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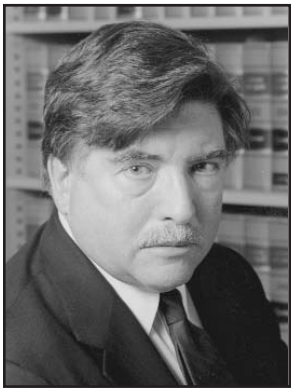
The New York Environmental Lawyer

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

A Message from the Section Chair

Reports of Our Demise Are Greatly Exaggerated



Last year, the popular trade press reported that environmental law was one of the "coldest" practice areas. Warm or cold, environmental law remains one of the most challenging practice areas. Moreover, it isn't going away. The environmental law practice area remains challenging because it is a microcosm of modern law requiring a mastery of varied professional skills. Indeed, environmental lawyers are and will face increasing professional challenges in the new millennium. A few words about the short history of our practice and Bar Section should place that statement in perspective. Thirty years ago, Congress enacted the National Environmental Policy Act, a harbinger of the soon-to-come flood of federal and state environmental legislation. However, the Bar Association probably had never heard of an environmental lawyer much less contemplated a large section of environmental lawyers. Twenty years ago, Love Canal galvanized Congress into enacting Superfund, and environmental law became an overnight "hot" specialty, and the Section grew to almost 2,000 lawyers. The "maturing" of EPA's Superfund program has coincided with a decrease in Section membership. Nevertheless, we remain a robust Section of almost 1,400 lawyers.

The most recent issue of the *Columbia Environmental Law Journal* contains Mike Gerrard's creative analysis of demand for environmental lawyers. He concludes there is and will be a constant, if not slightly increasing, demand for environmental lawyers. Certainly, the practice isn't getting easier. Indeed, only the comparatively easy problems appear to be solved. Environmental practitioners in New York still face the full panoply of environmental matters that arose in the eighties, except the huge multi-party hazardous-waste case appears to

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have suffered the same fate as other dinosaurs. Nevertheless, economic and health issues arising from the release of hazardous materials still abound. The public's heightened concern over latent effects from exposure to hazardous substances has spawned a new generation of toxic tort suits. Our own little National Environmental Policy Act, "SEQRA," continues to dominate land use development. The Navigation Law spawns expensive remediation and concomitant litigation. We have extensive problems with our wetlands, waterways, and reservoirs. We are only now grappling with basin-wide pollution and runoff. There is marked tension between the need to maintain surface waters as reliable sources of potable water and the accommodation of urban growth. New areas loom on the horizon: (i) implementation of the Clean Air Act's Title V permit program; (ii) the recovery of Natural Resource Damages under CERCLA; and, (iii) the intricacies of the various reporting statutes.

Another factor complicating our practice is the criminalization of environmental law. The law appears to grant sundry federal, state and local prosecutors broad discretion to treat environmental derelictions as misdemeanors and felonies. Although there can be little sympathy for persons or institutions that intentionally violate environmental laws, there is a strong need for guidance on when derelictions should be treated criminally. This is far too important an area to be left to the whims of government officials.

This Section is in the process of attempting to focus our state leaders on the need for Brownfield Legislation. This effort is critical to remove the blight on inner-city development that is created by the application of rigid clean-up statutes to historical contamination.

It is fair to conclude that there is a lot to do, and that work requires specialized skills that members of our Section often take for granted.

Although environmental law, like almost all other practice areas, can be practiced by almost any talented lawyer, there are some unique aspects to environmental law that may give rise to a fair degree of caution. Almost all of us have been called into a matter laden with environmental issues after it has been mucked up by the world's greatest litigator or corporate maven.

Environmental issues quite often involve the application of crude government regulatory efforts to poorly understood science. Moreover, the ability to find an economically fair solution may be obstructed by "political" and obscure agendas that are not readily discernible to the generalist. Finally, environmental expertise is applied in dramatically varied circumstances ranging from corporate due diligence to criminal defense. However, the action taken in one circumstance may trigger consequences in other areas. For example, decisions made in the course of a due diligence investigation may be the grist of a subsequent contract litigation. Similarly, even inaction in the course of a compliance audit may generate criminal proceedings. Sensitivity to these issues should arise from our practice of environmental law.

Accordingly, the Section also faces several challenges: increasingly complex issues with a possible concomitant of "over specialization" and the advent of new environmental areas. We must meet these challenges to help define the role of our Section. We can ensure that we, as Section members, are prepared to meet the challenges of the new millennium through the interchange of ideas, providing forums for the development of new approaches, continued legal education, and education of the public.

Daniel Riesel

REQUEST FOR ARTICLES

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

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

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect 5.1 or 6.1 or Microsoft Word, along with a printed original and biographical information, and should be spell checked and grammar checked.

From the Editor

This issue of the J*ournal* is being prepared as we exit one millennium and enter another. I probably cannot add much of significance to the public discussion—one might characterize it as hyperbole—about what should be felt as the clock turns to the proverbial zeros. However, it is inevitable, and probably healthy, that people take stock of the passage of time, the turn of events, and the comparisons that can and should be made between "then" (pick your date out of the last millennium) and "now." It would be more useful, of course, if the arbitrary date of 1/1/00 nevertheless encouraged people to pause and reflect on some of the underlying dynamics of how systems have changed over time. Given the leanings of our readership, the interplay among political and social systems and how ecological change, climate cycles, population dynamics, disease and food production and distribution have impacted on human history should prove interesting and likely prompt thoughtful predictions for our increasingly interconnected world. Any articles?

Globalism, recently the subject of more heat than light, may be a good departure point for looking backwards as well as forwards. The competing views on globalism often seem very reductionist. Yet, any reasonable view of the world today and its human systems has to acknowledge profound shifts in international economics. The impact on regional ecologies and national environmental policies remains to be seen. An analogy between such macroeconomic models and our increasingly sophisticated appreciation of interconnecting ecologies and climate systems naturally presents itself.

On the latter, there is the fact that ripples from regional climate variations, especially disastrous ones, are felt throughout the global climate and impact, too, on regional and national economies and political systems. The effectiveness of geographic distance as a firewall is increasingly in doubt. Here history serves as warning. The millennium opened at the end of a long period of substantial population movements likely caused in part by climate change, changing ocean currents thousands of miles distant, rising and falling sea levels, and the simple human need for space and resources. Recent historical scholarship also indicates disastrous droughts interspersed with disastrous wet spells, with regional variations, throughout our immediate past millennium, especially around the time known as the "Little Ice Age." Hot and cold periods oscillated throughout the millennium, as they had for millennia past. The implication is that the relatively stable global climate during much of the twentieth century (excepting the recent warming trend, the early century American dust bowl, and late century African desertification) is likely temporary, even without human-initiated global warming. This recent period of relative stasis happened to coincide with exponentially expanding populations for which Malthusian consequences were tempered by breathtaking advances in health and agriculture that capped off a millennium already marked by quantum leaps in human control over the environment. The century's technological advances in this sense may lead to a false sense of security and mask the underlying dynamism of a global climate system that remains beyond human beneficial modification as well as the dramatic ways in which regional environments may respond to disruptions. This is important in several respects. For instance, the new historical evidence, reaching not too far into the past millennium, is contributing to fresh views on social disintegration in over-stressed populations and change in populations better favored with resources. Now, we must look forward to future centuries likely characterized by expanded regional and world populations, the uncertainties of global warming and unanticipated consequences that environmental disruption may have on resources and even basic geography. One cannot help but take seriously how over-stressed the global population may become, especially when one acknowledges the often close historic link between the effects of climatic and environmental change on the one hand, and the resulting massive violence and population displacements throughout history on the other hand, and the enhanced power of human intelligence and technology in these regards to achieve great evil along with great good.

Nature also responds dramatically with pathogenic diseases, and here too there is some environmental grounding. Looking backward, the connections between exotic pathogens and depopulation, and ecological change and yet more depopulation, is clear. However, in the often fragmented equations we construct in analyzing history, these relationships are generally seen as existing on different tracks: although epidemics equal human disaster, and ecological disaster may equal human disaster, changed ecologies did not generally equal epidemics. In just the past few years, though, scholars and even the general public have come to grips with how ecological change today is bringing formerly isolated germs and disease vectors into close contact with distant populations in formidably fast time periods. Ebola, hanta viruses, variants of encephalitis and the like, and even HIV as a possible mutant of simian AIDS, can be traced to disturbed ecologies and highly transient germs and individuals. Recall the worldwide impact of the 1918 flu and the continuing mystery of its origins. Of course, transspecies infection is not new—that's how we account for measles, numerous poxes, and possibly even the common cold as humans in greater density occupied environments formerly reserved to wildlife. In just the last half of the twentieth century, though, human incursions have cut deeper into the brush,

coming into contact with formerly unknown disease reservoirs. Each village is closer to the next village, and so on, right to major road systems and airport entrances. Again, systems are interacting in novel ways. As we look forward, can we any longer count on epidemics burning out in their isolated pockets? The evidence seems to the contrary. The question is who will win the race: science coupled with appropriate political and social damage control, or quickly mutating germs astride international travelways?

These and similar issues may seem a bit far removed from the more traditional concerns of environmental lawyers and policymakers. But there actually is an increasingly compelling argument for our looking further afield, reviewing evidence from other disciplines, when we consider what environmental perspectives and policies will be appropriate for the next century and thereafter. If we've learned anything from the history of the last millennium, it is that systems, notwithstanding their own uniqueness and internal rules, impact on one another in often unsettling ways. We should be looking to reduce environmental unpredictability through better science and public policy, to mitigate where threats are predictable, also requiring better science and appropriately responsive public policy, to avoid risks that are ascertainable and unnecessary, and, otherwise, hang on for the ride!

But back here in the winter of 2000, there are some more immediate items to report. We lead off this issue with addresses to the Section by not one, but two, Parks Commissioners: New York State Commissioner of Parks, Recreation and Historic Preservation Bernadette Castro and Henry Stern, New York City Parks and Recreation Commissioner. Commissioner Castro's address was delivered at the Section's annual meeting in New York City. She proves herself to be an effective spokesperson for Governor Pataki on what she aptly calls "the most complex, most magnificent state park system in the country." The Commissioner's remarks touched on numerous points: the seemingly mundane, yet clearly critical, subject of funding; ongoing and proposed projects, including Governor's Island in New York Harbor; new initiatives regarding the Land and Water Conservation Fund; preservation efforts for historic sites; and the Department's close relationship with DEC and federal agencies, all underpinning the essential environmental ingredients of state policy on parks and historic resources. Commissioner Stern addressed himself to habitat conservation and restoration in that most urban of human habitats, New York City. Commissioner Stern is well-known as an ardent (and even verdant) enthusiast of what he terms the city's "Emerald Empire"—its interconnected parks and other open spaces. His remarks underscore why New York City, once a byword for urban decay, has become an unlikely leader among municipalities in the realm of restoration ecology.

This issue also includes the minutes of the Section's Executive Committee meeting held in conjunction with the annual meeting. We have the good news of a budget surplus—a seemingly common event these days except in Nassau County—and an update on Section activities. The minutes also reflect approval, in resolution form, of a report of the Ad Hoc Task Force on Superfund Reform. The report, submitted by Lou Alexander, the Task Force's coordinator, follows the minutes. A report on the Environmental Insurance Committee's conference conducted during the fall also is included.

Lauren Sears, of Hofstra Law School, was a finalist in the Section's essay competition. Her article on state conservation easements is being published in the present issue. Stuart Shamberg and Adam Wekstein submit an article evaluating—and criticizing—the recent Court of Appeals' decision in *Bonnie Briar Syndicate v. Town of Mamaroneck*, which they analyze in light of the recent U.S. Supreme Court ruling in *City of Monterey v. Del Monte Dunes*. The authors practice generally in the area of zoning law, counselling real estate developers. They represented the plaintiffs in this action. The article is included because it addresses issues regarding takings law that may have relevance to our readers. The authors contend that with this decision, the Court of Appeals has signaled, for state rezoning cases, a shift away from a more stringent rough proportionality standard in favor of the pre-*Nollan* rational relationship standard applied when evaluating the constitutionality of regulatory exactions. For the sake of balance, an article by the victors in that case, Robert Davis and Judith Gallent, is also included. The latter article appeared in one of our sister publications, the *Municipal Lawyer*.

Cheryl Cundall has assumed responsibility for the "Names in the News/People on the Move" feature to which Dave Markell had contributed his sleuthing efforts in keeping track of our membership. I personally thank Cheryl and especially note the comprehensiveness of her first column. I've always thought that this feature creates a valuable linkage among our readers, and has additional value for those times when one has to know who to call, and where to reach them. I would be remiss if I did not thank Whiteman Osterman and Hanna, yet again, for contributing the administrative update. This time, David Everett and Melissa Osborne prepared the summaries. Patricia Ahearn of St. John's Law School, who has since taken a recent leave of absence as student editor, supervised the case summaries. Jennifer Rosa will be assuming student editorial responsibilites.

Phil Weinberg, long a professor at St. John's and a dean of the environmental law bar, has made inroads into NYU recently. Phil helped develop and now directs the annual Summer Institute in Environmental Law at NYU's Wagner Graduate School of Public Service. Phil's stature has proved immeasurably beneficial for attracting stellar lecturers to the program. This year's seminar, which awards CLE credit, will be held from May 22-26. An announcement is included on page 36 of the *Journal*.

Kevin Anthony Reilly

Environmental Law Section Annual Meeting
Friday, January 28, 2000

Keynote Address of Bernadette Castro

Commissioner, New York State Office of Parks, Recreation and Historic Preservation

One of my favorite holiday gifts was Gail Port's letter of December 3rd asking me to speak to you today. I've enjoyed working with Gail as we serve together on the State Environmental Review Board. Her commitment to her profession and her dedication as a volunteer is commendable.

I am also very proud to share the dais with John Adams of the Natural Resources Defense Council. It is appropriate to call him a legend in the environmental movement. To be receiving an award with him this afternoon is both humbling and wonderful. I have a few other people I'd like to recognize: Chief Counsel for the Office of Parks, Recreation, and Historic Preservation . . . and more than that, as Mike Finnegan would tell you, one of the best lawyers to have ever entered government service, Meg Levine . . . and there are other good lawyers in Albany . . . a gentleman that works in the Governor's Counsel's office and a lawyer that works with Meg on so many important agency issues, Glen Bruening. And within our agency, Director of our Bureau of Environmental Management, a biologist who has brought a stronger sense of science to State Parks, Tom Lyons.

Each of you has been given several important publications that describe much of what the Office of Parks, Recreation, and Historic Preservation does. Actually, the name says it all: "Parks, Recreation, and Historic Preservation."

You also have a copy of our guidelines which includes our very important mission statement, and how all that we do must reflect and adhere to our mission. This document is concise by design . . . dozens of agency staff took part as did a coalition of conservation groups.

Our parks guide describes what ***you*** own:

- 158 State Parks
- 35 State Historic Sites
- 16 Heritage Areas
- 16 Nature Centers
- 1,350 Miles of Trails
- 774 Cabins
- 8,362 Campsites
- 76 Developed Beaches
- 51 Swimming pools **AND**
- 27 Golf Courses, one of which, the Black Course at Bethpage State Park, will host the 2002 United States Open. I cannot speak of the great moment in golf history without officially thanking David Fay, Executive Director of the USGA, Bradford Race, Secretary to the Governor, and Rees Jones, renowned Golf Course Architect for the important roles they played in what will be a global event. The first time in USGA history, the Open will be played on a government-owned golf course . . . and it is a very successful public-private partnership . . . the USGA invested $2.7 million in a golf course owned by the people of New York.

The other publication is one that has come to be regarded as one of the finest historic preservation newsletters in the country. I guarantee that you will learn something new, whether it's about Certified Local Governments, historic districts, or conserving furniture. . . . Look it over and if you'd like to be on our mailing list, just let us know . . . we *are* the Quality of Life Agency . . . we see 65 million visitors a year and 2 of our state parks are known globally: Niagara Falls in beautiful Western NY, also the oldest state park in the nation, established in 1885. And Jones Beach State Park, just an hour from here, without dispute the finest ocean-front park in the world. . . .

New York has the most complex, most magnificent state park system in the country. There isn't a day that goes by that I don't silently thank George Pataki for the opportunity to be the chief steward, the Commissioner of the great park system, the State Historic Preservation Officer. . . . I have had the distinct, rare thrill of awakening a sleeping giant. And because of this Governor's passion for all that we do, we are no longer ignored, we are no longer an easy budget . . . we are, along with our sister agency the Department of Environmental Conservation, because of Governor George Pataki, very important.

John Cahill and I often speak about how lucky we are to be serving in this Governor's Cabinet . . . clearly, one of George Pataki's greatest legacies will be his commitment to the environment: the $1.75 billion Bond Act, the fully funded Environmental Protection Fund with an annual appropriation of $125 million . . . EPF and Bond Act dollars have provided the resources so desperately needed by State Parks and DEC and numerous

municipalities across the state to address open space needs. . . .

It has also been invaluable in aiding us with major infrastructure and rehab, because these precious assets were neglected for so long. We keep every dollar, every fee that we collect. Not even the National Park Service can say that! . . . Our capital money comes from SPIF, the State Park Infrastructure Fund . . . and that fund is replenished from our user fees . . .

We have approximately:

- 1,700 Full Time Employees
- 6,000 Seasonal Employees

With a budget of $195 million, 47% of which is now funded from *non-state* tax revenues. New acquisitions?

With Parks and DEC combined, the Governor has protected more than a quarter million acres of precious open space. For State Parks, there has been Sterling Forest in the Palisades. For DEC, the Whitney and Champion properties in the Adirondacks. The purchases I just mentioned got the most press . . . but there were so many other important accomplishments: the acquisition of critical buffer land to existing state parks and historic sites . . . the acquisition of a great new urban park . . . Woodlawn Beach just south of Buffalo, the exciting state/city partnership that has created the Hudson River Park on the west side of Manhattan, and . . . the importance of reconnecting people to the waterfront cannot be overstated. . . .

Whether it is the Hudson River or Long Island Sound, we are committed to giving New Yorkers access . . . and let us not forget transfers from other state agencies such as our new Nissequogue River State Park, formerly known as Kings Park Psychiatric Center. The Empire State Development Corporation played a key role in that transfer and in the creation of our small, but important Gantry Plaza State Park in Queens . . . and as the State Historic Preservation Office, we will be very much a part of the planning for the future use of Governors Island. In fact, the closure of this United States Coast Guard base is a federal action and subject to our review under Section 106 of the National Historic Preservation Act. We worked for over 2 years to develop a programmatic agreement that would protect the historic resources in the short term through stipulated maintenance, and protect the resources in the long term through the development of a preservation and design manual and covenants. The process is still underway. . . . Governors Island is another example of multiple agencies working together: Dept. of State, DEC., Battery Park City Authority, Empire State Development, and numerous city agencies . . . all working together on the creation of a new public space, giving the public access to a gem in the harbor. . . .

A perimeter trail, a 50-acre park, athletic fields, a conference center, facilities for cultural institutions, and working with our partner the National Park Service to preserve the historic forts and north side of the island . . . the plans are big and beautiful and most important, doable! We just need the federal government to give it to us and we're in business! And what tremendous good has come from our partnerships with non-profits like the Regional Plan Association and numerous conservation organizations like:

- The Trust for Public Land
- The Open Space Institute
- The Adirondack Mountain Club which has formed a terrific alliance with the New York-New Jersey Trail Conference . . .
- The Appalachian Mountain Club
- Scenic Hudson
- The Audubon Society
- The Preservation League
- The New York Parks and Conservation Association, & too many more to mention . . . but let us focus for a moment on the Nature Conservancy and "The New York Natural Heritage Program" which is based within DEC and which is conducting biodiversity surveys in every natural area within the state park system . . . we focused first on Allegany State park, Sterling Forest, and Iona Island . . . although only 3 of our state parks . . . their combined acreage represents 30% of the total acreage.

In short, we are taking inventory. . . the Governor has made it very clear to me and John Cahill he wants no new trail cut unless we know what we're dealing with. . . . Heritage Program scientists are visiting our parks and sites and evaluating aerial photos. They are then providing us with maps of ecological communities and a listing of species ranked according to their rarity on a global and state basis . . . in short, we will be enhancing the protection of our environmental resources. And, let us not leave the science without referring to the importance of water quality to everything we do. In part, as a result of the Washington County Fair illness outbreak, I directed that we do a thorough assessment of the conditions of our water treatment systems. We are doing some preventive maintenance and investing in repairing and replacing where needed.

Most recently the public at large has been enlightened as to the potential danger of Methyl Tertiary-Butyl Ether and its now infamous initials: MTBE. While MTBE regulation comes under DEC and the Dept. of

Health, we have been aware of this issue. We take action to assure that events in our parks do not adversely impact our waters. Do we issue a permit for a jet ski competition? Do we allow swimming or not at our new Woodlawn Beach State Park on Lake Erie? Do we need to be concerned about the Canada geese polluting our beaches and—yes—our water?

And you should know that our partnerships with the *private for-profit* sector have done nothing to jeopardize the integrity of our state parks environment. Indeed, the partnerships discussed in your guide have provided millions of dollars to fund everything from new playgrounds to nature centers and tree replenishment. As a reminder, every partnership and concession contract is subject to the SEQRA evaluation. In many cases findings have enabled us to move forward with confidence, or . . . to amend plans . . . or in some cases, to abandon a project.

Our agency is also working to revive main street business districts . . . more and more communities are re-examining local land use strategies: they want their downtown back . . . they want to ease traffic congestion and encourage smart growth . . . adaptive reuse of our historic buildings is a critical component. *Historic Preservation must be "mainstreamed" and integrated into the overall environmental movement to conserve resources and combat sprawl*. Historic Preservation is no longer just the mansion on the hill. The Governor has most recently established a "Quality Communities Task Force" which will focus on redeveloping urban centers and older suburbs, preserving open space and agricultural and forest lands, protecting water and air resources, restoring and protecting New York's waterfront areas in existing communities. Many state agencies, including ours, will be working closely together.

On historic preservation issues, we are already doing much of this through the project review process. A great example of this inter-agency cooperation is the memorandum of understanding between State Parks and the Dept. of Transportation . . . hundreds of road improvement projects are reviewed by SHPO each year and this MOU has facilitated that process . . . our solid relationship with DOT has yielded many positive programs:

- A comprehensive survey of New York's historic bridges
- A new programmatic agreement for proposed work on the Taconic State Parkway
- Development of a similar agreement for the treatment of bridges over the N.Y. State Barge Canal

Archeological resource awareness has also improved. For example, when important archeological remains were discovered at the site of the New York State Dormitory Authority office building in downtown Albany, they were carefully documented and protected before, during and after the construction project . . . and the site's early history is now interpreted through excavated artifacts in the building's lobby . . . more recently, the public has actually been encouraged to view archeological work in progress . . . I even know of tours that were given at the DEC construction site in downtown . . . What a change! And . . . there are good incentives for commercial property owners to become historic preservation minded.

The federal preservation "investment tax credit" offers owners of commercial, office, industrial, or residential rental properties a federal income tax credit equal to 20% of approved historic rehabilitation costs. Over the past 4 years, New York has forwarded more than $1 billion worth of certified projects to the National Park Service, more than all other states combined. Disney is a believer . . . their New Amsterdam Theater project on West 42nd Street was a beneficiary; as was Met Life's wonderful building at Madison Square. But now we must urge the federal government to include historic rehabilitation tax credits for homeowners . . . this incentive would revive historic neighborhoods, promote affordable home ownership, and ease the pressure to develop precious open space. It is not elitist. If income is so low that taxes are not an issue, then there would be a discount on a home mortgage. Everyone, regardless of income, would benefit.

Often, however, many of the most historic buildings are owned by local governments: city halls, courthouses . . . or non-profits: churches, synagogues, theaters, opera houses. The Governor's Bond Act and Environmental Protection Fund money, as great as it is, will never be enough to fund all of the qualified grant applications that we receive each round, for open space acquisition, park development, and historic preservation . . . but there is another major source of funding. It's the state side of the Land and Water Conservation Fund. The legendary Robert Moses, whether you agree with all he did or not, lived a philosophy that must be applied here: "Long range planning always demands short range persistence." And that's a perfect segue to my final topic this afternoon.

The rebirth of the state side of the Land and Water Conservation Fund . . . As environmental lawyers, one of your missions is to see that government keeps its public policy promises. . . . In 1964, the federal government made a promise, in the form of federal legislation: from the billions of dollars in revenues generated from the off-shore oil and gas drilling, $900 million a year would go into the "Land and Water Conservation Fund". . . it went on to say that the money would be evenly split: $450 million for federal needs, acquisitions, etc. . . . and $450 million for what would be referred to

as the "state side program". . . money that would be distributed to states via a certain formula that would be used as a matching grants program . . . individual states could use the money where needed: acquisitions, park development . . . everything from pools in inner cities to public beaches, tennis courts and soccer fields in the suburbs.

States would administer and pass money through to municipalities . . . or in some cases could match some of the money for its own state parks and preserves or to fund state acquisitions . . . The program worked well in the early years . . . Between 1965 and 1995 New York awarded $200 million in competitive matching grants to 1,100 park projects, generating almost 1/2 billion dollars worth of park acquisitions and development . . . then we states saw a decline in what was understood to be a dedicated funding stream . . . in 1995 no state, I repeat, *no* state received any funding . . . the federal side continued to roll along . . . in fact, we had to plead for and finally received some funding from it, for the acquisition of Sterling Forest.

The state side of the Land and Water Conservation Fund represents a broken promise . . . in 1998, Governor Pataki directed me and Commissioner Cahill to establish an "Empire State Task Force for Land and Water Conservation Funding." Laurance Rockefeller agreed to be our honorary chair. It was Mr. Rockefeller who was deeply involved in the program's creation in 1964. We held a major one-day summit in Albany in January of last year. We told hundreds of leaders from municipalities, non-profits, conservation organizations, and concerned citizens, that the state side of the LWCF was zeroed out in the federal budget not because there were people crying out against it . . . no one was crying out *for* it . . . it was eliminated because it *could* be.

Well, things are changing . . . the high point came this summer when we delivered *unanimous* support from the New York Congressional Delegation for an amendment to add funding to the Interior appropriations bill. It was passed by both houses, received the President's signature, and for the first time in 4 federal fiscal years, there is funding for this program . . . not much, only $40 million for the country, meaning just about $2 million for N.Y. . . . but we are once again an issue. On my various Washington visits . . . and I have one coming up in a few weeks, most young staffers and many members of Congress don't even remember the program . . . they are amazed at how it just faded off the radar screen . . . well, we're baaaack!!!!

Here's where we need your help . . . near the end of 1999, the Republican Don Young of Alaska, Chairman of the House Resources Committee, came to agreement with the Democrat George Miller of California on a bill called "CARA," the Conservation and Reinvestment Act. If enacted, New York State would benefit dramatically . . . for everything from acquisition money to funding for urban park and recreation recovery, non-game species of wildlife, historic preservation . . . it's not perfect, but it promises to be the most important conservation funding legislation in 36 years. In words we have so often heard: "We cannot permit the pursuit of the *perfect* to prohibit the *possible.*"

Reach out to your friends in Washington, let them know you are aware and that you want CARA to move . . . remember "long range planning requires short range persistence."

Thank you for your time; we need your energy and your talent. Together, you possess the power to give birth to important change, to awaken the conscience of those in Washington who are making public policy and making promises, too. You must see that all of us in government keep our promises. Theodore Roosevelt IV, National Chairman of the League of Conservation Voters, serves on the Governor's LWCF Task Force . . . and it is his ancestor with whom our Governor is so often compared . . . Governor Teddy Roosevelt was New York's Governor 100 years ago . . . CARA, the Conservation and Reinvestment Act, would be a great anniversary gift to that leadership.

President Roosevelt's words sum up the romance of your mission and seriousness of my duty perfectly. They are especially appropriate because they use words of business rather than the environment . . . during our current cyberspace revolution and Wall Street boom they are especially appropriate. He said: "The nation behaves well if it treats the natural resources as assets which it must turn over to the next generation increased and not impaired in value."

We in the Pataki administration and you, when on the same team, are unbeatable . . . I look forward to winning many super bowls with you in the future. Thank you.

New York State Bar Association Environmental Law Reception
Sky Club • Thursday, January 27, 2000

Remarks by Henry J. Stern

New York City Parks and Recreation Commissioner

Salutations and libations. I am pleased to speak to you about habitat conservation and restoration in New York City. This evening, I will address the politics and art of funding, protecting and sustaining our Emerald Empire and highlight some of Parks' current woodland, wetland, and grassland restoration programs.

Much has been written about the marvelous interdependence of species in the wild; recent thinking treats ecological systems, such as woodlands and wetlands, as if they were single, yet interconnected entities, with different organs for different functions. Forests as lungs, wetlands as kidneys, and soils and microbial entities as arteries and veins. In our Parks' woodlands, wetlands, and meadows, the fine network of fungi and microbes that flourish beneath the soil surface acts as a primitive nervous system, linking plants and regulating the flow of nutrients that enhance our urban watersheds.

Over the past six years, nearly l,500 acres of biodiverse natural areas, supporting populations of state endangered and threatened rare oaks, and connecting critical freshwater and salt marsh systems have been protected and added to Parks Emerald Empire. These natural systems, including Arden Heights Woods, Saw Mill Creek Preserve, and the Teleport Magnolia Preserve, in Staten Island (that put Parks over the 28,000-acre threshold) are critical links and buffers to Raritan Bay and the Arthur Kill. Four Sparrow Marsh and Vernam Barbadoes Terra-Peninsula Coastal Preserves in the Jamaica Bay watershed and Givans Creek Woods Preserve and Palmer Inlet in the Bronx are buffers that enhance habitat values of Long Island Sound. These magnificent habitats protect the economic interests of our communities and businesses, with their remarkable ability to absorb flood flows from stone and relative sea level rise events. They also bind soils that reduce erosion and sediment loads, and non-point source pollution into the Harbor. They provide critical foraging and nesting habitat for our productive songbird, wading bird, coastal shorebird, and raptor populations. These acquisitions represent our best efforts for a conservation vision and legacy for future generations.

New York City occupies a unique position on the eastern seaboard, as it is located at the juncture of northern and southern hardiness zones (climatic zones.) As such, the City is home to more than 40 rare and endangered species (including the peregrine falcon, which is breeding seven floors over our heads) which are contained in our Parks system. The preservation and management of these species poses immense challenges for the nation's largest parks system; but in recent years, Parks has implemented several innovative habitat restoration and preservation programs which have dramatically enhanced our City.

The driving force behind our success is Parks' Natural Resources Group, which I founded in 1984. The Natural Resources Group (NRG) is responsible for developing and implementing restoration and management programs for the city's natural resources. NRG is an international leader in innovations in restoration ecology, research and parks management. The group is comprised of scientists, natural resource managers, geographic information systems mapping specialists, biologists, and restoration ecologists.

Parks catapulted into the international ecological arena as the recipient of the prestigious Society For Ecological Restoration International Sperry Award, the National Wetlands Award, the Chevron-Times Mirror Magazine North America Conservation Prize and the Nature Conservancy Oak Leaf Award. In 1998, NRG received the prestigious Society for Ecological Restoration Project Facilitation Award with the University of East London for establishing the Trans-Atlantic Urban Ecology Initiative. The initiative is the world's finest international academic and government technology transfer, focusing on restoration of urban impacted ecosytems.

The City of New York, in cooperation with the Natural Heritage Program, was the first municipality in the country to inventory and map its endangered species. We are now propagating and monitoring thirty rare plants and reintroducing them into Parks' urban wild. Over the past ten years, Parks has published ecological assessments and technical management plans using Global Positioning Systems, and integrated Geographic Information Systems that support more than $70 million of our Natural Resource Group's current restoration programs. This comprehensive tracking and inventory of our natural systems provides a baseline for soils, hydrological analyses, and microbial assemblages, that has enabled Parks to implement programs which have successfully reintroduced rare and endangered plants, and restored 250 acres of forest and grassland, and several miles of coastal shoreline.

Our woodland and wetland restoration projects are funded creatively through state, federal and private grants. Our Salt Marsh Restoration Team, now in its eighth year, is supported by $1.75 million negotiated from an Exxon oil spill settlement. Under their guidance, more than 4km of shoreline has been restored, with 600,000 Spartina alterniflora plants propagated from seed. Comprehensive research protocols have been implemented to monitor restored vegetation, total petroleum hydrocarbons, bacterial analysis, macro invertebrate populations in m2 quad-

rants. The project has focused on elucidating a relationship between heterotrophic bacteria (capable of degrading petroleum hydrocarbons) and the significant reduction in oil product through bioremediation.

This project has garnered national acclaim for its innovative restoration and monitoring. These applications and restoration successes were presented in 1999, first at a national damages recovery policy forum in Washington D.C., sponsored by the U.S. National Oceanic and Atmospheric Administration; and at the Ecological Toxicology International Conference, attended by 6,000 participants in Charlotte, North Carolina. The program's training component incorporates 500 inner city students from the five boroughs and Newark, New Jersey—it is an unprecedented education initiative.

Currently, 65% of NRG staff is supported by grants. NRG has negotiated several public works mitigations and natural resources damages recoveries that have funded a multiple of restoration projects, including design and restoration constructions.

Parks has been at the forefront of environmental protection. Learning of a plan by NYS DOT to expand the Long Island Expressway into Alley Pond Park, float would destroy 500 mature tulip trees, sweetgums, oaks, and their associated soils, Parks initiated a lawsuit against DOT. The lawsuit was dropped when DOT agreed to our requirements. Not one tulip tree or grain of soil will be harmed. In our deposition, we expressed concern for the wetlands in the Alley watershed, and the effects of non-point source road runoff—nitrogen-rich sediment and salts—that contribute to degradation of Long Island Sound. The suit gave way to an ecological collaboration with DOT. We recently completed the preliminary design for an exciting $11 million habitat and road improvement project that incorporates the decommissioning of two clover leaf exit ramps with the planting of 10,000 trees and shrubs and constructed wetland connections. These wetlands will biodegrade oil, trap sediment and other road runoff before entering Little Neck Bay. Additionally, Parks has inventoried damages by the Triborough Bridge and Transit Authority to forest and understory in Inwood Hill Park during their toll plaza reconstruction. A $1.7 million law suit is pending.

In 1996, Mayor Giuliani signed into legislation the nation's toughest law protecting street trees and their soils against arborcide. We are actively going after violators of our City's arboreal treasures.

Finally, more than $70 million in restoration projects—negotiated from natural resources damages claims, public corks mitigations, and state, federal, and private grants are currently being designed and executed by Parks Natural Resources Group. EPA non-point source pollution grants have been awarded through the NYC Soil & Water Conservation District and NYS DEC. NRG has received $10.7 million through the NYS Clean Water/Clean Air Bond Act, prioritized for funding by the National Estuary Program's NY/NJ Harbor Estuary Program. The funding has supported a Pelham Bay salt marsh restoration in the Bronx, Forest Park shrub swamp restoration in Queens, Northern Manhattan forest restoration, and Bronx River flood plain restoration, among others. 70,000 trees will be planted in our Parks watersheds over the next five years with these grants.

A recent EPA Award will focus on non-point source pollution reduction and soil stabilization. Precipitous and eroding slopes comprising thin, micaceous soils, that impact marshes have contributed to degraded water quality of the harbor. These grants will fund design, mapping and monitoring, and stabilize slopes by binding the soil mantle through planting and bio-engineering native trees, shrubs, and herbs into Parks critical watersheds.

Soil stabilization is a key to protecting both the City's terrestrial and aquatic natural resources, thereby promoting a productive economy. The re-established native plant communities are capable of self-repair, and by reinforcing the root matrix within the soil mantle, we filter and reduce sediment and nutrient loading into the estuary—thereby improving water quality, decreasing BOD, increasing dissolved oxygen, and reducing sediment loads to a system already stressed by dredging requirements.

Harbor Estuary Program—As chair of the NY/NJ Harbor Estuary Program's Habitat Workgroup (part of the National Estuary Program) we have coordinated a plethora of diverse regional concerns and generated acquisition, restoration, management and enforcement strategies and priorities for a sustainable NY/NJ harbor. These priorities have paved, rather greened, the way for $10.7 million in recent New York State Clean Water Bond Act funding to restore the forest and wetlands of Seton Falls Park in the Bronx, Inwood Hill Park in Manhattan and Four Sparrow Marsh in Brooklyn among others.

So too, the restored ecosystem is another prototype of our American legacy, and should also be understood as the culmination of a long tradition, the Arcadian tradition. What is Arcadia? You may find it in the paintings of Giorgione, Bellini, Titian; Poussin, Chardin. In the western landscape-gardening tradition it consists of ideas and tastes handed down to us, beginning with the biblical gardens of Egypt and Babylon; then on to the Greek gardens celebrated by Homer, to the Roman gardens of Northern Europe—Pope's Twickenham Garden, Monet's Clos Normand at Giverny; and then across the Atlantic to our own painted landscapes of the Hudson River School, the literary ones of Thoreau, and magnificent natural areas contained within New York City's five boroughs.

The ecologist Aldo Leopold admonished, "civilization is not the enslavement of a stable and constant earth. It is the state of mutual and interdependent cooperation between human animals, other animals, plants and soils which may be disrupted at any moment by the failure of any of them." The conservation movement is, at the very least, an assertion that the interactions between man and land are too important to be left to chance.

State Conservation Easement Acts: A View From Sea to Shining Sea

By Lauren A. Sears

"The only way you could tell you were leaving one community and entering another was when the franchises started repeating and you spotted another 7-Eleven, another Wendy's, another Costco, another Home Depot."[1]

I. Introduction

With the onslaught of strip malls and suburbia, more Americans have begun to appreciate open space. Concern over open space preservation is one reason that legislatures have responded with tools such as conservation easements. A conservation easement is a restriction landowners voluntarily place on their property to protect natural resources, to protect the land for certain types of uses, or to prevent certain activities from occurring on the land. As defined by the Uniform Conservation Easement Act, a conservation easement is a "non-possessory interest of a holder . . . in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air quality, or preserving historical, architectural, archaeological, or cultural aspects of real property."[2] The restriction is held in gross and enforceable by a non-profit or governmental entity. Because at common law a restriction in gross was not assignable and would not run with the land, conservation easements are a creature of statute.[3]

State enabling statutes have led to the widespread use of conservation easements. According to the Land Trust Alliance, an umbrella group of land trust organizations, local land trust organizations nationwide hold conservation easements that protect almost 1,400,000 acres.[4] This paper will compare six conservation easement statutes from states in different regions in the United States. The conservation easement statutes that will be compared are those from California, Kansas, Massachusetts, Montana, New York, and Virginia. These states represent regions from across the U.S.: the West, the Plains, New England, Rocky Mountains, the Mid-Atlantic, and the South. According to the Land Trust Alliance figures published in the Fall of 1998 report, three of the states, Virginia, New York, and Montana, are among the top five conservation easement holders in the country.[5] Furthermore, the state statutes will be compared with the Uniform Conservation Easement Act (Uniform Act). To date, sixteen states and the District of Columbia have adopted the Uniform Act with some modifications.[6]

Regional factors influence policy such as conservation easements. For example, the Montana statute is thorough, including many of the above provisions that the other statutes do not. This can be attributed in part to the concern in the Rocky Mountain region over the expansion that has occurred in the last decade.[7] Studies have shown that Americans are fleeing urban areas for what they perceive to be a more simple life in rural America.[8] Between the baby boomers packing their bags and buying a piece of the last best place and the advent of what Sotheby's International Realty describes as "trophy ranches," Montana and other Rocky Mountain states are becoming inundated.[9] Most recently, the Montana Legislature has responded to the concerns of Montana citizens by considering bills aimed at urban sprawl.[10]

"Concern over open space preservation is one reason that legislatures have responded with tools such as conservation easements."

Section II will give a background of conservation easements, including the common law restrictions, tax benefits, the state conservation easement statutes, and the Uniform Conservation Easement Act. The similarities and differences in the state acts will be addressed in Section III. Rationales behind the differences in the statutes will be presented.

II. Background of Conservation Easements

A. Common Law Aspects

A conservation easement is not an easement in the traditional definition because it does not necessarily grant an affirmative right. Instead, it is more analogous to a restrictive covenant or a negative easement.[11] Modern conservation easements are an outgrowth of three common law devices that enable their owner or beneficiary to control the use of property owned by another: equitable servitudes, easements, and real covenants.[12] These common law devices had characteristics that limited their usefulness for the perpetual preservation of open space land. The devices imposed limitations on who may own the interest, the purposes for which the conservation easements may be obtained, the enforce-

ability of the interest against subsequent owners of the land, and the duration, enforcement, and termination of the interests.[13] These uncertainties led states to enact legislation to eliminate the common law impediments to effective use of conservation easements.

The earliest use of conservation easements was in Boston in the late 1880's to protect parkways.[14] During the 1930's, they were first used extensively when the U.S. Fish and Wildlife Service (FWS) obtained 275 "refuge and flowage easements" in North Dakota, South Dakota, and Minnesota.[15] Between 1965 and 1985 the FWS obtained over 21,000 such easements for the protection of approximately 1.2 million acres of wetlands to preserve wetlands for migratory waterfowl.[16]

B. Tax Benefits

In addition to the advantages of flexibility and environmental benevolence, the grantor of a conservation easement may also reap tax benefits. Donation of a conservation easement may lead to a federal income tax deduction, reduced real property taxes, and reduced gift and estate taxes. These tax incentives are a stimulus for the preservation of unique natural and historical sites, as well as for the prevention of undesirable development in agricultural or scenic areas.[17] To further encourage conservation easements, the government could use a comprehensive tax credit against income, rather than the charitable deduction, and a credit towards gift and estate tax equal to the value of the conservation easement donated.[18]

1. The Charitable Deduction

The donation of a conservation easement can be a tax deductible charitable gift for income tax purposes if a "qualified real property interest" is donated to a "qualified organization" "exclusively for conservation purposes."[19] In order to be a qualified property interest, the conservation easement must be granted in perpetuity.[20] A qualified organization includes a § 501(c)(3) nonprofit organization.[21] The Internal Revenue Code defines conservation purpose as the preservation of land areas for outdoor recreation or education, protection of natural habitats, preservation of open space, and preservation of historically important land areas or buildings.[22]

The amount allowed for charitable deduction of a conservation easement is the fair market value of the donated property interest on the date of the contribution.[23] Generally defined as what a willing buyer would pay to a willing seller absent duress or other exigency[24], fair market value is determined by looking at sales of comparable property. Usually, however, there are no comparable sales to measure the fair market value. Therefore, the "before-and-after" approach is used.[25] Essentially, the "before-and-after" approach to determining fair market value is that the conservation easement may be valued as the "difference between the fair market value of the total property before the grant of the easement and the fair market value of the property after the grant."[26]

2. Real Property Tax

It is difficult to determine to what extent, if at all, a conservation easement will reduce a grantor's property taxes. Local property taxes in the United States are ad valorem: based on the value of taxable land and improvements.[27] Most states require that property taxes be based on a specified percentage of the fair market value of the property. To determine fair market value, assessors and appraisers employ three techniques to determine property tax valuation: comparable sales, cost, and income. A conservation easement alters the highest and best use of the property and results in a downward influence on the fair market value of the property.[28] Some of the state conservation easement statutes address this factor.[29] In addition, a number of state court decisions reflect the fact that conservation easements lower the fair market value of burdened land.[30]

Despite the recognition in state statutes and decisions, and federal tax laws, regulations, and decisions, that conservation easements should and do exert a downward effect on property values, a property owner may have difficulty obtaining a property tax assessment that accurately reflects the impact of the easement.[31] There are problems associated with using traditional appraisal methods to value land burdened by conservation easements which creates uncertainty for property owners who wish to donate conservation easements. Adding to the uncertainty is possible difference over what the highest and best use of the property is. Further frustrating the problem is the nature of the assessment process itself, which puts taxpayers at the whim of local assessors who may be apprehensive of reassessing easement-burdened land at a lower value because of a feared negative effect on local revenues.

3. Federal Gift and Estate Tax

Placing a conservation easement on property may also result in the reduction of estate taxes. Whether the conservation easement is placed on the land prior to death or through a will, the value of the land is reduced which affects either the value of the property to be included in the estate, or the value of the estate.[32] Use of this preservation tool can be especially beneficial for heirs to large historic estates and large open spaces such as farms and ranches[33] because the estate tax is levied on the fair market value, rather than the current use value of the property,[34] so that the resulting tax with a conservation easement on the property would be substantially lower. Consequently, the use of a conservation

easement as a tool for estate planning may enable heirs to keep property.

III. Similarities and Differences

Conservation easement statutes are alike in that they were created to avoid the common law aspects of equitable servitudes, easements, and real covenants which were limiting their usefulness.[35] However, because some statutes were written before the Uniform Conservation Easement Act was approved and because states have different policy priorities, variations in the statutes exist. The distinctions are often significant and can result in the lack of enforcement rights, shorter duration than expected, or even an unenforceable or invalid conservation easement. For example, whereas most state conservation easement acts permit easements that are perpetual in duration, conservation easements in Kansas are limited to the lifetime of the grantor unless the instrument creating the easement indicates otherwise.[36]

A. Similarities

1. Validity

Validity provisions in statutes eliminate common law impediments inherent in equitable servitudes, easements, and real covenants.[37] A typical provision states that a conservation easement is valid even though: (1)It is not appurtenant to an interest in real property; (2) It can be or has been assigned to another holder; (3) It is not of a character that has been recognized traditionally at common law; (4) It imposes a negative burden; (5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) The benefit does not touch or concern the property; or (7) There is not privity of estate or of contract.[38] Because the validity provisions reflect the purpose of eliminating common law barriers, the conservation easement statutes from all of the regions have similar validity sections.

2. Holder or Grantee

State conservation easement statutes generally allow only two types of entities to hold conservation easements. The Uniform Conservation Easement Act is an example:

> (2) "Holder" means:
>
> (I) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or
>
> (ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[39]

The state enabling acts differ as to their treatment of the second category of charitable organization. While the Uniform Act, Massachusetts, and New York require that the grantee's purposes or powers merely include conservation purposes, the statutes of Virginia and California require that conservation be the primary purpose or power of the organization.[40] Montana is the most lax in that it does not require that a non-profit organization have any conservation purpose or power. Rather, Montana's statute only stipulates that a grantee organization may be a holder if it "will provide a means for the preservation or provision of permanent significant open-space land and/or the preservation of native plants or animals, biotic communities, or geological formations of scientific, aesthetic, or educational interest."[41]

Should a grantee organization not have any conservation or preservation objective, its "ability or willingness to monitor for compliance and enforce the easement in the event violations occur, could be in doubt."[42] In fact, the requirement ought to be that grantee organizations operate primarily for conservation purposes. Otherwise, a statute might allow enough leeway for a grantee whose purposes are contrary to the legislative intent of statute.

B. Differences

1. Purpose and Scope Provision

The Uniform Act's conservation easement purposes include "retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."[43] All six states also provide for open-space conservation.[44] In addition, certain objectives of open-space including agriculture or farming and forestry are employed by all six states.[45]

Furthermore, all states except Montana provide for historic preservation.[46] Massachusetts provides for preservation of landmarks with a preservation restriction which protects "structure[s] or site[s] historically significant for [their] architecture, archeology or associations."[47] Montana's state enabling statute is the most restrictive in its scope. It provides only for the preservation of permanent significant open-space land and/or

the preservation of native plant or animal communities, or geographical formations of "scientific, aesthetic, or educational interest."[48] Thus, all states' conservation easement acts, except Montana, extend protection to important landmarks.

Some states have narrowed the scope of their statutes by limiting the purposes of their conservation easements. For instance, neither Virginia nor Massachusetts statutes' scope extends to cultural preservation.[49] California's statute does not assure lands availability for recreational purposes.[50] While the Virginia statute has limited its coverage by not covering scenic preservation, scope of the California statute does not extend to architectural aspects of real property.[51] Although Montana's statute does not cover cultural, scenic, architectural, or recreational purposes, it could be argued that its purposes of "scientific, aesthetic, or educational" are broad enough so as to encompass such purposes. For example, a conservation easement with a recreational purpose could be encompassed in Montana's aesthetic purpose by arguing that hiking and recreational activities appreciate the aesthetic value of open-space.

"[B]ecause placing a conservation easement on property probably results in a reduction of property value, many landowners are not inclined to so restrict their property."

Ideally, statutes should extend their scope over as many purposes as possible. Such purposes help to further the legislative intent of the conservation easement acts. For instance, both open-space and historic landmark preservation should be provided for. Safeguards prevent any potential abuse that may result from a conservation easement with broad scope. For instance, because placing a conservation easement on property probably results in a reduction of property value, many landowners are not inclined to so restrict their property. The primary incentive for landowners to impose the burden on their property is to receive federal income tax and local real property tax benefits. However, the Treasury Regulations promulgated by the Internal Revenue Code establish detailed criteria to obtain a charitable deduction.[52] The situation whereby an act with broad scope leaves room for a landowner to abuse the conservation easement is thus highly unlikely.

2. Duration or Term

Generally, the state enabling statutes are alike in providing for duration of conservation easements. Most statutes provide that the easements are unlimited in duration unless the instrument by which they are created provides otherwise.[53] Only the Montana statute requires that the conservation easement be for a specified minimum term of years. The New York statute has a provision which may provide for the establishment of a minimum term of years by regulation.[54]

The California act differs from most acts in that it provides that a conservation easement is perpetual in duration.[55] The California act does not contain an exception that the duration shall be limited if provided for in the instrument. This unequivocal statement appears to preclude any sort of termination regardless of whether it so provided for in the instrument.

At the other end of the spectrum lay Kansas' duration provision. Kansas' statute is based on presumption that a conservation easement is not perpetual, unless otherwise provided for in the instrument.[56] Because the purpose of a conservation easement statute is the long-term protection of open-space,[57] to presume that a conservation easement is not perpetual seems completely contrary to the furtherance of the goals of the statute. Furthermore, federal income tax benefits which may result from the contribution of an easement to a qualifying organization are available only if the restrictions run in perpetuity.[58]

3. Enforcement

Enforcement is essential to the success of conservation easements. Should an historic building be scheduled to be razed or a stand of redwood trees be threatened in violation of the restrictions in a conservation easement, bringing an action is a timely manner is critical. The holder of the conservation easement, the owner of the property, or an interested third party may want to sue for an injunction. However, without standing, each of these parties may not proceed. Standing thus becomes a crucial issue. Another issue arises should a party with standing no longer be available to enforce the restrictions. In addition, sometimes inspection rights are granted to prevent violations from occurring. However, should the restriction rise to the level of a lawsuit, the issue of remedies also becomes relevant.

a. Standing

Which parties are granted the right to enforce a conservation easement has many implications and can potentially result in an unpreventable violation. The state enabling statutes address the standing issue differently. All six state acts and the Uniform Act give standing to the owner and most to holder of the conservation easement.[59]

The Uniform Act provides that four categories of plaintiffs have standing to bring suit.[60] In addition to the owner and the holder of the easement, the Uniform Act grants standing to persons having a third party right, and persons authorized under law.[61] For instance,

the attorney general could be a person authorized under law, while a non-profit organization might be a person with a third party right.

The Massachusetts enabling statute addresses the issue of standing in a roundabout manner. The statute provides, "Such a restriction may be enforced by injunction or other proceeding. . . ."[62] Although the statute does not provide a list of which parties have standing, it provides that a conservation easement will not be unenforceable on account of a governmental body, or the charitable group or trust having received the right to enforce the restriction by assignment.[63] The statute has been interpreted in *Bennett v. Commissioner of Food and Agriculture* to mean that conservation easements are enforceable by public officials and charitable entities where the public purpose of the restriction is clear.[64] In that case, the Bennetts sought a declaratory judgment that they may construct a dwelling anywhere on land that was subject to an agricultural preservation restriction. The Supreme Judicial Court of Massachusetts found that because the restriction was consistent with public policy expressed in the statute,[65] enforcement of the conservation restriction was reasonable.[66] It appears as though, in making the standing provision vague, the Massachusetts act has provided enough leeway for several parties to enforce a conservation easement.

Virginia's enabling statute is very distinguishable from the other statutes in that it provides for a group that has default enforceability.[67] Should a grantee with an enforcement right relocate his residency to another state or a non-profit organization with an enforcement right close its doors, a conservation easement vests in the Virginia Outdoors Foundation.[68] The Virginia Outdoors Foundation is a state agency set up by the General Assembly in 1966 to promote the preservation of open spaces and scenic areas.[69] Such a provision ensures that there will be an organization with standing to enforce conservation easements, in keeping with the purpose of the statute.

Some states are more restrictive in granting a right to enforcement. California's enabling statute grants the right only to the grantor or the owner of the easement.[70] Montana, however, grants the right to the owner of the estate in dominant tenement and public bodies holding the conservation easement.[71] Excluded from the right is a private, non-profit organization. In effect, a Montana non-profit organization may acquire a conservation easement,[72] but it does not have standing under the statute to enforce easements it holds.[73] Because holders of conservation easements are the most likely to bring an enforcement action, it appears irrational to exclude non-profits from this category.

If the policy behind conservation easements is the public good, enforcement rights should be liberally granted. For example, a neighbor should be able to enforce a restriction in a situation where no one else is available, when the neighbor has paid more for the land on the reliance of a conservation easement being there.[74] That enforcement suits are expensive and time-consuming serves as a disincentive. Because of these costs, parties may be apprehensive of enforcing an easement. Standing should be liberally granted to encourage any other parties to further the policy behind conservation easements.

b. Inspection

A second concern regarding enforcement of conservation easements is inspection. Guarding against violation, usually into perpetuity, can be a burden, but is critical to the continued existence of the restriction.[75] Organizations which accept conservation easements proactively monitor and enforce them in an attempt to prevent violations. Only Montana's, New York's, and Massachusetts' enabling statutes provide for the right of inspection.[76] The sections all provide that the holder of a conservation easement "may enter the land in reasonable manner and at reasonable times to ensure compliance."[77] Effective monitoring of the burdened land through an inspection provision should be encouraged as it could avoid having to bring an action seeking injunction.

c. Remedies

Should a violation continue, an enforcement proceeding may need to be brought by a party with standing. Only the enabling statutes of California and Montana address enforcement remedies that may arise in a proceeding.[78] Both statutes provide that conservation easements may be enforced by injunction and damages.[79] Moreover, California's statute supplies factors to be taken into account in assessing damages. The factors include "cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, or environmental value to the real property subject to the easement."[80]

4. Types of Permissible Easements

The Montana and Massachusetts enabling statutes distinguish themselves greatly from the other state acts in that they list which actions and objects may be limited by a conservation easement.[81] Easements may restrict: structures, landfill, vegetation, excavation, surface use, acts detrimental to conservation, and subdivision of land.[82] Finally, there is a catch-all category encompassing "other acts or uses detrimental to such retention of land or water areas."[83] It would not seem necessary to include a provision detailing allowable restrictions. Such a provision could restrict what an instrument provides and defeat the conservation purpose of the easement. Furthermore, since a catch-all category is included, the entire provision seems useless other than to establish examples of stipulations that

could be provided for in an instrument creating a conservation easement.

5. Review Provision

Some states have established mandatory procedures for review as well as approval of conservation easements by public bodies prior to recording. Montana requires that conservation easements be subject to review by the local planning authority of the county in which the encumbered land is located.[84] However, such comments as the local planning authority shall have are not binding, but are merely advisory in nature.[85] Because the comments are not binding, Professor Gerald Korngold would consider such a measure useless.[86]

The Massachusetts statute is unique in its review requirement. In order to be enforceable, Massachusetts requires conservation restrictions to be approved by the secretary of environmental affairs, if the restriction is held by a public entity, or by the mayor, if the restriction is held by a charitable corporation or trust.[87] Once a restriction has been approved, the appropriate body need approve a release of the restriction.[88] Massachusetts is also original in that it requires approval by the secretary of environmental affairs as a prerequisite to registration of land with the "public approval index."[89]

6. Assessment and Taxation

Valuation of a conservation easement is an important consideration because a common motivation for a landowner to create a conservation easement is to receive a corresponding decrease in the fair market value of the property for real estate taxation purposes.[90] The problem in this area is two-fold. First, determining the fair market value of the easement is difficult and, secondly, the appraisal process does not always reflect a decrease in property value as a result of the placement of a conservation easement.

The Virginia, Montana, and California statutes address the valuation issue by incorporating provisions in their statutes for assessment and taxation. California's enabling statute simply states that a conservation easement constitutes an enforceable restriction which the assessor shall consider for the purposes of assessment.[91] Both Montana and Virginia provide that assessments shall be based on the use of the property.[92] Virginia further specifies that the assessment shall not include any value attributable to any potential uses that have been terminated by the conservation easement.[93] Rather, Virginia provides, the property shall be assessed at the use value for open-space.[94] The taxing provision indicates that the holder of interests subject to a perpetual conservation easement shall not be subject to state or local taxation, nor shall the owner of the interest be taxed for the interest.[95]

Montana provides a cap on the assessed value of the land as restricted with a conservation easement.[96] By creating a cap on the minimum value that the property may be decreased due to a conservation easement, the Montana legislature is protecting against any perceived potential for abuse of a conservation easement. This may, however, adversely affect valuation in that it may not provide enough flexibility to reflect the decrease in property value resulting from placing the conservation easement on the property.

Massachusetts' case law addresses the valuation issue. In *Parkinson v. Board of Assessors*, the Supreme Judicial Court of Massachusetts held that if part of property is encumbered with a conservation restriction and part is not, restricted and unrestricted portions must be assessed separately.[97] *Parkinson* also held that where conservation restriction was invalid and unenforceable due to vagueness, assessors correctly refused to consider restrictions found in conservation easement when assessing value of property.[98]

It is important for statutes to address valuation in order to protect a grantor and ensure that he will get a reduction in taxes. If it is codified that the assessment must reflect the restriction, a taxpayer may have less concern that assessors may face a pressure to value property high. The Massachusetts' statute does not address the valuation issue at all and, consequently, property tax assessors have treated conservation restrictions with considerable variation. Restrictions have resulted in downward assessments from as little as thirteen percent to as much as ninety-five percent of a property's pre-restriction assessed value.[99] However, the ceiling does not allow for a significant decrease in value when there may be a situation which warrants it where a conservation easement has decreased the property to below the cap amount.

7. Modification and Extinguishment

Typically, a conservation easement is designed to be perpetual in duration. There are circumstances, however, when conservation easements are terminated. Some states have anticipated this problem of termination and have permitted a conservation easement to be terminated in the same manner as other easements,[100] while other states remain silent on the issue.[101] A provision which states that conservation easements are to be terminated in the same manner as other easements, clarifies that a conservation easement is not to be treated as a covenant or equitable servitude.[102]

If it can be demonstrated that conditions have changed so substantially that the original purposes of a conservation easement can no longer be achieved, an action for injunction against the violation of the restriction can be defeated.[103] This doctrine of changed condi-

tions has been codified by New York.[104] The statute authorizes a court in any action seeking relief against a restrictive covenant, or a declaration with respect to its enforceability, to terminate the restriction; if the court finds that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.[105] This statute was passed in 1962, well before New York's statute allowing the creation of conservation easements.[106]

If a restriction on the use of land prevents its use for public purpose, the restriction may be extinguished by condemnation.[107] For example, if a restriction such as a conservation easement restricts development of land that is needed for schools or highways, eminent domain may be exercised. If there should be an eminent domain proceeding, only Virginia's statute provides that the holder will be compensated for the value of the conservation easement.[108]

"Conservation easement statutes are an effective tool with which to address open space and historic preservation."

Release provisions might be considered surplusage, except perhaps to alleviate concern that under some circumstances a court might consider such a termination objectionable on public policy grounds.[109] Such a release is an affirmative, voluntary act. In Kansas, the grantor is permitted to have the easement revoked at her request.[110] Montana's statute requires that, in order for open space land to be converted, it must be replaced with other property.[111] The consideration should be at least equal to the increase in value of the burdened land which will result from the termination of the restrictions.[112] Massachusetts' release provision is quite distinguishable in that it has a public hearing procedure and approval is necessary for release of a conservation restriction.[113]

IV. Conclusion

Land use values are changing and states are increasing their preservation efforts. For example, in a recent poll 63% percent of Montana residents polled said that managing growth is a priority to them, while 80% favored spending $4 million over the next two years to encourage farmers and ranchers to put conservation easements on their land to prevent sales to developers.[114] Conservation easement statutes are an effective tool with which to address open space and historic preservation. The six conservation easement statutes analyzed differ because of various regional factors such as land value. The differences in the statutes result in important implications such as shorter duration periods, unenforceable easements, and lack of enforcement rights.

Endnotes

1. Tom Wolfe, *A Man In Full*.
2. UNIF. CONSERV. EASEMENT ACT § 1(1), 12 U.L.A. at 53. The Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981 and by the American Bar Association in 1982.
3. RESTATEMENT OF PROPERTY (SECOND): CONSERVATION EASEMENTS § 430.1 (1987).
4. See LAND TRUST ALLIANCE, 1998 NATIONAL LAND TRUST SUMMARY 6 (Fall 1998). This figure represents almost a 400 percent increase over the amount of land protected by conservation easements just a decade ago. The total acreage figure is conservative as it takes into account 775 responses to the census, but nearly 200 trusts failed to respond. In addition to this acreage, The Nature Conservancy, according to its December 1998 publication of "Acres Saved," holds conservation easements for 1,159,000 acres.
5. See *id.*
6. See 12 U.L.A. at 163 (1998).
7. Between 1990 and 1996, Montana's population increased by 10 percent. Indications are that the population will continue to increase. Joe Kolman, *Holding The Line On Sprawl*, THE BILLINGS GAZETTE, January 24, 1999, A1.
8. "One statistic says that more than 40 percent of the baby boomer generation wants to retire in the Rocky Mountain West." *Id.*
9. "Trophy ranches" is the term used to describe the vast private lands of successful American's such as Time Warner's Ted Turner, president of the World Bank's James Wolfensohn, and Harrison Ford. With the influx, residents are becoming more concerned about development issues. *Id.*
10. The 1999 Legislature is considering bills aimed at encouraging community planning, revising subdivision laws, and giving tax breaks and incentives to agriculture producers to stay in business.
11. POWELL, *supra* note 2, at § 430.
12. Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements,* 63 TEX. L. REV. 433, 436 (1984).
13. POWELL, *supra* note 3, at § 430.
14. *Id.*
15. *Id.*
16. *Id.*
17. Teitell & Johnson, *Subcommittee Report of the Committee on Charitable Gifts, Trusts and Foundations, Probate Tax Division, Tax Incentives for Sensible Land Use Through Gifts of Conservation Easements,* 15 REAL PROP. PROB. AND TRUST J. 1 (1980).
18. Madden, *Tax Incentives For Land Conservation: The Charitable Contribution Deduction for Gifts Of Conservation Easements*, 11 B.C. ENVT'L. AFF. L. REV. 105, 146 (1983). ("[T]he use of a comprehensive tax credit either in addition to or instead of the charitable deduction would be more equitable. Higher bracket taxpayers would not get a larger subsidy from the government for their contributions. A comprehensive tax credit would also be attractive to those taxpayers who have land to donate, but whose

incomes are not high enough to make a deduction advantageous.").

19. I.R.C. § 170 (h)(1) (1994).
20. I.R.C. § 170 (h)(2)(C) (1994); Treas. Reg. § 1.170A-14 (b)(2).
21. I.R.C. § 170 (h)(3) (1994).
22. I.R.C. § 170 (h)(4)(A) (1994).
23. Rev. Rul. 73-339, 1973-2 C.B. 68.
24. Madden, *supra* note 18, at 105, citing Hutton, *Income Tax Incentives for Land Conservation*, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOLR LAND CONSERVATION, 33 at 35 (1982).
25. Rev. Rul. 73-339, 1973-2 C.B. 68; Rev. Rul. 74-583, 1974-2 C.B. 80; Rev. Rul. 75-358, 1975-2 C.B. 76.
26. Rev. Rul. 73-339, 1973 C.B. 68.
27. Daniel C. Stockford, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVT'L. L. REV. 823, 827 (1990).
28. See *id*., p. 830.
29. See *e.g.*, "Assessments of the fee interest that is subject to a perpetual conservation easement . . . shall reflect the reduction in the fair market value." VA. CODE ANN. § 10.1-1011 (B) (Supp. 1988) and "land which is subject to a conservation easement . . . shall be assessed and taxed at the use value for open space." VA. CODE ANN. § 10.1-1011 (c) (Supp. 1988). Also see CAL. REV. & TAX. CODE §§ 402.1, 423 (West 1987 & Supp. 1990); COLO. REV. STAT. § 38-30.5-109 (1982); ME. REV. STAT. ANN. tit. 36, § 701-A (Supp. 1989); NEB. REV. STAT. § 76-2, 116 (1986).
30. See Village of Redwood v. Bolger Found., 6 N.J. Tax 391 (1984), aff'd, 202 N.J. Super. 474, 495 A.2d 452 (1985), rev'd, 104 N.J. 337, 517 A.2d 135 (1986); Parkinson v. Board of Assessors, Nos. 122909 to 122911, 130976 to 130798 (Mass. App. Tax Bd. May 23, 1984), aff'd, 395 Mass. 643, 481 N.E. 2d 491 (1985), rev'd on reh'g, 398 Mass. 112, 495 N.E. 2d 294 (1986).
31. See Stockford, *supra* note 7, at 835. "Statistics show that property tax assessments and federal tax appraisals of easement-burdened lands vary considerably in the weight given to easements in determining the value of property. For example, a Massachusetts study showed that conservation restrictions caused assessors to lower assessments by as little as thirteen percent and as much as ninety-five percent of the properties' pre-restriction value. A statistical analysis conducted by Maine Coast Heritage Trust of thirty-six federal tax appraisals of conservation easements revealed that easements resulted in reductions of fair market value of between five percent and ninety percent."
32. See I.R.C. §§ 2031,2033 (1994); Treas. Reg. § 1.170A-14 (h)(3).
33. Janet Diehl & Thomas Barrett, THE CONSERVATION EASEMENT HANDBOOK at 9 (1988).
34. Treas. Reg. § 1.170A-14 (h) (3) (ii).
35. See Section I.A *infra.*
36. KAN. STAT. ANN. § 58-3811 (b) (1997). See Section II.B *infra.*
37. See Section II.A *infra*.
38. VA. CODE ANN. § 10.1-1014 (1998). The Uniform Conservation Easement Act (§ 4, 12 U.L.A. at 53) (1998) and the Kansas statute (K.S.A. § 58-3813) are identical.
39. UNIF. CONSERV. EASEMENT ACT § 1(2) (1981), 12 U.L.A. at 53. (See Section III.B *infra* for further discussion on purposes). Kansas statute has the same definition. See KAN. STAT. ANN. § 58-3810 (1997).
40. CAL CIV. CODE § 815.3(a) (Deering 1999); MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998); N.Y. ENVTL. CONSERV. LAW § 49-0303(2) (1998) (not-for-profit conservation organization may be a holder if it is organized inter alia for the conservation or preservation of real property); VA. CODE ANN. § 10.1-1009 (Michie 1999).
41. MONT. CODE ANN. § 76-6-204 (1998).
42. POWELL, *supra* note 3, at § 404.4[2].
43. KAN. STAT. ANN. § 58-3810 (1997); UNIF. CONSERV. EASEMENT ACT § 1(1), 12 U.L.A. at 53 (1998).
44. CAL CIV. CODE § 815.1 (Deering 1999); KAN. STAT. ANN. § 58-3810 (1997); MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998); MONT. CODE ANN. § 76-6-204 (1998); N.Y. ENVT'L. CONSERV. LAW § 49-0301 (1998); VA. CODE ANN. § 10.1009 (1998); UNIF. CONSERV. EASEMENT ACT § 1(1), 12 U.L.A. at 53 (1998).
45. See *id.*
46. See *id.*
47. MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998).
48. MONT. CODE ANN. § 76-6-204 (1998).
49. MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998); VA. CODE ANN. § 10.1009 (1998).
50. CAL. CIV CODE § 815.1 (Deering 1999). A recreational purpose was added to Massachusetts' statute in 1977. See MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998).
51. CAL. CIV. CODE § 815.1 (Deering 1999); VA. CODE ANN. § 10.1009 (1998).
52. Furthermore, "non-profit organizations have little incentive to accept easements which do not achieve the conservation or preservation purposes of their organization."
53. UNIF. CONSERV. EASEMENT ACT § 2(c) (1981); MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998); MONT. CODE ANN. § 76-6-202 (1998); N.Y. ENVT'L. CONSERV. LAW § 49-0305 (1998); VA. CODE ANN. § 10.1-1010 (Michie 1999) (If it is perpetual, the holder must have an office in the Commonwealth for at least five years.).
54. N.Y. ENVT'L. CONSERV. LAW § 49-0305 (7)(a). (The Department of Environmental Conservation shall promulgate regulations. This has not yet been accomplished.) See POWELL, *supra* note 3 at § 430.03 [5].
55. CAL. CIV. CODE § 815.2 (b) (Deering 1999).
56. KAN. STAT. ANN. § 58-3811 (d) (1997).
57. POWELL, *supra* note 3 at § 430.3 [5].
58. I.R.C. § 170 (h) (2). See Section II.2 *infra.*
59. CAL. CIV. CODE § 815.5 (Deering 1999); KAN. STAT. ANN. § 58-3812 (1997); MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1998); MONT. CODE ANN. § 76-6-207 (1998); N.Y. ENVT'L. CONSERV. LAW § 49-0305 (1998); VA. CODE ANN. § 10.1-1013 (Michie 1999); UNIF. CONSERV. EASEMENT ACT § 3 (1981), 12 U.L.A. at 53.
60. UNIF. CONSERV. EASEMENT ACT § 3 (1981), 12 U.L.A. at 53.
61. *Id.*
62. MASS. GEN. LAWS ANN. ch. 184, § 32 (2) (West 1998).
63. *Id.*
64. Bennett v. Comm'r. of Food and Agriculture, 411 Mass. 1, 576 N.E.2d 1365 (Supreme Judicial Court of MA, 1991).
65. MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998).
66. See *id.* at 5, 1367.
67. VA. CODE ANN. § 10.1-1013 (Michie 1999).
68. *Id.*
69. Ron Nixon, *Easements Ease Landowners' Minds Rather Than See Land Turn Into Subdivisions*, THE ROANOKE TIMES & WORLD NEWS, January 27, 1998, A1. The Virginia Outdoors Foundation holds

easements to 113,000 acres in Virginia. The Virginia General Assembly has recently also made it even more convenient for landowners to place easements on their land. The Open Space Land Preservation Act of 1997 provides funding to the Virginia Outdoors Foundation to reimburse landowners for appraisals, surveys, legal fees, and other costs.

70. CAL. CIV. CODE § 815.5 (Deering 1999).
71. MONT. CODE ANN. § 76-6-207 (1998).
72. MONT. CODE ANN. § 76-6-204 (1998).
73. Query whether non-profits are authorized elsewhere under law to enforce such a restriction. "It could be assumed, however, that if a person or organization is authorized by law to enforce a conservation easement, they could do so, even without the inclusion of such a provision in the conservation easement statute." POWELL, *supra* note 3 at § 430.
74. POWELL, *supra* note 3 at § 430.3[4], p. 28 for further discussion.
75. Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 113 (1997).
76. MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1998); MONT. CODE ANN. § 76-6-210 (1998); N.Y. ENVT'L. CONSERV. LAW § 49-0305 (1998).
77. *Id.*
78. CAL. CIV. CODE § 815.7 (Deering 1999); MONT. CODE ANN. § 76-6-210 (1998).
79. *Id.*
80. CAL. CIV. CODE § 815.7 (Deering 1999).
81. MASS. GEN. LAWS ANN. ch. 184, § 31 (West 1998); MONT. CODE ANN § 76-6-203 (1998).
82. *Id.*
83. *Id.*
84. MONT. REV. CODE § 76-6-206 (1998).
85. *Id.*
86. Korngold, *supra* note 12, at 433. However, some effective programs, such as the National Environmental Policy Act, are based upon advisory comments from government entities.
87. MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1998).
88. *Id.* However, no restriction that has been purchased with state funds or which has been granted in consideration of a loan or grant made with state funds shall be released unless it is repurchased by the land owner at its then current fair market value.
89. MASS. GEN. LAWS ANN. ch. 184, § 33 (West 1998). Janet Mills argues that a public pre-approval process such as this should be mandatory. Mills, *Conservation Easements in Oregon: Abuses and Solutions*, 14 ENVT'L. L. 555, 581 (1984).
90. See Section II.B *infra*.
91. CAL. CIV. CODE § 815.6 (Deering 1999).
92. MONT. REV. CODE § 76-6-208 (1998); VA. CODE ANN. § 10.1-1011 (Michie 1999).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* The minimum assessed value of a property cannot be less than the actual assessed value of the land in 1973.
97. Parkinson v. Board of Assessors of Medfield, (1986) 398 Mass. 112, 495 N.E.2d 294, superseding 395 Mass 643, 481 N.E.2d 491).
98. *Id.*
99. Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 ENVT'L. AFF. 481, 497 (1975). A number of other factors contribute to the uncertainty.
100. KAN. STAT. ANN. § 58-3811(1997); VA. CODE ANN. § 10.1-1010 (Michie 1999).
101. CAL. CIV. CODE (Deering 1999); MONT. CODE ANN. (1998). It can be assumed that California does not provide for termination because of the unswerving policy that a conservation easement is perpetual in duration (CAL. CIV. CODE § 815.2 (b)). "[California's] unequivocal statement appears to preclude judicial termination regardless of whether a conservation easement is categorized as an easement, a covenant, or an equitable servitude. Without this strong statutory declaration, a court might find that a public purpose, such as promoting the productive use of property, should override a grant of a real covenant or equitable servitude, despite a provision for perpetual duration in the grant. The statutory declaration, however, serves as a clear public demand for the courts to uphold conservation easement grants regardless of their classification." Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1197 (1989).
102. POWELL, *supra* note 3 at § 430.7 [1].
103. *Id.*
104. N.Y. REAL PROP. LAW § 1951(2) (McKinney 1999).
105. *Id.*
106. Blackie, see *supra* note 102, at 1215. For conservation easement analysis, Blackie promotes the use of the cy pres doctrine rather than the doctrine of changed conditions should the purpose of the easement become frustrated. The cy pres doctrine would allow the court to substitute another plan of administration which is believed to approach the original scheme as closely as possible. See Blackie for further discussion.
107. POWELL, *supra* note 3 at § 430.
108. VA. CODE ANN. § 10.1-1010 (f) (Michie 1999).
109. POWELL, *supra* note 3 at § 430.
110. KAN. STAT. ANN. § 58-3811(1997).
111. MONT. CODE ANN. § 76-6-207 (1998).
112. POWELL, *supra* note 3 at § 430.
113. MASS. GEN. LAWS ANN. ch. 184, § 32 (West 1998).
114. A recent Lee Newspaper poll quoted by Joe Kolman. See *supra* note 7.

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CASE COMMENT: ***Bonnie Briar Syndicate v. Town of Mamaroneck***

The New York State Court of Appeals Abandons the "Close Causal Nexus" Standard in Regulatory Takings Cases

By Stuart R. Shamberg and Adam L. Wekstein

In *Bonnie Briar Syndicate v. Town of Mamaroneck*[1] the State of New York Court of Appeals held that the rezoning of the Plaintiff's property from a residential zoning district to a recreational zoning designation survived constitutional scrutiny under the takings clauses of the federal and New York State Constitutions.[2] The Court found that the challenged rezoning has a reasonable relation to its stated and legitimate objectives. Curiously, the Court effectively ignored a series of its prior holdings which found that in order to advance substantially a legitimate state interest, so as to be constitutionally valid, a governmental action must have a "close nexus" to its putative goals.

"Curiously, the Court effectively ignored a series of its prior holdings which found that in order to advance substantially a legitimate state interest, so as to be constitutionally valid, a governmental action must have a 'close nexus' to its putative goals."

Background

The Plaintiff was the owner of a 150-acre property located in the Town of Mamaroneck (the "Property"), which has been used as a private golf club since 1917. When the Town adopted its first zoning ordinance in 1922, the Property was zoned for residential use. The Property had remained in the R-30 and R-15 Residential Zoning Districts (districts with minimum lot sizes of 30,000 and 15,000 square feet, respectively), until July 20, 1994 when the Town rezoned it for recreational use. The areas surrounding the Property are developed with single-family detached residences on lots of 30,000 and 15,000 square feet.

Local Law 6 of 1994 ("Local Law 6") rezoned the Property to restrict the use and development thereof solely to private or public recreational uses, effectively foreclosing any residential development.

Record Underlying the Rezoning

Any summary of the studies and data leading up to the rezoning must begin with the fact that the Property is located within the study area of the Town's Local Waterfront Revitalization Program ("LWRP"), as is a large portion of the entire Town. The Town issued and adopted the LWRP in 1986. One of the purposes of the LWRP was to examine land-use policies in order to establish coastal area and flood plain protective measures. The LWRP was drafted on behalf of the Town by the planning firm of Shuster Associates.

Section IV of the LWRP identified certain parcels of land in the Town which, because of their size or proximity to coastal zone or flood plain areas, might require special protective measures. The LWRP identified the goals for treating properties, such as the Property, which were located within a specific drainage basin and recommended the following:

> Should any portion of [the Bonnie Briar golf course] . . . be developed, land use and site development decisions concerning them must, at a minimum, avoid aggravating downstream flooding, and should where practicable contribute to its mitigation in those areas presently most affected. This means that decisions on the regulation of storm water runoff from specific sites in this and other flood-prone areas must give major weight to the policy objective of better flood and erosion control both at the site and at other locations.

After adopting the LWRP, the Town authorized Shuster Associates to undertake a study of how the goals and objectives set forth in the LWRP might be implemented with respect to various areas of the Town. In July 1988, Shuster Associates prepared and submitted to the Town Board a document entitled "A Study of Land Use Regulations and Development Impacts in the Golf Course Areas," (the "Study"). The Study postulated a series of development scenarios for the Property. Among other things, the Study concluded that the con-

struction of 125 clustered townhouse units in the center of the Property with a density based on the pre-existing R-30 and R-15 minimum lot size, would preserve virtually all of the natural site features as well as the golf course (with slight modifications to three holes) and that "virtually all of the Town's development policies would be realized."[3]

The Study and the Town's Draft Generic Environmental Impact Statement ("DGEIS") under the New York State Environmental Quality Review Act[4] concluded that a 75-unit attached townhouse development located in the center of the Property would preserve the 18-hole golf course, preserve the open space and have no impact on downstream flooding. The Town's Supplemental Draft Generic Environmental Impact Statement ("SDGEIS") found that the above development would preserve 91 percent of the Property's open space, as well as preserve the 18-hole golf course. Additionally, the Town's consulting engineers prepared an in-depth hydrology report and concluded the Property could be developed with attached housing in a manner that could actually improve flooding conditions in the Town if proper stormwater management measures were implemented.

Also significant is that two years before rezoning of the Property, the Town adopted Local Law 8 1992, entitled Surface Water Erosion and Sedimentation Control Law ("Local Law 8"), which required the preparation and approval of a surface water control plan for all construction activities and mandated the reduction of the rate of run-off from land development to prevent increases in flooding and flood damage. Such plans also had to reduce erosion potential and assure the adequacy of normal stormwater management facilities to control the rate and quality of the stormwater run-off resulting from construction.[5] As such, federal and state stormwater management laws and Local Law 8 prohibited the Plaintiff from developing the Property in a way that would increase the peak rate of stormwater runoff or cause a degradation in water quality.[6]

Despite this record the Town rezoned the Property. The putative purposes of Local Law 6 were the following:

1. To reduce the potential of downstream flooding as a result of the development of the Property;
2. To preserve the Property as open space including wildlife habitat; and
3. To preserve the Property as a recreational resource in the Town.

The Law

The United States Supreme Court's Decision in *Nollan v. California Coastal Commission*[7] reaffirmed and gave significant meaning to the second prong of the test enunciated in *Agins v. City of Tiburon*[8] requiring a governmental action to substantially advance a legitimate state interest. In order for legislation to meet this standard, the Court held that there must be an "essential nexus" between the goals of the legislation and the impact of the development sought to be regulated. In addition, the Court recognized the often repeated principle that "one of the principal purposes of the takings clause is to ban government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole."[9]

In *Seawall Associates v. The City of New York*,[10] the Court of Appeals expressly recognized that the Supreme Court required a heightened level of scrutiny under the takings clause in the form of the "essential nexus" standard. Arguably in *Seawall* the Court of Appeals employed an even more exacting standard of constitutional review, requiring a "close nexus," rather than *Nollan*'s"essential nexus," between regulatory means and ends. In *Manocherian v. Lenox Hill Hospital*,[11] the Court of Appeals applied the *Seawall* and *Nollan* standards to invalidate provisions of an emergency tenant protection act, which were designed to benefit not-for-profit hospitals. The Court specifically relied on the "close causal nexus" standard of *Seawall* in invalidating the challenged law and recognized that the essential nexus test of *Nollan* was uniformly applicable to takings claims. The Court stated the following:

> there is no basis in Nollan itself for concluding that the Supreme Court decided to apply different takings tests, dependent on whether the takings were purely regulatory or physical. The Court promulgated a principle for all property and land-use regulation matters. A crucial threshold of analysis is that no taking occurs if a law "substantially advance[s] legitimate state interests" (Nollan, supra, 483 U.S. at 834, 107 S. Ct. at 3147). In discussing the lack of a standard for determining what constitutes a "legitimate state interest," the Supreme Court specifically referred to non-physical regulatory takings cases (see, Nollan, supra, citing Agins v. Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106, supra; and Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631, supra). Further, the Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the "essential nexus" test. This suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases.[12]

A fair reading of such authority shows that they were not traditional exaction cases. *Seawall Associates*, *Manocherian* and *Rent Stabilization Association* involved challenges to the regulation of landlord-tenant relationships and *Gazza* consisted of an attack on the denial of a wetlands permit. As such, for almost a decade in New York the close causal nexus test did not appear to be limited to review of any particular type of governmental action claimed to effect a taking.

During the pendency of the appeals in *Bonnie Briar Syndicate*, the United States Supreme Court clarified one aspect of regulatory takings claims in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[13] Therein the plaintiff-developer sued the City of Monterey for violation of its civil rights under 42 U.S.C. Section 1983. After the City denied approval for the fifth iteration of its site plan, which had been repeatedly modified in response to design requirements set by the City, the plaintiff contended that the City's actions deprived it of all economically viable use of its property and failed to advance substantially a legitimate State interest. The District Court charged the jury that it should find for the plaintiff if the plaintiff had been denied all economically viable use of its property or the City's denial of the application did not substantially advance a legitimate State interest. The jury reached a verdict awarding the plaintiff $1,450,000 on its takings and equal protection claims.

In reviewing the decision of the Ninth Circuit Court of Appeals which affirmed the jury verdicts, the Supreme Court affirmed the jury award, but held that the "rough proportionality" standard set forth in the case of *Dolan v. The City of Tigard*[14] which requires that an exaction imposed as part of an approval be "roughly proportional" to the impacts resulting from the approved development, applies only to cases where the government compels an exaction as a condition of development approval.[15] The Court did not express an opinion as to whether the so called *"essential nexus"* test of *Nollan* applies outside the context of cases challenging exactions or even articulate a standard providing objective requirements for determining in the context of other governmental actions whether they "substantially advance" a legitimate state interest.

The Litigation

In response to the adoption of Local Law 6, the Plaintiff in *Bonnie Briar Syndicate* commenced an action against the Town alleging in its complaint, among other things, that Local Law 6 unconstitutionally took its property without just compensation. Plaintiff contended that because the record showed that a 72-unit residential development of attached housing constructed in the center of the Property would meet all the putative goals of Local Law 6, the prohibition of all residential development on the site did not have the requisite close nexus to the law's stated purposes. The complaint also alleged that the Town was seeking to solve a town-wide open space and drainage problem by rezoning the private property of the Plaintiff in a manner that forced the Plaintiff to utilize the Property solely for recreational use and as a *de facto* stormwater management facility for the area.

By Decision, Order and Judgment dated July 3, 1996, the Supreme Court, Westchester County denied Plaintiff's motion for summary judgment and granted the Defendants' cross-motion for summary judgment, declaring Local Law 6 constitutional. Plaintiff then appealed to the Appellate Division, Second Department and that court upheld Local Law 6, finding that it bears the requisite essential nexus to its ends.[16]

The Court of Appeals affirmed the holdings of the lower courts, but expressly found that the "close nexus" test was limited to review of permit exactions. To reach such a conclusion the Court relied on *Del Monte Dunes*, which it characterized as eliminating the essential nexus standard outside the context of permit exactions. The Court based this conclusion on *Del Monte Dunes'* rejection of the rough proportionality standard set forth in *Dolan,* stating as follows:

> as we have previously demonstrated, the "rough proportionality" test articulated in Dolan was nothing more than the Court's explication of the required closeness of the connection between the condition of development and the governmental objective under the essential nexus standard in an exaction case. Thus, in explicitly rejecting the application of the "rough proportionality" test when, as here, the zoning law merely "den[ies] * * * development" (City of Monterey v. Del Monte Dunes, supra, 526 U.S. at __, 119 S. Ct. at __, 143 L.Ed.2d, at 900), limiting its application to those cases involving exactions, the Supreme Court necessarily rejected the applicability of the "essential nexus" inquiry to general zoning regulations as well.[17]

The Court also relied on the fact that the jury instruction in *Del Monte*, which was upheld by the Supreme Court, instructed that the challenged regulatory action "substantially advanc[es] a legitimate public purpose, if the action bears a reasonable relationship to that objective."[18] Applying the deferential "reasonable relationship" test the Court found that the fact that the Town had options to achieve its objectives that were less restrictive of the Plaintiff's property rights was irrelevant and stated, "so long as the method and solu-

tion the Board eventually chose substantially advances a legitimate public interest, it is not the Court's place to substitute its own judgment for that of the Zoning Board."[19]

Although the Court extrapolated from *Del Monte* to conclude that the close causal nexus test was not applicable to general challenges to governmental action, or, presumably, the denial of a development application, an interpretation which is at minimum debatable, it completely ignored its contrary explicit application of the standard to takings claims based on actions *other than* permit exactions such as *Seawall* (legislative enactment), *Manocherian* (legislative enactment), *Rent Stabilization Association* (administrative regulations) and *Gazza* (denial of a wetland permit). Given the lack of any unequivocal language in or the holding of *Del Monte* concerning the application of the essential nexus test to non-exaction takings claims and the Court's irreconcilable precedent, the Court should have at least discussed why such prior authority was inapplicable or expressly stated that it was overruled.[20]

"[L]andowners in New York challenging governmental regulation of their property have suffered a substantial setback."

In sum, landowners in New York challenging governmental regulation of their property have suffered a substantial setback. They have been relegated to the deferential reasonable relationship standard which reigned supreme prior to the decisions in *Nollan* and its progeny.

Endnotes

1. 94 N.Y.2d 96, 699 N.Y.S.2d 721 (1999).
2. The fifth amendment to the United States Constitution provides in part: "Nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. The takings clause of the fifth amendment is made applicable to the states and, consequently, their subdivisions by the due process clause of the fourteenth amendment. Likewise, Article I, Section VII of the New York State Constitution states: "Private property shall not be taken for public use without just compensation." N.Y. Const., Art. I, § VII.
3. The Town Board then directed Shuster Associates to perform a further study analyzing a development under zoning featuring a 50,000 square foot minimum lot size. The revised Shuster Associates study concluded that so long as the units were clustered it would still calculate density of the attached housing based on a 30,000 square foot lot size.
4. Collectively referring to Article 8 of the New York Environmental Conservation Law and its implementing regulations codified at 6 N.Y.C.R.R. Part 617.
5. Under the Federal Clean Water Act, stormwater run-off from construction activity disturbing more than five acres, must obtain a national pollutant discharge elimination permit ("NPDES"), 33 USC § 1342(p) and 40 C.F.R. § 122.26(b)(14)(x). Continuing enforcement and administration of the NPDES is delegated to the New York State Department of Environmental Conservation ("DEC"), which requires Permit No. GP-93-06 (the "General Permit") to be issued. Both permits require the stormwater management plan for the property to demonstrate that there will be no increase in the pre-construction rate of stormwater run-off, nor a degradation of the quality of said run-off.
6. Curiously, the Board rejected stormwater management measures as unreliable, even though its own regulations required the use of them.
7. 483 U.S. 825 (1987).
8. 447 U.S. 255 (1980).
9. *Nollan*, 483 U.S. at 836, n.4.
10. 74 N.Y.2d 92, 111, 544 N.Y.S.2d 542, 551 (1989), *cert denied,* 493 U.S. 976 (1989).
11. 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994), *cert denied*, 514 U.S. 1109 (1995).
12. *Manocherian*, 84 N.Y.2d at 393-394, 618 N.Y.S.2d at 482. *See Rent Stabilization Association of New York, Inc. v. Higgins*, 83 N.Y.2d 156, 174, 608 N.Y.S.2d 930, 939 (1993), *cert denied,* 512 U.S. 1213 (1994) (in rejecting a takings claim based upon a legislative enactment the Court applied the close causal nexus test stating that "the absence of a close nexus between a regulated use of property and the problem sought to be ameliorated may invalidate a regulation"); *Gazza v. The New York State Department of Environmental Conservation*, 89 N.Y.2d 603, 616, 657 N.Y.S.2d 555, 561 (1997), *cert denied,* 522 U.S. 813 (1997) (in rejecting an economic taking claim where a landowner attacked as confiscatory a regulatory regimen which was in effect prior to the acquisition of its property, the Court stated that "*any takings analysis* involves the resolution of whether the government legislation is supported by a substantial state interest and close nexus." (Emphasis added)).
13. 526 U.S. 687, 119 S.Ct. 624 (1999).
14. 512 U.S. 374 (1994).
15. *Del Monte Dunes*, 119 S.Ct. at 1635. The Supreme Court decided that it was proper for a jury to decide the factual issues of whether or not the actions of the City in continuing to deny reduced development proposals substantially advanced a legitimate State interest. *Del Monte Dunes*, 119 S.Ct. at 1644.
16. *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 242 A.D.2d 356, 661 N.Y.S.2d 105 (2d Dep't 1997).
17. *Bonnie Briar Syndicate*, 94 N.Y.2d at 107, 699 N.Y.S.2d at 725-726.
18. 94 N.Y.2d at 107-108, 699 N.Y.S.2d at 726.
19. 94 N.Y.2d at 108, 699 N.Y.S.2d at 725-726.
20. This is particularly true where the prior New York case law was decided under both the State and federal Constitutions so that even if the Court properly divined the standard from *Del Monte*, it still should have stated its rationale for rolling back the standard of review established by case law applicable to State constitutional claims.

The authors are partners in the Mt. Kisco, New York, law firm of Shamberg Marwell Hocherman Davis & Hollis, P.C., and represented the plaintiff, Bonnie Briar Syndicate, Inc., in the action.

CASE COMMENT: ***Bonnie Briar Syndicate v. Town of Mamaroneck***

Court of Appeals Rejects Heightened Scrutiny in Determining Whether Rezoning Effects a Taking

By Robert S. Davis and Judith M. Gallent

In its recent decision in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*,[1] the New York Court of Appeals ruled that the Town of Mamaroneck's rezoning of a golf course from single-family residential to private recreational use did not effect a taking of property requiring just compensation under either the United States or New York State constitution. In so holding, the Court has settled a question important to both landowners and municipalities that had been left open by the United States Supreme Court as to the proper standard for reviewing regulatory takings claims not involving exactions. The Court's decision reinforces the deference traditionally afforded municipalities in establishing zoning classifications through legislative action and confirms that where a municipality has engaged in a thorough and legitimate comprehensive planning process, the courts will not second-guess its assessment of the public interest.

"[T]he Court has settled a question important to both landowners and municipalities that had been left open by the United States Supreme Court as to the proper standard for reviewing regulatory takings claims not involving exactions."

I. The Facts

Plaintiff Bonnie Briar Syndicate, Inc. is the owner of approximately 150 acres of land located in the Town of Mamaroneck, on which the Bonnie Briar Country Club is situated (the "Property"). The Club has operated on the Property continuously since the 1920s. The Property contains wetlands, water bodies, and rock outcroppings. A portion of it is within the floodplain of the Sheldrake River and serves as a natural detention basin for floodwater from the River.

Prior to the rezoning, the Property, as well as the nearby 280-acre Winged Foot Golf Club (together, the "Golf Course Properties"), the Town's only remaining large open spaces, were zoned R-30, which permitted the development of as many as 125 and 285 single-family residential units on the Property and Winged Foot, respectively.

A. Comprehensive Planning History

Critical to the Town's success in the litigation was that the rezoning was the culmination of a well-documented 30-year comprehensive planning process, which began in the 1960s as development spread through southern Westchester. Specifically, the Town's 1966 Master Plan and 1976 Master Plan Update both recommended that the Golf Course Properties remain as golf courses for their recreational and open space value as well as their important role in avoiding increased flooding in the area.

In 1985, a regional land use study, "Westchester 2000," sponsored by Westchester County, among others, reiterated the recommendations of the Master Plan and its Update that the Golf Course Properties remain as open spaces for continued recreational use and as buffer zones to encroaching urbanization. In 1986, the Town completed a Local Waterfront Revitalization Program ("LWRP"). The LWRP observed that the Town's ecosystems had been damaged by upstream flooding from overbuilt watersheds. It cautioned the Town to deal with the possibility of future changes in land use intensity that could have further adverse impact and repeatedly underscored the need to protect the Golf Course Properties as open space. In response, the Town designated the Golf Course Properties as Critical Environmental Areas. In 1989 the Federal Emergency Management Agency acknowledged the role of the Golf Course Properties in preventing more frequent and damaging flooding downstream.

B. The Rezoning Process

In response to the inconsistency between the then existing R-30 zoning of the Golf Course Properties and the recommendations of the Master Plan, the Update, "Westchester 2000" and the LWRP, that the lands be preserved as open space, the Town embarked on a four year review of the zoning of the Golf Course Properties. As part of that effort, and in accordance with its obligations under the State Environmental Quality Review Act ("SEQRA"), the Town prepared a Generic Environmental Impact Statement ("GEIS"), which considered the impacts of ten alternative development scenarios at varying densities. The GEIS also considered the Recreation Zone, which permitted private recreation facilities and prohibited residential development. Subsequently, the Town Board prepared a Supplemental Draft GEIS,

largely to consider three development scenarios submitted by the Syndicate, as well as a Final GEIS.

After nearly four years of review, the Town Board adopted a 76-page SEQRA findings statement in which it concluded that of all the alternatives, the Recreation Zone would best achieve the objectives of local, state, regional and federal policies that had guided the Town's comprehensive planning for almost three decades and be most consistent with the goals that emerged from the Town's comprehensive planning process—(1) maintaining scarce open space as a means of providing physical relief from increasing urbanization and sustaining natural habitats, scenic vistas, and other aesthetic values; (2) preserving recreation opportunities for area residents; and (3) avoiding any increases in flooding of Town homes. Thereafter, in accordance with its findings, the Town Board adopted Local Law 6-1994, thereby rezoning the Golf Course Properties to a Recreation Zone in which private recreation uses, including the existing golf club uses, tennis, and swim clubs, with associated restaurant and club facilities, are permitted as of right. The ordinance limits building coverage to 1.25% of total lot area.

II. The Syndicate's Takings Claim

In response to the rezoning, the Syndicate commenced an action in New York Supreme Court, Westchester County, alleging among other things that Local Law 6 effected a taking of the Property under both the United States and New York State constitutions because it did not substantially advance a legitimate government interest.[2] Both the Syndicate and the Town moved for summary judgment on these claims.

The parties agreed that the standard set forth by the United States Supreme Court in *Agins v. City of Tiburon*[3]—that a regulation effects a taking of property if "the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of land . . ."—applied to the Syndicate's claims.[4] However, the Syndicate asserted that in determining whether a regulation such as Local Law 6 runs afoul of the first prong of the *Agins* test, the Court must apply the "rough proportionality" and "essential nexus" requirements articulated in *Dolan v. City of Tigard*[5] and *Nollan v. California Coastal Commission*,[6] which, it argued, are simply refinements of the "substantially advance" test that apply to all regulatory takings claims. Thus, it argued, for a law to substantially advance a legitimate state interest, there must be a direct relationship between the condition imposed on development and the impact on the community associated with the development.

The Syndicate contended that Local Law 6 could not survive such heightened scrutiny because, in essence, there were means less restrictive of the Syndicate's property rights available to the Town to achieve its concededly legitimate interests. Because Local Law 6 was not necessary to achieve the Town's stated goals, it argued, it did not bear an essential nexus to those goals and was not roughly proportional to the problem it purported to solve.

The motion court rejected the Syndicate's arguments. Significantly, it recognized the "essential nexus" and "rough proportionality" tests of *Nollan* and *Dolan* have their origins in the narrow class of regulations involving adjudicatory exactions associated with individual permit applications. Accordingly, it held, as the Town had urged, that such heightened scrutiny is inapplicable to a zoning regulation such as Local Law 6 that does not involve exactions.

In *Nollan* the Supreme Court held that for a permit condition to pass constitutional muster there must be an "essential nexus" between the condition imposed and the legitimate state interest that it is alleged to advance.[7] Applying this test, the Court held that the condition attached to a permit for the rebuilding of the Nollans' house, which required the dedication of a public easement across the Nollans' beachfront lot, effected a taking. The easement exaction was constitutionally infirm because there was no nexus between the easement, which was designed to give the public lateral access to two beaches separated by the Nollans' property, and the legitimate interest that the California Coastal Commission sought to advance—increasing the public's visual access to the beach. Because enhancing the public's ability to traverse the beach did not serve the same governmental purpose of protecting visual access to the ocean, the permit condition constituted a taking. In justifying its imposition of the "essential nexus" requirement to the permit condition, the Supreme Court relied exclusively on state court developmental exaction cases.[8]

Dolan, like *Nollan*, is also a permit exaction case. There, plaintiff Florence Dolan applied for a permit to redevelop her property in Tigard, Oregon's central business district by razing her existing plumbing supply store, erecting a store twice the size on the same site, paving a 39-space parking lot, and building an additional structure for a complementary business. This redevelopment was consistent with the existing zoning. In response, the city conditioned Dolan's building permit on her dedication of roughly 10% of her property to the city for the improvement of a storm drainage system and a 15-foot adjacent strip for a pedestrian-bicycle path. The city justified its exaction as necessary to mitigate the increased stormwater runoff that would result from the proposed increase in impervious surface and to offset the increased traffic that would result from the larger store.

The Supreme Court first found that an "essential nexus" existed between the city's legitimate interests in the reduction of traffic congestion and flood control and the city's permit conditions.[9] It therefore framed the question presented by the case as "what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."[10] The Court answered that question by holding that there must be "rough proportionality" between the exaction sought to be imposed and the impact of the proposed development. Thus, the Court explained, a municipality must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[11]

The motion court reasoned that the Supreme Court's application of a higher degree of scrutiny to developmental exactions than to traditional zoning ordinances such as Local Law 6 is doctrinally sound because there are fundamental differences between the two.[12] These critical differences warrant heightened scrutiny of permit exaction cases, but make it unnecessary for zoning cases that do not involve exactions. Traditional zoning, such as Local Law 6, merely regulates land use by limiting the use of property, permitting some uses and prohibiting others. By contrast, permit exactions impose affirmative duties on the owner to construct public improvements, convey land to the municipality for public use or pay cash, with the obvious potential for governmental misuse. Because zoning regulations such as Local Law 6 do not involve concerns about government extortion, the court reasoned, heightened scrutiny is unnecessary. Moreover, permit exactions typically condition the right of a property owner to do something that the government has already found to be generally permissible on the relinquishment of property rights.

Applying the "substantially advance" prong of the *Agins* test, the motion court held that Local Law 6 substantially advances the ordinance's legitimate goals. "Obviously," the court held, "the maintenance of open space, recreational resources and the suburban quality of the community, and the reduction of flood hazard will be substantially advanced by measures that prohibit all . . . but recreational development of . . . existing open space and recreational resources such as country clubs." In so holding, the court rejected the Syndicate's contention that the Town was obligated to achieve its ends by the means that least restricts the use of its property.

The Appellate Division, Second Department affirmed the lower court decision. Without any discussion of the appropriate standard, the court held that "an essential nexus exists between [Local Law 6] and the legitimate governmental interests of . . . preserving open space and preventing the risk of additional flooding and other related adverse environmental effects."[13]

III. The Court of Appeals' Decision

The Court of Appeals, in a unanimous decision,[14] affirmed the order of the Appellate Division upholding Local Law 6, but, significantly, disagreed with its application of the "essential nexus" requirement in determining whether it effected a taking of the Property. The Court held that *Nollan*'s "essential nexus" test, and the relatively more stringent scrutiny implied by that decision, are confined to the exactions context.

The Court explained that in the aftermath of *Nollan* and *Dolan* there was "considerable disagreement as to the reach of those holdings" in both academia and the judiciary. Indeed, citing its decisions in *Seawall Assocs. v. City of New York*[15] and *Manocherian v. Lenox Hill Hospital*,[16] two non-zoning takings cases in which the majority and dissent disagreed as to the applicability of the "essential nexus" test, the Court acknowledged that there had been a sharp debate within the Court itself on this issue.

This uncertainty, the Court explained, was finally resolved by the United States Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[17] its latest takings case, decided while *Bonnie Briar* was being briefed in the Court of Appeals. There, the Supreme Court made explicit that *Dolan*'s "rough proportionality" requirement does not apply outside the context of exactions.[18] The Court of Appeals rejected for two reasons the Syndicate's argument that because the Supreme Court did not expressly declare *Nollan*'s "essential nexus" test inapplicable outside the exaction context, a reviewing court is still bound to apply it. First, the Court accepted the Town's argument that, in *Dolan*, the Supreme Court merely quantified the degree of nexus required by *Nollan* between the impact of a development project and a required exaction. The "rough proportionality" requirement merely elaborates on and sets forth a corollary to *Nollan*'s nexus requirement. Thus, in explicitly limiting the applicability of the "rough proportionality" to those cases involving exactions, "the Supreme Court necessarily rejected the applicability of the 'essential nexus' inquiry to general zoning regulations as well."[19]

Second, the Court relied on the fact that although the *Del Monte Dunes* Court was divided on the main issue in the case—the availability of a jury trial in takings cases—the Court had agreed unanimously that the charge given by the trial court to the jury accurately reflected the standard for a non-exaction regulatory takings claim. That charge, the Court of Appeals noted, made no reference to the "essential nexus" requirement, but simply required that in order to substantially advance a legitimate public purpose, a regulation must

bear "'a reasonable relationship to [the governmental] objective.'"[20]

Applying this relatively relaxed standard, the Court held that Local Law 6 easily passed the test. Citing the years of study and comprehensive planning undertaken by the Town, the Court held that "[b]ecause zoning plaintiff's property for solely recreational use bears a reasonable relation to the legitimate objectives stated within the law (to further open space, recreational opportunities and flood control), the regulatory action here substantially advances those purposes."[21]

"[M]unicipalities should not view the Bonnie Briar Syndicate *decision as a license to rezone property without careful study and analysis."*

Significantly, the Court also rejected the Syndicate's contention that because the Town had available to it less restrictive means of achieving those ends, the law did not bear the required relationship to the Town's goals. "So long as the method and solution the Board eventually chose substantially advances the public interest, it is not this Court's place to substitute its own judgment for that of the . . . Board." The Court further explained that "it is not for this Court to determine if, in regulating land use, the rezoning determination was more stringent than one might reasonably conclude was necessary to further public objectives." Thus the Court reinforced the deference traditionally afforded municipalities in land use determinations.[22]

The Syndicate had argued that Local Law 6 did not bear the required nexus to the ends it was enacted to achieve because the Town's goals could have been achieved through development under its subdivision plan under the pre-existing residential zoning. Had the Court accepted this argument, it would have turned zoning jurisprudence on its head. Applying *Nollan* in this manner would have reversed the well-settled principle that "the primary goal of zoning is to provide for the development of a balanced, cohesive community which will make efficient use of the Town's available land."[23] The application of the "essential nexus" requirement to zoning restrictions like Local Law 6 through a required comparison between development scenarios under different regulatory schemes would prevent a municipality from zoning in the best interests of the community by requiring it to zone in the best interests of each individual landowner. Requiring a rezoning to have an "essential nexus" to the impacts of potential development under the existing zoning, rather than reflecting the legislature's determination of the needs of the community, would have changed radically the nature of the zoning power and, as a practical matter, given landowners vested rights to existing zoning. The Court, consistent with its land use precedent, rejected this approach.

IV. Lessons for Municipalities and Property Owners

With its decision in *Bonnie Briar Syndicate*, the Court of Appeals settled definitively a question that had remained unanswered on both the federal and state levels since the Supreme Court's decision in *Nollan*—what is the nature of the requirement that a regulation not involving exactions substantially advance a legitimate government interest. In declining the Syndicate's invitation to apply heightened scrutiny in the takings analysis of a generally applicable zoning regulation, the Court ratified the broad scope of a municipality's police power to zone for "health, safety, morals, or the general welfare of the community."[24] However, the record in this case was exemplary—the rezoning was the culmination of nearly thirty years of land use planning, and the rezoning process itself took four years and involved the preparation of a thorough generic environmental impact statement. As important, the rezoning left the property owner with the same economically viable use to which the Property had been put for the last 70 years.

Thus, municipalities should not view the *Bonnie Briar Syndicate* decision as a license to rezone property without careful study and analysis. They must engage in meaningful planning that identifies legitimate municipal objectives and craft regulations that accomplish significant movement toward the realization of those goals.

Both on its own and in the context of the Court of Appeals' recent takings jurisprudence,[25] *Bonnie Briar*'s lesson for property owners is that takings claims are not easily established in the New York courts.

Endnotes

1. 99 N.Y. Int. 0155 (N.Y. Nov. 23, 1999).
2. The Syndicate had earlier challenged the Town Board's SEQRA findings, which were sustained by the Supreme Court, Westchester County, in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, No. 2958/93 (July 6, 1995).
3. 447 U.S. 255 (1980).
4. On its motion, the Syndicate alleged only that Local Law 6 ran afoul of the first part of the *Agins* test. However, its complaint also alleged that Local Law 6 effected a taking of the Property because it deprived the Syndicate of substantially all of its economic value. The fiscal prong claim was dismissed by the Appellate Division, Second Department on review of the Town's separate summary judgment motion. The Appellate Division found that the Syndicate's own appraisal demonstrated that the rezoning resulted in a reduction in value of only 38% and that sufficient value remained to defeat the claim. The Syndicate

abandoned that claim in the Court of Appeals and it is not discussed in this article.

5. 512 U.S. 374 (1994).
6. 483 U.S. 825 (1987).
7. 483 U.S. at 836-37.
8. 483 U.S. at 839.
9. 512 U.S. at 387.
10. 512 U.S. at 386.
11. 512 U.S. at 391.
12. Slip op. at 5-6.
13. 242 A.D.2d 356 (2d Dep't 1997).
14. Judge Rosenblatt, who presided over the Appellate Division panel that decided the case, took no part in the Court's deliberations.
15. 74 N.Y.2d 92, *cert denied*, 493 U.S. 976 (1989).
16. 84 N.Y.2d 385 (1994), *cert. denied*, 514 U.S. 1109 (1995).
17. 526 U.S.__, 119 S.Ct. 1624 (1999).
18. *See* 119 S.Ct. at 1635.
19. Slip op. at 11.
20. *Id*. at 11-12 (quoting *Del Monte Dunes*, 143 L. Ed.2d at 899).
21. Slip op. at 12.
22. *See, e.g., Marcus Assocs., Inc. v. Town of Huntington*, 45 N.Y.2d 501, 506 (1978); *Tilles Investment Co. v. Town of Huntington*, 137 A.D.2d 118, 125-26 (2d Dep't 1988), *aff'd*, 74 N.Y.2d 885 (1989).
23. *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 683 (1996).
24. New York State Town Law § 261 (McKinney 1987).
25. *See, e.g., Gazza v. New York State Department of Environmental Conservation*, 89 N.Y.2d 603 (1997); *Anello v. Zoning Board of Appeals of Dobbs Ferry*, 89 N.Y.2d 535 (1997) (rejecting takings claims where land use restrictions alleged to effect a tasking were in place at time of purchase of property).

Robert Davis and Judith Gallent are members of Robinson Silverman Pearce Aronsohn & Berman LLP, specializing in land use matters. Together with their partner, James Altman, they represented the Town of Mamaroneck in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*.

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New York Municipal Formbook

Second Edition

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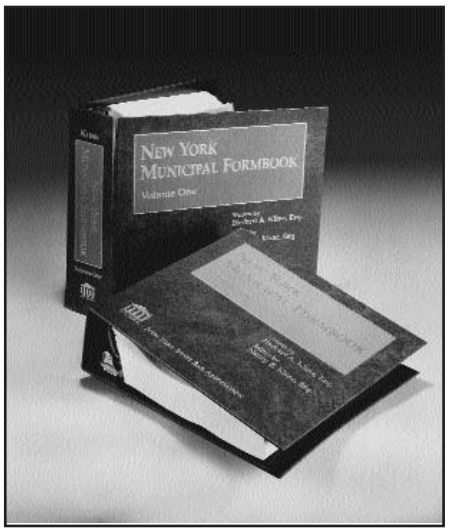

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February 14, 2000

The Honorable George B. Pataki, Governor
Executive Chamber
The Capitol
Albany, NY 12224-0341

Re: ***New York State Superfund Reform***

Dear Governor Pataki:

The Executive Committee of the New York State Bar Association's Environmental Law Section (the "Section") has recently endorsed a series of reform proposals with respect to Article 27, Title 13 of the State's Environmental Conservation Law ("State Superfund Law"). A copy of these proposals is enclosed.

As you may know, this past spring the Section sponsored a legislative forum on the State Superfund Law. Following that forum, the Section's Executive Committee established an Ad Hoc Task Force to review the existing State Superfund Law in light of the reforms that were being advanced.

The Task Force included the Co-Chairs of three Section Committees (Hazardous Waste Remediation, Hazardous Waste, and Legislation), and a former Section Chair. Two members of the Task Force, Louis Alexander and David Freeman, served to coordinate the Task Force's activities. The Task Force considered the Superfund Working Group and the Brownfields Coalition reports, the Administration's program bill, and the legislative initiatives introduced in the State Legislature during the 1999 session.

Based on that review, policy proposals were developed with respect to the State Superfund Law, and the oil spill and brownfields programs. The proposals, which addressed risk assessment, statutory exemptions and defenses, settlements, penalties, the Voluntary Cleanup Program, private rights of action, financing, hazardous substance and mediation, were considered by the Section's Executive Committee. Following debate and amendment, these proposals were approved as set forth on the enclosure.

The Sections' Executive Committee believes that implementation of these recommendations would enhance the State's remediation programs, ensure that environmentally protective standards are maintained, and promote redevelopment of contaminated properties. We urge their prompt consideration.

On behalf of the officers of the Executive Committee, we would welcome the opportunity to meet with you or your staff on the subject of Superfund reform. If you or your staff have any questions regarding the enclosed recommendations or would be interested in scheduling a meeting, please contact me at (212) 421-2150.

I have also asked the Task Force Chairs to contact your staff in furtherance of the Sections's interest in developing this program.

Respectfully,

Daniel Riesel

Daniel Riesel

cc: Officers, Environmental Law Section
David Freeman, Esq.
Lawrence Schnapf, Esq.

Report of the Ad Hoc Task Force on Superfund Reform

As amended—October 3, 1999

The Ad Hoc Task Force on Superfund Reform (the "Task Force") was established by the Environmental Law Section's Executive Committee at its April 20, 1999 meeting. The Task Force was directed to consider various reforms to Article 27, Title 13 (Inactive Hazardous Waste Disposal Sites) of the New York State Environmental Conservation Law ("State Superfund Law").

The following members of the Executive Committee were appointed to serve on the Task Force: the co-chairs of the Committee on Hazardous Site Remediation, Lawrence P. Schnapf and Walter E. Mugdan; the co-chairs of the Hazardous Waste Committee, David Freeman and John J. Privitera; the co-chairs of the Committee on Legislation, Michael J. Lesser and Louis A. Alexander; and former Section Chair G. S. Peter Bergen.

The Task Force held four conference calls to review proposed amendments to the State Superfund Law, including the recommendations of the Superfund Working Group established by Governor George Pataki and of the Brownfields Coalition (which included certain members of the Pocantico Roundtable for Consensus on Brownfields), as well as the initiatives in the Program Bill submitted by Governor Pataki to the Legislature earlier this year. Several task force members prepared memoranda summarizing key proposals for consideration. Members of the Task Force considered a variety of options, in addition to amending Title 13, including: eliminating Title 13; leaving the statutory language "as is"; and replacing Title 13 with language identical to the federal statute.

The members of the Task Force expressed a wide range of views regarding the various reform proposals. The Task Force met on Sunday, October 3, to review proposed recommendations for revisions to the State Superfund Law and related remedial programs. The Task Force approved submitting a series of reform proposals to the Executive Committee for its consideration. The Task Force further proposed to recommend that the officers of the Environmental Law Section be authorized by the Executive Committee to take an active role in the legislative process on reforming the State Superfund Law, and the brownfields and oil spill programs, consistent with the rules of the New York State Bar Association. Further, the Task Force indicated its willingness to participate in the legislative process and related reform activities at the direction of, or approval by, the officers.

The Task Force reform proposals were presented to the Executive Committee and, with certain modifications, adopted.

Recommendations Approved by the Executive Committee

General Principle

- all programs should have the same remedial goal: protection of public health and the environment and, at a minimum, elimination or mitigation of all significant threats to public health and the environment presented by contaminants, through proper application of scientific and engineering principles.

Risk Assessment

- use accepted risk assessment procedures to develop "look-up" tables of soil cleanup levels for different land uses (residential, commercial, industrial) which tables shall be promulgated as regulations by the New York State Department of Environmental Conservation;
- allow for site-specific risk assessments to justify other cleanup levels on a case-by-case basis;
- consider current, intended and reasonably anticipated future land uses at a site and surrounding properties in fashioning remedial proposals; and
- allow a departure from groundwater standards in remedial decisions in areas of "ubiquitous contamination" where groundwater is not used as a drinking water source, and otherwise on a case-by-case basis.

Exemptions and Defenses

- incorporate the lender liability protections in federal Superfund law into the State Superfund Law and oil spill program;
- incorporate fiduciary liability protections in federal Superfund law into the State Superfund Law and oil spill program;
- provide municipalities that acquire title involuntarily in the State Superfund Law and oil spill program with the same liability protections set forth in the federal Superfund law;
- provide liability protections to an IDA in the State Superfund Law and the oil spill program where DEC has determined that the IDA is serving in a capacity as "conduit financier"; and
- incorporate federal "innocent landowner" defense into the State Superfund Law and oil spill program.

Settlements[1]

- use de minimis and de micromis settlement strategies in the State Superfund program, consistent with current federal practice.

Penalties

- authorize imposition of treble damages on parties who refuse to comply with a DEC cleanup request without good cause.

Voluntary Cleanup Program

- provide a statutory basis for DEC's Voluntary Cleanup Program;
- provide for enhanced liability releases. All parties participating in cleanups as volunteers under State's Voluntary Cleanup Program would be given releases from further liability upon satisfactory completion of a Department-approved cleanup, with the release limited to the scope of the investigation;
- a single release would be provided for all state agencies;
- releases would run with the land and therefore be transferable to successors-in-interest;
- releases would confer contribution protection against claims by other potentially responsible parties;
- reopeners to be provided for new information, fraud, and change in the use of a property (assuming the new use would have required a higher degree of cleanup);
- provide for time limits for DEC responses to submissions; and
- strengthen notice and enforcement provisions for institutional controls.

Private Right of Action

- create a private right of action for cost recovery for cleanups consistent with State law.

Financing

- use fines and penalties received by the Hazardous Waste Remedial Fund and Oil Spill Fund solely for these program purposes;
- use cost recovery funds as a revenue source for remedial programs; and
- provide for loans and grants to municipal and non-profit organizations, targeted to economically-distressed communities. The making of loans and grants available to private parties should be considered, contingent upon the development of appropriate criteria.

Hazardous Substances

- broaden Title 13 to include hazardous substance sites. Note: This recommendation is not intended to require further remediation of hazardous substance sites that have been previously remediated. Furthermore, the Task Force noted that the recommendation to broaden Title 13 to include hazardous substance sites is not meant to add sites that do not pose a significant threat (coal tar sites being noted as one example).

Mediation

- endorse the use of mediation, to the extent possible, to resolve disputes involving State Superfund or oil spill sites.

Public Participation

- broaden the rights of affected publics to participate in decision-making by providing wider notice of proposed voluntary cleanup agreements and work plans.

Endnote

1. The various recommendations relating to releases under the Voluntary Cleanup Program (see second through fifth recommendations under that heading) would also apply to the State Superfund program.

Minutes of the Executive Committee Meeting NYSBA Environmental Law Section

The Otesaga, Cooperstown
October 3, 1999, 9:30 a.m.

Attendees:

William A. Ginsberg
Phil Weinberg
Bob Tyson
Virginia Robbins
Larry Schnapf
David Freeman
Walter Mugdan
Carl Howard
Roberta Vallone
Miriam Villani
Dorothy Marie Miner
Barry R. Kogut
James F. Dwyer
Peter G. Ruppar
George A. Rodenhausen
Kevin Healy
Mark Chertok
Lisa Bataille
Louis Alexander
Marc Gerstman
Joel Sachs
John French
Philip Dixon
Peter Bergen
Michael J. Lesser
Bob Kafin
Gail S. Port
Daniel A. Ruzow
Daniel Riesel
John L. Greenthal
James Periconi

1. Approval of April 20, 1999 Minutes (Secretary's Report)

Motion made, seconded, and approved unanimously.

2. Treasurer's Report

The Treasurer distributed the Section's budget, and indicated there would be a budget surplus at year's end. Accounting at NYSBA has projected our income from dues as being about $3,000 more than in 1999.

Chair's Report

On December 8, 9-11 a.m., a cleaning up of the Hudson River Conference will take place.

The Executive Committee appointed the Awards Committee to give out two awards. People appointed to that Committee: Phil Weinberg, Barry Kogut, Joan Leary Matthews. We ask that the Committee give out only two awards; one is for outstanding service to the Section. The other important Committee is the Nominating Committee: Gail Port, Jim Periconi, Mike Lesser and Alan Knauf.

Report on Annual Meeting: will be chaired by Miriam Villani and Walter Mugdan for our meeting on January 28 (Friday), 2000. Walter Mugdan reported: The Program Committee is well on way in planning this event. The theme is thinking globally and acting locally. The two topics include international environmental law issues and Glen Cove as a model of creative redevelopment. Carol Casazza, Connie Eristoff and John French are involved; on local issues: there will be more interaction, a panel of 7 or 8 people, back and forth. Dan Riesel is arranging City Hall contacts to get Mayor Giuliani as Keynote speaker.

About this weekend's program: thanks to co-chairs John Shea and Mark Chertok and Linda Castilla.

Listserv: Lisa Bataille learned more about NYSBA computer capability. Internal e-mail within a group can be for everyone who is on the e-mail address; but be careful to make a vacation notification: disable listserv so you don't create a repeating message back and forth problem.

Gail: CLE - Cost Effective Environmental Due Diligence for Corporate, Real Estate and Brownfields. Dates are: October 26 (Albany), October 28 (NYC), November 5 (Buffalo).

Gail: on the evening before the Jan. 28 Section meeting, Thursday Jan 27, we will have a cocktail party; looking for a good place; consensus (though no vote) that it is OK to spend up to $5,000 on party. As for next October (2000) meeting: Gail wants Jiminy Peak, since reviews were so good of our meeting last fall there.

Report of Ad Hoc Task Force on State Superfund Reform

Lou Alexander, Chair. Task Force includes co-chairs of three Section Committees: Legislation (Alexander and Michael Lesser), Hazardous Waste (David Freeman and John Privitera), Hazardous Site Remediation (Lawrence Schnapf and Walter Mugdan), and former Section Chair Peter Bergen. Mr. Alexander stated at the outset that, following a review of various State Superfund reform initiatives, the Task Force had prepared reform recommendations for consideration by the Executive Committee. Mr. Alexander then distributed and reviewed each of the reform recommendations of the Task Force. Mr. Alexander proposed, assuming acceptance of the task force recommendations, various strategies including submitting the recommendations to the NYSBA President, preparing a letter of support (on behalf of the Section) of the Task Force recommendations to be distributed to key state political and department personnel, and designating members of the Section to lobby on behalf of these recommendations. Dave Freeman: we believe these are consensus proposals, but

we are not unanimous; given that the Pocantico group issued similar proposals, excluding those on either extreme of the spectrum; all want to move forward on a consensus; we all realize that New York is behind virtually every other state in Brownfields regulation or legislation; we're losing opportunities to bring properties back into use; developers are finding it too difficult to work with the New York DEC on these issues.

Larry Schnapf: the proposals were more controversial than is apparent; e.g., innocent landowners status for oil spill is adamantly opposed by Attorney General's office as a cutting back on strict liability for even casually innocent property owners now in the Navigation Law.

Walter Mugdan: cleanup standard projected as goal is 1 x 10^{-6} cancer risk.

Peter Bergen: the current Superfund program is punitive; this program has to be more remedial.

Mike Lesser: I am not sure oil spill cases should go in to the Superfund pot; the Section has great opportunity to inject itself usefully in this process; unclear where this process will go; rumors are flying around at 50 Wolf Road (NYSDEC headquarters); the Section is one of few organized groups looking at and commenting on the proposals.

Kevin Healy: we should add mediation, as a way to resolve disputes? If legislation is drafted already, how do we interject and shape the language?

Larry Schnapf: Pocantico group has expressed an interest in the Section's input.

Dave Freeman: the major difference in proposals: large section on financing; big interest in public participation.

A copy of the report of the Task Force, including the approved recommendations, is attached to these minutes.

Resolution

The Chair, Mr. Riesel, made a motion, which was seconded:

BE IT RESOLVED that the Environmental Law Section hereby endorses the recommendations of the Section's Ad Hoc Task Force on State Superfund Reform, and indicates its support of reform legislation consistent with the Task Force's recommendations; and be it further

RESOLVED that the Section through its officers and, pursuant to the direction or approval of the officers, the Task Force is authorized to take a more active role in the continuing legislative process and the promotion of reform of the New York State Superfund, brownfields and oil spill program, consistent with the rules of the New York State Bar Association.

Votes in favor: unanimous. Opposed: none. Abstentions: Mike Lesser and Marc Gerstman.

1. **Transportation Committee:** Phil Weinberg reported that the Committee propose to hold a public hearing or panel on problems of the trucking industry, and related air pollution issues; one hearing in NYC, one upstate, fall and spring, at a *de minimis* cost to the Section; the City Bar Committee will co-sponsor; this is not a MCLE program (per Phil and Bill Fahey); Dan Ruzow suggests *could* be a MCLE meeting.

Section Chair Riesel authorizes Transportation Committee, at minimal cost to Section, to co-sponsor a program in the fall of 2000; and for spring meeting, to piggyback on the City Bar Co-Sponsorship.

2. **Special Committee on Administrative Adjudication:** Peter Bergen: in 1998 a commission was appointed to consider, in several state agencies, the successes and failures of administrative adjudication; old 1988 recommendations were reviewed to see which agencies have adopted 1988 recommendations.

3. **Internet Committee:** Alan Knauf: encourages co-chairs of the Committees that have not yet done so to submit Committee mission statements;

   Lisa: Listserv is for discussion; blast e-mail is more appropriate for notices and minutes for Section; Bill Ginsberg: I'm concerned that some of us who don't have e-mail addresses won't get the minutes, and that they should receive a fax, instead.

4. **International Environmental Law:** John French: March, 2000 in Costa Rica. Joel Sachs is providing more information. At January 2000 program, we will discuss private environmental groups certifying process manufacturing (World Wildlife Fund and Nature Conservation), e.g., Westvaco and Home Depot. There will be MCLE credit. Kevin Healy: his co-chair Antonia Bryson: implementation of Kyoto protocols; a third New York City program being planned on global climate change.

5. **Essay Contest:** Miriam Villani: there is a drop in the number of entrants (9 this year), and other than winners, who wrote good scholarly papers, the other submissions were weak. Bill Ginsberg: we need to communicate better with the law schools to get more submissions. Essays are due June 1. Dan Riesel: should we raise the amount of the prize? Phil: better to have lunch with the

law school professors and promote the idea. A consensus emerged: continue the contest; no need to raise the value of the prize; publication in *The New York Environmental Lawyer* is the real value; Phil, Miriam and Bill will discuss; the Section will pick up the cost of lunch with law professors; registration fees for the Section meeting where prizes awarded are already waived, and NYSBA student dues are only $10. Ginny Robbins: could we waive even the modest student dues? *OK* consensus.

6. **Legislative Committee:** Mike Lesser: good Forum in April, 1999; for future: difficult, given that the legislative process seems broken in this state; one possibility: pesticide controls and expanded health monitoring and screening; Committee thinks several Long Island legislators might be interested; date: second or third week of April (depending on when likely to be pending bills); Mike: invites people to contact him or Lou Alexander.

7. **New Business:**

   1) Government Lawyer Subsidies: John Greenthal (JG): one of reasons few government lawyers participate: in the old days, DEC paid dues, and travel expenses. Hasn't been true for several years. JG has spoke with Frank Bifera, Alison Smith and Mike Lesser: feeling is that costs ($ + time) are too great for the benefits received. MCLE provides a new inducement. But weighed against it is the expense of dues and time (away from family). Alice Kryzan and John: let's subsidize by paying from top to bottom for a handful of government lawyers, and put them on the Executive Committee as Committee Chairs. Mike: dollar expense is great, high turnover now in government is a problem; plus, lot of young lawyers do not like the Bar Association, because of MCLE; there is a large group of government attorneys who don't know why they should bother to join; top dues are $235, remaining cost for sixth or seventh years.

   Carl Howard: whoever attends meeting should stay at the same place; otherwise, the government attorney feels like a second-class citizen; Barry Kogut: Business Council Meeting in the fall with government attorney. Dave Quist: agrees that NYSBA should look at a subsidy; do something like other Bar Associations: not free, but a percentage cut of fees; Dave never stays at the main hotel because it's too expensive; government attorney does need reasonable alternative lodging arrangements; tying subsidy to agreement to be a Committee Chair is problematic. The government attorney could be in awkward position, using state time and equipment. Marc Gerstman: the attorneys need encouragement from top people (e.g., Peter Lehner at Attorney General's office). Joel Sachs: newer younger government attorneys aren't as interested.

   Walter: one half of my 75 attorneys live in New Jersey; the City Bar is less exclusively keyed to the New York State system which is good; on the other hand, NYSBA's focus is on State system, which is of no interest to us federal lawyers.

   It is also, a culture issue: "we government lawyers don't need to mingle." The Chair calls for an *ad hoc* Committee: to deal with money, lack of interest, lack of relevance, change of view; Bill Ginsberg: should we expand to other not-for-profit and academic?

   Dan asks new Committee to meet in next several weeks, come up with ideas. John Greenthal is appointed *ad hoc* Chair: Mike Lesser agrees to serve, as does Carl Howard who says: "listserv" is ideal for this kind of discussion.

   2) Retreat Dan Ruzow: if Section is going to stay at current size (and grow), we need to gather for one-day or day and a half, to discuss: when we leave the discussion room, we have to have developed plans to get more people in the Section; Jim Periconi agrees. Peter Ruppar: a great idea; but we *need* 2-1/2 days for this to work. Ginny Robbins: among other issues are leadership, future of practice, and the future of Section. Barry Kogut: a facilitator is critical.

   John Shea: an important idea; you have to settle on a small number of items—perhaps no more than three—in advance; team reports to be distributed in advance; need to have action items to vote on, on Sunday (the last day); John French: a facilitator is essential; meetings between groups; Bill Ginsberg: this has to be planned carefully, narrowed substantially; Dan Riesel: we probably need a paid commercial facilitator.

   Dan Ruzow: is appointed Chair of the Retreat Planning Committee; Gail, Virginia Robbins, Larry Schnapf, John Shea, and Jim Periconi volunteer to be members.

NAMES IN THE NEWS/ PEOPLE ON THE MOVE

Environmental Law Institute Has Close Ties to Section

Philip Weinberg is well known to our readership. He is not only one of the Section's founders, but was an early Section Chair and first editor of this *Journal.* He continues to contribute in a consistent manner to the Section, and he is instrumental in guiding the student editors. Like Mike Gerrard, his occasional co-author, he has also been a prolific writer in the environmental field. A long-time professor at St. John's Law School, he is expanding his academic horizons. Phil helped develop and now directs the Summer Institute in Environmental Law at NYU's Wagner Graduate School of Public Service. In fact, Phil's predecessor there was Mike Gerrard. This year, the Summer Institute in Environmental Law will be held from May 22-26.

Phil's efforts in the past attracted speakers from government, not-for-profits, academia, law firms and other environmental law experts. Currently, he has developed a stellar faculty, including Environmental Law Section notables **Mike Gerrard, Phil Dixon, Jim Pericone, Miriam Villani, Mary Lyndon, Steve Kass, Bill Ginsberg,** and **Walter Mugdan**. Their lectures will address water and air pollution, toxic substances, clean drinking water, hazardous wastes and solid waste management. Lectures are expected to cover liability for hazardous substances, land use issues, environmental problems in property transfers, public disclosure of toxic releases, citizen suits, enforcement in general and the application of health and environmental standards. These are the very topics that would be interesting for young lawyers, associates at larger firms and attorneys seeking to develop an environmental practice, especially given New York's CLE requirements. The course provides CLE credit. The Institute's relevance for Section members is obvious. Questions may be directed to Professor Philip Weinberg at 718-990-6628.

* * *

Monica Abreu Conley has been named to the new position of NYSDEC coordinator for environmental justice, responsible for overseeing the permitting of environmental projects in minority communities. Ms. Conley previously served in NYSDEC's Division of Environmental Enforcement.

Judy Drabicki has joined the firm of Rayhill Bankert & Rayhill (New Hartford, NY), and has opened the firm's office in Dexter, New York. Judy previously served as the Regional Attorney for NYSDEC Region 6.

Victor Gallo of NYSDEC's Legal Affairs Division and **Ruth E. Leistensnider** of Nixon Peabody, LLP (Albany) have been named as co-chairs of the Albany County Bar Association's Environmental Law Committee, succeeding **Louis A. Alexander** of Bond, Schoeneck & King, LLP (Albany), and **Maureen Long** of the New York State Attorney General's Office.

Michael B. Gerrard's fifth book, *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, was published by the American Bar Association. Michael's previous book, *Brownfields Law and Practice,* published by Matthew Bender & Co., Inc., recently was recognized as the "Best Law Book of 1998" by the Association of American Publishers. This is the second book of Michael's to receive this honor. Michael is with the New York City firm of Arnold & Porter.

Bonnie Harrington has joined General Electric's Corporate Environmental Programs (CEP) office in Albany as Counsel, Environmental Remediation. Bonnie was formerly with the New Jersey law firm of Dechert, Price & Rhoads. **Leslie Hulse**, formerly with GE CEP, has been named the Director of Environment, Health and Safety at NBC (owned by General Electric) in New York City.

John F. Klucsik of Devorsetz Stinziano Gilberti Heintz & Smith, P.C. (Syracuse), was the featured speaker at the Fifth Biennial Environmental Safety and Health Conference in Houston, sponsored by the National Stone Association.

Andrew S. Leja has joined the Environmental Practice Group of Hiscock and Barclay, LLP (Syracuse). Andy is a 1986 graduate of Rensselaer Polytechnic Institute and a 1990 graduate of the Syracuse University College of Law. **David G. Carpenter**, a 1992 graduate of Vermont Law School, has also joined Hiscock & Barclay.

Michael J. Lesser has taken a leave of absence from his position with NYSDEC. Mike will be taking the Florida Bar in February in contemplation of a possible relocation to Florida.

Elizabeth M. Morss has joined the Albany firm of Young, Sommer..., LLC.

Timothy Mulvey has joined the New York State Attorney General's office in Syracuse. Tim was formerly the Executive Director of the Onondaga Lake Cleanup Corporation.

N. Jonathan Peress has joined the Syracuse firm of Devorsetz, Stinziano, Gilberti, Heintz & Smith. Jonathan most recently served as Associate General Counsel for the Vermont Agency of Natural Resources. From 1994 to 1998, he was senior counsel in the Agency's Air Pollution Control Division.

Gail S. Port of Proskauer Rose LLP (New York City) was named adjunct professor at Pace University Law School. Gail will be teaching a course on "Commercial Environmental Law" in the spring 2000 semester.

Virginia C. Robbins of Bond, Schoeneck & King, LLP (Syracuse), received an "Outstanding Service Award" from the Central New York Chapter of the Air and Waste Management Association.

Marla B. Rubin, of Londa & Traub (New York City) was appointed Vice-Chair of the new Ethics Committee of the ABA's Section on Environment, Energy, and Resources (SEER). In addition, Marla was a guest speaker at the annual meeting of the New York State District Attorneys-Environmental Prosecutors and Investigators, lecturing on "Ethical Dilemmas," and she has recently lectured on "Ethics" and "Avoiding Legal Malpractice" for the Practising Law Institute.

Laurieann Silberfeld has been named Counsel to the Hudson River Park Trust. Laurie was formerly the Regional Attorney in NYSDEC's Region 2 office.

Sive, Paget & Riesel, P.C. (New York City) has announced that four environmental attorneys have become partners in the firm: **Michael S. Bogin**; **Paul D. Casowitz**; **Steven Russo**; and **David Yudelson**.

Windels, Marx, Davies & Ives has merged with Lane & Mittendorf, both based in New York City, to become Windels Marx Lane & Mittendorf, LLP, a 100-attorney firm. Section Officer **James J. Periconi** and **Edward E. Shea** head the environmental practice group for the new firm.

Compiled by Cheryl L. Cundall

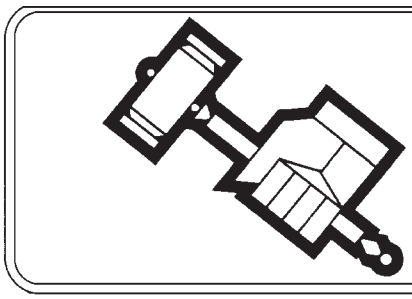
Environmental Insurance Conference Held in November

The Committee on Environmental Insurance held a conference on November 9, 1999, entitled, "Practical Applications of the New Environmental Insurance Products: Lessons Learned." The program gave an overview of current products and markets. It also provided practical advice on how and when to obtain environmental insurance products, and how these products can be used effectively. The moderators for this program were **Jerry Cavaluzzi** of Malcolm Pirnie and **Daniel Morrison** of Wilson, Elser, Moskowitz, Edelman & Dicker LLP.

The keynote speaker was **Gregory V. Serio**, First Deputy Superintendent of the New York State Department of Insurance, who spoke on the current state of the market as well as recent market trends and regulatory activity. **Peter B. Meyer**, a Professor of Urban Policy and Economics at the University of Louisville and the President of the E.P. Systems Group, presented an overview of the products and current markets for environmental insurance. **Rodney J. Taylor**, Managing Director for Willis Corroon's Global Environmental Practice, and **William J. Havard**, Vice President of Miller & Associates Environmental Brokers, provided information and case studies on large and small insurance products.

The second half of the program featured two panels of experts who discussed the process of selecting and using environmental insurance products. The first panel featured four risk management experts. The panelists were **Anthony F. Bonfa,** Risk Analyst; **Susan M. Hollingshead** of Land Bank, Inc.; **Susan Neuman**, President of the Environmental Insurance Agency; and **Stephanie A. Shepard**, General Manager of the Risk Management department of KeySpan Energy. The second panel featured four attorneys with extensive experience with environmental insurance products. The four were **Eugene Anderson**, of Anderson, Kill, and Olick; **Kenneth L. Robinson** of Corleto & Associates; **Ann Waeger** of Farer Fersko; and **Lawrence P. Schnapf**.

The program was co-sponsored by the Association of the Bar of the City of New York, with **Daryl Kessler** of Proskauer Rose and **Eileen Millett** of the Interstate Sanitation Commission serving as program moderators. A free copy of the program materials is available to Environmental Law Section members by request to Jerry Cavaluzzi, Co-chair of the Environmental Insurance Committee, at (914) 641-2950, or by e-mail at jcavaluzzi@pirnie.com.



Administrative Decisions Update

By David R. Everett and Melissa E. Osborne

CASE: ***In re the Alleged Violations of Article 15 of the Environmental Conservation Law By Michael B. Kolodzie ("Respondent").***

AUTHORITIES: ECL § 15-0505 (Protection of Navigable Waters)

ECL § 71-1107 (Enforcement of Article 15)

6 NYCRR § 622.12(a) (Uniform Enforcement Hearing Procedures)

DECISION: On November 8, 1999, the Commissioner of the NYS Department of Environmental Conservation (the "DEC") issued a decision holding the Respondent liable for violating ECL § 15-0505 for building a rock wall below the mean high water level in Oneida Lake without a permit. The Respondent was assessed a civil penalty of $5,000 and was directed to remove the rocks down to the existing lake bed.

A. Facts

The Respondent owns property on Oneida Lake in the Town of Lenox, Madison County, New York. In 1994, the DEC issued a permit to the Respondent's neighbor to construct a gabion wall along the shoreline of the lake to prevent erosion. The Respondent claimed that the new wall changed the water level adjacent to his property. To rectify this perceived problem, the Respondent removed rocks from the lake bed and constructed a rock wall approximately 1.5 feet below the mean high water level on the lake. The wall cut off water circulation to the shoreline resulting in a stagnant pool with abundant algae growth. The Respondent constructed the wall without obtaining a permit from DEC as required by ECL § 15-0505.

In late 1998 and early 1999, the DEC enforcement personnel inspected the site and confirmed that the Respondent had placed fill in the lake without a permit. Under 6 NYCRR § 622.12(a), the DEC commenced this enforcement proceeding by moving for an order without a hearing.

B. Discussion

ECL § 15-0505 prohibits the placement of fill below the mean high water level in any navigable waters of the state, without a permit from DEC. The Respondent did not dispute that he had constructed the wall without a permit. Instead, he argued that an Article 15 permit was unnecessary because the wall was constructed with materials removed from the lake bed and therefore did not constitute the placement of fill in the lake. In upholding the ALJ's decision, the Commissioner held that ECL § 15-0505 does not exempt materials that may come from the water body itself.

The Respondent also argued that a DEC staff biologist had directed him to construct the wall. Although the Respondent failed to provided sufficient evidence of this claim, the Commissioner held that the State cannot be estopped from enforcing its environmental laws based on the erroneous actions of a state employee.[1] In the instant matter, no permit had been issued to the Respondent and the apparent informal remarks made by the staff biologist provided no basis to proceed without a permit.

As authorized by ECL § 71-1107, the DEC staff requested a maximum civil penalty of $5,000. Under the DEC's 1990 Penalty Policy, the following factors may be considered when assessing a penalty: the gravity of the violation in terms of environmental harm; the economic benefit to the violator; the relevance of the violation in the regulatory scheme; culpability; cooperation; violation history; and ability to pay. The purpose of the penalty policy is to encourage compliance and deter violations of the ECL.

Although the Respondent had not obtained a significant economic benefit from the wall or created any long-term environmental damage through its construction, he was knowledgeable of the permit requirements and intentionally decided to disregard them. The Commissioner held that this conduct required the maximum penalty. He reasoned that a reduced penalty would only serve to undermine the DEC's ability to regulate the filling of navigable waters in the state.

C. Conclusion

The Commissioner held that the Respondent had violated ECL § 15-0505 by building a wall in Oneida Lake without a permit. The Respondent was ordered to pay a civil penalty of $5,000 and ordered to remove the rock wall down to the existing lake bed. The Respondent was given the option of removing the wall by randomly distributing the rocks over the lake bed from where they were taken.

* * *

CASE: ***In re Causing, Engaging in or Maintaining a Condition or Activity Which Presents an Imminent Danger to the Health or Welfare of the People of New York State or Which is Likely to Result in Irreversible or Irreparable Damage to Natural Resources of the State in Violation of Section 71-0301 of the Environmental Conservation Law ("ECL") of the State of New York and of Part 620 of Title 6 of the Official Compilation Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and the Alleged Violations of ECL Article 27 and 6 NYCRR Part 360, by Vincent Williamson, Mohawk Tire Storage Facility, Inc., Mohawk Tire Recycling, Inc., Mohawk Recycling Co., Mohawk Extractive Industries, Inc., Mohawk Extractive Industries, Ltd., Mohawk Recycling Co., Inc., Mohawk Extractive Industries Limited, Mohawk Industries Inc., Mohawk Truck and Equipment Sales, Inc., Mohawk Rubber Sales, Inc., Kathryn Williamson, (named individually, but for purposes of this action, collectively referred to as the "Mohawk Respondents") and Philip Rechnitzer Respondents, and In re the Proposed Revocation of Waste Transporter Permit No. 5A-140, Currently Held by Respondents Vincent C. Williamson and Mohawk Tire Recycling, Inc., as Well as the Denial of Any Modification and/or Renewal of Said Permit.***

AUTHORITIES: ECL Article 27 (Waste and Refuse)

ECL Article 71 (Enforcement)

6 NYCRR Part 360
(Solid Waste Management Facilities)

6 NYCRR Part 364
(Waste Transporter Permits)

6 NYCRR Parts 620
(Procedures for Issuance of Summary Abatement Orders)

6 NYCRR Part 621
(Uniform Procedures)

DECISION: On September 30, 1999, Commissioner John P. Cahill (the "Commissioner") of the NYS Department of Environmental Conservation ("DEC") issued a decision holding, among other things, that certain Respondents operated a waste tire storage facility which violated the ECL and jeopardized the health and welfare of the people and was likely to result in irreparable damage to natural resources. Based on this holding, the Commissioner: (1) continued and modified a DEC Summary Abatement Order relating to the facility by suspending certain proactive requirements of the order; (2) suspended the waste transporter permit of two Respondents; and (3) denied another Respondent's application for renewal and modification of its waste transporter permit pursuant to Article 27 of the ECL.

A. Facts

The Respondents referred to in the caption as the "Mohawk Respondents" have long operated a waste tire facility in the Towns of Waterford and Halfmoon in Saratoga County. The facility, which presently contains between three and five million tires, consists of numerous tire piles which fail to comply with the height, width, length and separation distances required by tire storage facilities in 6 NYCRR Part 360.

The facility suffered a tire fire in 1981 and since the implementation of regulations in 1988, the Respondents have failed to develop a fire safety plan. To date, the site lacks an adequate water source, no fire detection and firefighting equipment, and the distances between the tires would be impassable to fire trucks in the event of an emergency. The site is also not properly fenced, allowing access by unauthorized individuals.

The site contains a major east-west electric transmission line, as well as an underground natural gas pipeline, a portion of which, until recently, was exposed due to soil erosion. The site is upgradient from several nearby residences and a major GE manufacturing facility, downgradient from a school, and slopes toward the Old Champlain Barge Canal and the Hudson River. A fire at the site could create potentially toxic hazards for the surrounding area and the Respondents have never complied with the bonding requirements of the Waste Tire Storage Facility regulations to cover remediation in a worst case scenario.

The Respondents entered a number of Consent Orders with the DEC between 1990 and 1996 in an attempt to bring the facility into compliance. The Respondents Vincent Williamson and Mohawk Tire Recycling, Inc. (Respondents 1 and 2, respectively), who hold a waste transporter permit from DEC, have been convicted of numerous violations of the ECL and its companion regulations. Currently, more than two dozen similar charges are pending against them in local criminal courts statewide.

On June 8, 1999, the DEC began this particular action against the Respondents by issuing a Summary Abatement Order and Notice of Hearing ("SAO"). In the SAO, the Commissioner found that the Respondents were engaging in and/or maintaining conditions and activities at the site which presented an imminent danger to

the health or welfare of the people of the State or were likely to result in irreversible or irreparable damage to natural resources. The Commissioner ordered the Respondents to discontinue and abate such conditions and activities. Specifically, the Commissioner required the Respondents to create adequate passable access roads for firefighting equipment, to reduce the size and shape of the tire piles, and to implement a fire safety plan within five days of the SAO.

Additionally, pursuant to 6 NYCRR § 360-1.4(a), based on the numerous instances of noncompliance, the DEC notified Respondents 1 and 2 that it intended to revoke their waste transporter permit. The DEC further informed the Respondents that it intended to withdraw the facility's registration on the grounds of noncompliance. Pursuant to 6 NYCRR § 621.14(a), the DEC notified the Respondents that they could submit a written statement explaining why the registration should not be revoked, or request a hearing, or both. The Respondents failed to timely submit or request a hearing and the registration was withdrawn on July 24, 1999. This withdrawal had the effect of rendering any continued waste tire recycling activities as violations of the ECL.

Because the Respondents failed to comply with the remedial provisions of the SAO, the Commissioner commenced an action in the New York State Supreme Court of Albany County on substantially the same subject matter. On June 17, 1999, the Court issued a temporary restraining order requiring similar remedial action to that in the SAO, as well as requiring the Respondents to fence the entire site.

The Respondents failed to comply with the Court's order and, on July 29, 1999, the Court issued a formal order granting a preliminary injunction and authorizing the DEC to nominate a receiver to undertake the management and remediation of the site, but not requiring any action by the Respondents.

B. Position of the Parties

In their statement in lieu of a hearing, the Respondents plead financial inability to properly defend against the DEC's factual allegations. Instead of refuting the allegations, the Respondents proffered the legal argument that because the DEC commenced an action against them in Supreme Court, any duplication of subject matter in the Court action and this administrative proceeding creates confusion regarding control of the site as well as a burden for the Respondents to defend in two forums. The Respondents contended that under the doctrine of "primary jurisdiction," as explained in *Flacke v. Onondaga Landfill Systems, Inc.*[2] the DEC could fully discharge its duty within the orders of the Court. According to the Respondents, the *Flacke* decision explained that under the doctrine of primary jurisdiction, where courts and administrative agencies have concurrent jurisdiction over a dispute, the subject matter of which is "beyond the conventional experience of judges," courts will "stay [their] hand" until the agency has applied its expertise.

Next, the Respondents argued that because the Commissioner was the Plaintiff in the Supreme Court action and, therefore, accountable to the Court, it was inappropriate for the Commissioner to issue his own decrees on the same subject matter. The Respondents also sought the recusal of the Commissioner and any enforcement officers in this administrative proceeding.

Regarding their waste transporter permit, the Respondents did not contest the existence of the numerous convictions, but argued that: (1) the tickets were issued in default; and (2) pursuant to a local criminal court case, *People v. Kelley*,[3] waste tires did not constitute "regulated waste" and, consequently, the underlying regulations used to obtain the convictions and used here as a premise to revoke their permit, were invalid. They claimed that where the validity of the underlying regulation is in question, any revocation or denial of their permit would be arbitrary.

Initially, the DEC noted that the Respondents failed to contest any of the factual allegations leading to the SAO and the DEC's decision to revoke the Respondents' permit. The DEC also noted that the Respondents failed to comply with any of the requirements of the SAO, or any of the Supreme Court orders. The DEC, did concede, however, that a potential inconsistency existed between the SAO and the preliminary injunction and, accordingly, requested that certain provisions of the SAO be suspended. The DEC contended that inasmuch as the Respondents had failed to perform substantially all of the required remediation, and conditions at the site continued to threaten the environment as well as the health and safety of nearby residents, no justification existed for rescinding the remainder of the substantive portions in the SAO.

Next, the DEC argued that contrary to the Respondent's interpretation of *Flacke*, the Court of Appeals has specifically held that the DEC does not relinquish jurisdiction over a site by commencing a court action.[4] Specifically, the DEC noted that in *Flacke*, the Court held that the doctrine of primary jurisdiction was inapplicable because the Supreme Court and the agency did not have concurrent jurisdiction over determining the conditions of closing solid waste management facilities.[5] Accordingly, the DEC argued, *Flacke*'s discussion of primary jurisdiction was inapplicable in this case. The DEC further asserted that not only were the Respondents' claims of financial inability specious, they were also irrelevant to the instant administrative proceeding. The DEC argued that the Respondents' desire to recuse the Commissioner and any enforcement officers who participate in the Supreme Court action was unjustified because the Respondents had failed to produce any evidence to sup-

port a claim of bias or that the outcome of the administrative enforcement process would be flawed in any way.

Regarding the waste transporter permit, the DEC asserted that the revocation and denial could be justified solely on the numerous convictions of the Respondents as well as the multiple pending criminal charges. Again, the DEC noted that the Respondents failed to contest any of the factual issues related to the revocation.

Regarding the Respondents' legal defense in attempting to declare the Waste Transporter Permit Program invalid, the DEC countered that such a claim was beyond the scope of an administrative enforcement hearing and that the legal authority cited by the Respondents, a Town Court decision, was not controlling in a DEC hearing and had been specifically rejected by a County court.[6]

Finally, the DEC noted that the ECL explicitly includes waste tires in the definition of regulated waste,[7] thereby requiring a permit for the transportation of waste tires, and that the County court in *People v. Kelly*[8] determined that the existing regulations were valid and effectively implemented the intent of the statute. Consequently, the DEC sought a continuation of the SAO as modified by its request and revocation of the Respondents' waste transporter permit.

C. Discussion

The Commissioner rejected the Respondents arguments in toto. Specifically, the Commissioner noted that the implementing regulations in both 6 NYCRR § 620.3 and § 621.14 permit a respondent in a summary abatement situation and in a permit revocation situation to provide reasons why the action taken by the DEC is inappropriate. As noted by the Commissioner in the summary abatement action, the Respondents failed to provide any rebuttal to the factual allegations presented by the DEC staff.

Next, the Commissioner rejected the Respondents' claim of confusion over being required to participate in both the Supreme Court action and the DEC administrative proceeding. The Commissioner held that no bar existed to the DEC proceeding both judicially and administratively against any respondent. He expressly approved the DEC's interpretation of *Flacke v. Onondaga Landfill Sys., Inc.*,[9] holding that since the "doctrine of primary jurisdiction" was inapplicable, no rationale existed for the recusal of the Commissioner or any DEC prosecuting attorneys in the SAO matter. The Commissioner further concluded that there was no demonstration of any bias.

Regarding the Respondents' argument that waste tires do not constitute a "regulated waste" pursuant to *People v. Kelley*, the Commissioner stated that "they are just plain wrong on the law." The Commissioner agreed that the County court decision in that case was clear that the Town court decision is not binding on higher level courts nor on the DEC in administrative enforcement proceedings. The Commissioner also held that the County court's decision in *Kelley* directly addressed the issue of the validity of the DEC's implementing regulations for the transportation of waste tires pursuant to ECL § 27-0303(4) (12). Where a statute clearly defines and includes waste tires as regulated waste, no necessity exists to further include an express definition of regulated waste in the language of the implementing regulations in 6 NYCRR Part 364. The Commissioner further held that, contrary to the Town court's decision in *Kelley*, the exemptions listed in 6 NYCRR § 364.1—vehicles carrying scraps of rubber—were never intended to exclude from regulation truckloads of waste tires. Accordingly, the Commissioner held that the language of the statute must take precedence over any regulation enacted by an agency.

D. Conclusion

For the reasons stated above, the Commissioner recommended that the Summary Abatement Order be continued and modified as requested by the DEC staff; that the Respondents' waste transporter permit be revoked; and that the Respondents' applications for renewal and modification of their waste transporter permit be denied.

Endnotes

1. *See Parkview Assocs. v. City of New York*, 71 N.Y.2d 274 (1988) (an illegal building permit was issued to a developer who constructed a building 12 stories higher than allowed by the local zoning ordinance. The Court of Appeals agreed that the City was not estopped from requiring an owner to remove the excess stories to rectify the violation).
2. 69 N.Y.2d 355, 362 (1987).
3. 152 Misc. 2d 178 (1991). In *Kelley*, a Town court held that although the ECL had been amended to include "waste tires" in the definition of regulated waste, the DEC never promulgated regulations adding waste tires to the definition of regulated waste and, thus, the public was not on proper notice and charges of transporting waste without a permit had to be dismissed. The Court also held that waste tires fell under the "scrap rubber" exception to regulated waste of 6 NYCRR § 364.1[e][2][vi].
4. *Flacke v. Onondaga Landfill Systems, Inc.*, 69 N.Y.2d 355 (1987).
5. *Flacke*, 69 N.Y.2d at 361-362.
6. *People v. Kelly [sic]. Sphon and Gentile*, Ontario County Court, Hon. Frederick T. Henry, Jr., County Judge, November 6, 1992.
7. *See* ECL § 27-0303(4)(12).
8. *People v. Kelly [sic]. Sphon and Gentile*, Ontario County Court, Hon. Frederick T. Henry, Jr., County Judge, November 6, 1992.
9. 69 N.Y.2d 355 (1987).

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Recent Decisions in Environmental Law

Student Editor: Patricia Ahearn

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

***American Rivers v. Federal Energy Regulatory Commission*,** 187 F.3d 1007 (9th Cir. 1999)

Facts: Petitioners sought judicial review of the Federal Energy Regulatory Commission's (FERC) decision to reissue to the incumbent licensee, the Eugene Water and Electric Board, (EWEB), a hydropower license. This license authorizes the continued operation of two facilities, the 14.5-megawatt Leaburg Hydroelectric Project and the 8-megawatt Walterville Hydroelectric Project, for an additional forty years. The Leaburg facility is upstream (from what) and is comprised of a dam that creates a fifty-seven acre backwater (Leaburg Lake), a canal, powerhouse facilities, a tailrace, and a power substation. Downstream water is diverted from the McKenzie River into the Walterville power canal. The original licenses were granted by the Federal Power Commission to the Walterville Project in 1967 and to the Leaburg development in 1968. While both of the original licenses expired by their terms December 31, 1993, the facilities were managed by EWEB under annual licenses which were granted in accordance with § 15(a) of the Federal Power Act ("FPA").

The most recent license was issued on March 24, 1997, by the Director of the Commission's Office of Hydropower Licensing. The statutory authority for this power is found in two sections of the FPA. Section 4(e) is the provision which directs the Commission to issue licenses for hydroelectric projects located on waterways which are regulated by Congress under the Commerce Clause. Additionally, § 10(a) of the Act allows for the Commission to consider public uses and power development of the nation's waters. These general provisions were modified by the Electric Consumers Protection Act of 1986 which directs the Commission to consider the overall effect a project has on fish and wildlife when determining whether to issue a license.

The March 1997 license does address this issue by requiring EWEB to take action to benefit and to protect the fish populations within the area of the project. However, the license also allows an increase in generation capacity to 23.2 megawatts from 22.5 megawatts. This increase would be achieved by raising the water level in Leaburg Lake, building a fixed sill dam or other type of structures at the head of the Walterville canal, and excavation of the tailrace at Walterville. Further, the license authorizes an increase in flow.

In making the licensing decision, the Commission took several different factors into consideration. First, the Commission reviewed the final environmental impact statement (EIS) which its own environmental staff prepared. Under the final EIS, "no action" was defined as the projects as "operate[d] under the terms and conditions of their original licenses."[1] The baseline for environmental conditions against which to compare other conditions was determined to be no new environmental protection or enhancement measures. Second, the Commission reviewed the commissions which state and federal fish and wildlife agencies had submitted under authority granted to the Commission by FPA § 10(j) and § 18.[2] The final environmental impact statement adopted many of the suggestions under the authority granted to the Commission by FPA sections 10(a) and 4(e). Included here was the § 18 condition of the federal agencies which required fish ladders and fish screens. Finally, the Commission held a meeting in an attempt to resolve the inconsistencies between the recommendations made by the petitioners and the requirements of FPA § 10(j).

Three major areas of disagreement remained: (1) whether the water level of Leaburg Lake should be raised; (2) whether diversion dams should be installed at Walterville facility; (3) what the appropriate minimum instream flows should be in the bypass reaches of the two developments. The Director issued an order determining that the water level should be raised, diversion dams should be installed and the minimum instream flow should be set at 1,000 cubic feet per second.[3]

Two months following this meeting, the Secretary of the Interior filed modifications regarding fish screens and fish ladders for the Commission to consider. The Director decided to devise a plan in which the EWEB would consult with the agencies on the final designs

and monitoring plans rather than implementing them directly. Further, the Director determined the other prescriptions to be beyond the scope of § 18.

Rehearing was timely sought by American Rivers, the United States Department of the Interior, the National Marine Fisheries Service (NMFS), and Oregon Department of Fish and Wildlife (ODFW). The request for rehearing was rejected by the Commission on November 26, 1997. In the present appeal, the petitioners renewed the objections previously raised in the administrative petitions for rehearing. Therefore, the court determined it had jurisdiction based on 16 U.S.C. § 825(b), which affords an aggrieved party judicial review of the Commission's order.

Issues:

(1) Whether the Commission may use existing environmental conditions as a "baseline" for evaluating other alternatives.

(2) Whether the Commission properly discharged its NEPA duties in evaluating the alternatives to the EWEB proposal.

(3) Whether the FPA authorizes the Commission to determine that a recommendation submitted by a fish and wildlife agency pursuant to § 10(j) does not qualify for treatment under that section.

(4) Whether FPA § 18 authorizes the Commission to reject a "fishwayprescription" proposed by either the Secretary of the Interior or the Secretary of Commerce.

Analysis: The Ninth Circuit Court of Appeals examined the petitioners' first contention, that the FPA mandates the use of a baseline determined on what the area would theoretically be like today if the Walterville and Leaburg developments had never existed at the site, by performing the two-part *Chevron*[4] analysis. First, the court inquired as to whether Congress has spoken with sufficient clarity on the issue by looking at the statute directly.[5] The court found that the FPA makes no mention of a baseline and, therefore, proceeded to examine the legislative history of the Act. This examination led the court to conclude that the issue has not been addressed by Congress. Therefore, the court proceeded to the second prong of *Chevron,* which asks the court to examine whether the interpretation drawn by the agency is based on a permissible construction of the statute.[6]

Here, the court concluded that the agency's decision to use an existing project baseline was a reasonable interpretation of the FPA. The court also agreed with the Commission's view that the use of an "existing project baseline does not preclude consideration and inclusion of conditions in a license that enhance fish and wildlife resources and reduce negative impacts attributable to a project since its construction."[7] In summary, the court deferred to the Commission's choice of an existing project baseline because they found that neither the *Chevron* reasonableness standard nor the intent of Congress was offended by the Commission's construction.

In turning to the second issue, the court utilized the rule of reason to examine petitioners' complaint that the Commission erred in its choice of "no-action" alternatives. The rule of reason dictates the choice of alternatives and the extent to which each alternative must be discussed in the environmental impact statement.[8] While recognizing that the task of defining "no action" in the context of relicensing is difficult, the court concluded that the Commission's analysis was appropriate where they defined "no action" as continued operation under the same terms and conditions as the existing license. Additionally, the court drew an analogy to the Council on Environmental Quality's (CEQ) position in its NEPA guidelines memorandum which defines "no action" as "no change from current management direction or level of management intensity."[9] Finally, the court found that the alternatives the petitioners claimed had in fact been considered in the final environmental impact statement. For these reasons, the court concluded the Commission did take a hard look at the range of alternatives and did comply with the procedural obligations imposed by NEPA.

The third and fourth issues were issues of first impression for this court. The court held that § 10(j) does give the Commission discretion of whether and how it will incorporate agency recommendations. The petitioners urged that the reclassification issue is an open question based on the decision of the District of Columbia Circuit in *Kelley v. Federal Energy Regulatory Commission*.[10] However, the court opined that *Kelley* only leaves open the question of whether the Commission can reject an agency's recommendations without first publishing its findings, which is a required duty under § 10(j)(2) of the Act. Rather, the court adopts the rationale of *United States Department of Interior v. Federal Energy Regulatory Commission*,[11] which denies a veto power to agencies within the § 10(j) process.

The court also rejected the petitioners' second argument that giving the Commission the power to reject and reclassify agencies' recommendations is contrary to the language of the Act. In analyzing the provisions of § 10(j), the court refused to follow the approach taken in *Escondido Mut. Water Co. v. La Jolla Bands of Mission Indians*,[12] which found that the language of FPA § 4(e) mandated that the Commission include all conditions submitted by the Secretary of the Interior. In refusing petitioners' argument, the court premised their decision

on both the clear language of § 10(j)(2), which articulates that the Commission is to publish findings when it disagrees with an agency recommendation, and on the language of § 10(j)(1) which indicates that that subsection is governed by subsection § 10(j)(2). Finally, in rejecting the petitioners' argument that the legislative history of the ECPA amendments to the FPA makes the statue unclear, the court stated that legislative history may never override the text of a statute. In examining the legislative history the court determined that the history itself reconfirms their finding that the Commission retains the ultimate authority over agency recommendations. In so holding, the court was careful to limit its holding to the recognition that the Commission retains the ultimate authority on incorporating an agency's § 10(j) recommendation.

While recognizing the Commission's power, the court noted that the Commission must give deference to the recommendations which state and federal agencies make concerning the "'protection, mitigation, and enhancement' of fish and wildlife."[13] Ultimately, however, the judgment of the Commission must govern in instances of disagreement.

The final issue on this appeal was resolved in favor of the petitioners. The court rejected the two jurisdiction defenses raised by the Commission, standing and ripeness. First, they determined that American Rivers had organizational standing and that ODFW had *parens patriae* standing to challenge the § 18 rulings made by the Commission. Secondly, the Commission's attempt to persuade the court that their findings remained open-ended was denied, because the court determined that the Commission's order was final. Further, the court indicated that judicial review of an administrative agency's statutory authority is proper. Therefore, deciding § 18 issues were ripe for review.

The court differentiates between § 10(j) and § 18, both of which call for the Commission to "require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate."[14] The court found the lack of a qualifying clause in § 18, as contrasted with § 10(j)(2), which does authorize the Commission to reject agency submissions made under § 10(j), as critical. Consequently, the court found that Congress delegated the § 18 process to the Secretaries of Interior and Commerce. The Commission argued that its determinations should be upheld because it explained its reasons for rejecting the fishway prescriptions on the record and because to do otherwise would compromise their role. Both arguments advanced by the Commission were rejected and the court found the holding in *Escondido*[15] controlling in the context of § 18. Therefore, the court concluded that the Commission does not have the power to modify, reject, or reclassify any prescriptions made by the Secretaries.

In summary, the court denied those portions of the petitions which challenged the Commission's baseline determination, compliance with NEPA duties, and the Commission's authority regarding § 10(j) classifications. However, the court granted the petitions to the extent they challenged the construction of § 18 by the Commission. Therefore, the orders were vacated and the case was remanded to the Commission.

Amy Moynihan '01

Endnotes

1. Leaburgh-Waterville Hydroelectric Project (FERC Project No. 2496), Oregon, *Final Environmental Impact Statement*, § 2.3, at 2-6 (Dec. 1996).
2. *See* 16 U.S.C. §§ 661 *et seq.*, 16 U.S.C. § 811 (1994).
3. *See Order Issuing New License*, 78 Fed. Energy Reg. Comm'n Rep. (CCH) at 64, 701-3.
4. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841 (1984).
5. *Id.* at 842-3.
6. *Id.*
7. *American Rivers v. FERC*, 187 F.3d 1007, 1018 (9th Cir. 1999).
8. *City of Carmel-by-the-Sea v. United States Dep't of Tranp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).
9. *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18027 (1981).
10. 96 F.3d 1482, 1487 (D.C. Cir. 1996).
11. 952 F.2d 538, 545 (D.C. Cir. 1992).
12. 466 U.S. 765 (1984).
13. Quoting *Kelley v. FERC*, 96 F.3d 1482, 1486 (D.C. Cir. 1996).
14. 16 U.S.C. § 811.
15. 466 U.S. 765, 788 (1984).

* * *

Burnette v. Connecticut Envt'l Protection Dep't, 192 F.3d 52 (2nd Cir. 1999)

Facts: This action was brought in federal district court by the Burnette family, homeowners in Somers, Connecticut, against various Connecticut state agencies and state officers acting within their official duties. The suit was based on the Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Appellants claimed that the Connecticut Correctional Institute (CCI), which is operated by the Connecticut Department of Corrections, was the source of hazardous substances which were flowing from it. It was claimed that these hazardous substances were and still are polluting appellants' on-site water wells. Appellants sought injunctive and monetary relief as well as reimbursement for response costs

which "resulted from a release or threatened release of hazardous substances from CCI."[1] Furthermore, under CERCLA, appellants were asking for a declaratory judgment seeking future response costs, and contribution costs pursuant to 42 U.S.C. § 9613(f)(1). Appellees moved for a dismissal for lack of subject matter jurisdiction and asked for summary judgment on the claim for response costs. Appellees stated that the Eleventh Amendment barred monetary relief by granting sovereign immunity in the case at hand.

The district court, agreeing with the appellees, found that it lacked jurisdiction over this suit. The district court dismissed all of appellant's claims, holding that the State and its agents were immune from suit under the Eleventh Amendment. Summary judgment was granted for the appellees because recovery of response costs or potential contribution costs from the state agencies or officials would violate the state's sovereign immunity. Appellants appeal.

Issues:

(1) Whether the state agencies and officials were entitled to immunity under the Eleventh Amendment from suits brought by citizens within the state.

(2) Whether the citizens were entitled to a declaratory judgment for future response cost and contribution costs pursuant to 42 U.S.C. § 9613(f)(1), and whether they were entitled to recover from the state costs that were incurred in responding to the release of hazardous substances pursuant to 42 U.S.C. § 9607(a).

Analysis: The Court of Appeals affirmed the district court's decision that the Eleventh Amendment bars the relief and recovery that the appellants sought. The court held that, "Congress did not, by authorizing environmental citizens suits, intend to abrogate the states' sovereign immunity."[2] It also concluded that the State of Connecticut did not waive its sovereign immunity as to plaintiffs' CWA, RCRA, and CERCLA claims. The Eleventh Amendment does not allow citizens of another state or citizens of a foreign state to bring a suit against one of the United States. It does not prohibit a suit brought by a citizen of its own state, but the Supreme Court has "[h]eld that an unconsenting State is immune in federal court from suits brought by her own citizens as well as citizens of another State."[3] State officials acting within their duty are exempt as well.

As the Court of Appeals recognized in its holding, this exception to suit can be abolished if Congress made "its intention unmistakenably clear in the language of the statute"[4] to abrogate the state's immunity. All of the concerned statutes in this suit, CWA, RCRA, and CERCLA, provide provisions that say upon governmental notice and its failure to respond,

> any citizen may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of [the Act].[5]

The Court in *Burnette* found that this language is not "unmistakenly clear" with regard to Congress' intent to abrogate the State's protection provided by the Eleventh Amendment. The language was not explicit enough in saying that it takes away the states' immunity. Therefore, the Court held that Congress did not intend to make such an exception.

Notwithstanding the fact that the Court found it lacked jurisdiction, it went on to discuss the other claims. The appellants argued a claim that the United States is a real party in interest and that the complaint is a *qui tam* action; therefore, the Eleventh Amendment is not applicable. In a previous decision, *Connecticut Action Now, Inc. v. Roberts Plating Co.*,[6] the Court held that "there is no common law right to maintain a *qui tam* action; authority must always be found in legislation." Relying on this opinion, the Court in *Burnette* stated that the required authority was not present in the concerned provisions. The provisions empowered a citizen to bring a civil suit on his own behalf, not on behalf of the United States.

The Court went on to hold that appellants were not entitled to a declaratory judgment on future response costs and contribution costs pursuant to 42 U.S.C. § 9613(f)(1). The Court found that the aim of CERLCA § 113(f), 42 U.S.C. § 9613(f) was to provide a remedy only to a potentially responsible party seeking to recover from another potentially responsible party. Appellants only wanted to recover for themselves. They did not claim any responsibility to the claim. As a result, the Court found § 113(f) to be inapplicable.

With regard to appellants claim for reimbursement under 42 U.S.C. § 9607(a), the Court did not allow reimbursement. In *Seminole Tribe v. Florida*,[7] the Supreme Court held that two conditions must be met for Congress to take away the states' sovereign immunity. The first requirement was for Congress to "unequivocally express its intent to abrogate the immunity."[8] As to 42 U.S.C. § 9607(a), this requirement was satisfied based on the holding of *Pennsylvania v. Union Gas Co.*, where the court found that the "provisions of CERCLA unmistakenably express Congress's intent to divest the states of their Eleventh Amendment immunity."[9] As far as the second condition is concerned, that "Congress is acting pursuant to a valid exercise of power," the Court of Appeals found that it did not. According to *Seminole*,

the only time that immunity granted by the Eleventh Amendment could be abolished is "when acting under the power vested in it by § 5 of the Fourteenth Amendment. CERCLA was established in pursuant to the Commerce Clause; therefore any provisions in CERCLA that dealt with the State's liability is disregarded. Appellants claimed that Congress's creation of CERCLA response-cost claims was an observable property interest under § 5 of the Fourteenth Amendment, which would allow them to recover. The court disagreed and stated that appellants' claim was not a legitimate claim of entitlement to the property interest recognizable under the Fourteenth Amendment.

The appellants finally argued that by its action, the State had constructively waived its right to sovereign immunity, therefore exposing itself to suit. Appellants said that by the State participating in an activity controlled by Congress, it agreed to being brought before the court. The court stressed that by receiving federal funds for operation of CCI, the Connecticut did not constructively waive its right to Eleventh Amendment immunity. If Congress wanted condition the receipt of the federal monies on a waiver of the state's immunity, it could have and should have made it clear.[10] It did not do so, and for this and all the reasons above, the United States Court of Appeals affirmed the decisions of the district court.

Ann Coale '02

Endnotes

1. 42 U.S.C. § 9607 (a)(4)(B).
2. 192 F.3d 52, 54 (2nd Cir. 1999).
3. *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974).
4. *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989).
5. 33 U.S.C. § 1365 (a)(1); *see also* 42 U.S.C. § 6972; 42 U.S.C. § 9659.
6. 457 F.2d 81 (2nd Cir. 1972).
7. 517 U.S. 44, (1996).
8. *Id.* at 55.
9. 491 U.S. 1, 8 (1989).
10. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985).

* * *

Harmon Industries, Inc. v. Carol M. Browner, 191 F.3d 894 (8th Cir. 1999)

Facts: Plaintiff, Harmon Industries, self-reported to the Missouri Department of Natural Resources (MDNR) that its workers were discarding volatile solvent residue behind its manufacturing plant. Together, the MDNR and Harmon created a plan to clean up the disposal area. While Harmon was complying with the plan, the Environmental Protection Agency (EPA) initiated an administrative action seeking monetary penalties. The EPA assessed a civil penalty against Harmon for hazardous waste disposal, entered after the state court approved a consent decree between Harmon and the MDNR that released them from any claims for monetary penalties. In August of 1998, the district court found that the EPA's decision to impose civil penalties violated the Resource Conservation and Recovery Act (RCRA) and contravened principles of *res judicata*. The district court granted summary judgment in favor of Harmon and reversed the decision of the EPA. Upon this appeal brought by the EPA, the Court of Appeals affirms.

Issue: Whether the EPA was guilty of "overfiling," the process of duplicating enforcement actions, when it brought a second action in addition to the state's action against Harmon Industries.

Analysis: The Resource Conservation and Recovery Act, 42 U.S.C. 6901-6992(K) (1994), permits states to apply to the EPA for authorization to implement and enforce their own hazardous waste program. The MDNR, acting pursuant to RCRA, brought an action against plaintiff, Harmon Industries, for their improper disposal of volatile chemicals. This action was being settled when the EPA filed an additional action. The EPA's filing of a duplicate action is known as "overfiling". The permissibility of overfiling is a question of first impression in the federal circuit courts. The EPA argues that the language found in § 6928 authorizes either the state or the EPA to enforce the state's regulations, and the phrases "in lieu of" and "same force and effect," as found in the RCRA were misconstrued by the district court. The EPA asserts that "in lieu of" refers to which regulations are to be enforced in a state acting under an approved program, rather than who is responsible for enforcement. They further contend that the language "same force and effect," refers solely to the effect of state issued permits.

After examining this issue of first impression, the district court concluded that the plain language of § 6926(b) dictates that the state program operates "in lieu" of the federal program with the "same force and effect," as the EPA action. Therefore, it appears that in this case, the RCRA precludes the EPA from assessing its own penalty.

RCRA gives authority to the states to create and implement their own hazardous waste program. The plain "in lieu of " language contained in the RCRA reveals a congressional intent for an approved state program to supplant the federal program in all aspects including enforcement. This intent is seen in the authorization language of § 6926(b) of the RCRA, which states, "any action taken by a State under a hazardous waste program authorized under the RCRA has the same

force and effect as action taken by the EPA under this subchapter."[1] Once authorization is given it cannot be rescinded unless the EPA finds the state program is not equivalent to the federal program, the program is not consistent with federal or state programs in other states, or the state program is failing to provide adequate enforcement of compliance in accordance with the requirements of federal law.

The "same force and effect" language lends additional support for the primacy of states' enforcement rights. The EPA argues that because "same force and effect" language appears under the heading "Effect of State Permit," the language indicates only that state-issued permits will have the same force and effect as permits issued by the federal government. The court concluded that the EPA's contentions were wrong, noting that 42 U.S.C. § 6926(b) specifically provides that a "[s]tate is authorized to carry out [its hazardous waste program] in lieu of the Federal program. . . . and to issue and enforce permits." Nothing in the statute suggests that the "same force and effect" language is limited to the issuance of permits but not their enforcement.

Upon examination of RCRA's legislative history, the court also noted it is even more clear what Congress's intent was in regard to this issue. The House of Representatives stated after its hearings that through the RCRA, it intended to vest primary enforcement authority in the states. The court noted that there is no support in the text of the statute or the legislative history for the EPA's proposition that they may duplicate the state's enforcement mechanism. Although the EPA may act if the state is failing in its duties; they may not "fill the perceived gaps" . . . "by initiating a separate enforcement action." To do this would derogate the meaning and purpose of the RCRA.

The Court of Appeals also affirmed the granting of summary judgment based on the principles of *res judicata* which bar the EPA's action after the Missouri Court granted the consent order. *Res judicata* is based on the principles embodied in the Full Faith and Credit Act 28 U.S.C. § 1738 (1982), which requires that federal courts give preclusive effect to the judgments of state courts if the state court would give such an effect. The court looked to Missouri law to determine if state law would give *res judicata* effect to the consent decree entered into between Harmon and the MDNR. In Missouri, *res judicata* requires "(1) [I]dentity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons to the action; and (4) identity of the quality of the person for and against whom the claim is made."[2] The court determined that all the requirements were satisfied and thus the order issued by the district court satisfied the doctrine of *res judicata*.

The EPA further argued that even if *res judicata* is found to apply, the doctrine of sovereign immunity precludes the use of *res judicata* against the United States. Citing *Montana v. United States*,[3] the court stated that the EPA's defense is forestalled by the Supreme Court's decision which held that the United States must be bound by prior judgments involving state action as authorized by the RCRA. Therefore, the court held in favor of the plaintiff, Harmon Industries, Inc.

Kirsten Bennett '02

Endnotes

1. 42 U.S.C. § 6926(d).
2. *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. 1966).
3. 440 U.S. 147 (1979).

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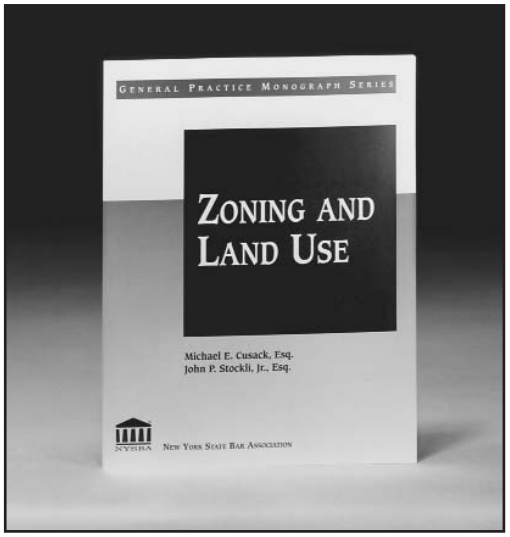

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