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Message from the Chair

Louis A. Alexander

As many of you know, on November 1, Peter A.A. Berle, former Commissioner of the New York State Department of Environmental Conservation and a leader in the environmental community, succumbed to injuries sustained in a tragic accident at his western Massachusetts farm. Peter was only 69 years old at the time of his passing. For many of us, we have lost a mentor, colleague and friend. For all of us, we have lost an extraordinary leader.

Peter's life was one of significant accomplishment in both the public and private sectors. As a member of the New York State Assembly from Manhattan in the late 1960s and early 1970s, Peter played a critical role in the passage of New York's early environmental laws.

Appointed as Commissioner of the Department of Environmental Conservation in 1976, Peter helped focus the agency's attention on environmental quality issues. During his tenure, New York took action with respect to PCB pollution in the Hudson River. He was involved in drafting the first solid waste plan for the state, as well as in addressing issues concerning the Love Canal toxic waste site in Niagara Falls. In addition, he vigorously pursued the purchase of land to expand the State's acreage within the Adirondack Park. Throughout his tenure, Peter sought to ensure that the environmental impacts of projects were fully evaluated and was willing to undertake political risks, such as in the consideration of the Westway project in New York City.

In 1979, Peter returned to the practice of law at Berle, Butzel, Kass & Case, a law firm which he co-founded in 1971. In 1985, Peter became the president of the National Audubon Society and served in that capacity until 1995. In 1989, Governor Mario Cuomo named Peter as chair of the Commission on the Adirondacks in the Twenty-First Century. The work of that Commission resulted in a number of significant recommendations regarding the Adirondack Park. Peter also served as one of the directors of the New York State Independent System Operator, where he brought an environmental perspective to electric power supply issues. In 1994, President Bill Clinton appointed Peter as one of the U.S. members of the Joint Public Advisory Committee, part of the North American Commission for Environmental Cooperation established through NAFTA.

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Many of us also remember Peter as host of "The Environment Show" on the Albany-based public radio station, and his entertaining and insightful commentaries on those programs.

Throughout his career, Peter was a trailblazer. By his stewardship, he has left his mark on a wide range of environmental issues over the past 40 years.

Since coming to the Department of Environmental Conservation, I had the opportunity on several occasions to meet with Peter or participate with him on various panels. His insights about environmental issues and his knowledge of the Department and its workings were always helpful and balanced with a good-natured humor about the vagaries (and limitations) of the political process!

Throughout his career, Peter was a trailblazer. By his stewardship, he has left his mark on a wide range of environmental issues over the past 40 years. But Peter's legacy is not solely his achievements on specific projects, but something much more intangible and valuable. That is the inspiration he has fostered in those of us in the environmental field to continue the work to which he was committed and the goals to which he was dedicated. Peter will be sorely missed, but he has left us with a great gift in the shared challenge of environmental commitment and dedication.

On behalf of the members of the Environmental Law Section, I extend our thoughts and prayers to Peter's family.

Louis A. Alexander

From the Editor

At the outset, I would like to note the passing of Peter Berle, a former DEC Commissioner, founding member of Berle, Butzel, Kass & Case, and environmental lawyer extraordinaire. Lou Alexander provides some honorary remarks about this titan of the environmental community on page 1.

Lou, our Section Chair, also wears the hat of Assistant Commissioner of the New York Department of Environmental Conservation. In his several roles at DEC over the years, and as an active member of the Section, Lou has diligently kept Section members up to date as to DEC policies and changes which necessarily impact the law practices of many Section members. In the present issue, he provides a current organizational chart, which should be useful to Section members who must navigate the Department's bureaucracy.

It is probably apparent to many of our members that notwithstanding the numerous aspects of our hybridized field of law, two areas of specialized knowledge stand out: familiarity with DEC's policies and regulations, as already noted, and insurance. Environmental insurance is, of course, important in terms of a client's coverage once there is a triggering event and, for defense counsel, the carrier's responsibility for defense costs. However, in counseling clients at the beginning of the insurance process—obtaining insurance—familiarity with what policy terms mean, prices and how to obtain appropriate coverage is important information. Susan Neuman, of Environmental Insurance Agency, Inc., submits an article that provides valuable information in this regard.

Kevin Ryan submits an article on an area of New York procedural law that has bedeviled many a lawyer—the CPLR Article 78 statute of limitations. The critical issues of finality and ripeness are too often unclearly defined in case law, are used interchangeably in some judicial decisions, and may often be inherently difficult to apply in many cases. Yet, abiding by these doctrines is critically—even fatally—important in litigating challenges to agency action. Kevin's article discusses the recent decision in *Eadie v. Town of North Greenbush* (7 NY3d 306 (2006)) but also reviews jurisprudence dating back to the seminal decision in *Save the Pine Bush v. City of Albany* (70 NY2d 193 (1987)). This article, which was also submitted in connection with the Section's Fall Meeting, will prove to be an invaluable primer for litigators trying to get a handle on this vexing topic.

Elizabeth Ferrell, of Cornell Law School, submits an article which analyzes water quality issues in the New York City watershed region. This large and ecologically complex area has enormous importance for one of our country's major urban and suburban areas, which, for several related reasons, has raised issues of public concern in recent years. The article, which has a particular focus on the Catskill/Delaware watershed system, analyzes the relationship between water quality and other environmental concerns, on the one hand, and the need of constituent municipalities for growth and economic development, on the other hand. It discusses land-use restrictions that have been imposed by State law, often over the objections of local communities asserting Home Rule prerogatives, legal hurdles that arise, and the experience at Belleayre Mountain (which happens to be one of my favorite regional skiing areas). This article was a finalist in the Section's 2006 Professor William R. Ginsberg Memorial Essay Contest.

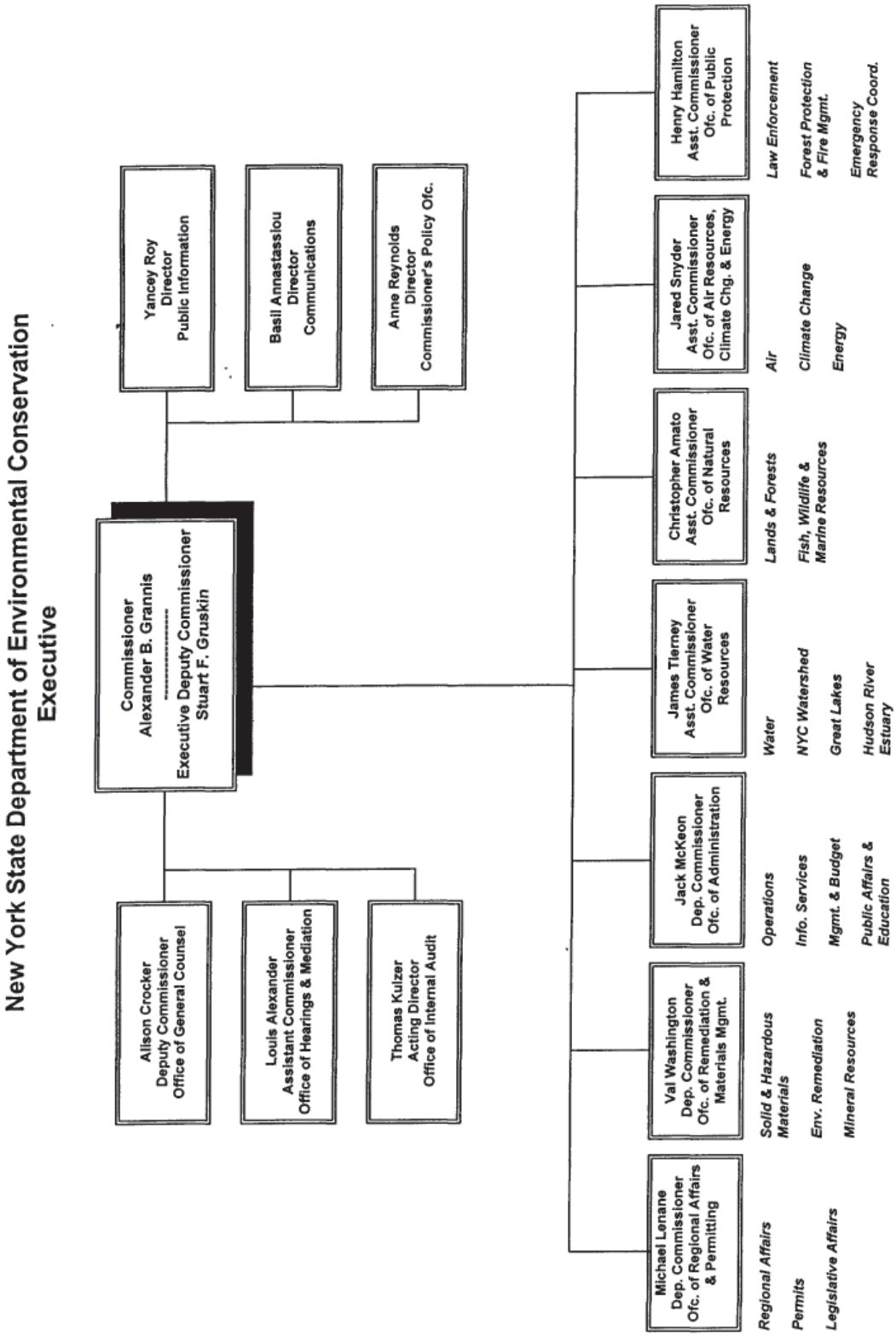
Student editor Jamie Thomas, of St. John's Law School, has again submitted case summaries, prepared by St. John's students for cases recommended by Phil Weinberg. The present summaries include the Supreme Court's recent decision in *United States v. Atlantic Research Corp.* (127 S. Ct. 2331 (2007)).

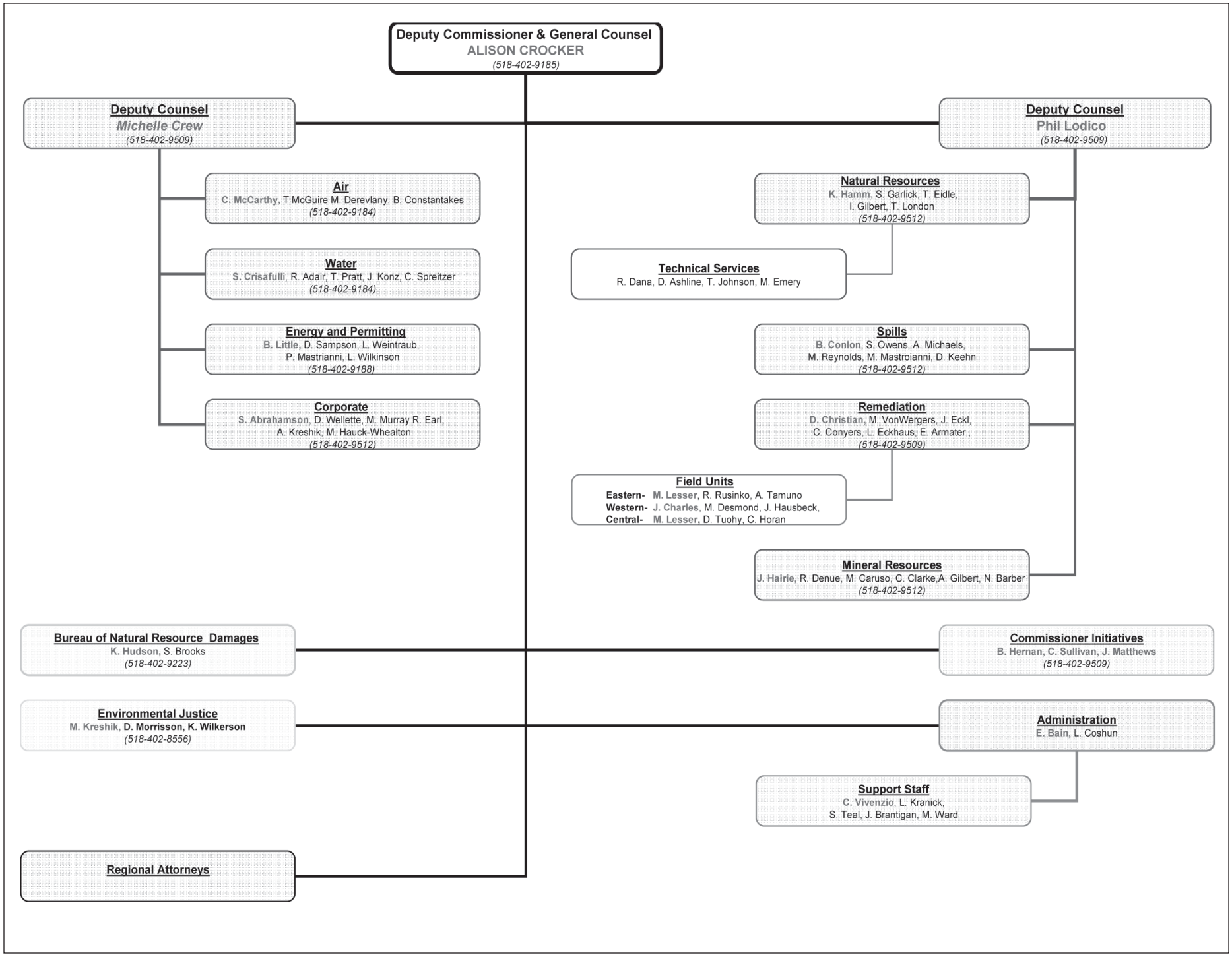
Global warming, a topic about which Kevin Healy and other Section members have diligently educated us over the years, is regaining currency in the national media but also among American businesses, responsible public leaders, certainly Al Gore, and even a couple more people in Washington. To the few remaining naysayers, I will just report this: on Columbus Day weekend, I spent hours on a crowded beach and in the ocean swells at Breezy Point, New York, as my twelve-year-old daughter surfed. This was a time and a place that in my college years I began worrying about my water pipes freezing in the coming weeks. Of course, Breezy Point is a couple of feet above sea level, which may bode poorly for the future, but occasional autumnal warmth may have its virtues. Just so the weather balances out. As our subtropical Fall winds down, I look to weather reports and, for accurate predictions, the *Farmers' Almanac* in anticipation of crystalline precipitation and a few mental health days at Belleayre and Windham.

Kevin Anthony Reilly

Transitions at the Department of Environmental Conservation

With the new administration, various executive-level appointments have been made at the New York State Department of Environmental Conservation. In addition, the Department's Office of General Counsel has been reorganized with the consolidation of its Divisions of Legal Affairs and Environmental Enforcement. Presentations on the new organizational frameworks were given at the Section's Fall conference in Saratoga Springs. For reference, current organization charts of the Department's executive personnel and the Office of General Counsel are reproduced below.




Deputy Commissioner & General Counsel
ALISON CROCKER
(518-402-9185)
Deputy Counsel
Michelle Crew
(518-402-9509)
Deputy Counsel
Phil Lodico
(518-402-9509)
Air
C. McCarthy, T McGuire M. Derevlany, B. Constantakes
(518-402-9184)
Water
S. Crisafulli, R. Adair, T. Pratt, J. Konz, C. Spreitzer
(518-402-9184)
Energy and Permitting
B. Little, D. Sampson, L. Weintraub,
P. Mastrianni, L. Wilkinson
(518-402-9188)
Corporate
S. Abrahamson, D. Wellette, M. Murray R. Earl,
A. Kreshik, M. Hauck-Whealton
(518-402-9512)
Natural Resources
K. Hamm, S. Garlick, T. Eidle,
I. Gilbert, T. London
(518-402-9512)
Technical Services
R. Dana, D. Ashline, T. Johnson, M. Emery
Spills
B. Conlon, S. Owens, A. Michaels,
M. Reynolds, M. Mastroianni, D. Keehn
(518-402-9512)
Remediation
D. Christian, M. VonWergers, J. Eckl,
C. Conyers, L. Eckhaus, E. Armater,,
(518-402-9509)
Field Units
Eastern- M. Lesser, R. Rusinko, A. Tamuno
Western- J. Charles, M. Desmond, J. Hausbeck,
Central- M. Lesser, D. Tuohy, C. Horan
Mineral Resources
J. Hairie, R. Denue, M. Caruso, C. Clarke,A. Gilbert, N. Barber
(518-402-9512)
Bureau of Natural Resource Damages
K. Hudson, S. Brooks
(518-402-9223)
Commissioner Initiatives
B. Hernan, C. Sullivan, J. Matthews
(518-402-9509)
Environmental Justice
M. Kreshik, D. Morrisson, K. Wilkerson
(518-402-8556)
Administration
E. Bain, L. Coshun
Support Staff
C. Vivenzio, L. Kranick,
S. Teal, J. Brantigan, M. Ward
Regional Attorneys

Will Your Site Pollution Liability Policy Cover Known Pollution Claims? A Short Guide to Deciphering Your Quote

By Susan Neuman, Esq., Ph.D.

Introduction

Brownfields typically contain small amounts of known contamination; they are occasionally defined as "lightly contaminated sites."[1] Therefore, site pollution liability (SPL) policies used to facilitate Brownfields transactions characteristically provide some limited coverage for liabilities arising out of known conditions. At some point in a transaction, ideally before the purchase and sale agreement is signed, a broker produces a coverage proposal, indication, or quotation. SPL quotes are inherently difficult to understand because the basic policy forms and endorsements are not standardized. Those requiring coverage for known conditions can be particularly difficult, at least for anyone who is not an environmental insurance expert. It is the purpose of this article to shed some light on the typical insurance quote involving SPL coverage for known pollution conditions so that lawyers may advise their clients accordingly. Before any review of the quotes themselves, however, there is a need to clarify the basics of the Brownfields risk transfer process and the role of environmental insurance in that process.

Brownfields Risk Transfer Basics

Define the Contamination. The first step in successful transfer of environmental liabilities is precise definition of the technical environmental risk. The contamination must be characterized and its scope defined before specific liability risks of concern at any site can be identified and then allocated contractually. Such technical definition is usually accomplished in documents such as Phase II and remedial investigation reports.

Identify the Specific Risks. Once the environmental documents define and characterize known contamination, it is then possible to identify specific liability risks of concern. Environmental lawyers tend to view environmental risks in terms of a matrix such as the one below.

Site Pollution Liability Matrix

	Unknown	**Known**			**New Conditions**
Liabilities		*Soil*	*Groundwater*	*Air*	
Cleanup Costs On-Site Off-Site					
Bodily Injury					
Property Damage Physical Diminution					
Natural Resource Damages					
Incidental Bus. Int. Soft Costs					
IC/EC Failure					

The matrix shows only the potential for liabilities to arise at any site. To fill one out with respect to a particular site, one needs to consider the specific elements of risk involved with each type of liability and then assess the real-world potential for a given risk to be realized.[2] For example, a large Fortune 100 corporation which owned a small manufacturing site in New Jersey was remediating groundwater contaminated by an underground storage tank (UST) leak in the basement of the building under a remediation plan approved of by the New Jersey Department of Environmental Protection. The seller's main concern was remediation costs arising out of unknown conditions (due to past manufacturing activities) that could be uncovered by excavation activities of the buyer. It was willing to be responsible in the contract for remediation costs due to the known UST contamination but wanted the buyer to indemnify it for remediation costs arising out of unknowns. Buyers at that time were generally unwilling to take responsibility for contamination caused by sellers, and, as a result, the site had been on the market for three years.

Apply and Integrate the Contracts. Brownfields sites usually involve two and sometimes three contracts: the purchase and sale agreement (PSA), the insurance contract, and the remediation contract. Each contract needs proper, separate implementation and seamless integration with the other contracts. It is difficult to do this without the services of legal and insurance experts who draft and negotiate the contracts so that their terms are legally sufficient; i.e., can hold up in a contractual dispute. Unfortunately, many Brownfields transactions are negotiated by real estate lawyers or even real estate brokers who do not understand environmental liabilities. This is one important reason why the transactions and associated environmental insurance policies often go awry.

The environmental provisions of well-drafted PSAs typically have precise indemnities for specific liabilities of concern and an environmental insurance provision indicating how the policy supports and/or complements the indemnities. In the New Jersey transaction, the buyer's lawyer negotiated a narrow indemnity by the buyer in favor of the seller for remediation costs arising from unknown conditions and an indemnity by the seller in favor of the buyer for remediation costs due to known conditions. The buyer's environmental insurance broker was able to obtain a quotation for an SPL policy with a narrow exclusion tracking the seller's indemnity and coverage for everything else: remediation costs arising from unknown conditions, and third-party bodily injury and property damage arising from known and unknown conditions.

Obtain an Appropriate SPL Quote

Before looking at a typical SPL quote, it is useful to consider a typical quote for Commercial General Liability (CGL) coverage. A CGL quote usually consists of a page itemizing 1) key policy terms, i.e., carrier, policy form, named insured; 2) a quote summary itemizing coverages, e.g., CGL Coverage A and B, aggregate and per occurrence limits, deductibles and associated premiums; 3) a list of standard endorsements modifying the policy form; and 4) conditions to binding coverage such as signing the form accepting or rejecting terrorism coverage. It is not ordinarily necessary to include the forms in presenting the quote to an insured because they are standardized forms drafted by the Insurance Services Office, Inc. (ISO) and previously approved of by the state insurance department.

The typical SPL quote consists of a letter beginning with 1) key terms (usually including the site location); 2) a quote summary with a matrix of basic coverages, limits, policy terms, and deductibles, and associated premium options; 3) a list of forms or endorsements modifying the preprinted policy form, or "jacket"; and 4) conditions to binding coverage such as financials or a signed application. The first stumbling block to proper understanding is the list of coverages. Potential SPL policy coverages generally track the SPL matrix presented above; all of the policies potentially cover remediation costs and third-party bodily injury and property damage arising out of preexisting (known or unknown) and new pollution conditions. However, the policy forms are not only nonstandardized; they also differ in the manner in which they structure basic coverages, in the number of basic coverages, and in the distinctions they make within those coverages.

For example, a Zurich quote summary will list two potential coverages: one for first-party cleanup costs and another for third-party liability (cleanup costs, bodily injury and property damage), tracking with the two basic coverages in the Zurich SPL (Real Estate Environmental Liability) policy form. The Chubb SPL form, on the other hand, contains four coverages: 1) Bodily Injury, Property Damage and Remediation Costs – pre-existing pollution incident; 2) Bodily Injury, Property Damage and Remediation Costs—New Pollution Incident; 3) nonowned locations, and 4) Business Interruption. Therefore, a Chubb SPL quote will list these four coverages, with those being offered in the quote checked off. The AIG Pollution Liability Select quote summary can be particularly confusing to the uninitiated; it has 10 potential coverages, some of which make distinctions that other policies ignore, such as between on-site and off-site bodily injury and property damage.

In order to understand a quote's coverage proposal, it is not enough to read (and understand) the basic coverages or insuring agreements (as modified by definitions and exclusions in the policy form). Coverages often are provided through standard endorsements including exclusionary endorsements. For example, the XL SPL form

includes a "coverage" for contingent transportation liability but not, like Chubb, one for business interruption. An XL insured who wishes the latter must obtain it by endorsement, while a Chubb insured who wishes the former must do the same.

It is also necessary to read the exclusions in the policy forms to understand what coverages are or may be provided. It is common to provide coverage through an endorsement amending an exclusion; for example, the underground storage tank (UST) exclusion which can be amended to provide coverage by scheduling specific tanks. Coverage for known pollution conditions works this way. It begins with an exclusion found in all the policy forms for known conditions that have not been properly disclosed. A typical exclusion (Zurich's) eliminates coverage for claims and losses arising out of any "pollution event" known to any "insured's" principal, partner, director, officer or employee with responsibility for environmental affairs prior to the effective date of coverage, unless prior to the effective date of coverage, such "pollution event" was disclosed to the Company and endorsed onto the policy.

The key language here is "endorsed onto the policy." Much of the litigation involving the SPL policies used since 1995 arose from the failure to define what is known and had been disclosed, e.g., *Goldenberg Development Corporation, et al. v. Reliance Insurance Company of Illinois*, 2001 U.S. Dist. LEXIS 12870, May 14, 2001. The version of the exclusion, such as the one at issue in *Goldenberg*, simply excluded pollution events known to the insured and not disclosed in the application process. The dispute in *Goldenberg* was about whether there had been the proper level of disclosure. The above type of language was a response to such litigation; it required what was known and disclosed to be defined in an endorsement.

Known Conditions Endorsements

Carriers typically use three sorts of endorsements relevant to known conditions which modify the known and disclosed conditions exclusion: the Disclosed Document Endorsements, a Known Conditions Exclusion Endorsement, and the Reopener Endorsement. These are usually not "manuscript" endorsements in the sense that they must be reinvented every time but standard endorsements that require some filling in with specific facts about particular conditions. The Disclosed Document Endorsement typically refers to the known and disclosed conditions exclusion in the policy form and states that the conditions described in the particular scheduled documents (e.g., Phase Is, IIs, remedial investigation reports) will be deemed to constitute known and disclosed conditions. Note that the ambiguous term "known" is not defined in most policies.

If the Disclosed Document Endorsement is used without any additional exclusionary language, the policy will cover all liabilities arising out of the known conditions disclosed in the listed documents. More typically, a Known Contamination or Known Pollution Conditions Exclusion Endorsement is employed which provides partial coverage of the known conditions. Most of the carriers have a standard exclusion form or a typical way of structuring such an exclusion. The trick for the insured is to be certain that the language of the endorsement defines the scope of what is excluded as narrowly as possible—or what is covered as broadly as it can. In many situations, such as the New Jersey case discussed above, the goal is to exclude only remediation costs arising out of known conditions and cover everything else; i.e., bodily injury and property damage arising out of known and unknown conditions. (Toxic tort complaints will not make that distinction.) In the policy for the New Jersey case, the sole exclusion was precisely for on-site remediation costs arising out of the UST contamination.

Reopener coverage is known as such because no further action letters (NFAs) frequently came with "reopeners" stating that the agency is free to change its mind and make a claim in the future with respect to contamination it now says has been fully remediated. Reopener endorsements used in the past typically stated that once an NFA letter was produced, the Known Contamination Exclusion would be removed. Upon removal of the exclusion, the carrier would be covering the risk that the agency will reopen the remediation and make a new claim. More recently, many carriers have begun to use qualifying language indicating that the removal or amendment "may" take place and only at the insurer's sole discretion. This is certainly troublesome from the point of view of insureds who want certainty. Other carriers such as Chubb use a reasonableness standard. For example, Chubb's typical Known Pollution Incident Exclusion endorsement states that the exclusion may be amended or deleted "upon the receipt, satisfy review and approval by the Company, which approval will not be unreasonably withheld or delayed" of the NFA letter or something similar.

NFAs often come modified by requirements for institutional and engineering controls (IC/ECs). (Perhaps the reason that most carriers use the sole discretion concept in their reopener language is the prospect IC/EC, long-term stewardship, liability.) The reopener endorsements of most carriers are silent on the subject of coverage for IC/EC liabilities, while AIG commonly excludes those liabilities through a deed restriction or other exclusionary endorsement. The author has been able to obtain coverage from Chubb for potential IC/EC liabilities under a manuscript endorsement to its SPL policy. One example excluded remediation costs arising out of specified known conditions and stated that the exclusion may be amended

or deleted (on a reasonableness standard) upon receipt of an NFA or fulfillment of certain conditions with respect to the implementation, monitoring, and enforcement of IC/ECs.

Getting Claims Covered

The first step in getting claims covered is to make sure that the language is legally sufficient at every stage, from initial quote up to and including the issued policy form. The first quote is usually subject to some negotiation and alteration leading to a "bindable" quote that should satisfy all parties. The final quote is followed by a binder, which is followed by an issued policy. At each stage, it is critical that the document in question adhere to the language of the previous document. The binder should mirror the last bindable quote, and the policy issued to the insured should mimic the binder exactly.

After the policy is issued, what sometimes happens, unfortunately, is that it gets put away in a drawer. Circumstances change; perhaps the site has been sold a second time, and the new buyer has different plans for site use than those stated in the policy. Perhaps contamination is discovered. Nobody contacts the broker. That is the worst-case scenario. If the broker is kept in the loop during the policy period about changes that could affect coverage, it is much more likely that claims will be paid. When a claim comes in or contamination is discovered, the broker should be contacted and should forward the claim to the insurance company according to the directions in the claims notification clauses. Assuming that the claim involves known conditions, the broker should attach to that notice letter the well-drafted endorsement(s) pertaining to known pollution conditions. Chances are that coverage will not be denied.

Conclusion

Environmental insurers would make the policy-buying process much easier if their quotes were more comprehensible to the layperson. However, the known conditions endorsements, which are at the core of Brownfields SPL coverage, are inherently technical and complex, and it will always be up to the broker to explain those endorsements to the client or client's lawyer. In the policy or quote negotiation process, underwriters and brokers should fill in the matrix of coverages arising from known and unknown conditions through carefully worded and legally sufficient known conditions endorsements. Meaningful coverage will not be possible unless contamination has been fully characterized and defined on an engineering basis as well as within the words of the quote, binder, and policy. If all of this is done, and the claim is presented properly to the insurer, there is every reason to expect that the claim for known pollution will be covered.

Endnotes

1. Michael B. Gerrard, ed., *Brownfields Law and Practice*, Vol. 1, Sec. 1.01 (2007).
2. *Id.*, § 7.02.

Susan Neuman, Esq., Ph.D., is with the Environmental Insurance Agency, Inc.

Statute of Limitations: *Eadie*—A State of Confusion

By Kevin G. Ryan

In his classic torts hornbook, William L. Prosser wrote, "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" Prosser, *The Law of Torts*, 4th Ed. at 571. This may be true, but the jungle surrounding the law of finality and ripeness in administrative challenges is surely a close second. In order to attempt some understanding of the meaning and implications of the decision of the Court of Appeals in *Eadie v. Town of North Greenbush*, 7 NY3d 306 (2006), this article will provide a limited survey[1] of cases discussing the finality/ripeness issue going back several decades and extending up to this year. First, it will discuss cases stretching back to and beyond the early Court of Appeals decision in *Save the Pine Bush*, 70 NY2d 193 (1987). It will then discuss the seminal case of *Essex County v. Zagata*, 91 NY2d 447 (1998). Next the article will review cases that applied (or ignored) the finality test set forth in *Essex County*, including the Court of Appeals opinions in *Gordon v. Rush*, 100 NY2d 236 (2003), and *Stop-The-Barge v. Cahill*, 1 NY3d 218 (2003). The *Eadie* decision will then be scrutinized against this background. Finally, this article will examine the 2007 Court of Appeals decision in *Walton v. New York State Department of Correctional Services*, 8 NY3d 186 (2007), in an attempt to discern what the future has in store for this convoluted area of law.

First Principles—CPLR 78 and Section 217

CPLR 78 provides a cause of action to challenge final administrative determinations. *See* CLPR 7801 ("a proceeding under this article shall not be used to challenge a determination . . . which is not *final*."). In setting the four-month default limitations period for such actions, CPLR 217.1 makes clear that the limitations period commences only with a final determination: "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes *final and binding upon the petitioner*. . . ." The phrase "final and binding upon the petitioner" seems simple enough. However, the courts have found it to be extremely difficult to apply in a consistent way. With multi-step approval procedures involving multiple agencies, the question of whether and when an administrative action may or must be challenged becomes very complicated. Add the separate layer of complex review procedures required under the State Environmental Quality Review Act (SEQRA), and the finality/ripeness issue becomes, to paraphrase Churchill, "a riddle, wrapped in a mystery, inside an enigma."

Ripeness, Finality and SEQRA: An Unsettled Question from the Beginning

By definition there is always at least one action or approval beyond a SEQRA determination. At the same time, except where an action is given a negative determination of significance, the SEQRA process involves multiple steps, each of which can arguably injure various parties involved in a given matter. This multiplicity of decision points in actions that undergo SEQRA review, together with countervailing policy arguments supporting early and late ripeness for review, have resulted in a chronic uncertainty and dispute as to when a challenge alleging SEQRA errors may or must be brought.

The debate over the proper timing of SEQRA challenges goes back to the early days following its enactment. This was one of the many issues thoughtfully discussed in the seminal summer 1982 issue of the *Albany Law Review* devoted to SEQRA. An article by Peter G. Crary noted presciently that the "mechanical application of time-honored administrative law principles to such actions, albeit technically correct, may in many cases frustrate some of SEQRA's important procedural goals and purposes." Peter G. Crary, *Procedural Issues Under SEQRA*, 46 Albany L. Rev., 1224–1226 (1982). Crary was specifically concerned about a conflict between the SEQRA policy of giving proper consideration to environmental impacts as early in the review process as possible and the notion that a SEQRA determination is merely an interim step to a final action. *Id.* at 1226-27. In Crary's view, if an action challenging a negative declaration were considered unripe until action had been taken on the underlying approval, then the early consideration and public participation policies could be frustrated. *Id.* at 1227. On the other hand, the article points out that an incorrect positive declaration could work harm upon an applicant, which, if insulated against challenge until a final decision, would be impossible to correct. *Id.*

These concerns reverberated through the early SEQRA limitations cases. Three years before the Crary article, *Ecology Action v. Van Cort*, 99 Misc.2d 664 (Sup. Ct., Tompkins County 1979) had stated the position that it is the final decision (in *Van Cort* subdivision approval) with respect to the underlying application, *not* the SEQRA determination, that is the true subject of the challenge. *But see Long Island Pine Barrens Soc'y v. Planning Board of the Town of Brookhaven*, 78 NY2d 608 (1991) (SEQRA challenge ripe upon preliminary subdivision approval). (*Pine Barrens* is discussed below.)

The question presented in *Van Cort* was whether to apply the four-month statute of limitations under CPLR 217.1 or the more brief 30-day period applicable to subdivision approvals. In support of their claim that the four-month period should control, the petitioners argued that their challenge went to the propriety of the SEQRA determination not to prepare a Final Environmental Impact Statement (FEIS) after preparation of a Draft Environmental Impact Statement (DEIS). The respondents countered that the SEQRA determination had no existence independent of the underlying subdivision approval and, therefore, even if the essence of the complaint was with regard to the SEQRA determination, the subdivision limitations period should be enforced. Sounding a theme repeated for the next decades, the court wrote,

> What the petitioners are really complaining about is the approval of the subdivision without, as they claim, due compliance with and consideration of the provisions of the State [ ] Environmental Quality Review Act. The environmental impact statements which these acts require, however, are merely a preliminary step in the process of denying, approving or modifying a proposed action, to insure that environmental factors are given due consideration in arriving at the final decision. *** We agree therefore with respondents, who state in their brief: *** "The SEQR determination, standing alone, was not determinative of the outcome of the subdivision request. It could well have been denied on other than SEQR grounds. Therefore, the determination of non-significance itself could not have aggrieved the petitioners. In this sense, it was not final and could not be the basis for Article 78 review." 99 Misc.2d at 669.

The *Van Cort* decision determined that the SEQRA challenge should be dismissed as time barred, although the court went on to explain that it would have held against the petitioners on substantive grounds anyway. *Compare Northeastern Queens Nature and Historical Preserve Commission v. Flacke*, 89 AD2d 928 (2d Dep't 1982) (dismissing challenge to SEQRA negative declaration as time barred while considering final permit on merits of decision allowing construction of sanitary force main); *Town of Yorktown v. New York State Department of Mental Hygiene*, 92 AD2d 897 (2d Dep't 1983) (SEQRA negative declaration not ripe for review until final decision on underlying application for certificate of approval to operate substance abuse program).

Save the Pine Bush v. City of Albany—*Eadie* Prefigured?

In 1987, the Court of Appeals handed down its decision in *Save the Pine Bush v. City of Albany*, *supra*, 70 NY2d 193. This case, which would figure prominently in the *Eadie* decision nearly 20 years later, concerned challenges to three ordinances concerning zoning in the ecologically unique Pine Bush area of the City of Albany. The first ordinance established a new C-PB zone intended to balance ecological and commercial values. The second ordinance designated a 550-acre Pine Bush Site Plan Review District with special criteria for consideration in certain site plan applications. No SEQRA review was performed with regard to either of these ordinances. The third ordinance concerned the rezoning of a specific parcel following a full SEQRA process which resulted in a statement of findings. The Court of Appeals had to decide what limitations period to apply to these legislative enactments; specifically, whether to apply the four-month limitations period for Article 78 proceedings or the longer period for declaratory judgment actions. The court held that, where the challenge is based not on the substance of the zoning enactment but on the alleged violations of the procedure followed by the legislative body, the four-month Article 78 limitations period should apply. As the court considered SEQRA to be a step in the process of enacting zoning, the court looked to see if the SEQRA challenges were brought within four months of enactment. This required dismissal of claims against the first two ordinances but allowed the SEQRA challenge with respect to the third to proceed.

For the purposes of this discussion, it is important to note that, despite the suggestion to the contrary in *Eadie*, there appears to be nothing in *Save the Pine Bush* to suggest that the question whether a SEQRA challenge could or should have been brought upon issuance of the findings statement was even considered. The holding simply addressed the situation where a challenge brought after enactment of zoning was subjected to the four-month statute of limitations with respect to SEQRA claims. With regard to the one ordinance that actually underwent SEQRA review, there is no indication as to the timing of the statement of findings relative to the enactment of the new zoning. From this silence it is difficult to see how the conclusion could be drawn that *Save the Pine Bush* should be read to specifically bar the commencement of the limitations period for SEQRA challenges prior to the enactment of the zoning ordinance, as suggested in *Eadie*.

After *Save the Pine Bush*

For a decade following *Save the Pine Bush*, the courts continued to experiment with various ripeness and limitations constructs.

Wing v. Coyne, 129 AD2d 213 (3d Dep't 1987), dismissed as time-barred challenges to the actions of a county legislature toward the establishment of a civic center where the lawsuit was brought more than four months after the filing of a statement of findings pursuant to SEQRA. In the face of an argument by opponents of the project that the SEQRA determination was merely a condition precedent to the ultimate discretionary action implementing the civic center proposal (i.e., the passage of a bond resolution some seven months later), the Third Department found that the legislature's SEQRA findings committed the county to a definite course of future decision making and, therefore, triggered the SEQRA limitations period. 129 AD2d 217.

In another decision involving a self-initiated government activity, the Supreme Court in Albany likewise held a statement of findings ripe for review in *Town of Red Hook v. Dutchess County Resource Recovery Agency*, 146 Misc.2d 723 (Sup Ct., Dutchess County 1990). The Third Department again held for an early limitations trigger in a case challenging a conditioned negative declaration adopted on the same day as a concept plan approval despite the fact that subsequent actions and approvals changed the project. *Monteiro v. Town of Colonie*, 159 AD2d 246 (3d Dep't 1990).

The Court of Appeals re-entered the fray with its holding in *Long Island Pine Barrens Soc'y v. Planning Board of the Town of Brookhaven*, 78 NY2d 608 (1991). This case concerned an application for subdivision approval. In *Pine Barrens*, following preparation of an EIS based upon a preliminary subdivision plan, a SEQRA findings statement was issued in May 1989 by the planning board nearly two-and-one-half years after the initial application filing in November 1986. Conditional preliminary subdivision approval was granted a month later in June 1989. After the developer had entered into construction financing commitments and went to contract on a number of planned homes, conditional final approval was granted in January 1990. An Article 78 petition was filed on February 7, 1990. In response to the planning board's motion to dismiss on the ground that the petition opposing the project should have been filed within 30 days of the *preliminary* subdivision approval, the petitioners argued that its SEQRA challenge was not ripe until the conditional final approval because, up until that point, the project was subject to further discretionary action on the part of the planning board.

The Court of Appeals rejected this argument, citing policies in both the Town Law and SEQRA favoring the prompt and early resolution of issues relating to both the components and the environmental impacts of a proposed subdivision. With particular respect to SEQRA, the court wrote:

> ECL 8-0109(4) provides that whether an EIS for a proposed action is required must be determined "[a]s early as possible" in the planning process. That section further states that the purpose of an EIS "is to relate environmental considerations to the *inception of the planning process*, [and] to inform the public and other public agencies *as early as possible* about proposed actions that may significantly affect the quality of the environment." Consistent with these SEQRA policies, we have concluded that the environmental questions pertaining to the [subdivision at issue] should have been reviewed as early as possible in the planning process—in this case, the preliminary plat approval stage—when it was still practical to modify the project and, if necessary, to mitigate adverse effects. 78 NY2d at 615 (emphases in original).

The court also noted that the preliminary plat approval contained no conditions relating to environmental aspects of the project, and that the preliminary approval was therefore "final regarding SEQRA issues." 78 NY2d at 614. Accordingly, notwithstanding the fact that the preliminary plat approval did not complete the approval process for the project, the court held that a challenge with respect to SEQRA became ripe upon the filing of the preliminary plat approval.

Essex County v. Zagata—A Watershed Decision

The next major case in the continuing struggle to define the point at which a challenge based on an alleged SEQRA violation becomes ripe for review was the seminal 1998 case *Essex County v. Zagata*, *supra,* 91 NY2d 447. In *Essex County*, the Court of Appeals attempted to articulate more overarching criteria to aid in this determination. The case concerned an application to expand the capacity of a landfill in the Adirondack Park. To fulfill a condition for the sale of the landfill to a private operator, the County of Essex needed to obtain approval for an increase in the number of tons that could be received at the landfill each day. On December 4, 1995, in accordance with procedures set under a Memorandum of Understanding (MOU) between the Adirondack Park Agency (APA) and the New York State Department of Environmental Conservation (DEC), the county applied to the DEC for approval of the capacity increase. The next day, also in accordance with the MOU, the DEC then forwarded the application to the APA. On December 8, 1995, the APA advised the DEC that it had no jurisdiction over the permit modification process. However, after some bad publicity in *The New York Times*, the APA reversed itself on January 25, 1996, stating in a letter to the County that it intended to assert jurisdiction. This decision, confirmed by a vote of the APA Board, was reiterated in another letter to the County on February 12, 1996, which added that "further informa-

tion regarding the amendment application process would be forthcoming." 91 NY2d at 451. The County, of course, took vigorous issue with the APA's new position, asserting among other things that the APA had no jurisdiction to assert and that, in any event, an application to the DEC constituted an application to the APA as well. The APA responded on February 29 that it would nonetheless require a renewed application and responses to various interrogatories, adding that until it received a new signature page on the application, "the 'regulatory time clock' would not begin to run and APA review of the project would not commence." *Id*.

The County continued to refuse the APA's demands and claimed that the regulatory time clock (i.e., a 90-day approval time limit provision under Executive Law) had started on December 19, 1995, the day the DEC had deemed the original application complete. On April 16, 1996, and May 1, 1996, the County sent letters, respectively, to the APA and the DEC demanding a decision on the application. The APA responded on April 22, 1996, that the regulatory time clock had not begun as previously advised. The DEC responded on May 9, 1996, by dismissing the application without prejudice pending resolution of the APA review. On May 16, 1996, the County (and the contract vendee) commenced an Article 78 proceeding asserting that the APA had acted without jurisdiction and claiming entitlement to the landfill expansion permit because the statutory approval period had expired.

The Court of Appeals was faced with several possible accrual dates from which to measure the 60-day limitations period under the Executive Law. The petitioners argued that the action became ripe on April 22, 1996, when the APA refused to grant a permit decision in response to the County's demand letter. In dismissing the petitioners' claims as time barred, the Supreme Court had found that the accrual date was February 8, 1996, when the APA formally asserted jurisdiction at its Board meeting. The Appellate Division came to the same result, but with a holding that the County's claim became ripe at the latest on March 7, 1996, when the County received the APA's February 29, 1996, letter reiterating jurisdiction and advising the County that the regulatory time clock would not start until the County renewed its application.

As the Court of Appeals put the issue, "when did the APA reach a final determination that rendered the appellant's various claims amenable to article 78 review, triggering the 60-day limitations period?" 91 NY2d at 452. To answer this deceptively simple question, the court articulated the following two-part finality/ripeness test based on both state and federal precedents: "Where, as here, agency action takes the form of a letter notifying petitioners of a definitive agency position, it will be considered a final determination for CPLR 7801(1) purposes if it causes petitioners actual, concrete injury and no further agency proceedings might alleviate or avoid the injury." 91 NY2d at 454. Under this test, according to the court, it was inconsequential that as of the February 29 letter the APA had not reached a formal conclusion regarding the proposed permit modification because the letter made clear that it would not do so until the County acceded to the APA's demand for a renewed application. The injury to the county was therefore considered actual, concrete, and unavoidable notwithstanding the subsequent dialogue between the county and the APA in which the county attempted to persuade the APA to reconsider its position. The county's petition, filed less than one month after the APA refused the county's direct demand for a permit modification, was therefore dismissed as time barred.

The *Essex County* Test—Sometimes Applied, Sometimes Not

After *Essex County*, the courts continued to reach consistently inconsistent results on the ripeness and finality of administrative challenges, sometimes citing the two-part test annunciated in *Essex County*, sometimes not. For instance, in *PVS Chemicals, Inc. v. New York State Department of Environmental Conservation*, 256 AD2d 1241 (4th Dep't 1998), the Fourth Department cited *Essex County* in declaring a SEQRA positive declaration to be a preliminary action not ripe for litigation. In contrast, the Third Department found that a negative declaration triggered the statute of limitations and on that basis held a petitioner time barred in *McNeill v. Town Board of the Town of Ithaca*, 260 AD2d 829 (3d Dep't 1999). In this decision, which did *not* cite *Essex County*, the court wrote, "Where the challenged action relates to SEQRA review, the limitations period commences with the filing of a decision which represents the final determination of SEQRA issues, *notwithstanding the fact that such determination may be embodied in preliminary or conditional approvals* [here amendment of zoning map consistent with a preliminary site plan that had been the subject of negative declaration]." 260 AD2d at 830. Echoing the *Pine Barrens* holding, the Third Department wrote, "This rule is consonant with the goals of identifying environmental issues and resolving them with finality as early as possible in the planning process." *Id*.

A week later, in *Sour Mountain Realty v. New York State Department of Environmental Conservation*, the Third Department held *against* early ripeness in a case challenging a positive declaration for a Supplemental EIS (SEIS). 260 AD2d 920 (3d Dep't 1999). In this case, the court analyzed the ripeness question on two levels. First, with specific regard to the timing of claims challenging the SEQRA determinations, the court wrote:

> DEC's issuance of a positive declaration requiring preparation of a SEIS to address newly discovered information is not a final determination; rather, like other interim SEQRA determinations, it is "a

> preliminary step in the decision-making process" and [as such is] "not ripe for judicial review" until the decision-making process is completed. Allowing piecemeal review of each determination made in the context of the SEQRA process would subject it to "unrestrained review which could necessarily result in significant delays in what is already a detailed and lengthy process." 260 AD2d at 921 (citations omitted).

The second part of the *Sour Mountain* analysis invokes the *Essex County* two-part finality test: "Petitioner may well obtain approval of its permit application following preparation of a SEIS and thus, notwithstanding the considerable expenses and time associated with its preparation, it cannot be said that the DEC's issuance of this positive declaration constitutes a 'definitive' position on an issue which inflicts actual, concrete injury." 260 AD2d at 922. That the applicant would devote "considerable expenses and time" to the contested procedure did not concern the court. *Contrast Gordon v. Rush*, *infra* (detailed discussion below).

Shortly after *Sour Mountain*, the Third Department was faced with another case challenging a SEQRA determination of significance in *J.B. Realty Enterprise Corp. v. City of Saratoga Springs*, 270 AD2d 771 (3d Dep't 2000). As in *McNeill*, this case concerned a negative declaration. The court found that the applicable limitations period (in this case 30 days under the General City Law), started with the issuance of a negative declaration. In *J.B. Realty*, the lead agency issued a conditioned negative declaration (CND) and project approval on the same date, July 9, 1998. The action was conditioned on further investigations and possible mitigations with respect to archeological conditions at the site. An archeological report recommended no further action on September 4, 1998. The CND was formally issued on November 25, 1998, *after* the first part of the project had already been constructed. In the meantime, an Article 78 petition had been filed on September 29, 1998. The Third Department held that the 30-day limitations period started on July 9, 1998, when the CND and the project were first approved. In the view of the Third Department, the conditions subsequent regarding archeological investigations and possible project changes did not render the negative declaration any less final for purposes of triggering the SEQRA statute of limitations. (Other than mentioning it, the tardy formal issuance of the CND did not figure in the court's analysis.)

Although it makes no reference to *Essex County*, the Third Department's finality analysis in *J.B. Realty* is noteworthy because of the rationale, grounded in SEQRA policy, that it uses in distinguishing its prior decisions *dis*favoring early accrual. After first admitting that the Third Department had previously held that "since SEQRA determinations are often preliminary steps in a project's decision-making process, the Statute of Limitations begins to run only when that decision-making process is completed, i.e., when the determination is 'final and binding,'" the *J.B. Realty* decision nonetheless avers that in SEQRA challenges, "[t]he determinative inquiry is when the agency has committed itself to 'a definite course of future action.'" 270 AD2d at 774 (citations omitted). Viewing the question in this light, the court found that the project had been approved "for all intents and purposes" on July 9, notwithstanding the environmental conditions to which the project remained subject. *Id*. *J.B. Realty* thus notes the important consideration in finality analysis that a SEQRA determination may be considered ripe for review if it commits the agency to a definite course of future action.

2003—A Big Year for Limitations Cases

For ripeness and finality cases pertaining to both SEQRA and more general matters, 2003 was a vintage year. In the case of *Cold Spring Harbor Area Civic Ass'n v. County of Suffolk*, 305 AD2d 299 (2d Dep't 2003), the Second Department dismissed as premature a 2001 petition challenging variances granted in 2000 by the county commissioner of health for a sewage treatment plant where further action (i.e., a separate permit) was required on the part of the county before the project could proceed. Citing *Essex County*, the Second Department wrote, "[T]here was no showing by the petitioners that the Commissioner's action had a 'direct and immediate' effect on [them]." 305 AD2d at 500. It is noteworthy that a negative declaration had apparently been prepared by the Town of Huntington Zoning Board of Appeals prior to the board of health action. In contrast to the *McNeill* and *J.B. Realty* decisions of the Third Department, the Second Department thus found premature an action involving not only a negative declaration but the granting of variances.

In *Alterra Healthcare Corp. v. Novello*, 306 AD2d 787 (3d Dep't 2003), the Third Department dismissed as time barred a non-SEQRA action challenging a determination by the New York State Department of Health (DOH) that the petitioner must seek licenses for certain of the plaintiff's adult residences. This determination was communicated in a letter dated May 25, 2001. Following a series of meetings and correspondence in which the petitioner protested the requirement and the DOH reiterated its position, the petitioner filed an Article 78 petition on December 28, 2001. The intervening meetings and correspondence were found by the court not to have created any ambiguity as to the meaning of the initial notification. While the decision cites the two-part finality test of *Essex County*, it acknowledges that the limitations period will not start unless the "aggrieved party is aware of the determination and the fact that he or she is aggrieved by it" 306 AD2d at 788. However, the petitioner's expertise

in the health care area was held against it in evaluating its claim that it did not fully comprehend the consequences of the initial DOH notification and that it should not have been required to bring an administrative challenge at that time. *Id*. at 789.

By the year 2003, it had become abundantly clear that there were diverging strains of precedent in the ripeness/finality case law relating to SEQRA as well as to more general matters. On the one hand, there was a trend favoring early accrual of the statute of limitations in cases challenging actions where negative declarations had been issued. On the other hand were cases finding positive declarations not ripe for review. The cases finding negative declarations ripe for review generally cited the SEQRA policies favoring the early consideration of environmental issues and disfavoring agency commitments to future decision making in the absence of such consideration. As to cases finding positive declarations not to be ripe for review, the interim nature of positive declarations was generally considered to be the paramount consideration. However, as to the latter, the 2003 decision of the Court of Appeals in *Gordon v. Rush*, *supra*, applied the *Essex County* finality test to reach the *opposite* conclusion, i.e., that a positive declaration can in fact be "final and binding upon the petitioner" for purposes of triggering the statute of limitations.

Gordon v. Rush

Gordon v. Rush, *supra*, 100 NY2d 236, concerned applications by a group of property owners for permits to install erosion-control structures along the Southampton oceanfront. Appropriate permit applications were received by the Town of Southampton Coastal Erosion Hazards Area (CEHA) administrator and the DEC. The CEHA administrator advised the DEC that that agency should serve as SEQRA lead agency because the proposed erosion project could have impacts extending beyond the Town. The DEC then assumed lead agency status. The DEC recommended potential changes to the project that would allow it to issue a negative declaration. The applicants decided to revise the application in accordance with one of the options offered by the DEC, at which point the DEC issued a negative declaration for the project. Notice of the negative declaration identified the town CEHA administrator and the Town of Southampton Board of Trustees as involved agencies. The town board's jurisdiction and involved agency status arose from the project revision, which involved placing a structure in an area over which the Town of Southampton held a right-of-way. The town board claimed that it had not been included throughout the review as an involved agency and had not therefore been able to contribute to the SEQRA review. Accordingly, it declared that it would conduct a *de novo* SEQRA review and would act as lead agency in making its own determination of significance.

Rather than prepare a DEIS, the petitioners brought an Article 78 proceeding challenging the positive declaration. Both the trial court and the Second Department held that the positive declaration was a final action for purposes of CPLR 7801 and 217.1. The Court of Appeals ruled that the town board did not have jurisdiction to commence its own SEQRA review following the DEC's negative declaration, and that the positive declaration was a final action ripe for review.

In reaching this conclusion, the Court of Appeals applied the *Essex County* analytic framework. That is, it reviewed the record to determine whether the respondent had "arrived at a definite position on the issue that inflicts an actual, concrete injury" on the petitioners, and whether "the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." 100 NY2d at 242. It found that the petitioners were aggrieved not by the board of trustees' mere assertion of lead agency jurisdiction, but by the concomitant issuance of a positive declaration.

The respondent town board forcefully argued for a "bright-line rule, adopted by some appellate courts, that a positive declaration requiring a DEIS is merely an interim step in the agency decision-making process, and as such is not final or ripe for review." 100 NY2d at 242–243. Among the policy arguments advanced by the respondent town were that judicial review of a positive declaration would violate the deference normally accorded to expert administrative agencies by the courts; that allowing review at such a stage could result in a flood of litigation given the number of positive declarations that are issued; that the economic consequences of having to prepare an EIS are a normal incident of the SEQRA process and not the sort of concrete injury contemplated in *Essex County*; and that permitting challenges to positive declarations will lead to piecemeal lawsuits challenging various other interim steps in the review process with a resulting impact on the efficiency of administrative decision making. *See generally* Brief of *Gordon v. Rush* Respondents-Appellants, February 7, 2002, and Reply Brief of *Gordon v. Rush* Respondents-Appellants, April 25, 2002.

Notwithstanding these cogent arguments, the Court of Appeals expressly declined the respondent's invitation to declare positive declarations categorically unripe for judicial review. 100 NY2d at 242–43. However, it couched its decision in terms of the circumstances of the case, that is, where a negative declaration had already been issued upon coordinated review (albeit where the respondent agency had at first been included as an "interested agency" and later as an "involved agency" under SEQRA). In the words of the court, "the harm was the issuance of the positive declaration directing petitioners to prepare a DEIS, involving the expenditure of time and resources, af-

ter petitioners had already been through the coordinated review process and a negative declaration had been issued by the DEC as lead agency." 100 NY2d at 243.

Stop-The-Barge

Just six months later the Court of Appeals issued its controversial decision in *Stop-The-Barge v. Cahill*, *supra*, 1 NY3d 218. This case concerned a proposal by NYC Energy, LLC (NYCE) to install a power-generating facility on a barge at the Brooklyn Navy Yard. The New York City Department of Environmental Protection (DEP), from which several local permits would be required (as explained below), acted as SEQRA lead agency and issued a CND for the project on January 10, 2000, which was published on January 19, 2000. The CND became final on February 18, 2000, after a 30-day comment period. After a public hearing the DEC subsequently issued the project an air permit on December 18, 2000. The petitioners filed an Article 78 petition challenging the DEC permit on February 20, 2001. The gravamen of the challenge concerned alleged defects in the SEQRA review that had been conducted by the DEP. The DEC argued that the petition was time barred because it had not been filed within two months of the DEC decision. The DEP argued that it was time barred because it was not filed within four months of the CND. The petitioners agreed that the proper limitations period was the four-month period applicable to SEQRA challenges but argued that this period should have been calculated from the issuance of the air permit by the DEC.

As in *Gordon v. Rush*, the parties in *Stop-The-Barge* vigorously debated the question of the finality of a SEQRA determination of significance. The *Stop-The-Barge* petitioners argued:

- that a negative declaration is "merely a preliminary step in the decision-making process" and that "some final approval, rather than issuance of a [SEQRA determination] commences that statute of limitations," May 15, 2003 Brief of Petitioners-Appellants at 7, 9;
- that the majority of precedent and commentary up to that time supported the position that SEQRA determinations are merely preliminary, *Id.*;
- that the CND was itself subject to amendment or rescission, as in fact it had been rescinded and reissued twice, *Id.* at 9, 15;
- and that a finding of ripeness would spawn multiple, repetitive lawsuits, *Id.* at 15–20. *See also* Brief for DEC Respondents, June 27, 2003, *passim.*

Again, the Court of Appeals was importuned by the State of New York to establish a bright-line rule: "Given the complex problems inherent in the Third Department's decision, the State requests this Court to adopt a rule that would calculate the limitations period from the final approval of the proposed project regardless of whether the final approval is issued by the SEQRA lead agency or by another involved agency." DEC Brief at 20–21.

On the other hand, the respondents cited the many cases that had previously ruled negative declarations to be ripe for review. In addition, they emphasized the following countervailing policy and practical arguments favoring early accrual:

- the SEQRA policy of addressing environmental impact issues as early as possible in the review of projects, Brief for Respondent DEP, July 7, 2003, at 13;
- the statute of limitations policy of "bringing repose to an issue so that the parties may proceed without fearing that their work will be subject to future judicial challenge on by-then ancient facts," *Id.*;
- the reality that project opponents already frequently challenge negative declarations, *Id.* at 23;
- the fact that the issues raised in the petition exclusively concern matters addressed in the SEQRA review, not the DEC air permit which followed, Brief for Respondent NYC Energy, July 3, 2003, at 9;
- that a bright-line rule barring SEQRA challenges prior to final project approvals would amount to a special SEQRA exception to the *Essex County* finality doctrine, *Id.* at 13-18; and
- that suspending ripeness until the "random issuance of the first substantive authorization" following the SEQRA determination makes no sense on its face, *Id.* at 20.

The Court of Appeals once more declined the invitation to fashion a bright-line rule governing the statute of limitations in actions challenging SEQRA determinations. Yet again the court quoted *Essex County*:

> [A] determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding. There must additionally be a finding that the injury purportedly inflicted by the agency may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered definitive or the injury actual or concrete. 1 NY3d at 223.

Noting that the CND constituted a "definitive position" on the SEQRA environmental impact issues, the court wrote, "Thus, to the extent that petitioners challenge the conclusions reached by DEP from its SEQRA review, the period of limitations must be measured at the latest from the time that the CND became final." *Id.* In accordance with *Essex County*, the CND stood as the "last word" on the discrete legal issue of SEQRA impacts analysis. The injury to the petitioners lay in the fact that the project had been determined to have no significant adverse environmental effects (provided the conditions to the negative declaration were honored) and could therefore proceed through the approval process without the preparation of an EIS. *Id.*

From *Stop-The-Barge* to *Eadie*

It is debatable whether or not the cases following *Stop-The-Barge* applied it correctly. There is, however, no debating that the courts have faithfully followed the precedent of confusion that pervades the law of ripeness and finality. One of the first decisions to come after *Stop-The-Barge* said as much.

Entergy v. New York State Department of Environmental Conservation, 3 Misc.2d 1070 (Sup. Ct. Albany County 2004), concerned a challenge to an FEIS prepared in connection with the Indian Point Energy Center, a nuclear power facility on the Hudson River. The petitioner challenged conclusions in an FEIS that had been prepared by the respondent DEC. Arguing for dismissal on the ground that "there has been no reviewable final determination" and that the action was therefore premature, the DEC sought once again to "establish a bright line test for when a determination under [SEQRA] is final and subject to judicial review." 3 Misc.2d at 1071. After reviewing the various theories of ripeness and finality that had been propounded in prior decisions, including a concise summary of the *Essex County* factors, the court offered the following understated observation: "Such general principles have given rise to confusion as to when a proceeding may or must be brought. The problem is compounded by the fact that courts will often look to subsequent procedures or delays when determining if a proceeding should have been brought at an earlier time." *Id.* at 1073. Fortunately for the court in *Entergy*, the question as to whether the FEIS at issue was a final determination was an easy call in that the document itself stated that more environmental review would be necessary and was "specifically contemplated." *Id*. at 1073-74. The case was therefore dismissed as premature.

As to *Stop-The-Barge*, the *Entergy* decision offers the following characterization *in dictum*: "When there are multiple agencies involved, with one agency performing SEQRA and all environmental review, and a different agency addressing other policy considerations and undertaking the ultimate action, the SEQRA determination will usually be held to be final." *Id*. at 1073. The pigeonholing suggested by the *Entergy* court's narrow characterization of *Stop-The-Barge* has been repeated and amplified in cases up to and including *Eadie*. As explained in the discussion of *Eadie* below, a careful examination of the language and facts in *Stop-The-Barge* suggests that the decisions consigning it to the anomalous circumstances quoted above are misfounded.

The Second Department applied in *Long Island Contractors' Association v. Town of Riverhead*, 17 AD3d 590 (2d Dep't 2005). This case concerned a landfill reclamation plan that occurred over a number of years and involved various actions and approvals. Following the closure of the landfill in 1994, the Town of Riverhead evaluated plans for its reclamation, eventually settling on a plan involving the reuse of landfill materials as aggregate in asphalt manufacture. The Town declared the landfill reclamation plan a Type II action in April 2001. It then obtained a beneficial use determination (BUD) from the DEC in August 2002. On March 18, 2003, after awarding a contract for the development of the asphalt facility, the Town Board issued a negative declaration with respect to the siting of a temporary asphalt plant in accordance with the landfill reclamation plan. The Town received an air permit for the asphalt plant from the DEC in June 2003. Petitioners filed an Article 78 petition on July 16, 2003. The Town respondents argued that the petition was time barred, apparently claiming that the limitations period started with the BUD. Citing *Stop-The-Barge*, the court found, instead, that the petition was in essence a SEQRA challenge and therefore that the negative declaration, which concluded the SEQRA review, started the four-month limitations period. As such, the action was held timely.

The Court of Appeals cited *Stop-The-Barge* and *Essex County* in the 2005 case of *Best Payphones, Inc. v. Dep't of Information Technology and Telecommunications* [DOITT], 5 NY3d 30 (2005). This non-SEQRA case concerned the award of a franchise to operate pay phones in New York City. The August 11, 1999, award was conditioned, among other things, on the execution and delivery of a franchise agreement. On January 13, 2000, DOITT sent Best a letter stating that the franchise approval would be ineffective if an executed franchise agreement were not delivered to DOITT within sixty days. Best failed to comply with the January 13 demand letter, and the City started issuing notices of violation in May 2000. On May 10, 2000, Best delivered the executed franchise agreement to DOITT. However, on June 19, 2000, the City notified Best that it was unlawfully maintaining public telephones on city property. Best filed an Article 78 on July 11, 2000, arguing that the deadline imposed by DOITT was arbitrary.

Noting that a "strong public policy underlies the abbreviated statutory time frame: the operation of government agencies should not be unnecessarily clouded by

potential litigation," the Court of Appeals held that the four-month limitations period started with the January 13, 2000, letter advising Best of the need to fulfill conditions of the franchise approval within sixty days. 5 NY3d at 34. According to the court, the January 13 letter was essentially a "take it or leave it" choice and, in accordance with *Essex County*, inflicted an actual, concrete injury that could not be ameliorated. *Id*. 34–35, 40. The court was not impressed by the fact that Best simply could have complied with the original approval, albeit on the arguably arbitrary schedule imposed by DOITT. In fact, Best did submit a signed contract shortly after being served with a notice of violation. Best's mistake lay in assuming that it should wait to bring a challenge until DOITT actually took action to follow through on its deadline threat.

In early 2006, the Second Department cited *Stop-The-Barge*, in holding that a SEQRA findings statement triggered the statute of limitations. *Jones v. Amicone*, 27 AD3d 465 (2006), concerned the proposed redevelopment of a portion of downtown Yonkers. Following a full environmental review and extensive public comment, the Yonkers City Council issued a SEQRA findings statement on June 27, 2003. On October 16, 2003, the City council enacted a special ordinance authorizing the acquisition of properties within the project area. Project opponents filed an Article 78 petition on January 28, 2004, seven months after the findings statement but three months after the enactment of the special ordinance. Citing *Stop-The-Barge*, the Second Department noted that the findings statement, which concluded the SEQRA process, was "the City Council's definitive position *on the issue that inflicted an actual concrete injury* on the petitioners." 27 AD3d at 469 (emphasis added). According to the decision, "The findings statement identified, authorized, and committed the City Council to future action necessary for the project, including the acquisition by condemnation of certain property on the proposed site. . . ." *Id*. The Second Department found that the subsequent condemnation process had no bearing on the SEQRA process. *Id*. The court further noted that "the findings stated that condemnation *would take place* upon completion of the SEQRA review," and that, "therefore, the adoption of the SEQRA findings statement was a final determination. . . ." *Id*. (emphasis added).

Jones v. Amicone thus focused on two important strands of the cases finding ripeness in SEQRA and other administrative determinations: that the court will examine the claims of a petitioner to determine its substantive concern and then look at the record to ascertain the last action determining that matter; and that the court will look for the action that committed the challenged agency to a definite course of future action.

These themes were carried forward by the Court of Appeals a month later in *In re City of New York [Grand Lafayette Properties, LLC]*, 6 NY3d 540 (2006). This non-SEQRA case concerned the condemnation of land in connection with New York City's Third Water Tunnel project. The property in question was slated to accommodate a deep shaft and a large distribution chamber to regulate water pressure. The property had been in use as a parking lot. To acquire the property, the DEP and the Department of Citywide Administrative Services (DCAS) started the condemnation procedure by applying to the Department of City Planning, which certified the application as complete. The community board with jurisdiction reviewed the application in accordance with the Uniform Land Use Review Procedure (ULURP), ultimately recommending approval. The Manhattan Borough President then approved the application. The DEP issued a negative declaration. In accordance with the Eminent Domain Procedure Law (EDPL), the City Planning Commission (CPC) held a public hearing in March 2004, at which the owner objected. On April 14, 2004, the CPC issued an approval resolution which discussed the importance of the project as well as compliance with SEQRA, CEQR, and ULURP. The City Council declined to review the decision under the "call up" provision of the City Charter. In August 2004, the Office of the Mayor approved the acquisition.

Having completed the administrative approval process, the City started an EDPL vesting proceeding in Supreme Court in November 2004. Grand Lafayette Properties asserted that the taking was excessive. The City argued that this substantive argument should have been raised in an Article 78 challenging the CPC's April 2004 determination approving the condemnation. The City claimed that the four-month Article 78 limitations period began either when the CPC adopted its resolution in April 2004 or at the latest, when the City Council "call up" period expired. Grand Lafayette argued that the statute did not start to run until the Mayor's Office approved the acquisition.

Employing the *Essex County* two-part finality test as carried forward by *Best Payphones* and *Stop-The-Barge*, the Court of Appeals decided that Grand Lafayette's claim regarding the alleged excessiveness of the condemnation did not become ripe upon the issuance of the CPC resolution, "since it was subject to potential *substantive review* by the City Council within [the] 20-day call-up period." 6 NY3d at 548 (emphasis added). On the other hand, ripeness did not await the approval of the Mayor's Office as this was just part of the capital budget process, "was not part of the ULURP review process and did not involve any substantive analysis of the CPC's [ ] findings." *Id*. Thus, even though the item might not have been included in the capital budget (if, for instance, Grand Lafayette mounted an effective lobbying campaign) and therefore might not have advanced as far as the Supreme Court vesting proceeding, the court held the injury to Grand Lafayette to be final with the lapse of the City Council call-up period.

Eadie v. Town of North Greenbush—Save the Pine Bush Redux?

Two months later the Court of Appeals decided the case of *Eadie v. Town Board of the Town of North Greenbush*, *supra*, 7 NY3d 306. This case concerned a challenge to the rezoning of property in the Town of North Greenbush to allow a shopping center. In September of 2003, a Draft Generic EIS (DGEIS) was circulated in connection with a proposed areawide rezoning that had been prompted by the request of John and Thomas Gallogly, the owners of property proposed for the shopping center. The DGEIS contained extensive discussions of various environmental issues, including traffic. There was considerable comment regarding the traffic issue during the public comment period. A final GEIS (FGEIS), which included more detail concerning traffic, was published on March 25, 2004. The town later adopted a statement of findings on April 28, 2004. According to the Court of Appeals, "The findings statement approved a project that included the rezoning of a number of parcels. It described proposed 'mitigation measures,' including those contained in its [traffic] access management plan," but left the timing of improvements to an unspecified future time. 7 NY3d at 313. After a hearing, the Town Board adopted the rezoning on May 13, 2004. Again, the traffic measures were left to be finalized at a future time.

Opponents to the rezoning brought an Article 78 on September 10, 2004. This date was more than four months following the SEQRA findings but less than four months after the rezoning vote. The respondents argued that the causes of action challenging the SEQRA determination were time barred. The petitioners made the familiar argument that the adoption of SEQRA findings was not a final action, and that any harm resulting from it had not become concrete until the rezoning was approved.

The Court of Appeals' ripeness/finality analysis in *Eadie* starts with *Grand Lafayette* and *Best Payphones*, two cases in which the court had held for early ripeness. As discussed above, both of these cases were held to be time barred. In *Grand Lafayette*, the court looked for the last decision or event involving the substance of the action which injured the appellant, i.e., the lapse of the City Council's call-up review of the proposed condemnation. That the acquisition might later have been dropped from the City's capital budget and become moot was not considered important. Similarly, in *Best Payphones*, despite the fact that the letter from DOITT merely (a) advised the franchisee that it had failed to comply with the condition of its franchise approval that it execute an agreement and (b) required the franchisee to cure its noncompliance by presenting an executed agreement, the fact that DOITT (c) set a time limit for the franchisee to cure its noncompliance was deemed in retrospect to be a final action which injured Best.

How did the court in *Eadie* harmonize these early accrual cases with its decision finding that the statute of limitations was triggered not by the final SEQRA action but by the later rezoning? It did so by citing *Save the Pine Bush v. City of Albany*, discussed above. As discussed above, *Save the Pine Bush* involved challenges to three ordinances. Applying the four-month limitations period to the review of the ordinances, the *Save the Pine Bush* court held that the challenges to two of the ordinances were time barred, even though no SEQRA had been performed as to either. The claim challenging the third ordinance, which rezoned a specific parcel after SEQRA review, was held to be timely and was considered on the merits. In distinction to *Eadie*, there is no indication in *Save the Pine Bush* that the question whether a SEQRA determination may itself trigger the limitations period ever came up. Despite this potentially important distinction, the Court of Appeals in *Eadie* took the position that *Save the Pine Bush* would be overruled were it to hold that the Town of North Greenbush's SEQRA findings statement constituted a final action which started the limitations period.[2]

In any event, the high court apparently believed it had to choose between *Save the Pine Bush* and *Stop-The-Barge*. To accomplish this, the *Eadie* decision distinguishes *Stop-The-Barge* in two ways. First, *Eadie* notes that "*Stop-The-Barge* does not control this case because it did not involve 'the enactment of legislation' as *Save the Pine Bush* did and this case does." The decision goes on to state the petitioners' injury was "only contingent: they would have suffered no injury at all if they had succeeded in defeating the rezoning through a valid protest petition or by persuading one more member of the Town Board to vote their way." 7 NY3d at 317. It is unclear how this potential for mootness differs in principle from that in *Stop-The-Barge* or *Grand Lafayette*.

Perhaps it is for this reason that *Eadie* attempts to distinguish *Stop-The-Barge* in another way. The Court of Appeals claims that *Eadie* differs from *Stop-The-Barge* because "in *Stop-The-Barge* the completion of the SEQRA process was *the last action taken* by the agency whose determination petitioners challenged. . . . It was not subject to review or corrective action by DEP." 7 NY3d at 317 (emphasis added). This comment apparently refers to the following comment in *Stop-The-Barge*: "We agree with DEP, NYCE and the Appellate Division that under the circumstances presented here, the CND was a final agency action for purposes of judicial review of petitioners' SEQRA claim." 1 NY3d at 223. In its *amicus* brief in the *Eadie* case, the State of New York highlighted this reference to the Appellate Division decision in *Stop-The-Barge*. In particular, the State argued that the Court of Appeals' statement in *Stop-The-Barge* that it agreed with the decision of the Appellate Division could mean only that the court understood the DEP to have no further role whatsoever in the approval of the energy project. According to

the State's brief, this conclusion was inescapable in view of the following language in the Third Department's *Stop-The-Barge* holding: "[T]he record reveals nothing indicating that any further action by DEP, such as its issuance of a permit, was expected or actually occurred. In these circumstances, DEP's issuance of a negative declaration completed the environmental review process for the purposes of calculating the timeliness of petitioner's judicial review proceeding." New York State *Amicus* Brief in Eadie at 17, citing *STB*, 298 AD2d 817, 819, (3d Dept. 2002).

The problem with this interpretation of *STB* is that it does not make sense. First, the suggestion that the DEP had no further role in the energy project beyond the CND is illogical on its face. Had this been the case, the DEP would not have been a SEQRA-involved agency, let alone the lead agency. The SEQRA regulations make clear that in order for an agency to be "involved" or "lead," it must have decision-making jurisdiction over some aspect of a proposed action. *See* 6 N.Y.C.R.R. § 617.2(s) ("involved agency" definition); 617.2(u) ("lead agency" definition).

Further, notwithstanding the strange nonfinding of the Third Department regarding the permitting role of the DEP, *both* sides in *Stop-The-Barge* agreed that the DEP in fact had further actions to take before the project could go forward. According to the DEP's brief to the Court of Appeals in *Stop-The-Barge*, it had to make a number of post-SEQRA decisions concerning the project. *See Brief of Respondent-Respondent DEP* in *Stop-The-Barge* (the DEP Brief) at 4. The DEP Brief points out that the notice published describing the CND "explained that, after the SEQRA review, the next steps towards implementation of the project would be applications for various installation and operating permits, *both City and State*." *Id.* at 4 (emphasis added). The DEP Brief goes on to enumerate the specific post-SEQRA actions needed for the project to move forward. *Id*. at 22–23. Similarly, the *Stop-The-Barge* petitioners-appellants alerted the Court of Appeals to the approvals yet to be issued by the DEP at the time the CND was finalized. *See Brief of Petitioners-Appellants* Stop-The-Barge et al. in *Stop-The-Barge*, May 15, 2003 ("*Stop-The-Barge* Petitioners-Appellants' Brief") at 3. In the context of their argument that the SEQRA decision was unripe for review, they specifically acknowledged that further action would be required of the DEP: "[I]n the case of multiple permits and coordinated review, the SEQRA statute of limitations should not start to run until the *lead agency* issues a final substantive approval; a circumstance that on this record *has not yet happened* in this case." *Id*. at 10 (emphasis added).

Finally, the "under-the-circumstances" sentence in *Stop-The-Barge* could not have meant that, for purposes of the Court of Appeals decision, the DEP had no further approval role because the sentence noted agreement not just with the Appellate Division but with the DEP and NYCE, both of whom, as noted above, argued that the CND was final *notwithstanding the fact that the DEP had further decisions to make before the project could be constructed*. Therefore, the only possible relevant point on which the DEP and NYCE agreed with the Appellate Division *under the circumstances of that case* was that "the issuance of the CND was a final agency action triggering the statute of limitations." 1 NY3d at 222.

In short, there are substantial questions regarding the underpinnings of *Eadie* at least with regard to its efforts to distinguish and limit *Stop-The-Barge* to its supposed facts.

After *Eadie*

Putting aside any skepticism concerning the need for, and the accuracy of, *Eadie*'s efforts to distinguish and confine *Stop-The-Barge*, the urgent question facing practitioners is what does *Eadie* mean? How will it be applied? Based on *Eadie*'s clarion reaffirmance of *Save the Pine Bush*, there would at first appear to be no doubt that, at least with regard to zoning changes, a SEQRA challenge is not ripe until enactment of the zoning. But the Court of Appeals hedged even this narrow and clear holding. *Eadie* proposes that even in cases involving legislation, there may be situations where the SEQRA limitations period will start prior to enactment. According to the court, an example of this could be if something in a SEQRA findings statement might unfairly burden a property owner's ability to develop its property. 7 NY3d at 317. Thus, in a given case, there might be different accrual points depending on whose ox is being gored. A property owner might be *required* to sue within four months of the issuance of a findings statement, whereas a project opponent's limitations period presumably would not accrue until some time later with enactment of the new zoning. Recall that the court had observed that project opponents' injury was merely contingent because they might have "succeeded in defeating the rezoning." *Id.* The type of situation which might trigger a property owner's claim earlier than enactment is a matter of speculation and, in all likelihood, future litigation.

Walton v. New York State Department of Correctional Services

If the next major statute of limitations decision from the Court of Appeals is any indication, the forecast is for more, rather than less, confusion. In the non-SEQRA case of *Walton v. New York State Department of Correctional Services*, 8 NY3d 186, 831, the petitioners were recipients of collect calls from New York State Department of Correctional Services (DOCS) prisoners. The petition sought to enjoin DOCS from receiving a 57.5% commission under its 2001 contract with MCI Worldcom, (MCI) the company that it had contracted with to provide collect call service to the inmates. In addition, the proceeding raised constitutional questions of due process, equal protection, the power to tax, and free speech. DOCS and MCI moved to

dismiss the case on the ground that the contract which set the commission had been approved more than four months prior to the initiation of the action. Despite "final" action by the two agencies directly involved with the DOCS-MCI contract approval process (DOCS and the Office of the State Comptroller), a divided Court of Appeals held that the petitioners' injury was not concrete upon contract approval because one element of the contract (the per-call rate structure) was subject to a later approval by a third agency, the Public Service Commission (PSC).

The contract between DOCS and MCI provided for two streams of collect call revenue to MCI: a per-minute call rate and a per-call surcharge. DOCS would receive a commission based on a percentage of these revenues. A small portion of this commission would be used to maintain the phone system, the rest would go into a so-called Family Benefit Fund account to provide medical and other services to the inmates and their families. The 2001 contract between DOCS and MCI provided for a "time-of-day" per-minute call rate structure plus the per-call surcharge. DOCS would receive a commission equaling 57.5% of the combined receipts from these revenue streams. In May 2003, DOCS and MCI agreed to amend the 2001 agreement to provide a flat charge of 16 cents per minute plus a $3-per-call surcharge. The 57.5% commission remained unchanged. Following DOCS' approval of the 2003 contract amendment, the State Comptroller added its approval on July 25, 2003.

MCI then filed an application with the PSC to revise its tariff to reflect the new per-minute charges. The *Walton* petitioners opposed the tariff application before the PSC. On October 30, 2003, the PSC determined that it had jurisdiction over the call charges, i.e., the portion of the charges relating to telephone service, but not over the DOCS commission. The PSC directed MCI to file new tariffs separating the jurisdictional and nonjurisdictional parts of call charges. The petitioners filed a combined declaratory judgment action and Article 78 proceeding on February 26, 2004, less than four months after the PSC determination but more than four months after every other action taken in the matter, including the Comptroller's July 25, 2003, approval of the contract amendment.

After determining that the claims in the petition challenging the 57.5% commission were subject to the four-month statute of limitations, the Court of Appeals once again turned to the two-part finality test announced in *Essex County*, also citing *Best Payphones*, *Grand Lafayette Properties*, and *Eadie*. Emphasizing the exhaustion of administrative remedies strand expressed by the second part of the *Essex County* finality test (i.e., that the injury may not be ameliorated by further administrative action), the court noted that, to the extent the injury complained of concerned the amounts charged for calls, this injury had been contingent until the Public Service Commission (PSC) ruled on MCI's tariff application. In the view of a majority of the court, the PSC could have rejected the entire package rather than split its decision between jurisdictional and nonjurisdictional components. This result "would quite obviously have significantly ameliorated the injuries petitioners contend they have suffered as a result of the high collect call rates, and would have forced DOCS to abandon the commission structure of its inmate collect calling system." 8 NY3d at 196.

Yet again, the Court of Appeals felt constrained to distinguish *Stop-The-Barge*, in which the Court ruled for early ripeness despite the possibility that a subsequent decision of another agency might have mooted the injury caused by the administrative action of the first, i.e., the CND issued by the DEP in *Stop-The-Barge*. As before, the court relied on the rationale proffered in *Eadie* that "the CND marked the point at which the review process by DEP . . . was complete." *Id*. Taking the point a step further, the *Walton* decision continues, "A refusal by DEC to issue an air permit would not have forced DEP to reconsider its CND." *Id*. Tying this logic back to the situation in the *Walton* case, the court wrote, "Here, on the other hand, corrective action by DOCS would necessarily have followed disapproval of the MCI rates by the PSC, and therefore petitioners had not exhausted available administrative remedies until the PSC review was complete." *Id*.

A strong dissent by Judge Read, who took no part in the *Eadie* decision, attacks virtually every element of the majority opinion in *Walton*. The dissent first points out that the 2001 determination of DOCS to require a 57.5% commission, which the petitioners had sought to enjoin, was in no way affected by the 2003 contract amendment, which was only concerned with a change of the telephone call rate structure. The dissent further points out that the PSC itself "took the position in its 2003 determination that it did not even have *jurisdiction* over the commission." 8 NY3d at 200 (emphasis in original). Thus, if the petitioners had any expectation that PSC action would nullify the commission, this was wrong as a matter of law. *Id*. Judge Read's dissent also points out that, if the petitioners had been operating under the assumption that the determinative decision would be that of the PSC, they should have sued that agency, which they did not. More to the point for present purposes, Judge Read debunks the majority's attempt to distinguish *Stop-The-Barge*.

Judge Read's dissent disagrees with both of the assumptions that the majority decision uses to distinguish *Stop-The-Barge*: (1) that a negative decision by the DEC in *Stop-The-Barge* would not have forced the DEP to reconsider its CND, and (2) that a negative decision by the PSC in *Walton* would have forced DOCS to reconsider the 57.5% commission. As to *STB*, Judge Read acknowledged that an outright rejection of the NYCE air permit by the DEC would have obviated any further action by the DEP. However, her dissent notes that it would be "more likely [that] DEC would have attached conditions to its ap-

proval, which, depending on their terms, might well have required the company to ask DEP to revise the CND's provisions." *Id*. On the other hand, Judge Read's dissent points out that in the *Walton* case, a negative PSC decision concerning the 2003 contract amendment could merely have caused DOCS to revert to the 2001 time-of-day rate structure, with the 57.5% commission intact. 201, 758–59. Judge Read's overarching point is worth quoting in full:

> What all of this shows, of course, are the ambiguities and difficulties inherent in trying to craft an exception to our usual claims-accrual rule—as the majority does in this case—so as to make a challenge to an administrative agency's final and binding determination accrue (or, more accurately, revive) on the date when another administrative agency makes a corollary determination with respect to the same contract or project. It is almost always possible for a party to argue—as petitioners do here—that some action the second agency (here, the PSC) might have taken might have caused the first agency (here, DOCS,) to revisit the complained-about decision in whole or in part, or that the party had a good-faith belief that this was so. But this does not make the first agency's determination any less final and binding. Moreover, such an approach is antithetical to the finality and certainty that the four-month statute of limitations under CPLR article 78 is intended to achieve. 8 NY3d at 202.

Judge Read's dissent continues: "I note also that we have consistently sought over the past several years to encourage parties who seek to challenge an agency determination to do so *at the earliest possible date*." *Id*. (emphasis added) *citing, with parenthetical notes as follows*, *Grant Lafayette Properties* ("city planning commission's determination to approve planning commission's determination to approve condemnation of property final and binding after expiration of 20-day city council call-up period notwithstanding fact that mayor's office subsequently approved project"); *Best Payphones* ("agency letter denying franchise starts statute of limitations notwithstanding fact that letter is conditional and gives applicant 60 days to cure"); and *Stop-The-Barge* ("under SEQRA, CND is final agency determination that starts statute of limitations notwithstanding fact that other administrative proceedings will take place").

Rather than accept that, with cases like *Walton* and *Eadie*, the Court of Appeals has abandoned the doctrine of repose, Judge Read concludes that the *Walton* decision should be "chalked up as sui generis." *Id*. Given Judge Read's formidable critique of *Walton*, including *Walton*'s effort to further limit *Stop-The-Barge*, it is reasonable to query whether the Court of Appeals has completely made up its collective mind about the *Stop-The-Barge*, or at least about the ripeness of final SEQRA determinations in situations where "other administrative proceedings will take place."

Perhaps the Court of Appeals' extraordinary mental gymnastics in *Walton* is best explained in Judge R.L. Smith's concurring opinion. Although his concurrence supports the majority decision on the theory that the important constitutional questions presented in the case should not, in his view, be barred by an unforgiving application of the short statute of limitations for administrative challenges under the CPLR, Judge Smith, *who authored Eadie*, concludes that "[i]t is in part to avoid the constitutional problems that this case would otherwise present that I choose the majority's rather than the dissent's view." 8 NY3d at 198. Even Judge Smith appears to be having second thoughts on the subject.

Walton seems most clearly to stand for the proposition that confusion will continue to reign in the case law jungle of ripeness and finality.

Conclusion

Several things are clear. First, the question of when the limitations period commences in multistage administrative actions is often *un*clear. Second, SEQRA exacerbates the inherent difficulty of this question. This may be because SEQRA is both procedural and substantive. That is, while SEQRA adds a procedural overlay to existing administrative practice, it also comes with its own substantive mandates. *See* Philip H. Gitlen, *The Substantive Impacts of the SEQRA*, 46 ALBANY L. REV. 1241 (1982). SEQRA and related administrative challenges can therefore be procedural, substantive, or, more likely, some admixture of the two. As a result, the courts have been particularly bedeviled in their efforts to determine when SEQRA challenges are ripe for review or are time barred in particular matters.

As outlined above, advocates in various cases have presented countervailing policy and practical reasons to support opposite conclusions as to the accrual of SEQRA claims. Parties arguing that the SEQRA limitations period should begin only with the first "substantive" approval or action following SEQRA often claim that SEQRA is a mere procedure, an interim step, on the way to that subsequent action. As such, the implementation of a SEQRA determination is by definition contingent on a later decision and therefore is not final. They add that the courts will be faced with piecemeal and vexatious litigation if interim or even final SEQRA steps are considered ripe for review. On the other hand, supporters of the early accrual theory

point out that SEQRA itself calls for the substantive analysis and resolution of environmental impact questions as early as possible. Waiting to sue upon subsequent administrative actions could therefore have the perverse effect of effectively mooting the SEQRA issue, as in the case of negative declarations. They stress that the short statute of limitations for Article 78 proceedings is designed precisely to achieve certainty and repose with respect to government decision making. Proponents of early accrual also point out that the first subsequent action may take place long after the conclusion of the SEQRA process and may have little connection with it, such that the substantive portion of the petition (i.e., the SEQRA claims) may have nothing to do with the substance of the challenged action. More generally, those favoring early ripeness argue that over the past decades SEQRA has come to be much more than an incidental procedure. To the contrary, in many cases SEQRA is the main event, in which case, they argue, the proper time to initiate a SEQRA challenge should be measured from critical decision points in the SEQRA process, such as, the determination of significance or, in the case of a full SEQRA review, from the statement of findings.

In conclusion, it appears that as long as the question of the timing of SEQRA litigation is left to the courts, the issue will remain problematic. Except perhaps in the very narrow case of SEQRA challenges in zoning cases where the prospective petitioner is a project opponent, the prudent counselor will, as has often been said, be loath to recommend anything other than to "sue early and often."

A Suggestion

As summarized above, there are important and opposing policy and practical considerations in disputes over the timing of SEQRA challenges. Reasonable minds can and do differ over how they should be weighed. This issue cries out for legislative clarification. It is reported that the State of New York is planning to propose amendments to SEQRA to clarify the rules governing the timing of SEQRA challenges. The author suggests that the Environmental Law Section review the state's SEQRA amendment proposal as well as any others[3] with a view to making its own recommendations to the State Legislature. Whether one is for early or late ripeness in SEQRA challenges, the current state of "sui generis" adjudication is to no one's benefit.

Endnotes

1. Practitioners and scholars familiar with the body of case law dealing with the ripeness or finality of administrative challenges may notice the absence of a number of frequently cited cases. The author attempted to provide useful summaries of a reasonable number of reported cases expressing or exemplifying important elements of the ripeness/finality issue as it has developed over the years. However, the field had to be narrowed, lest the article become completely unwieldy. As a result, some noteworthy cases are not discussed in this limited survey. Other sources for information on this topic include Professor Weinberg's excellent Practice Commentary following Environmental Conservation Law § 8-0109 in McKinneys *Consolidated Laws of New York – Annotated*, Volume 17½. A very thorough discussion of this and related issues is also presented in the LexisNexis publication *Environmental Impact Review in New York*, by Gerrard, Ruzow and Weinberg, Chapter 7, § 7.02 (Timing of Litigation).
2. In is noteworthy that, in holding that the *Eadie* petition was untimely with respect to SEQRA challenges, the Appellate Division considered and rejected the claim that *Save the Pine Bush* and *Stop-The-Barge* are mutually exclusive. In this regard, the Third Department wrote, "Furthermore, we are unpersuaded that [*Save the Pine Bush*], which predates the decision in *Stop-The-Barge*, compels a different conclusion."
3. As, for example, that proposed in a 2006 article by John M. Armentano, Esq. *See* Armentano, *Statute of Limitations, Court Confuses Four-Month Rule In Zoning Cases*, New York Law Journal, July 26, 2006.

The views presented herein are exclusively those of the author and do not represent those of the Environmental Law Section or the NYSBA.

Developing Wisdom*: Analysis of a Living Watershed

By Elizabeth Ferrell

**True wisdom consists in not departing from nature, and in molding our conduct according to her laws and model.*
—Seneca

Introduction

As the human population of our planet increases simultaneously with our ability to chemically and mechanically alter our environments, the human race faces increasing pressure to balance the impacts of economic growth on the natural environment with maintaining a healthy and livable environment. The difficulty finding this balance is particularly poignant in the New York City Watershed,[1] located in the Catskill Mountains, 125 miles north of New York City. In the part of the Watershed located west of the Hudson River, the landscape is mostly rural, mountainous, and sparsely populated. To date, human land uses have had only limited impact on the water quality in the West of Hudson basins. Because the water is of exceptional quality, municipal water supplies sourced from those rivers and streams need not filter the water before supplying it to the public. The high quality of water is both a blessing and a curse to the West of Hudson Watershed residents: They enjoy pristine waters and abundant natural beauty, but New York City's endeavors to maintain the water quality have severely restricted the Catskill communities' ability to grow and thrive.

This article seeks to examine the impact and efficacy of the water quality protection measures with respect to their effect on economic development and growth within the West of Hudson Watershed communities. Because the developers of a proposed project in the watershed have recent first-hand experience with the restrictions on growth within the watershed, this article will closely examine those particular experiences to aid in the examination of restrictions more generally.

Part I: Setting the Stage

Towards Safe Drinking Water

The Safe Drinking Water Act of 1974,[2] as amended in 1986 and 1996, ensures that publicly distributed waters in the United States will not compromise the health of its residents. Until recently, water suppliers have relied on filtration to treat water before distribution. Unfortunately, conventional treatment and filtration can fail to remove all pathogens from the water supply.[3] Some of the pathogens can even be fatal to persons with weakened immune systems.[4] In addition to pathogens, conventional treatment can fail to eliminate many toxic chemicals that enter our water system via household sewers, manicured lawns, and roadways.[5] Finally, water treatment systems can and do fail entirely, exposing us to untreated water.[6] Maintaining high quality source water supplies is therefore an essential element to protect public health.

Congress recognized the importance of source water protection by increasing emphasis on those measures in the 1986 Amendments to the Safe Drinking Water Act. Pursuant to this Act, the Environmental Protection Agency (EPA) specified the circumstances under which drinking water drawn from surface water bodies must undergo filtration.[7] Under the rule, public water suppliers may forgo filtration if they can prove the existence of, and their capacity to maintain source waters of sufficiently high quality.[8] Before a public water supply system can avoid filtration, the EPA must grant a so-called "Filtration Avoidance Determination" (FAD), indicating that "the public water system [can] demonstrate through ownership and/or written agreements with landowners within the Watershed that it can control all human activities which may have an adverse impact on the microbiological quality of the source water."[9] Where the water supplier owns all or most of the watershed, this demonstration is relatively straightforward. In privately owned watersheds, such as the New York City (NYC) Watershed, the intricacies of social, legal and political rights and prerogatives render this no simple matter.

Safe Drinking Water in New York City and Suburbs

Pursuant to the Surface Water Treatment Rule, New York City may either build a massive filtration plant at an estimated cost of $6 to $9 billion,[10] with estimated annual maintenance costs of $200 to $400 million,[11] or obtain EPA's FAD approval and forgo filtration so long as it can demonstrate a capacity to maintain high quality source water. In 1993, 1997, and 2002, the EPA granted NYC a FAD for waters originating in the Catskill and Delaware water (generally West-of-Hudson) supply systems.

The New York City Watershed is the largest unfiltered surface water supply in the country,[12] composed of a network of 19 reservoirs in a 2,000-square-mile Watershed that extends 125 miles north and west of New York City,[13] and provides 90% of the 1.4 billion gallons of water supplied daily to 9 million New Yorkers and residents of Westchester, Putnam, Orange, and Ulster Counties.

Because 70% of the property in the New York City Watershed is privately owned[14] it has the highest population density of any other large, unfiltered watershed in the country.[15] The watershed's 21 drainage basins, associated reservoirs, and controlled lakes are divided into three districts: the Catskill, Croton, and Delaware Districts.[16] The Catskill and Delaware system series of reservoirs constitute the "West of Hudson" part of New York City's Watershed. The "Croton" system of reservoirs encompasses the "East of Hudson" source waters. To complicate matters, the Kensico reservoir—the terminal point of and formally part of the West of Hudson system—receives water from East of Hudson catchment areas.

The Beginning: The MOA

To better understand the importance of the FAD, one must first backtrack to 1994. In that year, after a tumultuous four years, New York State, NYC, the Watershed communities, and various environmental groups agreed to negotiate a reasonable, effective, and scientifically defensible Watershed protection program satisfying the requirements of the SWTR.[17] These negotiations resulted in the "Memorandum of Agreement" (MOA),[18] which satisfied the EPA that New York City could control human activity within the Watershed, meeting a critical requirement of the FAD. Under the MOA, New York City, New York State, and the federal government committed massive funds to protect the water. New York City pledged $666 million for land acquisition and partnership programs and $550 million for infrastructure and water quality improvements; New York State committed $53 million to foster partnership and to aid in implementation of the Watershed Agreement; and the Federal Government committed up to $105 million under the Safe Drinking Water Act Amendments of 1996.[19]

Part II: Conditions in "the Watershed"

A critical aspect of the MOA without which the agreement may not have been possible was its express statement that economic development and maintaining water quality were not incompatible goals. If the two goals are not wholly incompatible, they are at least in tension within the watershed. Economic growth may lure additional permanent residents to the Watershed; in contrast, a focus on water quality protection measures seeks to protect the water from the negative impacts on water that increase in correlate with population density. The economic future of Watershed towns and cities as well as the effectiveness of the MOA hinge on balancing the two goals, a task that has proven difficult.

Currently the Catskill/Delaware Watershed landscape is largely rural. Agriculture has traditionally been a vital, albeit declining, part of the Watershed economy. Other mainstays of the Watershed economy include tourism, manufacturing and construction.[20] In particular, tourism has played a major role in the Watershed economy and community character.[21] From the early 1900's until as late as the 1960's tens of thousands of tourists visited the Catskills annually. Today, many Watershed communities have focused on reviving tourism to boost their declining local economies.[22]

Although the MOA did not expressly endorse any particular type of economic development appropriate for the Watershed, the economic development studies funded under the MOA suggest that tourism may be the region's best bet. Specifically, the MOA established the Catskills Fund for the Future (CFF),[23] whereby the City pledged approximately $60 million "to establish a program supporting responsible, environmentally sensitive economic development projects." Under the MOA, New York City also funded a comprehensive study of community and economic development goals and opportunities for the West of Hudson Watershed consistent with the City's water quality objectives and the Watershed Regulations.[24] The study evaluated specific opportunities that would build a stronger base for regional employment by major economic sectors.[25] The completed study suggested that an emphasis on reviving the tourism industry, and that CFF funds should be spent to encourage large-scale resorts. However, the report contained one significant caveat: "in all cases it should be demonstrated that the project will not result in secondary growth via new housing or roads, that would threaten water quality."[26] In effect, this statement swallows the endorsement for any development – for how can the region support tourists without infrastructure to support the development? Any new development will have some impact on the water, via roadways or possible secondary growth from employees, or visitors who later return as private individuals to acquire a primary or a secondary residence in the Catskills.

Water Quality Problems in the Catskill Region

To best understand how to protect the water quality in the Watershed, the first step is to understand the threats to water quality. The most significant problems in the Catskill/Delaware Watershed are microbial contamination and eutrophication caused by nutrient enrichments, and sediment loading and turbidity.[27] The Whole Farms Plans program targeted agricultural sources of contamination and has made progress both in decreasing phosphorous and by exercising and expanding local capacity to plan and implement storm water management techniques.

Progress notwithstanding, "[t]he poorest water quality is associated with areas that have significant population growth."[28] Sewage is also an important pollutant threatening water quality in the Watershed.[29] In addition, with increased human activity in the watershed comes a heightened impact on water quality from Stormwater runoff,[30] in part because increased development often precipitates an increase in impervious surface coverage.[31]

Defining the Goal: Economic Growth

As discussed above, it is important to understand the threats to water quality in the Watershed. Similarly, the term "economic development" is an important threshold issue. Without properly defining "economic development" as used in the MOA, the agreement in the MOA was merely illusory.[32]

Unfortunately, it appears that the Watershed Communities, NYC, and the Department of Environmental Conservation (DEC) failed to address this threshold issue before "agreeing" to watershed management conditions that would permit economic growth. The MOA very confidently asserts that "the goals of drinking water protection and economic vitality within Watershed communities are not inconsistent . . ."[33] and ". . . the Agreement, when implemented . . . would allow existing development to continue and future growth to occur in a manner that is consistent with the existing community character and planning goals of each of the Watershed communities. . . ."[34] Despite such bold statements, evidence suggests that signatories to the MOA did not truly agree to anything more than the most vague notions of economic growth. First, in 1993 the New York City Department of Environmental Protection commissioned a Draft Generic Environmental Impact Statement (GEIS)[35] to examine the impact of the then-proposed Watershed Rules and Regulations on the Watershed. Some of the Draft GEIS and analysis rest on plainly stated but perhaps unfair assumptions about the future of the Watershed Communities; and more specifically, assumptions about potential land use changes to boost economic growth:

> no significant land use changes are anticipated between future condition without implementation of the Draft Watershed Regulations and the future should the regulations be implemented. . . . Projected commercial and industrial land use remains virtually identical in the two scenarios.[36]

The drafters of the Draft GEIS assumed that land use patterns within the Watershed could remain the same and still support economic development. Yet logically, some shift in land use patterns is necessary to promote economic growth in an economically depressed region. Popular notions of economic growth support that land use patterns need to shift with economic growth patterns. Generally, economic development correlates with economic growth.[37] Authors Beryl and Radin note that "economic development . . . implies a change in the character or structure of the economy of an area."[38] In addition, economic development generally implies "building and maintaining local and regional institutions which . . . generate[] an acceptable quality of life today . . . and . . . [in] the future."[39]

In another assumption about the Watershed's future economic growth, the draft GEIS stated that "[i]mplementation of the Draft Watershed Regulations West of Hudson would have no impact on projected employment in the Watershed with the exception of the Towns of Hurley and Woodstock. Every town in the watershed with the exception of Hurley has enough land to accommodate projected employment growth."[40] Thus, the GEIS drafters assumed employment needs in the Watershed would remain at the 1993 employment levels, ignoring the need for jobs potentially created by alternative land use patterns. Between 1980 and 1990, several Watershed communities suffered population decline.[41]

Regardless of legal restrictions on economic growth in the Watershed, the region's geography significantly limits development opportunities. The Draft Generic Environmental Impact Statement notes:

> Outside of the river valleys,[42] much of the land is too mountainous and steep for building. Although there [were] 16,000 acres of vacant land, only 9,600 [were] suitable for development, even at slopes of up to 25 percent [in 1993].[43]
>
> Likewise, in Shandaken, the natural topography of the area severely limits development: "Mountainous forested preserves [] make up three-quarters of the town's land area. . . . Of the roughly 6,000 acres of vacant land in the town, only about 3,000 are developable."[44]
>
> [In Middletown] implementation of the draft watershed regulations is estimated to remove 935 acres from potential development. Consequently, almost 1,900 acres of the new development would be on land with more than 15 percent slope and 900 acres of developable land would remain [after setback requirements and other land use restrictions removed land from developable acres].[45]

Today, these figures of developable land have been further reduced by New York City's land acquisition program, which permits the City to purchase vacant land with a slope greater than 15%, thereby removing it from the total tally of developable acreage.

Legal Restrictions on Economic Growth

Before any significant developments can be built within the watershed and contribute to the region's economic development, prospective developers face several legal hurdles. First, the State Environmental Quality Review Act (SEQR) applies, providing an opportunity for public comment. Second, developers must apply for and

receive permits from the Department of Environmental Conservation. Finally, developers must also get permits from New York City's Department of Environmental Protection.

a. State Environmental Quality Review Act

The New York State legislature enacted the New York State Environmental Quality Review Act[46] to ensure "a suitable *balance* of social, economic and environmental factors be incorporated into the planning and decision-making processes of state, regional and local agencies."[47]

Every time a local, municipal, or state agency or department grants a permit, that decision is an "action" that may be subject to SEQR, depending upon the size of the project. When SEQR is required,[48] a Lead Agency assumes responsibility[49] to lead the Environmental Impact Statement (EIS) review and, ultimately, determines the acceptability of the project's environmental impact.[50] The Lead Agency bears responsibility for either preparing a draft EIS or for seeing that the developer commissions preparation of a draft EIS. The Lead Agency also determines when the draft EIS is ready for public review and comment.[51] At the close of all review and comment periods, the Lead Agency must finalize the EIS, on the basis of which the Lead Agency will either approve or disapprove of the proposed action.[52]

The breadth of issues encompassed by the term "environment" under SEQR is large: in addition to the impact on the natural physical environment, SEQR issues may include aesthetics,[53] impact on "population concentration, distribution, or growth, and existing community or neighborhood characteristics."[54] In addition to immediate impacts of a development, the cumulative impact of a development is also subject to SEQR review. The cumulative impacts analysis has historically only been required where projects or actions are included in, or undertaken as a result of a town's long range plan, or where multiple projects are proposed or advanced at about the same time.[55]

b. New York State SPDES Permits

In addition to gaining the necessary approvals under SEQR, prospective developers must obtain several permits from the New York State Department of Environmental Conservation (DEC). First, the developer will probably need to acquire a State Pollutant Discharge Elimination System (SPDES) permit. Pursuant to this permitting authority, DEC regulates the area's wastewater treatment plants for requisite reliability standards, effluent limits, and required monitoring. Developers need also obtain water supply permits, to ensure there is adequate water supply for the new development.

Should DEC determine that the existing wastewater treatment plants are insufficient to service new development, and if it will not grant SPDES permits to expand or develop new wastewater treatment plants, then future development would be confined to that supported by septic systems.[56] But in the Watershed, development relying on septic systems is also subject to regulation, in this case from New York City.

c. Watershed Rules and Regulations (or DEP Permits)

Under the WR&R, New York City has the power to regulate some types of development within the watershed[57] by requiring parties to obtain a permit from DEP before engaging in certain activities.[58] Interestingly, the WR&R give New York City broad powers to ensure that watershed activities have *no impact* on the water supply.[59] This broad authority is tempered only by a statement that regulatory decisions must be made after taking consideration of the particular characteristics of the affected water supply.[60]

More specifically, NYC DEP's Stormwater pollution prevention permit authorizes DEP to grant or deny applications for new construction, even on individual residences. This Stormwater permitting authority stems from recognition that stormwater runoff can have a damaging impact on water quality:

> Stormwater is water that runs off the land's surface as a result of rain or melting snow or ice. . . . Land development . . . particularly impervious surfaces . . . can prevent stormwater from infiltrating the soil . . . increase[ing] the volume and velocity of runoff, causing flooding, and interferes with the natural processing of . . . contaminants by biological activity in the soil.
>
> [C]ontaminants [such as] oil and grease, pesticides, suspended solids, . . . nitrogen and phosphorus, and bacteria . . . run into surface water and degrade water quality, wildlife habitats, and the recreational enjoyment of rivers, bays, and beaches. Increased runoff also degrades stream channels, erodes slopes and other land surfaces, and causes landslides, the loss of topsoil, and the buildup of sediment.[61]

As a preliminary matter, it may be appropriate to question the appropriateness of imposing Stormwater permit requirements on the West of Hudson Watershed communities at all. The draft GEIS predicted that the regulations would not drastically alter contaminant loading in most of the West of Hudson reservoirs,[62] but that the real impact of the regulations on the West of Hudson system was in the Kensico reservoir.[63] As the final dumping point for Catskill/Delaware waters, the Kensico reservoir is technically part of the Catskill/Delaware system; how-

ever, water quality in the Kensico suffers, presumably, from discharges within its own catchment. Some of this pollution likely proceeds from development taking place East of Hudson, but within the Kensico catchment area. If the GEIS accurately predicts that water quality from the Catskill/Delaware system was not materially affected by the imposition of Watershed Rules and Regulations, then it seems somewhat illegitimate that the Catskill/Delaware watershed is nevertheless subject to such severe restrictions. A more appropriate solution might specifically address the sources of pollution within the Kensico reservoir.

In theory the Watershed Rules and Regulations, together with the DEP and DEC permits should sufficiently protect the water from developments adversely impacting water quality. Nevertheless, significant developments within the Watershed must also undergo SEQR, which contemplates water quality impacts and broad impacts on wildlife, community character, noise pollution and traffic. Therefore, SEQR is useful in the Watershed, as elsewhere, to require a balance between the benefits of development and the environmental impacts resulting from development. Moreover, SEQR provides an important opportunity for public opinion to play a role in cultivating local communities.

In the Watershed, the combined impact of the permitting system and the SEQR process is greater than the impact of either SEQR or permits alone. In reality, the MOA and the Watershed Rules and Regulations have heightened public awareness of the region's unique environmental character—superb water quality. In turn, the hyper-aware public has greater incentive to participate in SEQR. While SEQR participation alone does not give rise for alarm, increased SEQR participation can be problematic if the public vigorously challenges non-water quality impacts as mere pretense to bolster challenges to water quality impact issues.[64] Mere pretextual interest in the SEQR issue seems contrary to the spirit of SEQR and unduly prejudicial to the developer, who presumably has an interest in freedom from pretextual claims.

PART III: Case Study: The Belleayre Resort at Catskill Park—Environmentally Responsible Economic Growth?

Crossroads Ventures, LLC has proposed the largest resort ever built in the Catskills, a $450 million Belleayre Resort, occupying approximately 2,000 mountaintop acres in the Watershed. Of these 2,000 acres, the proposal calls for development of 573 acres to house: two championship golf courses, two luxury hotel complexes, a world-class spa, hundreds of time-share apartments, and single-family homes. Crossroads Ventures intends to place the remaining 1,387 acres under conservation easement.[65] Before Crossroads Ventures can begin construction it must undergo SEQR and obtain SPDES and NYCDEP Stormwater permits. As of May 2006, Crossroads Ventures has been waiting more than six years for the appropriate approvals and permits and a final determination is not yet in view.

In 2000, the DEC asserted Lead Agency status for the Belleayre Resort SEQR and in December 2003, they accepted the draft EIS for review. [66] In January 2004, the administrative law judge began review[67] and ordered public hearings.[68] In September 2005, the judge granted party status to eight interested parties and ordered adjudicatory hearings on twelve of the sixteen issues addressed in the draft EIS. The developer, the DEC, and two additional parties appealed the adjudication determinations and opposing parties have responded to these appeals. Presumably, after the DEC Commissioner rules on the appeals, the remaining adjudicable issues will be subject to a trial-like hearing process. Once the hearings are complete and the administrative law judge determines that the draft EIS sufficiently and accurately addresses the issues, the then-final Belleayre EIS will be ready for DEC review and determination.

The Belleayre Resort SEQR timeline is unusually long owing to the project's location in the Watershed and the public debate stemming from that location. New York City and environmental preservation groups' concerns notwithstanding, the desirability of the development is hotly debated among Watershed residents themselves. As previously discussed, a major preoccupation in the Watershed is with stimulating economic growth. Some Watershed residents believe the Belleayre Resort can revitalize tourism and the region's flagging economy.[69] Crossroads Ventures estimates that the resort will create 500 full-time jobs, 330 part-time jobs, and $20 million in annual salaries.[70] Moreover, they estimate that resort guests will spend $12 million annually in the villages and hamlets along Route 28.[71] In contrast, some Watershed residents prefer the "Sleepy Hollow" feel of the Catskills[72] and fear the resort will overwhelm the region with traffic, noise and light pollution.[73] Whatever the local prerogative may be, local governments within the Watershed have made clear that they wish to decide the future of their communities themselves. Several issues pertaining to community conditions have made their way into the DEC-led SEQR, and local governments resent outsider input on "Home Rule" issues. Thus, local towns have joined Crossroads Ventures on several appeals, not on the developer's behalf, but rather to challenge outsiders' influence on local land use determinations.[74]

Standing

The resort proposal inspired many distinct environmental organizations to unite their challenges to the project. In addition to the applicant, the DEC, and various governments and agencies, the administrative law judge granted party status to the Catskill Preservation Coalition and the Sierra Club (jointly referred to as "CPC"). A

conglomerate of environmental organizations, CPC exemplifies "heightened public awareness." CPC's members are: Trout Unlimited; Natural Resources Defense Council, Inc.; Riverkeeper, Inc.; Catskill Center for Conservation and Development, Inc.; Friends of Catskill Park; Zen Environmental Studies Institute; Pine Hill Water District Coalition; Catskill Heritage Alliance; Theodore Gordon Flyfishers, Inc.; New York Public Interest Research Group; and the Sierra Club.[75] Some, but not all of CPC's constituent groups' members live in the Watershed or within New York State. Nevertheless, the administrative law judge found that CPC satisfied the generous standard for organizational standing.[76] Party status enabled CPC to raise "substantive and significant issues" regarding completeness and adequacy of the draft EIS.

Lead Agency Determination

In addition to inspiring public participation, the Belleayre proposal motivated multiple agencies to assert themselves as Lead Agency for SEQR. Usually, only local planning agencies assert Lead Agency status for SEQR proceedings on projects within their jurisdiction. This being the Belleayre resort, however, the usual course would not suffice. Because one half of the resort would be located in Shandaken, and one half in Middletown, neither local government has full jurisdiction over the project. Although Middletown did not assert Lead Agency status, NYC took the highly unusual step and did assert Lead Agency status to protect its interest in its water supply system. In particular, the DEP feared that Shandaken's planning department lacked the experience necessary to competently review such a large-scale project. While NYC's planning board may be better equipped to handle large-scale environmental reviews, neither NYCDEP nor Shandaken ultimately took the role of Lead Agency. Relying on 6 N.Y.C.R.R. Part 617.6(b)(5)(v), governing Lead Agency disputes,[77] the DEC Commissioner ultimately determined that New York State DEC was best suited to lead SEQR. One of the commissioner's rationales for the decision focused on the inherently regional nature of impacts to state waterways and the state-owned Catskill Park. Because these impacts are of greater regional than local concern, the Lead Agency needed a predominantly regional perspective. Of the three, the DEC offered the most regional perspective.

Unfortunately, there are several drawbacks to having DEC as Lead Agency. First, the DEC is not intimately familiar with local prerogatives and sensitivities within the West of Hudson Watershed communities, resulting in a SEQR analysis less attentive to local concerns. Second, SEQR guidelines mandate that when DEC is Lead Agency, DEC permits and SEQR processes proceed together in a combined agency action. The result is that permit applications, which are typically privately determined by an agency, become part of the SEQR review and thereby subject to public comment.

Part IV: Analyzing the Process

SEQR

a. Standing

Although the ALJ determined that CPC had satisfied the requirements for party status, the Watershed towns and municipalities might justifiably view CPC's input on the issue of "community character" as unwelcome infringement on local decision-making authority. After all, because many CPC constituents do not live in the Catskills, perhaps they should not be heard with respect to issues of local prerogative.[78] Under current law, however, CPC is a party, and therefore, may raise issues of community character. A corollary to issue-raising power is the power to increase the scope of SEQR, thereby increasing SEQR costs and delaying final determination. Indeed, Crossroads Ventures has spent more than $8 million on permits and SEQR related expenses and counting.

Despite the environmental groups' willingness to participate in SEQR, they were less willing to converse with the developer outside of SEQR. According to Crossroads Ventures' Dean Gitter, he contacted several of CPC's constituent groups seeking input during the planning stages of the development,[79] but not one organization responded.

Despite any initial reluctance to discuss the resort, CPC has certainly made itself heard during SEQR, if only through its power to increase costs. Environmental groups play a vital role in environmental reviews, wherever located.[80] In the NYC Watershed, however, stricter requirements may be appropriate to regulate SEQR participation because the Watershed is already strictly regulated by the DEP. One approach to restrict standing provisions is to require any group to engage in facilitation or arbitration with the developer before requesting party status.[81] Such requirements would not preclude public participation in SEQR, and instead merely require that such groups engage in meaningful attempts to resolve their differences with the developer's proposal outside SEQR. While a facilitation or arbitration requirement may impose financial hardship upon groups or individuals seeking SEQR party status, absent facilitation or arbitration agreements parties can and often do inflict financial hardship by using SEQR as a dilatory tool instead of a means to craft environmentally sensitive development.

Watershed residents also criticize New York City's SEQR involvement, especially regarding issues not directly related to water quality.[82] Although New York City may only submit evidence directly relating to water quality, this limit is broad enough to allow New York City to comment on the secondary growth that the resort may induce. CWT has appealed NYC's involvement in secondary growth issues. New York City's draft EIS clearly indicates however, that secondary growth from development is of the utmost concern.[83] Moreover, the

EPA will likely consider the possible future growth in the Watershed before renewing NYC's FAD.[84] Because the FAD relies on New York City's ability to control human activity within the Watershed,[85] the impact of today's activities on future human activity within the Watershed is of central importance. Although NYC may be properly motivated to control induced growth, it can restrict future development through its permitting authority. Therefore the Belleayre SEQR is an improper forum for determining the permissible contours of future growth at the expense of this developer.

One final point of interest on the Belleayre SEQR is that the parties did not introduce a Comprehensive Plan into evidence. CPC successfully raised a substantial and significant issue with respect to community character because local and regional zoning and planning efforts did not conclusively establish "community character."[86] If, however, those zoning and planning efforts had taken the form of a formal Comprehensive Plan, the judge may have been less inclined to admit additional evidence on community character.[87] Comprehensive Plans may provide strong evidence defining a community's character.[88] Moreover, when cities prepare a GEIS for the Comprehensive Plan, that GEIS can substitute or supplement any site-specific SEQR. Because a GEIS might prescribe mitigation measures applicable to all development in an area, site-specific developers may not need to prepare expensive site-specific environmental studies. As a result, the GEIS can incent developers to concentrate their projects within specifically designated growth areas.[89] For example, many issues addressed in the Belleayre EIS could have been properly addressed by a region-wide GEIS, which may have drastically reduced Crossroads Ventures' EIS preparation costs. In addition, presence of a GEIS may have been able to reduce the length and cost of SEQR; presumably, a GEIS for a regional Comprehensive Plan provides substantial evidence of community expectations with respect to character, scenic views, and open space priorities. Comprehensive Plans can also inform assumptions about the location and extent of cumulative effects and induced growth by delineating the suitable areas for future growth. Comprehensive Plans are particularly adept at addressing the cumulative impacts of a proposal, as "it may be difficult for applicants to evaluate fully the cumulative impacts of their projects on the area and the area's ability to absorb these impacts over time. . . . [because] [f]ew 'related projects' will be at the same stage in the approval process or be completely designed at the same time."[90]

b. Lead Agency

The DEC Commissioner's Lead Agency determination was another font of discontent arising from the Belleayre SEQR. The MOA and the FAD both emphasize local planning capacity as a critical aspect of water quality protection,[91] thereby underestimating the significance of the Lead Agency determination. In other words, the MOA and FAD focus on local planning capacity should at least support the view that local communities should have the capacity to act as Lead Agency for SEQR. The Commissioner may have correctly resolved the Lead Agency dispute in this instance, but certainly local governments should develop the capacity to assume Lead Agency in future SEQRs. Pursuant to New York State's "Home Rule,"[92] local governments are always appropriate engines for local land use decisions.[93] However, the Belleayre SEQR presented a unique political and technical reality with respect to Lead Agency because many parties outside of the Watershed, including the DEP, expressed skepticism at Shandaken's ability to impartially review the resort's environmental impacts in light of the local economic conditions.[94] The resort's large size also had the effect of increasing the complexity and extent of the environmental impact reviews beyond that with which Shandaken planners were presumably accustomed. Perhaps, given a task as strictly scrutinized as the Belleayre resort SEQR, it would not have been appropriate, or fair, for the Town of Shandaken to try to undertake SEQR responsibility without any DEP assistance. Regardless, one thing is clear—"Home Rule," the MOA and the FAD all indicate that local capacity ought to be sufficient to enable competent compilation and objective review of EIS data.

Therefore, the Watershed communities need a planning body with the expertise and financial resource necessary to competently execute SEQR for large-scale projects.

Combining Permit Determinations and SEQR

As noted in Part II, Crossroads Ventures needs several permits before constructing the Belleayre Resort. Although the DEC would normally conduct the relevant inquiries informing a decision whether to grant the permits as a private, agency-contained process, when DEC is Lead Agency, permitting issues are opened to public participation as part of SEQR despite DEC recommendation to grant the permit. For example, the DEC has reviewed and issued a draft water supply permit for the resort; however, CPC and NYCDEP raised issues about the permit on the basis of which the administrative law judge ordered adjudication hearings to flesh out the differences of scientific and technical opinion.[95] If the permit application were separate from SEQR, the DEC decision would be challengeable only in a formal court action. The ALJ also recommended adjudication of the DEC recommendation to grant the necessary SPDES permits to resolve differences of scientific and technical opinion.[96] Although the NYC Stormwater Permits are not actually at issue in the SEQR proceedings, the underlying issues relevant to NYC's eventual consideration of those permits have been subject to public comment and also recommended for adjudication.[97] Thus, under the Uniform Procedure

Act, DEC's role as Lead Agency subjected the Watershed Communities and Crossroad's Ventures to increased public participation and increased delay on issues normally within DEC's exclusive purview. The foregoing provides an additional argument that the Watershed Community is the appropriate Lead Agency for actions in the Watershed.

What the Watershed Rules & Regulations Taketh, the Watershed Rules & Regulations Might Giveth: Certification

The Watershed Rules and Regulations grant New York City DEP considerable ability to regulate development within the Watershed. The dynamic of outside authority effectively trumping local land use authority has undermined the legitimacy of land use decisions in the Watershed.

The drafters of the Watershed Rules & Regulations must have heeded this fact, because the regulations provide a procedure to delegate powers back to the local communities.[98] Specifically, the WR&R provide for local governments to become "certified" to perform administrative and enforcement functions currently performed by the DEP.[99] The certification provisions permit a city, town, village, or county to apply to assume responsibility to administer specific functions under the regulations, including processing and review of, and determinations on, applications for approval of specific regulated activities.[100] In evaluating certification applications, the DEP considers: which specific provisions the local community wishes to administer and/or enforce; the local community's capacity to administer, both in terms of staff and resources; identified funding for implementation of the program; who, precisely, will administer these rules and regulations; the information management capability of those administering; and applicable existing local laws and plans for coordination of such laws with these rules and regulations.[101] In all cases, Certification requires that the applicant be able to provide the same level of efficiency and effective protection of the water supply as that already provided.[102]

The certification procedures offer hope that the Watershed communities can resume their effectiveness in local land use decision-making. Of course, the certification tool is only as useful as the applying entity is capable of assuming responsibility for these functions. Therefore, the Watershed communities must focus on increasing the depth of planning experience and breadth of personnel, financial and technological resources before certification becomes a reasonable opportunity.

The financial reality renders illogical any suggestion that each community within the Watershed develop its own no-expense-spared planning department, especially when the existing planning boards satisfy most of the communities' planning needs. A reasonable alternative, however, is for the Watershed communities to maintain the current planning departments while simultaneously channeling resources towards a regional planning facility capable of providing supplemental planning expertise to any of the Watershed communities if and when additional capacity is necessary.[103]

One appealing use for the regional planning board would be to create and expand upon local Comprehensive Plans. Additionally, the regional planning resource could create a GEIS for these Comprehensive Plans giving the local governments more control over site-specific SEQRs. A GEIS enables site-specific environmental impact reviews to proceed more efficiently and cost-effectively by identifying impact issues in advance.[104] Moreover, individual developers need not incur the expense of commissioning review of impacts that the GEIS adequately addresses, thereby limiting the developer's SEQR expenses.[105] Developers need only commission analysis of the unique impacts of their development upon the environment.[106] To be effective, a GEIS should contain "detailed data on existing conditions, anticipated development projects and their impacts, the improvements necessary to serve that development and their costs, specific mitigation measures or development thresholds that need to be employed to absorb or limit the impacts of the development. The final GEIS must be formally adopted by the lead agency and filed in accordance with the SEQR regulations."[107]

Part V: Practical Suggestions to Facilitate Change

Suggestion: Intermunicipal Coordination

Many of the West-of-Hudson towns, villages, municipalities, and counties face similar pressures to grow and similar restrictions on growth. Reconciling tension will require careful and comprehensive planning. Adequate planning for an area like the West-of-Hudson Watershed requires a level of labor, expertise, and technology that, because of financial constraints, is unavailable to smaller units of government. One solution, then, is to fund adequate planning facilities at the regional level, where the need and combined capacity may support a well-funded planning program.[108] West-of-Hudson Watershed Communities may benefit from entering into intermunicipal agreements with neighboring local governments to fund and form an umbrella planning agency that would benefit from economies of scale and could provide human and technological planning expertise to all of the regional governmental units.

Happily, New York law provides a mechanism for intermunicipal agreement.[109] Intermunicipal Planning Resources ("IPR") have the advantage of preserving the "local" element so critical in local planning. IPRs need not

replace local planning departments, as the latter would still perform daily planning duties. Instead, the IPR's role would focus on long-term planning at the local and the regional levels. Free from the burden of daily planning responsibilities, the IPR could fully devote its resources to aid local planning boards in developing expansive Comprehensive Plans addressing Stormwater management, open space preservation, commercial centers, affordable housing concerns, and more. Because the IPR has a regional perspective it could aid all of the local planning boards to incorporate these considerations into their Comprehensive Plans compatible with the plans of neighboring communities.

The IPR's regional perspective leads to a third advantage of the IPR—to help each locality achieve growth and development goals by working to place local goals into a regional scheme. A thriving community has several distinct needs: economic engines, affordable housing, recreation space, and a reasonable means of access between the different centers. Individual towns or villages within the watershed may not have sufficient appropriate spaces to meet each of these needs; however, the West-of-Hudson watershed region, as a whole, likely does. A regional entity can consider practical sensibilities that may be ignored in more local planning attempts, such as how far people are willing to drive to work, where to cluster development.[110] Regional planning coordination is particularly important in an area like the West-of-Hudson watershed because the mountain geography and public lands limit suitable locations for development. For example, if the West-of-Hudson watershed, as a whole, seeks economic growth, but economic growth engines are more appropriate to one locality than another, the IPR can help realize regional growth by coordinating the location of residential zones in one city, with the location of commercial development zones in neighboring localities.

Although a business district located in one town is not located in another, that does not mean the benefits of that business district accrue only to the town where it is located.[111] Nevertheless, the host town of a business district enjoys benefits like an increased tax base that neighboring towns do not enjoy. To accommodate the disparate cash flows, however, IPR funding responsibilities can be equitably allocated between participating local governments. Although some towns and cities may contribute more cash to the IPR, each locality contributes an essential element in realizing regional growth goals. In the Watershed, open space and natural areas are particularly valuable resources necessary to attract tourists, as is the infrastructure to accommodate tourists. Each locality's particular contribution will affect its ability to fund the IPR; consequently the intermunicipal agreement forming the IPR should equitably allocate the IPR-funding burden.

Additionally, the IPR could help Watershed communities achieve certification to take on certain administrative and enforcement tasks under the Watershed Rules & Regulations.[112] The IPR scheme addresses DEP skepticism about local agencies' capacity to regulate at a level the DEP deems necessary. By pooling resources, the IPR should be able to accumulate superior technical and staff expertise than that achievable by individual localities. Consequently, Watershed communities present the most compelling case for certification using the IPR.

One example of successful intermunicipal coordination is already in place in New York State. In 1991, the New York towns of DeKalb and Richville began what has been a successful application of intermunicipally coordinated planning.[113] In order to ensure that the joint planning agency represented local concerns and prerogatives of both towns, the intermunicipal agreement stipulated that "three of the five planning board members must be residents of the town but not the village, and the remaining two must reside in the village."[114] The intermunicipal board has wide planning authority, as it can review and decide upon site plan review application. In addition, the board has authority to act as lead agency under SEQR.[115]

Perhaps most importantly, the local governments need not fear that an IPR will destroy local "Home Rule" planning authority. Per New York State constitution, local governments have the power to make local land use decisions, but local governments do not have the power to cede that authority.[116] Accordingly, intermunicipal agreements are advisory and ministerial only,[117] and if the localities disapprove of IPR recommendations, or the overall scheme does not serve its purpose, the governments are not bound to continue with the agreements.

On the other hand, a well functioning IPR may provide a mechanism for asserting local input in FAD reviews and in other government actions affecting the rights and responsibilities of Watershed communities. Analogy to case law suggests that an IPR may qualify as a political subdivision of the State of New York and therefore has authority to engage in activity necessary to fulfill the purpose for which it was created. In the case of *Saratoga Lake Association, Inc. v. City of Saratoga Dept. of Public Works*,[118] the Supreme Court of Saratoga County held that the Saratoga Lake Protection and Improvement District (SLPID) was a political subdivision of New York State and a unit of local government authorized by State Legislation and created by referendum to "foster the development of a *unified* management policy for Saratoga Lake."[119] Therefore, the court reasoned, SLPID had the authority to take whatever measures were necessary to carry out the "functional responsibility" to which it was assigned.[120] Although State Legislative Act does not specifically authorize a West-of-Hudson IPR, the statute permitting intermunicipal agreements implicitly authorizes an IPR.

In addition, the legislative purpose for intermunicipal coordination is to encourage unified regional cooperation in matters exceeding jurisdictional boundaries, such as watershed management.[121] Thus a West-of-Hudson IPR should have the same authority of the member governments so long as the member governments agree to support the IPR and if such authority is necessary to fulfill its function.[122] Because the IPR represents a unified approach to Watershed management, it seems necessary that the IPR have a voice in decisions (like FAD renewal) that affect watershed management.

Setting Standards

Looming behind SEQR issues is the issue of defining the threshold with which to judge economic development projects. The current absence of defined thresholds permits implicitly assumed (and unstated) thresholds to govern evaluations on the impact of development. Under the current Watershed Rules and Regulations, New York City may deny a permit for *any* (regulated) land use that would adversely affect water supply. This lack of standard is disconcerting, as human activity will always have some impact on water quality. The MOA expressly permits economic development in the watershed, yet the ability to prohibit any impact on the water quality poses in stark contrast to the MOA's statement that economic development and water quality protection are not incompatible. Development almost certainly has some impact on water quality. The remaining question, then, is *how much* impact is acceptable? The Belleayre SEQR exemplifies this conundrum, because the ultimate challenge will lie in determining if the environmental impact from the development is acceptable. Moreover, even if the Lead Agency determines that the Belleayre resort poses acceptable levels of environmental impact, DEP might still exercise its own permitting authority and deny Stormwater permits on the basis that the project would have any impact on water quality.

Conclusion

The residents of New York City's West-of-Hudson Watershed have a right to exercise local decision-making and land use authority to invigorate the local economy. New York City residents have a strong interest in clean drinking water. Despite the complex tension between these interests, the differences are not irreconcilable. A true meeting of the minds, however, will require New York City and the Watershed communities to fully specify their expectations, especially regarding matters of local authority and local community-building. The techniques discussed in this article are a few of the options available to help maintain and expand upon the Watershed Communities' ability to guide its own future while balancing the need for restricted use of local powers.

Endnotes

1. A "watershed" is an area or region drained by a river, river system or other body of water. The New York City Watershed is the region whose waters run into a series of reservoirs from which New York City draws its drinking water.
2. 42 U.S.C.A. §§ 300f to 300j-26.
3. Schneeweiss, Jonathan, *Watershed Protection Strategies: A Case Study of the New York City Watershed in Light of the 1996 Amendments to the Safe Drinking Water* Act, 8 Vill. Envtl. L.J. 77, 86 (1997).
4. For example, in 1993, 403,000 people fell ill from a Cryptosporidiosis outbreak in Milwaukee; filtration did not remove the offensive microorganisms from the public drinking water. *Id.* There is no treatment for the Cryptosporidium organism, only for the symptoms; therefore, it can prove fatal to persons with weakened immune systems. Lecture to Water Law Clinic by Keith Porter, Professor, Aug. 30, 2005. Another example of filtration's failures is with the organism giardia lamblia: although giardiasis can be treated with high chlorination, high chlorination levels themselves create carcinogenic byproducts. *Id.* Therefore, giardia is sometimes still delivered to consumers of public water supplies. *Id.*
5. Schneeweiss, *supra* note 3.
6. *Id.* Water treatment plants often fail during high rainwater events, regularly expelling raw sewage overflow into rivers and streams.
7. 42 U.S.C.A. § 300g-1(b)(4)(E)(v). Surface water bodies are those bodies of water exposed on the surface of the earth.
8. 40 C.F.R. § 141.71 (1996).
9. 40 C.F.R.§ 141.71(b)(iii). The SDWA also permits filtration avoidance in the case of uninhabited and undeveloped Watersheds that are fully owned by the water supplier. *See* William E. Cox, *Evolution of the Safe Drinking Water Act: A Search for Effective Quality Assurance Strategies and Workable Concepts of Federalism*, 21 Wm. & Mary Envtl. L. & Pol'y Rev., 69, 109-110 (1997).
10. Andrew C. Revkin, *Scientists Give Mixed Marks to the City's Water Plan,* N.Y. Times, Sept. 16, 1999; Anthony DePalma, *The Water's Fine. Don't Come In.*, N.Y. Times, Sept. 17, 2005, *available at* http://www.nytimes.com (visited on Sept. 17, 2005) (estimating the cost of a water filtration plant at $9 billion).
11. Michael C. Finnegan, *New York City's Watershed Agreement: A Lesson in Sharing Responsibility*, 14 Pace Envtl. L. Rev. 577, 618 (1997).
12. *Id*. at 578.
13. Anthony DePalma, *A Boost for the Catskills, Or Something in the Water?; Construction of $250 Resort Could Pollute City's Reservoir, Critics Say*, N.Y. Times, Feb. 8, 2004, at 25, 32.
14. *Id*. The Watersheds of Portland, OR, Seattle, WA, and San Francisco, CA are 100% owned by either the federal government or the water suppliers themselves. The fourth major unfiltered water supply granted a FAD is Boston. MA owns only 42% of the Watershed, but nearly 50% of the Watershed lands are permanently protected from development. Letter from David J. Miller, Audubon, N.Y. et al., to Governor George Pataki and Mayor Michael Bloomberg (Jan. 24, 2003) (on file with author). In 1997, New York City owned only 6.4% of the Watershed land in the Catskill, Delaware, and Croton systems. Finnegan, *supra* note 11, at 578.
15. Finnegan, *supra* note 11, at 578.
16. NYCDEP, Vol. I Draft Generic Environmental Impact Statement for the Draft Watershed Regulations for the Protection from Contamination, Degradation, and Pollution of the New York City Water Supply and its Sources, E.S.-29 (August 1993) (assessment conducted pursuant to revisions to, and replacement of the 1953 Watershed Rules and Regulations) [hereinafter, Draft GEIS].

17. *Id*. at 623.

18. Signed by the Watershed communities, environmental organizations, New York City, New York State, and the Environmental Protection Agency on January 21, 1997.

19. Letter from David J. Miller, Audubon, N. et al., to Governor George Pataki and Mayor Michael Bloomberg (Jan. 24, 2003) (on file with author).

20. *Id.* In the 1990 census, 22,086 manufacturing jobs were identified in the five West of Hudson watershed counties, 11,089 construction jobs identified, and approximately 350 dairy farms. *Id.* at 620.

21. In addition to the CFF study, the New York City Draft Generic Environmental Impact Statement, completed in 1993, states that "occupants of an estimated 1,500 seasonal housing units almost double the year-round population of the town [of Middletown]. Tourism accounts for a major share of the 1,500 jobs and 170 businesses in [Middletown]." DRAFT GEIS, *supra*, note 16, at Part VII.C.1-5; Josh Ripps, *Dean Gitter: The Catskills Last Resort?*, THE CHRONOGRAM (2002), *at* http://www.chronogram.com/issue/2002/05/current/artofbusiness (last visited Sept. 12, 2005).

22. Robert Worth, *In the Catskills, Water Hazards; A 36-Hole, 500-Acre Resort Plan Draws Opposition*, N.Y. TIMES, May 16, 2001, at B1.

23. *Id.* art. 135.

24. Memorandum of Agreement, Jan. 27, 1997, Watershed Communities-New York City, art. 134. [hereinafter MOA].

25. For a more detailed discussion of employment opportunities and growth sectors in the West of Hudson between 1980 and 1990, see DRAFT GEIS, *supra*, note 16, at E.S.-116, 118.

26. Hamilton, Rabinovitz & Alschuler, Inc. et al., *West of Hudson Economic Development Study for the Catskill Watershed Corporation* 31 (July 26, 1999) [hereinafter CWC Economic Study].

27. Sources of Pollution in the New York City Watersheds, 143.

28. *Id.*

29. DRAFT GEIS, *supra*, note 16, at E.S.-48 (noting "Sewage that enters the water supply, either from leaking systems, or through inadequately treated discharges, represents a threat to public health due to the introduction of pathogens, nutrients and other contaminants. Improperly treated sewage also accelerates eutrophication of surface waters by introducing nutrients. In addition, the discharge of inadequately treated sewage increases levels of suspended solids, BOD and trace organic chemicals in water supply, which would potentially have an adverse effect on water quality.").

30. *Id.*, at E.S.-62 ("Stormwater is a nonpoint source of pollution which could contribute a significant pollutant load to surface water sources such as those found in watersheds.

    A general list of pollutants most often associated with Stormwater includes:

    - Total and fecal coliform bacteria;
    - Phosphorous;
    - Total nitrogen;
    - Suspended solids;
    - Biochemical oxygen demand (BOD);
    - Heavy Metals (copper, zinc, lead); and
    - Oil and grease.

    Suspended solids are the most significant of all the parameters because other Stormwater contaminants cling to particles in the suspended solids. Suspended solids are also the most visible of Stormwater pollutants."

31. *Id*. (Impervious surfaces act as one of the major sources of, and a conveyance for, pollutants. When impervious surfaces are located near water bodies they provide a rapid pathway for up gradient sources of pollution.").

32. Restatement (Second) of Contracts, § 20 ("Effect of Misunderstanding (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other; or (b) each party knows or has reason to know the meaning attached by the other").

33. MOA, *supra*, note 24, at para. 6.

34. *Id.* at, para 9.

35. It is unclear if this Draft GEIS was ever finalized. Regardless, this author has been unable to find more than the Draft GEIS.

36. DRAFT GEIS, *supra*, note 16, at E.S. -111.

37. BERYL A. RADIN, ET AL., NEW GOVERNANCE FOR RURAL AMERICA 53 (1996).

38. *Id.* (quoting Kane and Sand, 1988, p. 10).

39. *Id.* (citing Sears et al., 1992, p.113).

40. DRAFT GEIS, *supra*, note 16, at -119.

41. *Id.* at E.S.-112.

42. One should remain cognizant that pursuant to setback requirements in the Watershed Rules and Regulations, development opportunities within river valleys are limited.

43. DRAFT GEIS, *supra*, note 16, at Part VII.C.1-4, 1-5. The Draft GEIS executive summary clarifies what was included in "developable land," stating that "areas such as wetlands, steep slopes and shallow soils were not considered developable. Under the Acton condition, additional areas were excluded including the area within the impervious surfaces limiting distance and parcels that fell within the variable septics buffer." *Id.* at E.S.-7.

44. *Id.*, Part VII.C.1-11, 1-12.

45. *Id.*, at E.S.-134.

46. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 *et seq*. (McKinney 2005).

47. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c), (d) (2005) (emphasis added) (noting "it is not the intention of SEQR that environmental factors be the sole consideration in decision-making"). Additional purposes of SEQR include encouraging productive and enjoyable harmony between man and his environment; promoting efforts to prevent or eliminate damages to the environment and enhance human and community resources; enriching the understanding of the ecological systems and the natural, human, and community resources important to the people of the state. JOHN R. NOLAN, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 184 (2001).

48. Under SEQR, all non-residential construction that alters 10 or more acres or creates more than 100,000 square feet of floor area are presumed to require the preparation of an Environmental Impact Statement (EIS). Therefore, the Belleayre Resort proposal must undergo SEQR review. *See id.* 6 N.Y.C.R.R. § 617.4.

49. 6 N.Y.C.R.R. § 617.2(u) (defining Lead Agency as "an involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required").

50. *See* 6 N.Y.C.R.R. §§ 617.1 *et seq.*

51. *Id.*

52. *Id.*

53. *WEOK Broadcasting Corp. v. Planning Board of Town and Lloyd*, 79 N.Y.2d 373 (1992).

54. WELL GROUNDED *supra*, note 47, at 190 (citing *Chinese Staff and Workers Assoc. v. City of New York*, 68 N.Y.2d 359 (1986)).

55. *Id.*, at 196. Cumulative impacts are defined as "the project's impacts in conjunction with those of other projects under review or planned for the area." *Id.*, at 195.

56. DRAFT GEIS, *supra*, note 16, at E.S.-32.

57. 10 N.Y.C.R.R § 128-1.4(a) (stating, "These rules and regulations apply to all persons undertaking, or proposing to undertake, the activities in the categories listed below, where such activities are specifically regulated in these rules and regulations and occur in the New York City watershed: (9) Discharge of Stormwater and sediment, and preparation and implementation of Stormwater pollution prevention plans.(10) Construction of impervious surfaces.").

58. 10 N.Y.C.R.R § 128-2.3 (b)(1) ("No person shall undertake any activity listed in section 128-1.4 of Subpart 128-1 of these rules and regulations which requires the review and approval of the Department without first obtaining written approval from the Department, except where a temporary emergency approval has been obtained from the Department pursuant to section 128-2.4 of this Subpart").

59. 10 N.Y.C.R.R § 128-2.1(a)(1) ("All regulated activities shall be planned, designed, scheduled and conducted in such manner as to not constitute a source of contamination to or degradation of the water supply").

60. 10 N.Y.C.R.R § 128-2.1(a)(2) ("shall additionally take into consideration the system specific water quality characteristics.").

61. JOHN R. NOLAN, OPEN GROUND: EFFECTIVE LOCAL STRATEGIES FOR PROTECTING NATURAL RESOURCES 380 (2003).

62. GEIS E.S.-66 (stating "For West of Hudson, only the annual loads for the Cannonsville and Schoharie basins under Action and No Action conditions are presented. Due to the minimal amount of development affected by the Draft Watershed Regulations projected for other drainage basins in West of Hudson, little or no incremental water quality benefit would be expected over the No Action condition [Action referring to Stormwater Management Plans]").

63. *Id.*

64. Some opposition to the development may be no more than a knee-jerk reaction to the negative impacts of development east of the Hudson, which have resulted in non-renewal of the FAD.

65. Appeal Brief for Applicant at 4, Crossroads Ventures LLC (NYCDEC filed Nov. 22, 2005) (Application No. 0-999-00096/00001,3,5,7,9&10) [hereinafter Crossroads' Appeal].

66. Sept. 7, 2005 Rulings re: Crossroads Ventures, LLC, 5 [hereinafter Rulings].

67. Paul Smart, *Questions of Balance*, WOODSTOCK TIMES, Sept. 8, 2005, *at* http://www.ulsterpublishing.com.

68. Rulings, *supra* note 66 at 5.

69. Several economic studies have concluded that the Watershed should focus on creating a year-round, week-long tourism industry. *See, e.g.*, CWC Economic Study, *supra* note 26.

70. *Id.* at 6.

71. *Id.*

72. *See* DePalma, *supra* note 13, at 32. Those opposing the development include people like Sherret Spaulding Chase, whose family has lived in the Catskills for many generations, as well as more recent arrivals who came to the Catskills seeking a "vegan, Zen-infused, counterculture way of life." *Id*. at 25, 32.

73. *Id.*

74. Paul Smart, *supra* note 67.

75. *Id.* at 9-15.

76. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991) (Requiring that one or more of the organization's members has standing to sue, the interests asserted are germane to the organization's purposes such that it is the appropriate representative of those interests, and that neither the asserted claim nor the appropriate relief requires participation of the individual members.)

77. 6 N.Y.C.R.R. § 617.6(b)(5)(v).

78. Jay Braman Jr., *Shandaken planners back limits to review of resort*, Daily Freeman.com, Nov. 11, 2005, *at* http://www.dailyfreeman.com (last visited Nov. 17, 2005) (noting that many Watershed residents, and the CWT, feel that community character and secondary growth issues are best left to the Watershed communities and out of the SEQR process). *See also* Phil Laroque & Bruce Bonke, *SEQR's 25th Anniversary: A Building Industry Perspective*, EMPIRE STATE REPORT, Aug. 2000, at 27 (stating that issues such as "character of the area" and "cumulative impact" are particularly ripe for abuse).

79. Crossroads Ventures did attempt to design an environmentally sensitive development, and employed architect Emilio Ambasz, who is renowned for his environmentally sensitive designs. DePalma, *supra* note 13, at 32.

80. After all, there was more than a kernel of truth to Dr. Suess's claim that "Unless someone like you cares a whole awful lot, Nothing is going to get better. It's not."

81. *See* WELL GROUNDED, *supra*, note 47 (discussing the possibility of facilitation or mediation requirements).

82. NYC supposedly put out a $600,000 bid for a consultant to look at a range of issues related to the proposal, like air quality and traffic. Michael Hill, *Catskill Proposals Stir Debate,* N.Y. TIMES, July 4, 2003. The NYCDEP withdrew the bid and agreed to seek only a more limited review focusing on water quality, and agreed to give the local towns $100,000 to fund their own studies. *Id.*

83. The Council of The City of New York, to Alexander Ciesluk, Jr., Deputy Regional Permit Administrator, NYSDEC 3 (April 23, 2004) (regarding Belleayre Resort draft EIS).

84. Letter from Walter Mugdan, Director, U.S.E.P.A., Div. of Envtl. Planning and Protection, to Alexander Ciesluk, Jr., Deputy Regional Permit Administrator, NYSDEC 2 (Mar. 23, 2004); Letter from Gifford Miller, Speaker, and James F. Gennaro, Chair, Committee on Environmental Protection.

85. *See* 40 C.F.R. § 141.72.

86. Rulings, *supra* note 66 at 117.

87. *See generally* N.Y. COMP. CODES R. & REGS. Tit. 6, § 617.10(b), (c) (2005) (stating that agencies may prepare generic EISs after adoption of a Comprehensive Plan, which in turn may be used to limit SEQR review on the impacts of individual actions taken in conformance with the comprehensive plan).

88. *See supra* note 87, and text.

89. WELL GROUNDED, *supra*, note 47 at 28.

90. *Id.* at 197.

91. New York City Filtration Avoidance Determination, USEPA 8-9, 35 (Nov. 2002) [hereinafter FAD].

92. N.Y. CONST. Law art. 9, § 2 (McKinney 2002). Municipal Home Rule Law § 10(1)(ii)a)(11) (granting municipalities the right to adopt local laws for the "protection and enhancement of its physical and visual environment); § 10(1)(ii)(a)(14) (granting municipalities authority to adopt zoning regulations); § 37(4) (granting cities authority to supersede any inconsistent provisions of New York State statutes if amendable by local law).

93. *See* Donna Cafaldo, *Hurley denounces proposed Watershed land-use limits*, Daily Freeman, July 2, 2004 (stating that "[w]atershed communities argue that it is their right to plan and regulate their own land uses stipulated under municipal home rule provisions of the state Constitution, and the city agency's interference is 'a serious breach of the agreement.'").

94. *See generally,* Cox, *supra* note 9 at 163 (stating, "[*t*]*he local role, as significant as it is to certain program elements, is ultimately limited by several factors. One significant limitation is the small geographical jurisdiction of the typical locality and the associated limitations on managerial perspective. Small geographical scale means that hydrologic*

units will often exceed local political boundaries, creating an abundance of 'externalities'" . . .).

95. Summary of Rulings, pp. 26-47.
96. *See id.* at 53, 153.
97. *See id.* pp. 57.
98. 10 N.Y.C.R.R § 128-7.1; 10 N.Y.C.R.R § 128-7.5.
99. *Id.*
100. 10 N.Y.C.R.R § 128-7.1(d)(1); 10 N.Y.C.R.R § 128-7.5.
101. 10 N.Y.C.R.R § 128-7.1; 10 N.Y.C.R.R § 128-7.5.
102. 10 N.Y.C.R.R § 128-7.1(d)(1); 10 N.Y.C.R.R § 128-7.5.
103. See *infra*, Part V, for a more thorough discussion of this idea.
104. *Id.*, at 198.
105. *Id.*
106. *Id.*
107. *Id.* at 198-199.
108. Economic Advantages: "by aggregating the consultant, staff, hardware, and software expenses [of GIS systems] at the county level, geographical information systems may become cost-effective for local governments that otherwise could not develop such systems on their own." WELL GROUNDED, *supra*, note 47, at 267.
109. Pursuant to NYS General City Law § 20-g; Town Law § 284; Village Law § 7-741; General Municipal Law § 119-u. Municipalities may enter into intermunicipal agreements with counties to receive professional planning services through county planning agencies. Costs associated with joint land use planning services through county planning agencies may be apportioned among participating municipalities. 67 St. Comp. 562 (1997).
110. A regional plan may aid localities and their neighbors to coordinate land use actions within the context of compatible regional plan for sustainable land development and conservation. "Certain advantages may be realized by such an approach. Economic development activities in one community, for example, cannot reverse negative trends in the larger economic market area. One community cannot create enough supply to meet the regional demand for affordable housing. Efforts in one community to protect natural resource areas that are shared with adjacent municipalities frequently cannot work to truly preserve the resource without compatible efforts in all the communities." WELL GROUNDED, *supra*, note 47, at 270.
111. For example, people who work in the business district may reside and pay property tax in a neighboring village.
112. *See* 10 N.Y.C.R.R § 128-7.1; 10 N.Y.C.R.R § 128-7.5.
113. WELL GROUNDED, *supra*, note 47, at 267.
114. *Id.*
115. *Id.*
116. *Id.*, at 268 (referring specifically to giving county ability to plan for towns).
117. *Id.*
118. 2006 N.Y. Slip Op. 26048.
119. *Id.* at 2-3 (emphasis in original).
120. *Id.* at 3.
121. *See id.* at 2-3.
122. *See id.* at 3.

Elizabeth Ferrell was a student at Cornell Law School when she won third place in the Professor William R. Ginsberg Memorial Essay Contest in 2006.

Recent Decisions in Environmental Law

Student Editor: Jamie Thomas

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

United States v. Atlantic Research Corp, 127 S. Ct. 2331 (2007)

Issue

Over the past several years, federal courts of appeals throughout the country have split over whether potentially responsible parties (PRPs) may sue other PRPs for environmental cleanup costs under § 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

Facts

In *United States v. Atlantic Research Corp.*,[1] the United States Supreme Court answered this very question. The facts of the case centered on Atlantic's operations at the Shumaker Naval Ammunition Depot. The depot served as the site where Atlantic refurbished rocket engines for the Department of Defense. In this process, Atlantic would use high-pressure water to cleanse jet engines of solidified propellant and afterward burned the remaining wastewater and liquid propellant. Eventually remnants of this toxic concoction polluted the surrounding soil and groundwater.

Realizing its potential legal liability, Atlantic cleared the depot of toxic waste and then sued the federal government under § 107(a) to recoup some of the resulting removal costs. The government defended the claim on the grounds that § 107(a) did not permit PRPs, such as Atlantic, from recovering cleanup costs. The government argued that § 107(a) solely extended to "innocent" private parties who never contributed to pollution.

The case eventually found its way to the United States Court of Appeals for the Eighth Circuit, where a three-judge panel held that § 107(a) encompassed suits by PRPs against other PRPs. The judges reasoned that § 107(a)'s text authorized suits by the federal and state governments, Indian tribes, and "any other person." Therefore, "any other person" naturally included suits by private PRPs.[2] The federal government appealed this decision to the United States Supreme Court.

Holding/Reasoning

On June 11, 2007, the justices affirmed the decision of the Eighth Circuit and concluded that "the plain terms of § 107(a) allow a PRP to recover costs from other PRPs." Writing for the Court, Justice Thomas examined various subparagraphs of § 107(a)'s text to distill its plain meaning. The Court's analysis particularly focused on two subparagraphs, §§ 107(a)(4)(A) and (a)(4)(B). Subparagraphs (A)-(B) state that PRPs can be held legally responsible for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not consistent with the national contingency plan; [and]
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.[3]

Read together the Court found that "it is natural to read the phrase 'any other person' [in subparagraph (B)] by referring to the immediately preceding sub-paragraph (A), which permits suit only by the United States, a state or Indian Tribe."[4] Consequently, the term "any other person" meant "any person other than those three,"[5] which would include PRPs within the scope of subparagraph (B).

After discussing the plain meaning of the statutory text, the Court then discarded the government's textual argument because it was overbroad. As in the Eighth Circuit, the federal government argued that the phrase "any other person" only applied to innocent private parties and not PRPs, such as Atlantic. The justices found this interpretation unreasonable because even innocent parties could "fall within the broad [statutory] definitions of PRPs."[6] The Court feared that the government's textual stance would prevent "all PRPs, innocent or not, from recovering clean up costs,"[7] and eviscerate § 107(a)'s enforcement provisions.

Conclusion

Ultimately, the Court's decision in *U.S. v. Atlantic Research Corp*. extends the scope of liability for environmental restoration and paves the way for industry to take the initiative in environmental safety without the fear of being stuck with the bill.

Daniel Weininger '07

Endnotes

1. 127 S. Ct. 2331 (2007).
2. *Id*. at 2335.
3. 42 U.S.C. § 9607(a)(4)(A)-(B).
4. Atlantic Research, 127 S. Ct. at 2336.
5. *Id*.
6. *Id*.
7. *Id*. at 2336–37.

* * *

Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 226 Fed. Appx. 715, 2007 WL 901580, 64 ERC 1330 (9th Cir. March 22, 2007)

Facts

In *Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation*,[1] eight organizations representing environmental and fishery interests sought injunctive and declaratory relief against the United States Bureau of Reclamation (BOR) and the National Marine Fisheries Service (NMFS), alleging violations of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544.[2] The lawsuit concerned the federal government's efforts to operate an irrigation project in accordance with its responsibilities under the ESA to protect the threatened coho salmon and its habitat.[3] The organizations argued that the government's plan employed a phased approach but failed to address how the first two phases, representing the first 8 years of a 10-year plan, would avoid jeopardizing the coho salmon.[4] The federal agencies and defendant/intervener Klamath Water Users Association (KWUA) argued that the plan represented the agency's best judgment given scientific uncertainties.[5]

The district court struck down parts of the plan but upheld the first two phases.[6] The Ninth Circuit reversed and remanded.[7] On remand, the district court issued an order enjoining BOR from making irrigation diversions from the Klamath Reclamation Project (Project) under the 2002 Biological Opinion.[8] The district court ordered the injunction to remain in place until a new biological opinion consistent with the provisions of the ESA had been produced. KWUA appealed the district court's order.

Issues

(1) Whether a supplemental analysis released by NMFS issued after the district court found the first two phases of the plan unlawful eliminated the legal basis for the injunction and (2) whether the district court exceeded its authority under the ESA by issuing the injunction.

Holding/Reasoning

The Ninth Circuit affirmed the district court's order. First, the court held that the NFMS supplement issued after the district court found the first two phases of the plan unlawful did not eliminate the legal basis for enjoining the execution of the Project. The court reasoned that "a previous agency determination in a Biological Opinion cannot be amended or supplemented with post-determination analysis or evidence without reinitiating the consultation process." Second, the court held that the district court had not exceeded its authority in granting the injunction. The court reasoned that (1) project construction and operation constitute part of the environmental baseline covered by the ESA, and (2) that district courts have "broad latitude in fashioning relief when necessary to remedy an established wrong." The court found that the district court had issued an injunction "reasonably calculated to remedy an established wrong" and has not abused its discretion.

Conclusion

The court upheld the injunction barring the BOR from making irrigation diversions until the NMFS issues a new biological opinion consistent with the provisions of the ESA.

Matthew Ford '08

Endnotes

1. 426 F.3d 1082 (9th Cir. 2005).
2. *Id*. at 1084.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, No. 06-16296, 2007 WL 901580 (9th Cir. March 26, 2007).

* * *

Misleading Government Press Releases About Air Quality at Ground Zero Following the September 11 Attacks Are Not Actionable as Substantive Due Process Violations

Lombardi v. Whitman, 485 F.3d 73 (2d Cir. 2007)

Facts

Plaintiffs appealed from the decision of the United States District Court for the Southern District of New York, which granted defendants' motion to dismiss for failure to state a claim. The original complaint alleged that defendants, sued in their individual capacity, violated plaintiffs' substantive due process rights by issuing misleading statements about the air quality at Ground Zero (the "Site") following the September 11 attacks on the World Trade Center (the "Attacks"). The District Court dismissed the case because plaintiffs failed to allege a violation of a constitutional right and, alternatively, defendants had qualified immunity.[1] The United States Court of Appeals for the Second Circuit affirmed.

The five plaintiffs were emergency responders[2] who participated in search, rescue, and cleanup work at the Site following the Attacks. According to the complaint, plaintiffs' employers did not warn them of potential air quality-related health risks associated with the collapsed buildings and continuing fires at the Site. Additionally, plaintiffs claimed they relied on EPA press releases reassuring them of acceptable air quality standards at the Site. Plaintiffs wore little to no equipment to protect their lungs.

The EPA press releases at issue made a series of reassurances regarding air quality at the Site. Specifically, the statements claimed that the air and drinking water were safe, that the harmful substances detected were below maximum acceptable levels, that the public was not being exposed to excessive levels of asbestos or other harmful substances, and that there was no significant health risk to the public. According to a subsequent report by the EPA Inspector General's Office, however, the agency was aware that 25% of bulk sample dust recorded asbestos at levels posing a serious health risk.

The EPA claimed its press releases were subject to approval by the National Security Council and the Council on Environmental Quality, and thus the content of the press releases was not entirely within EPA control.[3]

Plaintiffs filed a *Bivens*[4] action, alleging a violation of their substantive due process rights. A *Bivens* action is permitted "where an individual 'has been deprived of a constitutional right by a federal agent acting under color of federal authority'. . . provided that Congress has not forbidden such action and that the situation presents 'no special factors counseling hesitation in the absence of affirmative action by Congress.'"[5]

Issue

The issue, addressed by Chief Judge Jacobs, is whether the District Court properly dismissed the complaint in finding that the misleading press releases did not constitute a violation of plaintiffs' due process rights.

Reasoning

In response to a *Bivens* action, defendants are entitled to claim qualified immunity. To overcome this immunity, the facts, taken in the light most favorable to complainants, must show that the right allegedly violated was "so clearly established that a reasonable government official would have known that her conduct violated a constitutional right 'in light of the specific context of the case, [and] not as a broad general proposition.'"[6]

The ability to maintain an action against a government official for a substantive due process violation safeguards citizens from an overreaching government; it does not create an affirmative duty to protect citizens' safety. Where the government "created or increased the danger," however, there may be a duty to protect the individual.[7] Plaintiffs alleged that defendants' affirmative assurances put them within this "State-created danger" exception. The court recognized, however, that even within this exception, the government conduct must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[8]

The court rejected plaintiffs' comparisons to the state-created danger precedent. In all cases examined, the government actor put the plaintiff in a position to be harmed by a private third-party wrongdoer.[9] In this case, the court found that the third-party act was completed before the government took action. It stated that "plaintiffs' claims [were] based neither on any alleged encouragement of the terrorists nor on any relationship between defendants and the terrorists."[10]

Additionally, the court noted that even if the statements the government made misled plaintiffs, a myriad of problems existed in proving causation and reliance. Even assuming causation, the court found that the claim still failed because defendants' conduct did not rise to a level that shocks the contemporary conscience. In some instances the standard is clear: negligence is never shocking enough, while unjustifiable intent to injure is always sufficient. This case, however, fell into the intermediate category of deliberate indifference. The court applied a contextual analysis, finding that "deliberate indifference that shocks in one environment may not be so patently egregious in another. . . ."[11] In balancing defendants' competing interests following the Attacks, the court found

that defendants' need to "put the affected community on a normal footing, i.e. to avoid panic, keep order, restore services, repair infrastructure, and preserve the economy" outweighed the possible health risks of poor air quality.[12] The court emphasized the gravity of this situation when distinguishing it from *Briscoe v. Potter*,[13] finding that the need to keep order in lower Manhattan far outweighed the importance of distributing mail from a single post office.

In reaching its conclusion, the court also considered how holding federal agents individually liable for their statements during emergency situations might encourage silence at times when the public needs information. The court denied plaintiffs' allegations that because defendants had time to make "unhurried" decisions, the situation was not an emergency, and thus defendant's actions shocked the conscience. Rather, the court held that although the press releases came out days and weeks after the Attacks, "Defendants were required to make decisions using rapidly changing information about the ramifications of unprecedented events in coordination with multiple federal agencies and local agencies and governments."[14]

Conclusion

Because defendants' issuance of misleading press releases did not rise to the level of shocking the contemporary conscience when balanced with the need to restore and maintain order in lower Manhattan following the September 11 attacks, there was no violation of plaintiffs' substantive due process rights. The court affirmed dismissal of the complaint.

Endnotes

1. Two plaintiffs' claims were dismissed on additional "special factors." John Lombardi's claim was dismissed because military personnel are precluded from maintaining a § 1983 action for injuries suffered incident to military service. Rafael Garcia's claim failed because as a U.S. marshal, he had an adequate remedy under the Federal Employees' Compensation Act.
2. John Lombardi is a New York Army National Guard medic; Roberto Ramos, Jr., is a an emergency services officer in the New York City Corrections Department; Hasan A. Muhammed is an emergency services captain in the New York City Corrections Department; Rafael A. Garcia is a deputy U.S. marshal; and Thomas E. Carlstrom is a paramedic in the New York City Fire Department.
3. The Inspector General's report reflects that the CEQ changed certain phrases to sound less alarming and omitted sampling reports that reflected increased presence of asbestos.
4. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
5. *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 108 (2d Cir. 2005) (quoting *Bivens*, 403 U.S. at 396).
6. *Lombardi*, 485 F.3d at 78 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).
7. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989).
8. *Lombardi*, 485 F.3d at 79 (quoting *Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005)) (internal quotations omitted).
9. *See Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005); *Hemphill v. Schott*, 141 F.3d 412 (2d Cir. 1998); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993).
10. *Lombardi*, 485 F.3d at 80.
11. *Id*. at 81 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)).
12. *Id*. at 83.
13. 355 F. Supp. 2d 30 (D.D.C. 2004), *aff'd*, 171 F. App'x 850 (D.C. Cir. 2005) (holding there was a state-created danger where postal workers contracted anthrax after assurances from government officials that their work site was safe).
14. *Lombardi*, 485 F.3d at 82.

Section Committees and Chairs

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

Committee on Adirondacks, Catskills, Forest Preserve and Natural Resource Management
Thomas A. Ulasewicz
Ulasewicz Melewski & Greenwood LLP
112 Spring Street, Suite 307
Saratoga Springs, NY 12866
Tom@umgllp.com

Carl R. Howard
US EPA
290 Broadway
Office of Regional Counsel
New York, NY 10007-1866
howard.carl@epa.gov

Committee on Agriculture and Rural Issues
David L. Cook
Nixon Peabody LLP
1300 Clinton Square
Rochester, NY 14603
dcook@nixonpeabody.com

Peter G. Ruppar
Duke Holzman Photiadis & Gresens LLP
1800 Main Place Tower
350 Main Street
Buffalo, NY 14202-3718
pruppar@dhpglaw.com

Ruth A. Moore
New York State Department of Agriculture & Markets
10-b Airline Drive
Albany, NY 12205
rmoore49@nycap.rr.com

Committee on Air Quality
Robert R. Tyson
Bond Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355
rtyson@bsk.com

Flaire Hope Mills
U.S. Environmental Protection Agency Regional Council
290 Broadway
New York, NY 10007-1823
mills.flaire@epa.gov

Peter C. Trimarchi
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
ptrimarchi@woh.com

Committee on Biotechnology, Nanotechnology and the Environment
David W. Quist
NYS Department of Health
Division of Legal Affairs
Empire State Plaza Corning Tower, Room 2
Albany, NY 12237-0026
davidquist@earthlink.net

Committee on Coastal and Wetland Resources
Drayton Grant
Grant & Lyons, LLP
149 Wurtemburg Rd
Rhinebeck, NY 12572-2342
grantlyons@aol.com

Terresa M. Bakner
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260-2015
tbakner@woh.com

James A. Boglioli
Whiteman Osterman & Hanna LLP
1 Commerce Plaza
Albany, NY 12260-1000

Committee on Continuing Legal Education
James P. Rigano
Certilman Balin Adler & Hyman, LLP
1393 Veterans Memorial Highway, Suite 301S
Hauppauge NY 11788
jrigano@certilmanbalin.com

Maureen F. Leary
NYS Dept of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224
maureen.leary@oag.state.ny.us

Kimberlee S. Parker
Bond Schoeneck & King PLLC
111 Washington Avenue
Albany, NY 12210
kparker@bsk.com

Committee on Corporate Counsel
George A. Rusk
Ecology & Environment
368 Pleasantview Drive
Lancaster, NY 14086-1316
grusk@ene.com

Robert M. Hallman
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005-1701
rhallman@cahill.com

Edward J. Malley
TRC Companies, Inc.
1430 Broadway, 10th Floor
New York, NY 10018
emalley@trcsolutions.com

Committee on Energy
Kevin M. Bernstein
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1325
kbernstein@bsk.com

William S. Helmer
Green & Seifter, PLLC
194 Washington Avenue, Suite 315
Albany, NY 12210
whelmer@gslaw.com

Jennifer L. Hairie
NYS Dept of Environmental Conservation
Division of Legal Affairs
625 Broadway; 14th Floor
Albany, NY 12233-1500
jlhairie@gw.dec.state.ny.us

Committee on Enforcement and Compliance
Dean S. Sommer
Young Sommer LLC
Executive Woods
5 Palisades Drive
Albany, NY 12205
dsommer@youngsommer.com

George F. Bradlau
The Bradlau Group, LLP
PO Box 541
18 Washington Street, 2nd Floor
Morristown, NJ 07963-0541
gbradlau@thebradlaugroup.com

Committee on Environmental Business Transactions
Louis A. Evans
Thacher Proffitt & Wood, LLP
2 World Financial Center
New York, NY 10281
levans@tpw.com

Robert H. Feller
Bond Schoeneck & King, PLLC
111 Washington Avenue
Albany, NY 12210
RFeller@bsk.com

Jeffrey B. Gracer
Sive Paget & Riesel PC
460 Park Avenue
10th Floor
New York, NY 10022
jgracer@sprlaw.com

Committee on Environmental Impact Assessment
Mark A. Chertok
Sive, Paget & Riesel, P.C.
460 Park Avenue, 10th Floor
New York, NY 10022
mchertok@sprlaw.com

Kevin G. Ryan
10 Circle Avenue
Larchmont, NY 10538
kevingryan@cs.com

Michael P. Naughton
Owens, McHugh, Naughton & McQuade PLLC
358 Broadway, Suite 206
Saratoga Springs, NY 12866
mikenaughtonlaw@aol.com

Committee on Environmental Insurance
Daniel W. Morrison III
Bleakley Platt & Schmidt, LLP
One North Lexington Avenue
White Plains, NY 10601
dmorrison@bpslaw.com

Gerard P. Cavaluzzi
Malcolm Pirnie Inc.
104 Corporate Park Drive
PO Box 751
White Plains, NY
10602-0751
gcavaluzzi@pirnie.com

Committee on Environmental Justice
Peter M. Casper
New York State Thruway Authority
Legal Department
200 Southern Blvd; PO Box 189
Albany, NY 12201-0189
peter_casper@thruway.state.ny.us

Luis Guarionex Martinez
Natural Resources Defense Council (NRDC)
40 West 20th Street, 11th Floor
New York, NY 10011
lmartinez@nrdc.org

Jean M. McCarroll
Carter Ledyard & Milburn LLP
2 Wall Street
New York, NY 10005
mccarroll@clm.com

Committee on Global Climate Change
J. Kevin Healy
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104
jKhealy@bryancave.com

Virginia C. Robbins
Bond Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202
vrobbins@bsk.com

Vincent Altieri
Office of the County Executive
11 New Hempstead Road
New City, NY 10956
vinnyaltieri@hotmail.com

Eleanor Stein
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1000
eleanor_stein@dps.state.ny.us

Committee on Hazardous Waste/ Site Remediation
Lawrence P. Schnapf
Schulte Roth & Zabel
919 Third Avenue
New York, NY 10022
lawrence.schnapf@srz.com

David J. Freeman
Paul, Hastings, Janofsky and Walker LLP
75 East 55th Street
New York, NY 10022
davidfreeman@paulhastings.com

Committee on Historic Preservation Parks and Recreation
Dorothy M. Miner
400 Riverside Drive
New York, NY 10025

Jeffrey S. Baker
Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC
5 Palisades Drive
Albany, NY 12205
jbaker@youngsommer.com

Committee on International Environmental Law
Constantine Sidamon-Eristoff
Lacher & Lovell-Taylor
460 Park Avenue, 20th Floor
New York, NY 10022
cseristoff@lltlaw.com

John French III
33 East 70th St.
Suite 6 E
New York, NY 10021
tudorassoc@aol.com

Committee on Land Use
Rosemary Nichols
Rosemary Nichols Law Firm
1241 Nineteenth Street
Watervliet, NY 12189-1602
rosemarynicholslaw@nycap.rr.com

Edward F. Premo II
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place
Rochester, NY 14604
epremo@hselaw.com

Michael D. Zarin
Zarin & Steinmetz
81 Main Street, Suite 415
White Plains, NY 10601
mzarin@zarin-steinmetz.net

Committee on Legislation
Michael J. Lesser
NYS Department of Environmental Conservation
625 Broadway
Albany, NY 12233
mjlesser@gw.dec.state.ny.us

Terresa M. Bakner
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260-2015
tbakner@woh.com

Committee on Membership
Howard Michael Tollin
Environmental Services Group
Aon Risk Services, Inc. of NY
300 Jericho Quadrangle, Suite 300
Jericho, NY 11753
howard_tollin@aon.com

Janice A. Dean
NYS Attorney General- EPB
120 Broadway, 26th Floor
New York, NY 10271
janice@janicedean.com

Committee on Mining and Oil & Gas Exploration
Thomas S. West
The West Firm PLLC
677 Broadway, 8th Floor
Albany, NY 12207
twest@westfirmlaw.com

Dominic R. Cordisco
Drake Loeb Heller Kennedy Gogerty Gaba & Rodd, PLLC
555 Hudson Valley Avenue, Suite 100
New Windsor, NY 12553
dcordisco@drakeloeb.com

Committee on Pesticides
Telisport W. Putsavage
Keller & Heckman LLP
1001 G Street, NW, Suite 500 West
Washington, DC 20001
putsavage@khlaw.com

Vernon G. Rail
NYS Dept of Environmental Conservation
Region 1, Bldg. 40-SUNY
Stony Brook, NY 11790
railmail@optonline.net

Committee on Pollution Prevention
Kristen Kelley Wilson
Thacher Proffitt & Wood LLP
50 Main Street
White Plains. NY 10606
kkwilson@tpw.com

Megan Rose Brillault
Beveridge & Diamond
477 Madison Ave.
15th Floor
New York, NY 10022-7380
mbrillault@gmail.com

Committee on Public Participation, Intervention and ADR
Terrence O. McDonald
The Bradlau Group, LLP
18 Washington St., 2nd Floor
Morristown, NJ 07963-0541
tmcdonald@thebradlaugroup.com

Jan S. Kublick
McMahon, Kublick et al.
500 South Salina St.
Suite 816
Syracuse, NY 13202-3371
jsk@mkms.com

Gary A. Abraham
Law Office of Gary A. Abraham
170 North 2nd Street
Allegany, NY 14706
gabraham44@eznet.net

Committee on Solid Waste
Marla E. Wieder
Office of Regional Counsel USEPA
290 Broadway, 17th Floor
New York, NY 10007-1823
wieder.marla@epa.gov

John Francis Lyons
Grant & Lyons, LLP
149 Wurtemburg Rd.
Rhinebeck, NY 12572
jlyons@grantlyons.com

Committee on Toxic Torts
Cheryl P. Vollweiler
Wilson Elser
150 East 42nd Street, 23rd Floor
New York, NY 10017
cheryl.vollweiler@gmail.com

Stanley Norman Alpert
The Alpert Firm
85 Fourth Avenue
New York, NY 10003
salpert@alpertfirm.com

Committee on Transportation
William C. Fahey
Wilson Elser
3 Gannett Drive, Suite 400
White Plains, NY 10604-3407
faheyw@wemed.com

Philip Weinberg
St. John's University School Of Law
8000 Utopia Parkway
Fromkes Hall
Jamaica, NY 11439
weinberp@stjohns.edu

Committee on Water Quality
George A. Rodenhausen
Rapport, Meyers, Whitbeck, Shaw & Rodenhausen, LLP
35 Main Street, Suite 541
Poughkeepsie, NY 12601
grodenhausen@rapportmeyers.com

Janis E. Fallon
Whiteman, Osterman & Hanna, LLP
One Commerce Plaza
Albany, NY 12260-1000
jfallon@woh.com

Michael J. Altieri
57 Lime Street
Newburyport, MA 01950
m.j.altieri@hotmail.com

Internet Coordinating Committee
Alan J. Knauf
Knauf Shaw LLP
2 State Street
1125 Crossroad Building
Rochester. NY 14614-1314
aknauf@nyenvlaw.com

Robert S. McLaughlin
Bond Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202
mclaugr@bsk.com

Journal
Kevin Anthony Reilly
Appellate Division: First Department
27 Madison Avenue
New York, NY 10010-2201

Petroleum Spills Task Force
Douglas H. Zamelis
8363 Vassar Drive
Manlius, NY 13104
dzamelis@windstream.net

Wendy A. Marsh
Hancock & Estabrook, LLP
1500 Mony Tower I
PO Box 4976
Syracuse, NY 13221-4976
wmarsh@hancocklaw.com

Gary S. Bowitch
Law Office of Gary Bowitch
744 Broadway
Albany, NY 12207
bowitchlaw@earthlink.net

Task Force on Legal Ethics
Randall C. Young
New York State Dept of Environmental Conservation
317 Washington Street
Watertown, NY 13601-3744
ryoung2934@aol.com

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Kevin Anthony Reilly
Editor

Student Editorial Assistance
St. John's University, School of Law

Editor: Jamie Thomas

Contributors:
Matthew Ford
Daniel Weininger

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NEW YORK STATE BAR ASSOCIATION
ENVIRONMENTAL LAW SECTION
One Elk Street, Albany, New York 12207-1002

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