (1999).

35. *See* New York State Assembly Memorandum in Support of Legislation—A.9039—Purpose or General Idea of Bill [filed with author].

36. *Id*. at Justification. Under current New York law, only the Siting Board may issue "permits necessary for the siting" and the "power to issue permits is subject to delegation or authority from . . . [EPA]" and the EPA only authorized the DEC to issue federal environmental permits.

37. Environmental Advocates Opposition Memo to A.9039 (hereinafter "Environmental Advocates") [filed with author] Environmental Advocates is a lobbying group located in Albany, N.Y., which mainly lobbies the New York Legislature for the improvement of the environment.

38. Swedeen G. Kelly, *The New Electric Powerhouses: Will They Transform Your Life?,* 29 Envtl. L. 285, 285 (Summer 1999) (stating that "the year 1999 finds seventeen states embarking on retail competition in generation. They are looking for choice, lower costs, and innovation . . . but they do not want to lose the reliability, universal service and environmental protection that the regulated generation monopoly brought us").

39. *See Environmental Advocates*, *supra*, note 37.

40. *Id.*

41. *See About the New York State Board on Electric Generation Siting and the Environment* (visited March 17, 2000) <http:www.dps.state.ny.us/sitingboard.htm.> A.9039 amends § 164(6) from $150,000 to $300,000.

42. *See* Jim Gordon, *On or Off,* Empire State Rep., August 1999, at 40.

43. *Id*. at 41. S*ee, e.g., Your Energy . . . Your Choice* <http://.dps.state.ny.us/energyguide.htm> (showing New York's regulated monopoly utilities are Brooklyn Union Gas Co., Central Hudson Gas & Electric Corp., Consolidated Edison Co. of New York, Inc., National Fuel Gas Distribution Corp., New York State Electric and Gas Corp., Niagara Mohawk Power Corp., Orange and Rockland Utilities, Inc., and Rochester Gas and Electric.)

44. *Id*. (stating that "[t]he choice of building a plant, and the risk it entails, is . . . [the company's]."

45. *Id*. (noting that the northeast is "where future demand for power is expected to steadily increase").

46. *See New York State Board on Electric Generation Siting and the Environment* (visited March 17, 2000) <http:www.dps.state.ny.us/articlex.htm> (listing the 11 projects that are "under review in accordance with Article X" and listing 4 projects that have been publicly announced).

47. *See* Gordon, *supra* note 42, at 40.

48. *Id*. (quoting Carol Murphy, Executive Director of the Independent Power Producers of New York, "[a]nd where . . . [the companies] put their resources depends on the ability to site a plant, tax policy, ease of doing business, and how long its takes to get a decision").

49. *See About the New York State Board on Electric Generation Siting and the Environment* (visited March 17, 2000) <http://www.dps.state.ny.us/sitingboard.htm>. *But see* Gordon, *supra* note 42, at 42 (explaining that A.9039 "lengthens the one-year approval period to as long as two years from the time the application is deemed complete").

50. *See* Article X, *infra* note 63 and accompanying text.

51. *See* Gordon, *supra* note 42, at 40 (New Jersey's no limit can be looked at in two ways; either it is a shorter limit or since there is no limit, New Jersey can take as long as it needs to make a final decision regarding the approval of a power plant).

52. *See Your Energy . . . Your Choice* (visited March 17 2000) <http://www.dps.state.ny.us/energyguide.htm> (showing a diagram of the source of power for the facilities from 1997; coal: 20.2%, oil: 5.5%, gas: 32.8%, hydro: 20%, nuclear: 19.9%, other-1.6%). *See also* Ann Weeks, *Advising Nature: Can We Get Clean Air From the Old Dirties?* 33 New Eng. L. Rev. 707, 719 ft 58 (noting that over 70% of electricity in the United States is produced by burning fossil fuels).

53. *See* Ann Weeks, *Advising Nature: Can We Get Clean Air From the Old Dirties?* 33 New Eng. L. Rev. 707, 711 (1999) (stating that "seventy percent of total energy production is derived from fossil fuel burning power plants-either coal, oil, or gas fired").

54. *Id*. at 712 & n.20. *See also* 42 U.S.C. §§ 2502(c)(1), 7511(a)(2)(A) (Supp. II 1996).

55. *Id*. *See also* 42 U.S.C. §§ 7479(3), 7501(3)(8) (Supp. II 1996).

56. *Id*. at 712 & n.28. (The six exceptions are "routine maintenance, repair, or replacement; increased production rate (if accomplished without a capital expenditure); increased hours of operation; use of alternative fuel (including certain conversions to coal for energy supply considerations); addition of pollution control technology; or relocation or change in ownership").

57. *Id.* at 715.

58. *Id.* at 716 (stating that "dirty power is cheaper than cleaner power").

59. Rudy Perkins, *Electricity Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C. L. Rev. 993, 1006-7 & n.105 (1998) (explaining that "[c]ombined-cycle generation plants use a combination of gas-fired turbines and steam turbines to generate electricity . . . [by using] [t]he exhaust of the gas turbine . . . to heat steam to power a steam turbine to produce additional electricity").

60. *Id*. at 1006-1007 & n.107.

61. *See Athens Generating Plant* (visited March 17, 2000) <http://www.dps.state.ny.us/athens.htm>. Athens Generating Co., L.P., an affiliate of PG&E Generating filed the application on August 28, 1998.

62. *See* Initial Post Hearing Brief of the New York State Department of Environmental Conservation, p. 1, June 28, 1999 [filed with author].

63. *Id*. *See generally* Article X, *supra*, notes 15-51 and accompanying text.

64. Bill Paul, *New Yorkers to Know Where Their Electricity Comes From,* N.Y. Times, Jan. 18, 1999. Reprinted on PSC's Web site entitled "A PSC Consumer Guide" <http://www.dps.state.ny.us/energyguide.htm>.

65. *Id.* (noting that "every investor-owned utility, every energy services company providing retail electricity, and those municipal or cooperative electric utilities subject to commission jurisdiction will be required to provide the environmental disclosure label").

66. Richard Perez-Pena, *Despite Deregulation, Utilities Avoid New York*, N.Y. Times, April 17, 1999, at 37.

67. *See* Paul, *supra* note 64 (*quoting* Todd Myers of Resource Data International for a statement announcing the publication of RDI's new report: *Green Power: Consumer Choice and Clean Air*, "Consumers will increasingly select electricity programs that provide some environmental advantage over the competition.").

68. *Id*.

69. *Id.*

70. *See* Ann Weeks, *Advising Nature: Can We Get Clean Air From the Old Dirties*? 33 New Eng. L. Rev. 707, 719, nt 58, (1999) (citing National Environmental Education and Training Foundation, Roger/Starch Worldwide, The National Report Card on Environmental Knowledge, Attitudes and Behaviors 1, 6 (Dec. 1998) (7th Annual Survey of Adult Americans) (showing that "most of the public mistakenly believes that electricity produced in the United States comes from "clean" power sources like hydroelectricity or renewable resources."

71. *See id.*

72. *See* Weeks *supra* note 70, at 711 (noting that the U.S. relies heavily on the coal burning facilities). *But see* Robert L. Hirsch, *The Energy Plateau*, Pub. Util. Fortnightly, March 1, 1996, at 13 (asserting that the "general public feels that the environment is in fairly good condition in most places, so energy related environmental concerns have abated significantly").

73. *See* Frank Dixon, *Wall Street Goes Green*, Pub. Util. Fortnightly, Sept. 15, 1999, at 78 (stating that "investors are looking at the issue . . . [because] environmental leaders consistently achieve better financial and stock market performance than their less coefficient competitors"). Frank Dixon is the managing director of research and development at Innovest; he formerly was a management consultant in the energy and manufacturing sector.

74. *Id.* These findings were reported in "The Electric Utilities Industry, Hidden Risks and Value Potential for Strategic Investors," a study by environmental rating agency Innovest Strategic Value Advisors.

75. Bruce W. Radford, *We Got Green? Not Hardly* Pub. Util. Fortnightly, Oct. 1, 1999, at 4. In an interview with Ottamn, Radford asked her how the "competitive power industry should get around the problem that its electricity product flows where it wants to, instead of along defined contract paths."

76. *Id.* Ottman asked Radford to "[r]emember th[e] early green products of the 70's, such as all-natural laundry powders that didn't clean clothes, and water-saving shower heads that sputtered? They languished on health food stores shelves, gathering dust." Another analogy to consider is the recent boom in sales of sport utility vehicles. These vehicles get only 15 miles per gallon, a number that can hardly be considered to be environmentally friendly, yet more car companies continue to develop their edition of a sport utility vehicle.

77. Rudy Perkins, *Electric Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C. L. Rev. 993, 996 (1998) (examining "the co-evolution of two interwoven policy objectives of electric utility regulation: 1) the search for least cost power . . . through deregulation of the electric generating system; and, 2) the continued effort to protect environmental objectives through the organization of power production").

78. *See Your Energy . . . Your Guide* (visited March 17, 2000) <http://www.dps.state.ny.us/yourenergy.htm>.

79. *See* Perkins, *supra* note 77, at 1014. *See generally* The Federal Energy Policy Act of 1992 (allowing for states to deregulate the electric industry and the Act expressly links least-cost goals and environmental objectives in the nation's energy strategies).

80. *See* Lori M. Rodgers and Joseph F. Schuler, *Ready, Fire, Aim: California and the Nation on the Eve of Competition*, Pub. Util. Fortnightly, Jan. 1, 1998, p. 26.

81. Ryan Wiser, William Golove, and Steve Pickle, *California's Electric Market; What's in is for the Customer,* Pub. Util. Fortnightly, August 1998, at 38.

82. *Id*. at 41.

83. *Id.* at 42.

84. *Id.* at 41 (noting that even "[t]hough AT&T still commands 50 percent of the long-distance market, over time consumers have become more familiar with the process of switching long-distance carriers, causing AT&T's market share to decline").

85. *Id*. at 42 (stating that one company "reportedly spent $10 million to attract 30,000 residential customers, a $300-per-customer cost").

86. *Id.*

87. *Id.* (explaining that "one of the only entrees into this market . . . [was] to offer premium-priced, value-added products and services, the most prominent of which were turning out to be green power products—that is, products that were differentiated based on environmental characteristics").

88. *See* Rudy Perkins, *Electric Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C. L. Rev. 993, 1035-36 (1998) (stating that "[t]he time it takes a consumer to uncover information on cost-saving alternatives and to calculate if those cost-savings apply to the consumer's existing equipment and/or patterns of usage represents an additional cost to the consumer for any change from the status quo").

89. *Id.* (*citing* Massachusetts DPU's report, D.P.U. 86-36-F, 98 Pub. Util. REP. 4th, at 82, 84 and stating that "consumer lack of information, particularly concerning recently developed technologies, was a cause of the lack of investment in cost-effective technologies").

90. *See id.* at 1037.

91. *See* Paul, *supra* note 67 and Weeks, *supra* note 70 (reporting that over two-thirds of Americans believe that the environment is more important than industrial growth).

92. *See Environmental Advocates*, *supra,* note 37.

93. *See* Carl J. Levesque, *Federal Electric Restructuring*, Pub. Util. Fortnightly, July 15, 1999, at 16 (quoting Thomas Casten, of Trigen Energy Corp., ". . . monopoly regulation keeps inefficient, dinosaur plants operating, hindering replacement with newer, cleaner plant technology. Update the Clean Air Act for the benefit of everyone—environmentalists and industry").

94. *See* Industry Standards, *supra* notes 52-60 and accompanying text.

95. *See* Ann Weeks, *Advising Nature: Can We Get Clean Air From the Old Dirties*?, 33 New Eng. L. Rev. 707, 716 (1999) (noting that if these older plants were "subject to new source standards, their price per kilowatt hour could increase anywhere from ten to 100 percent over today's market price"). *See also Environmental Advocates, supra,* note 37.

96. *Id.* at 716-17, ft 45 (advising that "in order for the smaller, cleaner, non-utility generating units utilizing natural gas or renewable energy sources as fuel to remain in business in a competitive market for kilowatt hours, the implicit subsidy enjoyed by older coal-fired units must be removed contemporaneously with the emergence of competition").

97. *See id.* at 716.

98. *See* <http://www.state.ny.us/governor/press/year99/oct14_199.htm> Governor Pataki Press Release for Oct. 14, 1999, "Governor Takes Action to Protect New York From Acid Rain."

99. *Id.*

100. Steven Ferrey, *Renewable Subsidies in the Age of Deregulation; State Imposed Preferences May Have Come at the Wrong Place at the Wrong Time*, Pub. Util. Fortnightly, December 1997, at 22 (stating that "[e]nvironmental groups fear that without some form of compulsion or subsidy, or both, renewable resources will not survive in an energy economy based on least direct consumer cost. However, utilities do not want to be saddled alone with the chore of carrying all renewables to market"). Steven Ferrey is Professor of Law at Suffolk University Law School. He is a consultant and expert witness on electric power deregulation for companies including LaBoeuf, Lamb, Greene & MacRae).

101. *See Electric Restructuring in New York: A Status Report, by the Committee on Energy* (visited Nov. 15, 1999) <http://www.abcny.org/energy.html>.

102. *See* Ferrey, *supra* note 100, at 26. For example, the Legislature could allocate a certain amount of general taxes to this fund, but if it decided to add a special tax on electricity for the production of in-state renewable resources, New York may have a Interstate Commerce issue to contend with.

103. *Id.* For this possibility, New York could allow this type of company to receive its certificate of environmental compatibility sooner than the 12-month requirement currently set by Article X. Also, it could waive the intervener fund requirement.

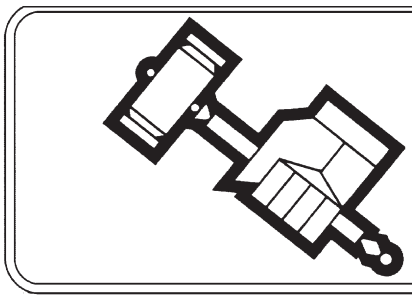
104. Swedeen G. Kelly, *The New Electric Powerhouses: Will They Transform Your Life?*, 29 Envtl. L. 285, 293 (Summer 1999) (noting that the fuel cell produces "electricity by converting liquid fuel into electricity through a chemical, catalytic reaction rather than combustion").

105. *Id.* (stating that the "launch of a fuel-cell-powered house is up there with the introduction of the electric refrigerator, the room air-conditioner and the fluorescent light").

106. *Id.*

107. *See The Electric Utility Restructuring in New York: A Status Report*, (visited March 17, 2000), <http://www.abcny.org/energy.html> (warning that "[a]n increased emphasis on short term price considerations may result in increased generation from coal burning power plants").

Robert Panasci tied for third place in the Environmental Law Section's Essay Contest. He is a 2001 graduate of Albany Law School.



Administrative Decisions Update

By Rusty Pomeroy

CASE: ***In re the Application for a Tidal Wetlands Permit, Use and Protection of Water Permit, and Water Quality Certificate Pursuant to the Environmental Conservation Law (ECL) Articles 15 and 25 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 608 and 661 by Stuart Goldsmith.***

AUTHORITIES: ECL Article 8 (State Environmental Quality Review)

ECL Article 15 (Water Resources)

ECL Article 25 (Tidal Wetlands)

6 N.Y.C.R.R. § 608 (Protection of Waters)

6 N.Y.C.R.R. § 608.9 (Water Quality Certifications)

6 N.Y.C.R.R. § 617.5(c)(1) (State Environmental Quality Review)

6 N.Y.C.R.R. § 661 (Tidal Wetlands)

DECISION: On March 16, 2001 the Acting Commissioner of the New York State Department of Environmental Conservation (DEC), Gavin Donohue, adopted the hearing report of Administrative Law Judges Susan DuBois and Molly McBride in the matter of the application of Stuart Goldsmith to conduct maintenance dredging in the Village of East Patchogue, Town of Brookhaven, Suffolk County, as the decision in this matter. The hearing report concluded that the site conditions remain the same today as when the tidal wetlands permit was first issued in 1989. The report further concluded that the project met all of the standards necessary for issuance of the tidal wetlands permit, protection of waters permit and water quality certification. Accordingly, the permit application was granted.

A. Background

The maintenance dredging activities sought to be conducted by Mr. Goldsmith ("the Applicant"), and the permits associated therewith, have a history dating back more than 30 years.

The Applicant first received permits for maintenance dredging in 1978 from the U.S. Army Corps of Engineers ("the Corps") and the Town of Brookhaven ("the Town"). The DEC approved the project by letter to the Applicant stating, *inter alia*, that it was not necessary for the Applicant to apply for a permit from the DEC. The expiration date of the letter approval was December 31, 1988.

Upon expiration of the original permits and letter approval in 1988, the Applicant applied for permit renewals to the Corps, the Town, and the DEC. While the Corps and the Town approved the permit renewals, the DEC denied the renewal and a hearing was held before ALJ Dubois. The DEC argued that the proposed maintenance dredging was not necessary to accomplish the goals stated by the Applicant in the application, ". . . to prevent buildup of seaweed, thereby eliminating the nauseous odor of the decomposing seaweed, and to permit boating access." ALJ Dubois issued a hearing report that was adopted by Commission Thomas Jorling in a decision dated October 18, 1989. That decision directed that the requested permits be issued for a term of ten years. The report concluded that the maintenance dredging would allow continuation of the environmental conditions which have existed at the site since the bulkhead was constructed, and would not diminish the existing environmental value of the wetland.

In January of 1999, more than ten months prior to the expiration of his permits, the Applicant filed an application with the DEC for the reissuance of a tidal wetlands permit, protection of waters permit and water quality certification which were all in effect from 1989 to 1999. The Applicant sought to continue the maintenance dredging of an area 10' by 460' located seaward of an existing functional bulkhead, and a 300 square foot triangular area located at the westernmost limit of the bulkhead, to a depth of 3' below mean low water. Fifty to 100 cubic yards of spoil would be removed from the waterway and deposited landward of the existing bulkhead. Pursuant to ECL Article 8 and 6 N.Y.C.R.R. Part 617, DEC staff determined that the proposed project was a Type II action under SEQRA (§

617.5(c)(1), *maintenance of an existing facility*) and consequently no further environmental review was required.

During the current permitting process, the Applicant's representatives met with DEC staff. Following this meeting the Applicant reduced the area sought to be dredged in the permit from 30' by 460', to 10' by 460' which was the amount allowed under the 1989 permit. The Applicant indicated that he reduced the area in the permit renewal believing that since the permits had been approved in 1989 for that project, they would be issued again. The Corps and the Town approved the reissuance of the permits. The DEC staff denied the permits.

B. Position of the Parties

Applicant—The Applicant argued that the requested dredging permit was merely a reissuance of a permit to continue dredging that has been ongoing in excess of 30 years. It was the Applicant's position that the dredging was necessary to maintain boating access that he has enjoyed from his property since his ownership of the property began in the 1960s.

Department—The Department contended that the Applicant had not met the burden of demonstrating that the dredging project met the standards for the issuance of a tidal wetlands permit, a protection of waters permit or a water quality certification. The Department contended that if no more dredging occurs at the site, the area will become a functioning tidal wetland that will benefit those living on and using the Great South Bay.

C. Conclusions

The Commissioner adopted the recommendation of the ALJ which recommended that the permits and water quality certificate be issued. The recommendation was based upon the following facts, *inter alia*;

(1) The environmental conditions in existence at the site in September 2000 were almost identical to those that were present in 1989.

(2) There have been no changes in the applicable sections of the ECL or DEC regulations since the permits were issued in 1989.

(3) If the maintenance dredging requested in the application were to be carried out as it had been, there would be no change in the conditions at the site.

(4) If the dredging were not carried out there would be little or no change in the conditions at the site due to the existence of the bulkhead.

(5) Without dredging, the area seaward of the bulkhead would reach a depth of one foot or less, disrupting boating access at the Applicant's property.

The ALJ concluded that,

> [w]here an application is made for permit renewal, the permitee has the burden of proof to demonstrate that the permitted activity is in compliance with all applicable laws and regulations administered by the department. A demonstration by the permitee that there is no change in permitted activity, environmental conditions or applicable laws and regulations constitutes a *prima facie* case for the permitee.

6 N.Y.C.R.R. § 624.9(b)(3). Here the Applicant has met the required burden. The Applicant applied for the renewal permits more than ten months prior to the expiration of the existing permits. The Applicant demonstrated that there was no change in the permitted activity. The dredging activity the Applicant seeks permits for has been ongoing for at least 30 years. The environmental conditions at the site have not changed since the permit was last issued in 1989, and there has been no change in the applicable laws or regulations.

* * *

CASE: ***In re the Application for a Mined Land Reclamation Permit Pursuant to Article 23 of the Environmental Conservation Law and Parts 420-426 and 624 of Title 6 of the New York Compilation of Codes, Rules and Regulations (N.Y.C.R.R.) by Adrian Girouard.***

AUTHORITIES: 6 N.Y.C.R.R. § 624
(DEC Permit Hearing Procedures)

9 N.Y.C.R.R. § 580
(APA Permit Hearing Procedures)

ECL Article 23 (Mineral Resources)

INTERIM DECISION: On March 16, 2001 the Acting Commissioner of the New York State Department of Environmental Conservation (DEC), Gavin Donahue, affirmed the decision of ALJ Helene Goldberger which denied the motion of William Thomas for party status in the DEC proceeding regarding the application for a mining permit of Mr. Girouard.

A. Background

Mr. Girouard owned a 129-acre parcel in the Town of Brighton, Franklin County. He proposed to disturb five acres of this site to mine sand and gravel. The property is located within the bounds of the Adirondack Park, thereby giving concurrent jurisdiction over the project to the DEC and the Adirondack Park Agency (APA). The DEC identified the project as a Type II

action under State Environmental Quality Review Act (SEQRA).

In pursuit of his project, Mr. Girouard filed mining permit applications with the DEC and the APA who subsequently held joint hearings on the applications. With the participation of attorneys from DEC and APA, ALJ Goldberger explained to those at the hearings the differences between the DEC and APA permit proceedings, including the standards for party status.

Mr. Thomas, an owner of land near the Girouard site, filed an application under 6 N.Y.C.R.R. § 624.5 with the DEC's Office of Hearings and Mediation Services to participate in the DEC proceeding as a full party. While finding that Mr. Thomas' petition for party status was filed in a timely manner, and that he had an adequate environmental interest, ALJ Goldberger denied the petition finding that it did not meet the requirements of § 624.

B. Discussion

A petition for party status must include, *inter alia*, the precise grounds for opposition or support and identify "any interest relation to statutes administered by the Department relevant to the project. . . ." 6 N.Y.C.R.R. §§ 624.5(b)(iii), (v). In addition, § 624.4 (c)(2) sets forth the standards for adjudicable issues as substantive and significant. A petitioner seeking party status has the burden of showing that a proposed issue is substantive and significant.

Because the project is in the Adirondack Park, and not subject to SEQRA review by DEC, the DEC's jurisdiction is limited to those matters that directly impact the mining permit under ECL Article 23 and 6 N.Y.C.R.R. §§ 420-426. It is the APA that has authority in this application to conduct the broader environmental review.

C. Conclusion

The petition filed by Mr. Thomas made several unsupported complaints regarding, among other things, noise, negative impacts on property values, water contamination, traffic, air quality, wildlife, and aesthetics.

In addition, the petition concluded, without proof, that the mining will leave "large gaping holes" on the land and that emissions from heavy equipment will "adversely impact air quality." These assertions were made with no offer of proof for substantiation, and no citation to any statutory or regulatory criteria that could be violated by the proposed project.

Holding an adjudicatory hearing where "offers of proof, at best, raise uncertainties" does not meet the intent of DEC's regulatory process. *See In re AKZO Nobel Salt Inc.*, Interim Decision of the Commissioner (January 31, 1996). While the intervenor's offer of proof at the issues conference need not be so convincing so as to prevail on the merits, its offer must amount to more than mere assertions or conclusions. *See id*.

* * *

CASE: ***In re the Application for a Permit Pursuant to Article 15 and 25 of the New York State Environmental Conservation Law (ECL) and Parts 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 N.Y.C.R.R.) by John Tubridy, Jr. and Virginia Tubridy.***

AUTHORITIES: ECL Article 15 (Water Resources)

ECL Article 25 (Tidal Wetlands)

6 N.Y.C.R.R. § 621.15 (Special Provisions)

6 N.Y.C.R.R. § 621.9 (Final Decisions on Applications)

DECISION: On April 19, 2001, the Commissioner of the New York State Department of Environmental Conservation (DEC), Erin Crotty, declined to adopt the Decision of Administrative Law Judge (ALJ) Francis Serbent approving the post-construction permit application of John and Virginia Tubridy (the "Applicants") for construction of a bulkhead on their property in Rockaway Beach, Queens County. Commissioner Crotty denied the post-construction permit, and ordered the removal of the bulkhead from the Applicants' property.

A. Background

In 1993, the Applicants were granted a tidal wetlands permit by DEC to rebuild a home on Jamaica Bay that had been destroyed by a storm. However, a 1997 inspection by the DEC revealed that the Applicants had impermissibly constructed a bulkhead on the property and placed fill in regulated wetlands without a permit. The 1993 permit did not authorize the construction of the bulkhead.

Following a DEC enforcement proceeding, former Commissioner John Cahill, issued an order on December 31, 1998 finding that the Applicants had constructed the bulkhead and placed fill in a regulated tidal wetland without the benefit of a DEC permit, and that the construction adversely affected the functioning of the wetland at the site. The former Commissioner levied a fine for the unpermitted construction and allowed the Applicants to submit a post-construction permit application for consideration due to the unusual water supply and sewage disposal situation at the site.

Pursuant to the Commissioner's Order, the Applicants filed a permit application in April 1999. In May 1999 and again in August 1999, the DEC notified the Applicants that the permit application was incomplete

and that further information was required to evaluate the project. The Applicants did not respond to the requests for additional information, and the DEC denied the permit in January 2000.

In August 2000, Assistant Commissioner James Ferreira advised the Applicants that the permit application would receive no further action until such time as the Applicants complied with the December 1998 enforcement order. The Applicants paid the outstanding fine amount in December 2000, and the application process was resumed.

B. Discussion

The Applicants were given the opportunity to apply for a tidal wetlands permit and protection of waters permit after an enforcement proceeding had determined that the bulkhead had been constructed and fill placed in tidal wetlands and adjacent areas in violation of ECL and the Navigation Law of the state of New York. The Applicants were apparently granted this opportunity as a result of their argument that the bulkhead was necessary to bury water and sewer lines that would otherwise be open to the elements and subject to freezing.

The application was denied by DEC staff for three reasons; (1) failure to submit a complete application; (2) failure to comply with the Commissioner's 1998 Order; and (3) noncompliance with the ECL.

ALJ Serbent, in his recommended decision, reached three conclusions of law; (1) the Applicants' site could no longer be treated as a tidal wetland; (2) the bulkhead and fill were permitted by the DEC in the 1993 permit; and (3) the application was complete.

C. Conclusions

Commissioner Crotty held that ALJ Serbent erred by not adjourning the hearing pending receipt of the information DEC had requested from the Applicants. Section 621.15(b) of DEC's regulations authorizes DEC staff to request ". . . any additional information which is reasonably necessary to make any findings or determinations required by law." The request must be made in writing and a reasonable period of time must be afforded for a response. DEC staff made the request for information to the Applicants in writing and allowed a reasonable period of time for Applicants to respond. DEC is authorized to deny an application if the requirements of § 621.15 are not met. ALJ Serbent was incorrect in determining the application was complete at the time of the hearing.

ALJ Serbent also erred by not addressing the appropriateness of DEC's denial of the application based upon the Applicants' non-compliance with the Commissioner's 1998 Order. Sections 621.9(f) and 621(a)(5) grant DEC staff the authority to deny an application due to non-compliance with orders of the Commissioner or the ECL.

ALJ Serbent also erred in finding that the bulkhead had been authorized in the 1993 permit. Commissioner Crotty found the ALJ's finding to be unsupported by the record, that it had not been raised as an issue at the hearing, and that Commissioner Cahill had already conclusively determined the matter in the prior enforcement hearing.

ALJ Serbent also erred in concluding that the site could no longer be treated as a tidal wetland under 6 N.Y.C.R.R. § 661. It had already been determined, by Commissioner Cahill in the 1998 Order, that the bulkhead and fill were adversely affecting the function of the wetland at the site, interfering with an area that supports animal and plant life, and that the bulkhead and fill were reducing the value of the wetland for flood control. The Applicants did not challenge those findings in 1998 and they are not permitted to challenge them now. ALJ Serbent also erred in accepting the testimony of the Applicants' expert witness on this issue and in completely discrediting the testimony of the DEC staff without a rational explanation. Because the DEC position had already been considered and accepted by the Commissioner in the 1998 Order, ALJ Serbent had to articulate why he was not accepting the testimony.

The Applicants argued at the enforcement hearing that the bulkhead and fill were necessary to protect the water and sewer lines from freezing. It was as a result of this argument that they were granted the opportunity to file a permit application, and the scope of the permit application process was thus limited by the enforcement order to that issue. At the subsequent permit hearing, the Applicants stated that the bulkhead and fill were not necessary for pipe protection and agreed to amend the permit application to delete that reference. Once this item was deleted from the application, the permit could not be granted.

The Applicants had the burden of overcoming the presumption that the requested use is incompatible with wetland function and the burden of demonstrating that the use is reasonable and necessary. The Applicants failed on both points. By removing the argument that the bulkhead and fill were necessary to protect the water and sewer lines, the "reasonable and necessary" argument is defeated. The Commissioner had already determined, in the prior enforcement action, that the use was incompatible with wetland function.

The Commissioner denied the application, and ordered the removal of the bulkhead and fill.

Rusty Pomeroy is a summer associate in the Environmental Practice Group of Whiteman Osterman & Hanna in Albany, New York.

Recent Decisions in Environmental Law

Student Editor: Elizabeth Vail

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State of New York, et al. v. Sour Mountain Realty, Inc., 714 N.Y.S.2d 78 (App. Div. 2000)

Facts: Defendant, Sour Mountain Realty, Inc., is seeking to continue use of a snakeproof fence intended to keep timber rattlesnakes off of the defendant's land. In order to protect the habitat of the rattlesnakes, the state of New York brought an action to permanently enjoin the continued use of the fence by the defendant. The timber rattlesnake involved in this matter has been designated by Environmental Conservation Law § 11-0535 (also known as the New York State Endangered Species Act) to be a threatened species. Defendant's parcel is adjacent to land being used by the Hudson Highlands State Park. The defendant intended to begin mining operations on the land and was applying for a mining permit from the New York State Department of Environmental Conservation (DEC) at the time of this suit. After discovering the rattlesnake den approximately 260 feet from its property line, the defendant notified the DEC of its plan to construct a four-foot-high snakeproof fence along 3,500 feet of the property line. The DEC warned the defendant that "should the placement and nature of the fencing or other activity unilaterally undertaken by [you] harass or harm or significantly modify, degrade, or limit the habitat of the identified [snakes], the Department would consider such activity to be violative of ECL § 11-0535 and 6 NYCRR part 182."[1] The defendant disregarded the DEC's warning and built the fence. Upon learning of the fence's construction, the state of New York and the Commissioner of the DEC brought an action to permanently enjoin the defendant from continuing to use the fence. After a hearing including expert testimony on the habitat and migratory patterns of the species involved here, the Supreme Court granted the plaintiff's motion for a preliminary injunction and instructed the defendant to remove the fence. The defendant appealed this order arguing that the DEC does not have the statutory authority to protect the habitat of a threatened or endangered species under the New York State Endangered Species Act.

Issue: Whether the modification of the habitat of a threatened species constitutes a prohibited taking under New York's Environmental Conservation Law § 11-0535.

Analysis: After hearing the testimony of the plaintiff's experts at trial, the Supreme Court determined that the fence would indeed threaten the habitat and migratory patterns of the timber rattlesnakes. Further, the court concluded that this threat would constitute a taking under the New York State Endangered Species Act. The court also found that if the fence were not removed, the plaintiffs who "are charged with the protection of all threatened species" would suffer irreparable harm.[2] In accordance with its findings, the court permanently enjoined the defendant and ordered immediate removal of the fence.

The defendant acknowledged that the fence interfered with the rattlesnakes' habitat and migratory habits. On appeal the defendant argued that the DEC lacked the statutory authority to protect a threatened or endangered animal's habitat from destruction. Instead, the defendant asserted that the DEC only had the power to prevent the intentional harming or killing of a threatened or endangered species.

Section 11-0535 of the Environmental Conservation Law prohibits the taking of a threatened or endangered species. Additionally, § 11-0103 of the same law defines "taking" as "include[ing] pursuing, shooting, hunting, killing, capturing, trapping, snaring, and netting . . . and all lesser acts such as disturbing, harrying, or worrying, or placing, setting, drawing or using any net or other device commonly used to take any such animal."[3] The court construed the statute according to its plain meaning and held that the "lesser acts" included in the statute's language were meant to incorporate acts of habitat modification. Moreover, the Supreme Court determined that the DEC does have the statutory authority to protect the habitats of threatened or endangered species. The present court affirmed the notion "that the Legislature intended broad protection to be

afforded protected species and that habitat protection may, under appropriate circumstances, be encompassed within that protection."[4]

The court also considered federal law on this issue after discerning that the New York State Endangered Species Act's legislative history revealed the Act was meant to complement the Federal Endangered Species Act. The court noted that the Federal Endangered Species Act, 16 U.S.C. § 1532(19), § 1538(a), "makes it illegal to 'harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect' any endangered species or to attempt to do so."[5] The court cited a decision of the Federal Court of Appeals[6] that held "even though eagles and other endangered species often prey on privately owned livestock and poultry, the Endangered Species Act prohibits self-help measures which have the effect of harming such predators."[7] The court here also looked to the United States Supreme Court to affirm its holding that the Endangered Species Act included in its definition of "taking," habitat alteration that results in a definite harm or death to members of a threatened or endangered species.[8] The court noted that the Federal Act's definition of a taking is to some extent narrower than the definition of New York State's Act. However, the court agreed with cases where federal courts have repeatedly held that habitat disturbance may amount to a taking. With this reasoning, the court deduced that the modification of a habitat may constitute a taking under § 11-0535 of the Environmental Conservation Law.

In issuing its holding, the court verified that the plaintiffs met their burden in seeking a preliminary injunction of a defendant's actions. The court observed this burden could be met by showing "(1) a likelihood of success on the merits, (2) irreparable injury absent the granting of a preliminary injunction, and (3) that the balancing of the equities favors the movant's position."[9] The court in the instant case affirmed that the plaintiffs established the first part of their burden by showing a likelihood of success on the merits. Further, the court found that the DEC properly exercised its regulatory power in finding a taking and that their decision was neither arbitrary nor capricious.[10] Although the defendant contended that the DEC's actions constituted a taking of the defendant's property without just compensation, the court rejected this argument. Rather, the court determined that the removal of the fence has little if any economic impact upon the defendant's land and is thus not considered a taking.[11] Additionally, the court affirmed that both the second and third requirements of the plaintiff's burden were also met. Therefore, the court held that the plaintiffs were properly granted preliminary injunctive relief and affirmed the order below.

Lorena Montalbano '02

Endnotes

1. 714 N.Y.S.2d at 80.
2. *Id.* at 81.
3. *Id.* at 82.
4. *Id.*
5. *Id.*
6. *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 at 1427-28 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).
7. 714 N.Y.S.2d at 83.
8. *See Babbitt v. Sweet Home Chapter of Communities for Greater Oregon*, 515 U.S. 687 at 690, 697 (1995).
9. *Randisi v. Mira Gardens, Inc.*, 707 N.Y.S.2d 204 at 204-05 (App. Div. 2d Dep't 2000).
10. *See* 515 U.S. 687 at 708.
11. 714 N.Y.S.2d at 84.

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Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623 (2001)

Facts: The Croton Watershed, an interconnected chain of reservoirs and lakes throughout Westchester, Putnam and Dutchess counties is one of New York city's principal drinking water sources. In 1992, the city acknowledged the need for filtration of the water in order to comply with state and federal[1] safety standards, and agreed to construct a water treatment plan by July of 1999.

However, five years later, impatient with New York City's lack of progress, the federal government brought suit against the city and its Department of Environmental Protection for violation of federal law. The state of New York intervened, alleging noncompliance with the state Sanitary Code. Subsequently, a consent decree was entered into whereby 26 deadlines for the city were established for the various stages of the water treatment plant including an Environmental Impact Statement, and approvals under the City's Uniform Land Use and Review Procedure.

The city announced its preferred site, the Mosholu Golf Course in Van Cortlandt Park, which had been dedicated as parkland by an act of the Legislature in 1884.[2] Construction of the site was scheduled to last over five years, during which time 28 acres of the park including the golf course would be closed to the public. Furthermore, the Environmental Impact Statement disclosed that hundreds of trees and vegetation rare to New York City were threatened by the construction. The city was urged by the State Attorney General and citizen groups, to acquire legislative approval for the site, however, the city did not seek approval.

The state brought suit by virtue of the city's violation of the consent decree provision that required necessary approvals from the state legislature. This suit was combined with *Friends of Van Cortlandt Park, et al. v. City of New York* and *Norwood Community Action, et al. v. Department of Environmental Protection*, who were seeking to enjoin the city from "convert[ing] a considerable area of parkland from public use without an act of the State Legislature."[3]

The suits were removed to the eastern district, which granted the city's summary judgment motion on the basis that there was "no transfer of an interest in land to another entity . . . [and] no diminution of parkland available for public use after the plant is built, underground use of the parkland [was] not alienation in the sense of diversion of parkland for non-park purposes."[4]

The plaintiffs appealed on June 30, 2000 and moved to certify before the New York Court of Appeals, the question whether state legislative approval is required for the proposed water treatment plant at the Mosholu site.

Issue: Whether state legislative approval is required when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored.

Analysis: The court answered the certified question in the affirmative determining that state legislative approval was required. The parties agreed that constructing a water treatment facility constituted non-park use and that *Williams v. Gallatin*[5] was controlling precedent. In *Williams*, the city leased, without legislative approval, unused parkland for a ten-year term, which was cancelable if the parkland was needed. The court held that parks are recreational areas impressed with the public trust to be used to promote public health and welfare, and that "no objects, however worthy, . . . which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred."[6]

The city argued that no approval was required under *Williams* because there was no alienation of parkland, nor was the treatment plant to interfere with the parkland as it was to be underground with the park surfaces fully restored. The court found this argument lacked merit and asserted that the *Williams* holding applied regardless of whether there was an outright conveyance of the land and regardless of whether the parkland was to be restored.

The court also referred to *Bates v. Holbrook*[7] where the court held that the legislature granting temporary privileges to erect buildings on parkland could not be construed to allow construction of storage buildings which were not temporary. Since the structures were to remain for three years, the court did not consider them temporary. The court determined that to permit construction would equate to an invasion of the park for which direct legislative authority was necessary.

The New York Court of Appeals concluded that the public would be deprived of Van Cortlandt Park for approximately five years, and therefore legislative authority was required. The "use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred."[8]

Purvi Patel '02

Endnotes

1. Surface Water Treatment Rule, 40 C.F.R. § 141.70-141.75.
2. L. 1884, ch. 522.
3. 95 N.Y.2d at 624.
4. 96 F. Supp. 2d 195, 204.
5. 229 N.Y. 248.
6. *Id.* at 253-54.
7. 171 N.Y. 460.
8. *Ackerman v. Steisel*, 104 A.D.2d 940, 941, *aff'd*, 66 N.Y.2d 833 (1985).

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In re Soho Alliance, et al. v. The New York City Board of Standards and Appeals, 95 N.Y.2d 437 (2000)

Facts: Plaintiffs brought action seeking judicial review of a determination made by the New York City Board of Standards and Appeals (BSA) which granted use variances permitting development of two neighboring properties and issuing a Type I Negative Declaration rather than requiring an Environmental Impact Statement (EIS). The two properties at issue are located on West Houston Street within and along the northernmost boundary of the SoHo Cast-Iron Historic District. These sites fall within an M1-5A zoning district designated for light manufacturing. The BSA's determination was made after eight months of proceedings, which included four days of public hearings and a review of documentary materials and exhibits. The City Planning Commission (CPC) conducted an initial review of the properties and since the sites were located in a historic district, the owners obtained the necessary approval of the Landmark Preservation Commission.

Issue: Whether the determination made by the BSA to grant use variances permitting development of the

two properties and issuing a Type I Negative Declaration rather than requiring an EIS was valid.

Analysis: In order to issue a use variance, the BSA is required to find that the proposed development meets five specific requirements: (a) that because of "unique physical conditions" of the property, conforming uses would impose "practical difficulties or unnecessary hardship"; (b) that also due to the unique physical conditions, conforming uses would not "enable the owner to realize a rational return" from the zoned property; (c) that the proposed variances would "not alter the essential character of the neighborhood or district"; (d) that the owner did not create the practical difficulties or unnecessary hardship; and (e) that only the "minimum variance necessary to afford relief" is sought.[1]

The court found that review of the BSA's determination to grant the variances is limited by the well-established principle that a municipal zoning board has wide discretion in considering applications for variances. A determination by the board "may not be set aside in the absence of illegality, arbitrariness or abuse of discretion" and "will be sustained if it has a rational basis and is supported by substantial evidence."[2]

The court held that the BSA was entitled to rely on the study completed by the CPC to determine the existence of unique physical conditions resulting in practical difficulties or unnecessary hardship. Also, the BSA could rely upon expert testimony submitted by the owners providing "dollars and cents" evidence through significant documentation that the unique physical configurations of the properties would preclude a reasonable rate of return from conforming uses.[3] The owner's expert testified that a reasonable rate of return on the properties would be 9.9% and that not only would conforming uses fail to provide the 9.9% return, even less deviant uses could not yield that rate of return.

Although the plaintiffs did not dispute the economic analysis supplied by the owner's expert, they objected to the owner's expert testimony being based upon comparable properties from outside the zoning district. The court, after noting that more than half of the properties examined were within the district and that the other properties surveyed were located in adjoining areas, stated that there is no inflexible rule which requires, as a matter of law, that an economic analysis to support a use variance be restricted exclusively to data on properties within a particular zoning district. By examining the New York City zoning ordinance requirement that any proposed development not alter the essential characteristic of the neighborhood or district, the court reasoned that this contemplates the possibility of consideration of properties that might fall outside of the district boundaries. The court also noted that the value of the property, which also determines the feasibility of potential uses, is affected by its geographical location as well as its zoning location.

The BSA was also allowed to rely upon the changes to the plans of development made to conform to the Landmarks Preservation Commission's construction requirements, in order to determine that the proposed developments would not change the essential character of the neighborhood. It was also held that it was not irrational for the BSA to conclude that the development would have only an insignificant effect on the general character of the mixed-use neighborhood since the proposed changes would only bring an additional 185 residents to the already-existent population of 10,000 residents.

For all of the foregoing reasons, the court concluded that there was substantial evidence to support the BSA's findings as to each of the five requirements necessary to issue the proposed use variances.

Finally, the court found the BSA's determination that an EIS was not necessary, was neither irrational nor illegal. The court held that the BSA's finding of "no foreseeable significant environmental impacts that would require the preparation of an [EIS]" was rational since the BSA took a "hard look" at the potential environmental impacts of the proposed development.[4] The BSA also received input from interested agencies such as the City's Department of Environmental Conservation and the Landmarks Preservation Commission. Archaeological studies and soil and groundwater testing were also required by the BSA before the board issued the use variances.

Accordingly, the Court of Appeals affirmed the holding of the Appellate Division that there was substantial evidence to support the findings as to each of the five requirements and there was a rational basis for determining there were no foreseeable significant environmental impacts that would necessitate the preparation of an EIS.

Nancy B. LeJava '02

Endnotes

1. *See* N.Y.C. Zoning Resolution § 72-21; *Bella Vista Apt. Co. v. Bennett*, 89 N.Y.2d 465, 655 N.Y.S.2d 742, 678 N.E.2d 198 (1997).
2. *See Consolidated Edison Co. of N.Y. v. Hoffman*, 43 N.Y.2d 254, 256, 403 N.Y.S.2d 193, 374 N.E.2d 105 (1978).
3. *See Village Board of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 256, 440 N.Y.S.2d 908, 423 N.E.2d 385 (1981).
4. 95 N.Y.2d 437, 442.

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Whitman v. American Trucking Associations Inc., et al. 121 S.Ct. 903 (2001)

Facts: In July of 1997 the Administrator of the Environmental Protection Agency (EPA) revised the national ambient air quality standards (NAAQS) for ozone (O3) and particulate matter (PM).[1] The NAAQS were revised pursuant to § 7409 of the Clean Air Act (CAA), which mandates that the Administrator review and update the standard at five year intervals.[2] "Numerous petitions" were filed challenging the revised NAAQS on several grounds including a charge that the EPA's interpretation of § 7409 of the Act, allowing the Administrator to set air quality standards with an adequate margin of safety, amounted to an unconstitutional delegation of legislative authority.[3]

In holding that the non-delegation doctrine had been violated, the Circuit Court of Appeals for the District of Columbia provided an analogy in which Congress commanded the EPA to select "big guys," and the EPA provided height and weight as selection criteria, but provided no cutoff point.[4] The court held that the EPA "articulated no intelligible principles" in its interpretation and that none were provided by the statute.[5] Both ozone and particulate matter are considered non-threshold pollutants and as such there is no established threshold limit below which there are no health risks. Therefore, the court reasoned, no intelligible principles could be deduced for the EPA to set a limit that is "requisite to protect the public health with an adequate margin of safety."[6]

Essentially the EPA would be free to set limits that were "any point between zero and a hair below the concentrations yielding the London killer fog."[7] The court remanded the NAAQS back to the EPA to re-interpret the statue in light of the court's concerns.

The court also held that the EPA could not consider the cost of implementation when setting new NAAQS. Finally, the court held that a provision of the 1990 amendments to the CAA prevented the EPA from implementing the new ozone NAAQS in non-attainment areas.[8]

Both parties petitioned the United States Supreme Court for review and certiorari was granted, for both parties, in May of 2000.[9]

Issues:

1. Whether § 7409 of the CAA delegates legislative authority to the EPA.
2. Whether the EPA may consider the cost of implementing the new NAAQS.
3. Whether the EPA properly interpreted Part D of Title 1 of the CAA.[10]

Analysis: The U.S. Constitution grants legislative powers exclusively to Congress,[11] and the Supreme Court has held that in order for Congress to grant decision-making authority to executive agencies it must "lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform."[12] With respect to § 7409 of the CAA, the Court found that this standard was met.[13] The Court commented that § 7409 was "well within the outer limits of our non-delegation precedents," and reversed and remanded the D.C. Circuit on this issue.[14] The Court reasoned that Congress established intelligible principles limiting the scope of § 7409 in that the EPA must base its standards on published air quality criteria that reflect the latest scientific knowledge. Also, in establishing standards that are "requisite" to protect public health, the EPA is bound by the definition of requisite, which means "sufficient, but not more than necessary."[15] The opinion goes on to cite numerous precedent in which the Court has upheld similar limits on agency discretion.[16] The Court also held that the D.C. Circuit erred in remanding the NAAQS for reconsideration for a potentially constitutional reinterpretation of the statue by the EPA. That the EPA could reinterpret a statue that unconstitutionally delegates authority seemed "internally contradictory" to the Court. The EPA would be exercising legislative authority in making the choice to limit itself in interpreting the statue. The Court concluded, "we have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statue."[17]

With respect to the issue of consideration of cost as a factor, the Court held that the EPA was prohibited from doing so when issuing new air standards. In so holding, the Court cited numerous precedent cases and the text of the statue, which instructs the EPA to establish NAAQS "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[18] The plain language of the statue leaves no room for consideration of the cost of implementation of new standards. This language is "absolute."[19]

The final issue that the Court dealt with was the EPA's implementation of the revised ozone NAAQS in non-attainment zones. The question arose within the context of varying interpretations of Subparts 1 and 2 of Title 1 of the CAA.[20] Part D of Title 1 imposes additional restrictions for pollutants that currently exceed the allowable levels, or non-attainments zones. If Subpart 2 is controlling then the EPA's discretion as to the setting of levels and compliance timelines would be limited to the established values set out in Subpart 2, and would preclude the implementation of the new NAAQS for ozone. The EPA argued that Subpart 2 did not displace

Subpart 1, which allows for more discretion, it merely supplemented it. The Court disagreed. The Court noted that it must defer to a reasonable interpretation made by the administrator of an agency,[21] but concluded that in this case the EPA "goes beyond the limits" of what the court sees as a reasonable construction of the statue.[22] The Court found the plain language of § 7511(a) of Subpart 2 to be controlling. The statue states "each area designated non-attainment for ozone … shall be classified at the time of such designation by operation of the law."[23] Therefore, the EPA cannot implement the new ozone NAAQS in non-attainment zones unless they are revised to comply with the standards set out in Subpart 2.

Brian Troy '02

Endnotes

1. *National Ambient Air Quality Standards for Particulate Matter*, 62 Fed. Reg. 38,652; *National Ambient Air Quality Standards for Ozone*, 62 Fed. Reg. 38,856 (1997).
2. 42 U.S.C. § 7409(d)(1).
3. *American Trucking Associations, Inc. v. U.S.E.P.A.*, 175 F.3d 1027 (D.C. Cir. May 14, 1999).
4. *Id.* at 1034.
5. *Id.*
6. *Id.*
7. *Id.* at 1037.
8. *Id.* at 1033-34.
9. *Browner v. American Trucking Associations, Inc.*, 120 S.Ct. 2003 (U.S. Dist. Col. May 22, 2000) (No. 99-1257); *American Trucking Associations, Inc. v. Browner,* 120 S. Ct. 2193, (U.S. Dist. Col. May 30, 2000) (No. 99-1426).
10. 42 U.S.C. §§ 7501-7515.
11. U.S. Const. Art. 1 § 1.
12. *J.W. Hampton, Jr. & Co. v. United States*, 48 S.Ct. 348, 363 (1928).
13. 121 S.Ct. 903.
14. *Id.* at 913.
15. *Id.* at 912.
16. *See, e.g., Touby v. United States*, 111 S.Ct. 1752 (1991); *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 100 S.Ct. 2844 (1980).
17. 121 S.Ct. at 912.
18. 42 U.S.C. § 7409(b)(1).
19. 121 S.Ct. at 908.
20. 42 U.S.C. §§ 7501-7509a (subpart 1); 42 U.S.C. §§ 7511-7511f (subpart 2) (added by the Clean Air Act amendments of 1990).
21. 121 S.Ct. at 916 (citing *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 104 S.Ct. 2778 (1984)).
22. *Id.*
23. *Id.* at 917.

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Publication Submission Deadlines: On or before the 1st of March, June, September and December each year.

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Printed on Recycled Paper

THE NEW YORK ENVIRONMENTAL LAWYER

This publication is published for members of the Environmental Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. The views expressed in articles in this publication represent only the authors' viewpoints and not necessarily the views of the Editor or the Environmental Law Section.

ISSN 1088-9752

PRSRT STD
U.S. POSTAGE
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PERMIT NO. 155