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# The New York Environmental Lawyer

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

## A Message from the Chair

It is a privilege to serve as Chair of the Environmental Law Section.

I have been active in the Section since it achieved that status over 20 years ago (moving up from being a committee), and I was honored to have been selected to make a presentation at the first Section Annual Meeting in January 1981. My co-speakers were two great men in the field of environmental protection, New York State Commissioner of Health David Axelrod and Langdon Marsh, who was at the time the Executive Deputy Commissioner of Environmental Conservation. My topic was the brand-new field of hazardous waste enforcement. (Keep in mind that CERCLA had been enacted only one month earlier.)

The Section has grown and improved over the past two decades. As of March 2002, there were close to 1,350 members enrolled in the Section.

Our Section's Continuing Legal Education programs—both at our Fall and Annual Meetings and at our Association-sponsored programs held around the state throughout the year—are the best in the business. They feature the high-level policymakers, the day-to-day practitioners of environmental law, and consultants and technical experts in the field, people who really know what they are talking about. Priced to accommodate all budgets, our CLE programs provide great value.

In some facets of our work, however, our maturity has led to staleness. For example, the Section's committees, which are largely structured around the various environmental media and programs, have in some cases—but far from all—become less active and less vibrant than they were. This is a condition afflicting many other Sections of the Bar Association, yet one which the Environmental Law Section has acted quickly to remedy.

Thanks largely to the efforts of Ginny Robbins, who currently serves as the Second Vice-Chair of the Section and who chairs our Committee on Committees, several initiatives are underway to reinvigorate our committees. Not the least of those is the development of a Committee Chair Manual, authored by Phil Dixon. That

## Inside

document sets forth the Section's expectations for the leaders of our committees, and it thereby injects a measure of accountability into those important roles.

In addition, the officers of the Section will be looking closely into the scope of each committee's mission and its relative success in fulfilling it in an effort to determine whether it is functioning as intended. For example, we expect to consider such issues as whether some committees should be expanded, contracted, eliminated, or merged with another committee. It is our sense, however, that the problems affecting other committees can be resolved through the committed attention of the members of those committees themselves.

A more difficult issue for the Section as it has aged has been the growing homogeneity of the Section's active members. As time has passed, the breadth of our members—at least in terms of their professional backgrounds—has decreased.

To examine the status quo in that regard and to make recommendations, the Section has created an Ad Hoc Committee on Diversity. It is designed to deal with the concern that on occasion Section programs/initiatives are not well-balanced by sector (public/private), gender and race.

Chaired by Joan Leary Matthews and Eileen Millett, the Committee has as its charge

> to identify the diversity needs of the Section in the areas of membership, programming and committee functions—and in any other areas that the Committee identifies.

The Committee will make an interim report to the Executive Committee at the Fall Meeting, which is scheduled to be held in Cooperstown on September 27-29, 2002.

As a way of tackling at least one element of the perceived imbalance within the Section, notably the fact that our active members are largely from the private sector, the CLE program at the Fall Meeting will revolve around an interactive private-public dialogue. It will depend heavily on participation in the program by government attorneys, and will feature panels on such topics as negotiating a consent order and negotiating permits. In addition to panel discussions at which formal presentations will be made, there will also be "breakout" sessions at which more focused discussions can occur.

Developing such a program will require the participation and the input of the Section at large and beyond. I invite you to offer your ideas and to become involved in the planning of this unusual program. It will be tailored to the needs of many and thereby be more effective as an educational tool only if comments are provided by the broadest possible cross-section of environmental law practitioners.

My telephone number is 518-427-2670. My e-mail address is jgreenthal@nixonpeabody.com.

I look forward to hearing from you and working with you to make the fall program, and the Environmental Law Section, even better than it already is.

**John L. Greenthal**

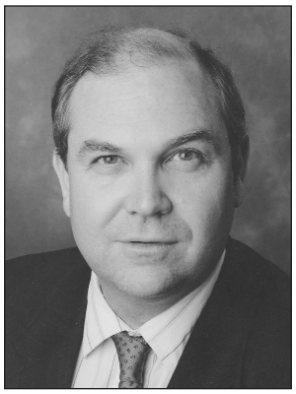
# New York State Bar Association
# Environmental Law Section

# 2002 Fall Meeting

## *September 27-29, 2002*

## The Otesaga Hotel
## Cooperstown

# From the Editor



This issue of the *Journal* is being published as Dan Ruzow retires from his stewardship of the Section during a very busy year. This year will likely be remembered for, among other initiatives, the commencement of the Section's self-evaluation of how we operate and provide services, and the manner in which restructuring can provide a more streamlined operation and better services. This initiative, started under Dan's chairmanship and shepherded by Virginia Robbins and others, including Phil Dixon's ongoing crafting of a Chair's manual to guide future Section leaders and participants, will likely provide the template for the next two decades of Section activities. As such, significant thought and planning is going into the effort. Dan should be congratulated for getting the process started. This issue also gives the Section a chance to welcome our new Chair, John Greenthal, who has already taken the helm at the Spring Meeting in Albany.

The *Journal* plays a vital role in linking our membership, but also in providing information to members, information that otherwise may be hard to access. This information is provided in several different formats, including special features, such as the Administrative Update, Environmental Decisions (prepared by students at St. John's Law School), ethics updates provided in Marla Rubin's regular "Minefield" column, articles derived from the Section's Environmental Essay competition, regular housekeeping items, and other features. We are also looking to revive committee contributions on a regular basis, so as to provide a voice for committees and to keep readers regularly informed about committee activities, which so often form the backbone of Section endeavors.

The *Journal* also relies on articles submitted by recognized professionals writing in their areas of special expertise or particular interest. These articles—all by volunteer writers—so often provide invaluable information, and also often provide useful perspectives which at the very least may trigger interest in recent developments and even possibly elicit responses. As an editor, I do not exercise editorial control over the content of an article by recognized writers with responsible viewpoints. If I were to edit out viewpoints based on the existence of contrary viewpoints, that, I believe, would be a disservice to the *Journal*'s pedagogical role in generating discussions on important public issues. I am also, personally, distinctly uncomfortable with the notion that I should limit responsible discussion. As such, the articles which are published do not represent any editorial viewpoint, nor, in fact, do they represent the Section's position on any issue of public importance unless such is explicitly stated. This, in fact, is made very clear in the *Journal*'s statement of editorial policy, which I had included on the last page of the *Journal* a few years ago and which has appeared in every issue since.

That being said, as I have also repeatedly stated in this column and elsewhere, especially at our Section meetings where the major players in the environmental field congregate, I always invite responsive articles. The invitation remains open. It is sometimes hard to anticipate in advance which articles will prompt a response. Given some of the anomalies of our publishing cycle, and especially the need for me as editor to keep publication on track, it is often unlikely that responsive articles will get published in the same issue. However, as I have consistently made very clear in the past, responsible responsive articles, or even a letter to the editor, are always invited and will be warmly received.

As noted, whether or not a particular issue has present urgency is not always clear to individuals who are not in the loop on particular events or policy matters. For that, we all depend on the provision of timely information by those parties, especially regulatory agencies or other public entities that are in the proverbial loop. Several times over the years, and most recently in a series of telephone conversations last year, I have invited several regulatory agencies to utilize the *Journal* as a device for informing our membership about policies or events that are important to us. I reiterate that invitation and encourage the Committee Chairs to also reach out to the various agencies with which our members interact. The particular type of feature should be one that provides the basic information that readers need in advising clients or even in dealing with the agency, though the format does not have to be static. A list of bullet-points might be more appropriate on some occasions, whereas more expository writing might be more appropriate at other times. An additional pedagogical benefit might be that readers could thus connect areas of ongoing regulatory interest and perspectives offered by other authors in their articles on current areas of public interest. We continue to look forward to receiving articles from writers with a diverse set of backgrounds and experience.

This issue includes an article by Peter Henner, whose area of practice includes the representation of municipalities and environmental organizations on

issues regarding the electrical industry. His present focus is on the Public Service Commission's recent deregulation of investor-owned electrical utilities, intended to encourage competition and expand customer choice in selecting power suppliers. But, he argues, the concomitant deferral of a comprehensive environmental review of the effects of deregulation has resulted in that responsibility being eclipsed. Peter, in an extensive and thoughtful article, addresses what he sees to be the problematic consequences of deregulation as it is being accomplished. Peter thoughtfully sent copies of his article to PSC personnel who were involved in some of the matters discussed in the article.

Marla Rubin includes another essay in her continuing series of articles on ethics issues that pertain to the practice of environmental law. In the present article she tackles—need it be said—Enron and Arthur Andersen. Her focus, though, is on the multi-disciplinary practice of law, a matter that has engaged the New York State Bar Association significantly in recent years. Her concern is the extent to which ethical rules that govern law practice by lawyers do, or don't, govern the provision of non-legal services. And if not, what kinds of clients are most likely to be misled or simply fail to comprehend that nature of the representation.

This issue also includes an article by Jeffrey Tapick, of Columbia Law School, addressing conservation easements. The article was a first place finalist (tied for first) in the Section's Environmental Essay Competition. Students at St. John's have provided the case summaries. The case summaries have always been informative and timely, and for this I have to thank Phil Weinberg for his constant efforts in this regard.

Turning to Phil Weinberg—our long-time Section member and, in fact, a Section founder as well as an early Chair—more than a few kind words were said about Phil at an event in his honor which was held at St. John's recently. St. John's Law School's Environmental Law Society has been successfully expanding its mission and activities in recent years. Members contribute to our *Journal*, and the Society recruits many of tomorrow's environmental lawyers. The Society in recent years has also been holding an annual cocktail party at the law school, where an annual honoree is recognized. Recently, Walter Mugdan was recognized before a very sizeable crowd. This year, Phil Weinberg was honored before a standing-room-only crowd populated by fellow faculty, students and former students and, especially, many Section members. Dean Joseph Bellacosa and Academic Dean Andrew Simons also participated. Phil's stature, always secure, as one of the deans of environmental law in New York, was all the more apparent in the turnout, as was the sincere admiration and warm friendship in which he is held by so many in the environmental and academic communities. Andy Simons' hand in the success of the event was always apparent. What may not be as apparent to our members, though it has always been known by those of us who hail from St. John's, is that Andy is a recognized song master. A copy of his "Weinberg Opus," commissioned for the occasion, is included on page 5. A photo of Phil and Dean Bellacosa is also included.

And that concludes the Editor's column for this issue. For prospective authors, please mind the deadlines included on the last page of every issue.

**Kevin Anthony Reilly**

# REQUEST FOR ARTICLES

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

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

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

# Ode to Weinberg

**Dean Joseph Bellacosa and Professor "Phil" Weinberg**

I
As we were wonderin' what to say about Weinberg
We thought of askin' his friends at NYPIRG
They said, "We know him as a legal scholar."
He's cleaned this land for you and me.

**Refrain:**
**This land is your land—this land is our land;**
**And Phil has led us as we've tried to clean up**
**Our rivers and beaches and our landfills also;**
**He's cleaned this land for you and me.**

II
He's roamed and rambled from Penn to Columbia
And he's written books for / protecting our flora
And our fauna also / as Attorney General—
He's cleaned this land for you and me.

**(Repeat Refrain)**

III
The sun came shining when he came to St. John's
So many years past / to teach our students
Of the environment and how to protect it;
He's cleaned this land for you and me.

**(Repeat Refrain)**

IV
As he was walking to a life of teaching
He saw above him that endless tenure;
He saw below him the students he'd treasure:
"This life" he said, "was meant for me."

**(Repeat Refrain)**

# The Alarm Clock Didn't Ring: The Failure to Consider the Environmental Impacts of the "Deregulation" of the Electric Industry in New York

By Peter Henner

In 1996, the New York State Public Service Commission (PSC), in Opinion No. 96-12,[1] adopted a far-reaching decision to radically restructure and deregulate New York's investor-owned utilities, with the stated goal of establishing "competition" and "customer choice" for all ratepayers. As part of that determination, the PSC directed the preparation of a Final Generic Environmental Impact Statement (FGEIS) and made environmental findings in accordance with SEQRA. However, that FGEIS deferred consideration of important environmental issues until they could be analyzed in the context of the specific plans that would be filed by each utility, and in the context of other decision-making by the PSC. Unfortunately, these issues were later ignored in subsequent environmental reviews, with the result that the PSC has now implemented what may be the single most important policy initiative of the last 25 years without meeting its legal obligations to analyze the prospective adverse environmental impacts of its determination, and to minimize such impacts to the maximum extent practicable.[2]

The purpose of SEQRA is to ensure that state and local agencies give full consideration to the environmental consequences of their actions before committing to an action. A town planning board must consider all prospective impacts of a new subdivision, including impacts on growth, traffic, municipal services, air quality and water resources. Similarly, a state agency proposing to dramatically change the manner in which a crucial service is delivered to the citizens of the state must also carefully consider the impacts of its proposed determination. The failure of the PSC to do so has serious implications, not just with respect to the future of the electric industry, but also for the issue of SEQRA compliance. The important public policy goal of a thorough environmental review for all public "actions" is threatened if a state agency can avoid SEQRA in its consideration of a controversial decision such as the decision to implement "competition" in the electric industry.

It is the author's belief that deregulation has failed in New York and will continue to fail: 1) electric prices have continued to rise at a higher rate in New York than in the rest of the country; 2) customer "choice" has not been practical; 3) problems associated with the policies for full stranded cost recovery have provided a windfall for utilities at the expense of ratepayers; 4) transmission constraints have resulted in the exercise of market power, especially in the New York metropolitan area; 5) the reliability of electric transmission and distribution systems in New York State has decreased; and (6) utility divestiture of generating assets may exacerbate the problems of meeting the rising demand for electricity in New York State. However, the purpose of this article is not to argue against deregulation; rather, my intention is to provide a case study of how a critical policy decision was made without full consideration of potentially serious adverse environmental impacts. A proper SEQRA review could and should have anticipated the factors and events that have resulted in the failure of deregulation. Had such a review been done, it is possible that different determinations would have been made with respect to the restructuring of the electric industry.

The recent California energy crisis has graphically illustrated the dangers of implementing deregulation without adequately considering prospective impacts. This is not to say that the problems in California can or will happen in New York. It is to say that one of the purposes of SEQRA is to ensure that the possibility of such a crisis is considered by the decision-making agency, in this case, the PSC. It is also to say that the possibility of such a crisis, as well as the possibilities of lesser adverse impacts, was not given adequate consideration in the SEQRA review process.

In 1993, the PSC instituted the "Competitive Opportunities Proceeding."[3] After a collaborative process, and a formal hearing culminating in a Recommended Decision, the PSC issued Opinion No. 96-12 on May 20, 1996. In this Opinion, the PSC: 1) ordered five investor-owned utilities—Central Hudson Gas and Electric Corp. ("Central Hudson"), Consolidated Edison ("Con Ed"), New York State Electric and Gas (NYSEG), Orange and Rockland Utilities ("Orange and Rockland"), and Rochester Gas and Electric (RGE)—to file proposed plans for restructuring;[4] 2) set forth a lengthy vision and goal statement; and 3) made important decisions with respect to the implementation of retail versus wholesale competition and the creation of an Independent System Operator (ISO).

In Opinion 96-12, the PSC also made findings under the State Environmental Quality Review Act (SEQRA)[5] and approved a Final Generic Environmental Impact Statement (FGEIS) that had been issued on May 3, 1996. This FGEIS formed the basis of the environmental conclusions made by the PSC in Opinion 96-12.

As discussed below, the environmental findings in Opinion 96-12 necessarily left a number of issues to be

resolved in the context of specific restructuring proposals which were to be filed by the individual utilities. However, the PSC ultimately determined not to require the preparation of any supplemental environmental impact statements in connection with individual utility restructuring plans. Instead, the PSC determined that all of the environmental impacts associated with these plans were within the thresholds and limits established by the 1996 FGEIS. Consequently, a number of important environmental impacts pertaining to the deregulation of electricity were never considered, mitigation measures were never considered, nor were the environmental impacts of alternative measures analyzed in the context of the individual restructuring efforts.

## Issues in the Restructuring of the Electric Industry in New York

The importance of electricity to contemporary society cannot be overstated. Virtually every aspect of daily living, from the use of residential lighting and appliances, and commercial and industrial enterprises, to the services upon which we rely, is dependent upon the existence of a reliable and affordable supply of electricity. The need for electricity is expected to rise dramatically as a result of the use of computers; 13 percent of national electric use is currently used to power computers and the Internet, and this figure is expected to increase to 50 percent.[6] Traditionally, electricity has been supplied by public utilities that have exercised a monopoly subject to price regulation by government. Public utilities have also been vertically integrated, and have generated power, transmitted power and distributed it to customers. However, in the last 20 years, power producers have become established which are not regulated utilities. Furthermore, technological advances in electricity transmission, combined with both legal and regulatory changes, have made it possible to separate the electricity generation function from the transmission and distribution function.[7]

Under traditional regulation, a utility is allowed to earn a rate of return based upon its capital investment in a generating facility. The generation of power has been assumed to be a monopoly, but the utility is restricted from obtaining monopoly profits by the regulatory agency. However, with the rise of non-utility generation, non-regulated power producers can now generate power, in some cases cheaper than the utility. Advocates for deregulation argue that power produced by non-regulated generators, and sold in a competitive market, will ultimately result in lower prices for electricity than can be realized under a regulated monopoly.

In order to establish a competitive market for power generation, it is necessary for utilities to separate the generation and transmission and distribution functions. Under the competition model chosen by the PSC, electric customers will purchase power from generators in a competitive marketplace. The power generators will then "wheel" the power to the customers on power lines owned by the utility. The utility will charge a fee for power delivery, in addition to the fees paid to the generator.

Under this new "deregulated" system, the cost of generating the power will theoretically be lower than the regulated price presently charged by the utility. However, the goals of competition and choice of electric supplier have not been realized. As of November 30, 2001, less than 5 percent of the customers of investor-owned utilities in New York State purchased power from entities other than the utility.[8] Nor has the price of electricity been reduced for New York ratepayers: between 1999 and 2000, the average price paid by all New York ratepayers per kilowatt hour increased from 10.4 cents to 11.19 cents, while the national average price only increased from 6.66 cents to 6.69 cents.[9]

New York State's determination to "deregulate" electric utilities will almost certainly have a tremendous impact upon the state. In particular, this decision will have a number of "environmental impacts," especially considering the broad definition of "environment" under SEQRA.[10] Prospective impacts include the possibility of increased air pollutant emissions, changes in energy use, impacts on renewable energy programs and energy efficiency programs, and conservation programs. In addition, deregulation of the electric industry may have tremendous social and economic impacts, including changes in the cost of power, the availability of electric power for prospective economic development, impact on low-income ratepayers, and impacts upon municipalities that have been the host communities for large power plants.[11]

If deregulation encourages cheaper power, we must ask whether the use of cheaper power will result in increased pollution. For example, should older coal plants not covered by contemporary environmental controls obtain a competitive advantage as a result of deregulation, electric power from these plants could displace power from newer, cleaner plants, and could result in increased air pollution.

Deregulation may also have a significant impact on energy conservation programs. Public service commissions may lose the ability to effectively require utilities to allocate resources for programs that encourage energy conservation and energy efficiency. Furthermore, utilities that have been engaged in research and development activities, particularly with respect to renewable energy, will no longer be able to fund those activities in a competitive deregulated environment.

There are also serious environmental impacts associated with the transition from a regulated environment to a competitive environment. The sale of power plants to

non-regulated entities may affect environmental permits, and result in property tax and other economic consequences to the host communities.

Perhaps the most important consequence of deregulation is the question of "stranded cost recovery." Utilities, having invested large sums of money based upon a regulated environment which was expected to continue, claim that they are entitled to recover those sums of money as a result of the transition to a deregulated environment. In contrast, electric customers, either industrial or residential, that may seek to leave the utility and obtain power from different sources, may be adversely affected if they are required to pay money to the utility, as well as pay for the cost of obtaining power elsewhere.

This is not to say that the implementation of "competition" is necessarily bad or that these issues cannot be satisfactorily resolved. However, if a governmental agency in general, and the New York State Public Service Commission in particular, is to adopt a competition policy, it has an obligation to consider these possible effects, and, in the case of a New York State agency, to take the requisite hard look required by SEQRA before implementing such a policy.

## SEQRA Requirements

SEQRA requires that every "agency" consider the prospective environmental impacts of its "actions." A decision maker is required "to balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project."[12] An environmental impact statement under SEQRA "is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return."[13]

Most of the 25 states that have "deregulated" or "restructured" the electric industry have done so by legislative enactment.[14] Legislative enactments are not "actions" under SEQRA, and if the decision to deregulate electric utilities had been made by the Legislature, it would have been exempt from environmental review.[15] However, in New York, the restructuring of the electric industry was accomplished through a "proceeding" that was conducted by the PSC, and the administrative determination to implement deregulation was therefore an "action" within the meaning of SEQRA. The PSC was therefore required, as part of its SEQRA review, to consider the prospective environmental impacts of deregulation, including prospective mitigation measures and alternatives, as well as the "no-action" alternative. The PSC was also required to consider the "cumulative impact" of its action, together with other planned actions.

## Summary of Competitive Opportunities Proceeding, Opinion 96-12

Opinion 96-12 did not implement the actual deregulation of the electric industry in New York State. Instead, the PSC set forth its "vision and goals for the future regulatory regime,"[16] identified the major issues that would need to be resolved, and set forth an implementation plan. The opinion established a goal of establishing competition with respect to the generation of power and in the area of energy service, while maintaining system reliability. The PSC determined that competition was desirable because of the potential consumer benefits, particularly with respect to the lowering of electricity prices. The PSC determined to adopt a "retail model," by which customers would purchase electricity from generators, either directly, or indirectly through energy service companies (ESCOs), rather than a wholesale model, where utilities purchase electricity on the open market, for resale to customers.

The PSC rejected the utilities' argument that they were entitled to recover all stranded costs as a matter of law.[17] Instead, the issue of stranded cost recovery was deferred to the individual restructuring plans which utilities were to file. The PSC determined that only "prudent" strandable costs would be recovered. The PSC determined to delay its reassessment of "the flexible rate guidelines and the need for them [until] after the competitive market has been in effect for a few years."[18]

The PSC also determined to implement a "system benefits charge" to provide a funding source for public policy initiatives that were not expected to be addressed by the competitive markets. These public policy initiatives pertain to programs to encourage energy efficiency, conservation, and renewable resources. However, the PSC also stated that the "use of a system benefits charge should be revisited sometime after retail competition has commenced to determine whether the level of these programs is sufficient and whether the continued use of a system benefits charge is required."[19]

Opinion 96-12 "strongly encourage[d] divestiture, particularly of generation assets, but [did] not require it immediately."[20] Similarly, "while divestiture of energy service company operations is encouraged, for now we will allow utilities to continue to provide energy services to their customers . . . ,"[21] utilities were also directed to continue to be providers of last resort for electric service; i.e., if a customer did not elect a different energy supplier, the customer would continue to purchase electricity from the utility.[22]

As noted above, Opinion 96-12 did not implement deregulation. However, the PSC set forth an implementation plan that was intended to enable "customers to enjoy the benefits of competition as quickly as possible" because "the need to achieve the goals of competition is

urgent and we must proceed without undue delay."[23] In the first phase of the plan, utilities were directed to file rate restructuring plans by October 1, 1996, with the goal of establishing a competitive wholesale power market in early 1997 and introduction of retail access early in 1998. In addition to the rate restructuring plan, the utilities were also directed to file: 1) documents pertaining to the classification of transmission and distribution facilities, 2) a proposal for the creation of an independent system operator, 3) information pertaining to load pockets, and 4) information about the role of energy service corporations and other issues with both the PSC and with the Federal Energy Regulatory Commission (FERC).[24]

The PSC anticipated that "a wholesale competitive market [would] begin in early 1997. The experience gained in the wholesale market prior to the introduction of retail access will allow parties to become more familiar with what can be expected in the way of market prices."[25] Although the experience that was expected to be gained in the wholesale competitive market was expected to be necessary for the transition to retail competition, the utilities' filings in 1996 were expected to address

> the structure of the utility both in the short and long term . . . ; a schedule for the introduction of retail access to all of the utilities' customers, and a set of unbundled tariffs that is consistent with the retail access program, [and] a rate plan to be effective for a significant portion of the transition that incorporates our goal of moving to a competitive market.[26]

As it happened, wholesale competition did not begin until November 18, 1999, when the New York ISO commenced operations.[27] The delay in implementing wholesale competition, if considered by the PSC, might have slowed the PSC's headlong rush toward retail competition. In May 1996, the PSC did not have a clear vision of what was likely to happen with respect to the transition to competition, and was hoping to rely upon the experience that it hoped to gain as result of the transition to wholesale competition in 1997. Nevertheless, the PSC directed the utilities to proceed with the transition to retail competition without the benefit of any experience with wholesale competition.

## Environmental Findings in Opinion 96-12

In making SEQRA findings in Opinion 96-12, the PSC characterized its

> proposed action in this proceeding [as] the adoption of a policy supporting increased competition in electric markets, including a preferred method to achieve electric competition; and regulatory and rate-making practices that will assist in the transition to a more competitive and efficient electric industry, while maintaining safety, environmental, affordability, and service quality goals.[28]

The "Findings" section of Opinion 96-12 acknowledged that

> the likely environmental effects of a shift to a more competitive market for electricity are not fully predictable due to: 1) the complexity of the electric industry in New York; 2) the interaction of New York's regulatory activities with those of other states and the federal government; 3) the level and types of market responses; and 4) the lack of relevant examples of such a shift to competition.[29]

In summary, the PSC acknowledged that, as of May 1996, it was not possible to fully ascertain the extent of the environmental impacts of its proposed action.

Nevertheless, the PSC determined that "the FGEIS did not identify reasonably likely significant adverse impacts . . . " with the exception of issues pertaining to loss of research for renewable energy and energy efficiency, impacts on local communities where generating plants were located, and decreased air quality as result of increased emissions related to oxides of nitrogen and sulfur.[30] In order to address these impacts, the PSC proposed mitigation measures in the form of a "systems benefit charge" to fund energy efficiency and research programs, and expressed its intention to "monitor closely" the competitive restructuring to ensure that specific mitigation measures are implemented if needed.[31] The PSC also expressed its intention to "support and assist efforts by New York State and federal agencies with respect to possible increased air contamination as a result of the transition to competition."[32] The PSC expressed its belief that energy efficiency would be increased by its retail competition model and that such a model might provide as much research and development as the "no-action" alternative.[33]

Even though adverse environmental impacts were hard to predict, the PSC determined that any adverse environmental impacts that could not be mitigated were outweighed by the benefits that it assumed would be realized as a result of the transition to competition. It might be argued that the perceived benefits of competition were not properly analyzed in the FGEIS, or in Opinion 96-12. A critical or, at the least, a more balanced discussion of the presumed benefits of competition might have been able to predict the possibility that the transition to competition would not yield the promised rewards. However, while the PSC's environmental analysis could have been challenged on such grounds, a

strong argument could be made that the FGEIS, based upon the knowledge that was available in 1996, represented a reasonable effort to comply with the PSC's obligations under SEQRA, and to provide a thorough environmental review of prospective adverse environmental impacts. The PSC's efforts should be compared with the efforts of the Federal Energy Regulatory Commission, which also prepared an FEIS in connection with its Order 888, establishing an open access rule for electricity transmission lines.[34] Given the lack of knowledge at the time, given the strong theological belief of the PSC in 1996 in the miracle powers of "competition," and the traditional deference given to substantive compliance with SEQRA, the environmental findings of the PSC in Opinion 96-12 would appear to meet statutory muster.

Nevertheless, the major criticism of the PSC's environmental review of the deregulation process is not that it failed to conduct a proper review in the 1996 FGEIS; rather, the crucial failing is the PSC's continuing reliance upon this 1996 FGEIS to address the questions that have arisen in the course of implementing deregulation. This is especially true since, from the perspective of 2002, with the benefit of hindsight into the experiences not only of New York, but also of California, the environmental findings in Opinion 96-12 are, at the very least, suspect.

As specific restructuring plans were developed, and as determinations were made with respect to issues that were left open in Opinion 96-12, further environmental review should have been required. Nevertheless, no Supplemental Environmental Impact Statement was prepared, and the important environmental questions were not addressed. Consequently, the PSC failed to consider the important environmental impacts associated with the deregulation of the electric industry.

### Filings of Individual Electric Utilities

On October 1, 1996, Con Ed, RGE, NYSEG, Orange and Rockland, and Central Hudson filed rate/restructuring proposals, in accordance with Opinion 96-12. Con Ed, RGE, and NYSEG filed Environmental Assessment Forms (EAFs) for their plans. On December 19, 1996, a coalition of 16 environmental and consumer groups known as Public Interest Intervenors (PII)[35] filed a motion to require the remaining utilities to file Environmental Assessment Forms, and to require the preparation of Supplemental Environmental Impact Statements for all five rate/restructuring plans.

After the rate/restructuring plans were filed, the utilities engaged in settlement discussions with all interested parties. As a result of these discussions, proposed settlement agreements were submitted to the Public Service Commission that included specific proposals for the utilities: 1) to divest themselves of generating assets, 2) to implement rate changes as a result of the transition to competition, 3) to recover stranded costs, and 4) a proposal regarding systems benefit charges. Environmental Assessment Forms were ultimately submitted with respect to all of these proposed settlements.

PII's motion was ultimately denied in a ruling by Chief Administrative Law Judge Gerald Lynch, on June 19, 1997. Judge Lynch held that

> PII's support for preparing SEISs is based in part on its overly narrow view of the FGEIS. The general nature of the FGEIS does not detract from its comprehensiveness which covers many of potential effects of the introduction of competition into the generation and other segments of the electricity market.[36]

PII had identified a number of specific issues that they believed had not been adequately addressed in the FGEIS, and which required further supplemental environmental analysis. PII raised six issues that were common to all of the restructuring plans, plus an additional two issues with respect to Con Ed's restructuring plan. Specifically, PII questioned: (1) the level of the systems benefit charge, which was intended to pay for the cost of energy efficiency, conservation, and research and development, particularly with respect to renewable energy; (2) whether the reduced commitment to energy efficiency would have any air quality impacts; (3) whether there were environmental impacts associated with the institution of "price cap regulation" for transmission services; (4) whether there were environmental impacts associated with the imposition of a "competitive transition charge" which would permit the utilities to recover their stranded costs, and, according to PII, would protect the utility's fossil generating units from full market risk; (5) the lack of environmental disclosure with respect to the sources of power that customers would be able to purchase under a retail choice program; and (6) impacts on "load pockets" (areas in which access to electric power is limited by transmission and distribution constraints). In addition, PII also argued that an SEIS should have studied the two particular impacts associated with Con Ed's restructuring plan: a requirement that 80 percent of the electric power used in New York City would be generated within the city, and the tax revenue impacts associated with the need to purchase electric power from out-of-state to replace the power from the divested generating facilities.

Although the FGEIS had considered the possible air quality impacts at some length, it could not and did not address the specific questions associated with individual restructuring plans. The FGEIS considered the issue of stranded costs, but Opinion 96-12 specifically deferred consideration of the issue of stranded cost recovery to the individual restructuring plans. Now, in these individ-

ual plans, the PSC approved settlements permitting the recovery of these costs, and, furthermore, established a specific mechanism, the Competitive Transition Charge (CTC), for their recovery. The PSC did not consider the possibility of mitigating the prospective environmental impacts of permitting the full recovery of stranded costs. Nor did the PSC consider the implications of permitting the full recovery of stranded costs and the possible subsidization by ratepayers of uneconomic and environmentally dirty power plants.

Furthermore, by permitting the utilities to recover their full stranded costs, the PSC affected the process by which the utilities' generating assets would be sold. If the utility will recover any losses associated with the forced sale of generating assets, it has no incentive to minimize these losses in the sale process.

The imposition of the CTC will also affect competition, and the ability and willingness of customers to purchase power from sources other than the utility. The CTC may therefore affect whether or not competition, the stated goal of the PSC, will actually be realized. Nevertheless, the PSC did not deem the potential environmental impacts of the CTC on competition as worthy of study in a SEIS.

Similarly, the other impacts identified by PII raised issues that were not addressed in the FGEIS. Although the FGEIS considered the imposition of a systems benefit charge, questions as to the amount of the systems benefit charge were obviously delayed until the individual restructuring plans. However, the environmental impacts of different levels of the systems benefit charge were not considered in the individual restructuring plans. Higher systems benefit charges would mitigate environmental impacts, a crucial question under SEQRA. Nevertheless, this question was not considered worthy of an SEIS.

Issues pertaining to load pockets are obviously specific to each utility's service area. Specific load pockets, even the New York City load pockets, were not discussed in the FGEIS. Once again, there are clear alternatives as to how this issue could have been addressed and prospective environmental impacts associated with each of these alternatives.

Ultimately, the PSC, in approving all five of the utility restructuring plans that were submitted on October 1, 1996, upheld the recommendation of Judge Lynch not to require an SEIS. In all of these decisions, as well as in the decision approving Niagara Mohawk's PowerChoice restructuring plan, the PSC determined that the impacts identified in the Environmental Assessment Form and all of the other information that had been submitted was "within the bounds and thresholds of the FGEIS adopted in 1996," but noted "because of the inherent uncertainty in forecasting future impacts, as a matter of discretion, monitoring of [the utility's] restructuring and environmental impacts will be implemented."[37] Thus, even though the PSC acknowledged the continuing uncertainty, and even though the PSC did not consider the specific impacts associated with each deregulation plan, no further environmental review was considered necessary.

The only issue that the PSC did deem worthy of further environmental review was the question of environmental disclosure of the sources of power. Although any environmental impacts associated with such disclosure were found to be within the scope of the 1996 FGEIS, the PSC ultimately addressed the issue of environmental disclosure in a separate order, Opinion No. 98-19, issued on December 15, 1998.

### Niagara Mohawk's PowerChoice Proceeding

Niagara Mohawk had been exempted from the requirement to file a rate and restructuring plan by October 1, 1996, because Niagara Mohawk had filed a rate and restructuring proposal known as PowerChoice. This proposal involved long and comprehensive settlement discussions with all interested parties, that resulted in the filing of a proposed settlement on October 10, 1997.[38]

Niagara Mohawk had unique problems as a result of 29 purchase power agreements with independent power producers. Pursuant to the now repealed provision of section 66-c of the Public Service Law[39] (commonly referred to as the "six cent law"), Niagara Mohawk had been required to purchase power at substantially above market cost. By the mid-1990s, these contracts had contributed to a fiscal crisis for Niagara Mohawk, which, inter alia, was considering filing bankruptcy.

The Niagara Mohawk settlement also included a "Master Restructuring Agreement" (MRA). Under the MRA, Niagara Mohawk would pay approximately 80 percent of the value of the purchase power agreements, in the form of cash and 25 percent of Niagara Mohawk's stock, in order to obtain relief from the requirement to purchase power at above market rates.

Niagara Mohawk submitted a supplemented Environmental Assessment Form on November 4, 1997, with respect to environmental issues. PII did not comment on the Niagara Mohawk EAF, and several of the environmental groups represented by PII, including the Natural Resources Defense Council, Pace Energy Project, and the Adirondack Council, signed the Niagara Mohawk settlement. Nevertheless, the PSC, in an appendix to Opinion 98-8, repeated its discussion of the generic concerns raised by PII.[40]

However, the city of Oswego, the "Steam Host Action Group" and a group of large industrial customers known as "Multiple Intervenors" commented on the EAF. The "Multiple Intervenors" supported the EAF, as they had supported EAFs filed by other utilities. The "Steam Host Action Group" expressed the concerns of

industrial customers that purchased steam from cogeneration plants owned by independent power producers. Oswego, joined by the cities of Fulton and Cohoes, raised a number of concerns with respect to the systems benefit charge, and the potential social and economic impacts of power plant closures. In addition, a variety of other parties commented on the EAF in their briefs to the PSC.

In Opinion 96-12, the PSC had declined to immediately require that utilities divest their generating assets. Nevertheless, all of the utility plans, including Niagara Mohawk's plan, involved some provisions for the sale of generating assets.

In adopting a divestiture plan, there are a number of variables that need to be considered. The PSC had to determine whether the generating assets should be sold at an auction, how the auction would be conducted, and whether the utility itself or any of its subsidiaries would be permitted to participate in the auction. Furthermore, the PSC had to determine how the generating assets would be packaged.

For example, one of the issues involved in Niagara Mohawk's auction was whether all of its hydroelectric facilities should be auctioned in one package, or whether interested bidders could bid on one or more hydroelectric facilities separately. The PSC, by packaging the 38 MW School Street hydroelectric facility together with a group of small hydroelectric facilities, effectively precluded the city of Cohoes from participating in the auction, and limited bidding to entities willing to assume the responsibility for operating a group of hydroelectric facilities. The environmental impacts of decisions pertaining to the conduct of individual auction plans were obviously not considered in the context of the FGEIS associated with Opinion 96-12.

The FGEIS did consider, and specifically acknowledged, the fact that the selling of generating assets could have local economic impacts. However, the FGEIS did not consider the specific localized impacts of specific utility plans on specific communities.

Niagara Mohawk's "Recommended Full Environmental Assessment Form," that it filed on March 6, 1998, in connection with its proposed auction plan, noted that

> the specific physical and operational changes that might result from the divestiture of [particular facilities] *are difficult to predict*. It is safe to say, however, that the changes which may result have already been covered in both the PSC's Competitive Opportunities Environmental Impact Statement, as well as the analysis of the environmental impacts of the PowerChoice restructuring plan [emphasis added].

If these changes were difficult to predict in 1998, it is hard to imagine how they could possibly have been considered in the 1996 FGEIS. In any event, none of these impacts from the divestiture of any specific facility were previously considered, either in the FGEIS, or in the EAF associated with the PowerChoice proceeding itself.

Niagara Mohawk's EAF in the PowerChoice proceeding did not acknowledge any specific impacts. Instead, the EAF stated, in a conclusory manner, that the benefits of alleged lower electricity rates would compensate for any adverse impacts. Niagara Mohawk did not consider the fact that communities such as Oswego, where utility generating assets comprise 71 percent of the local tax base,[41] would be particularly hard-hit by the sale of generating assets.

The Department of Public Service did prepare a Draft Supplemental Environmental Impact Statement (DSEIS) in connection with Niagara Mohawk's auction plan. The DSEIS was issued on April 15, 1998, more than three weeks after the PSC had determined to approve the restructuring plan of Niagara Mohawk, and exactly one week after the PSC approved the revised auction plan for Niagara Mohawk, as well as auction plans for two other utilities on April 8, 1998. The PSC explained its decision to conduct a SEQRA process after making its determination by stating that it would proceed on a "dual track": by proceeding with the auctions while proceeding with the environmental review (the receipt of comments on the Draft Environmental Impact Statement (DEIS) and the preparation of the Final Environmental Impact Statement (FEIS).

Thus, any review of the localized impacts of the auction plan was an ex post facto review, conducted after the relevant determinations had been made, in clear violation of the mandate that SEQRA processes should be completed before the agency determines to act. The FGEIS had specifically acknowledged that there would be need for such a review, that

> it is not possible to predict what communities will experience changes in character due to electric competition, or what will be the magnitude of those impacts . . . it is not possible now to predict what communities will experience losses of tax revenues due to electric competition, or what will be the magnitude of those losses.[42]

Nevertheless, even though the need for consideration of local impacts was acknowledged in 1996, the actual environmental review of these impacts was not conducted until after the final determinations were made with respect to the sale of the generating assets.

Although the PSC finally, in its April 15th DSGEIS, acknowledged that there might be serious consequences

for the city of Oswego, the PSC was no longer in a position to take any meaningful action, nor did the PSC take any meaningful action to mitigate those consequences. Given the decisions to which the PSC had already committed itself, there were no effective alternatives. The restructuring plan had already been approved, and the PSC was committed to the auction plan. The only mitigation measure that could be offered was for the PSC to offer to mediate tax disputes between the prospective new owners of the generating facilities and affected municipalities. The PSC could not offer any mitigation measures that would have affected the auction of the facility, nor could the PSC even consider any provision to require Niagara Mohawk to provide any relief to the affected municipalities.

Furthermore, the DSGEIS did not address crucial questions with respect to the auction plan. Although the DSGEIS did address the question of tax impacts, it did not consider alternative auction plans, different "packaging" of assets to be sold, or mitigating the adverse impacts associated with high stranded costs.

Oswego, joined by Fulton, Cohoes, the New York Conference of Mayors, and Buffalo City Councilman Alfred Coppolla, brought an Article 78 proceeding against the Public Service Commission, alleging violation of both SEQRA procedures and substantive compliance with SEQRA.[43] In its petition, Oswego noted the prospective harsh environmental impacts as a result of loss of tax revenue, but also noted the failure of the restructuring plan to provide any rate relief for residential ratepayers, and specifically alleged that

> the PSC, in its eagerness to move towards competition in the electric industry, has made a determination that the benefits of competition outweigh any possible costs that may be associated with any particular plan to effectuate the transition to competition . . . [The PSC] has not considered the actual benefits that may result from a specific plan to achieve its goals, and the PSC has failed to balance the purported benefits against the actual adverse environmental impacts of the Settlement.[44]

Oswego noted the failure to calculate the impacts of permitting recovery of "stranded costs" and of the determination that ratepayers would be required to pay the full cost of the buyout of the independent power producers' contracts. Oswego also challenged the PSC conclusion that there were alleged public benefits associated with the transition to competition and also noted that the settlement in general, and the CTC in particular, would have the impact of prohibiting industrial customers from developing on-site generation, and would also inhibit the use of alternative energy sources such as solar power. Finally, Oswego described a number of alternatives and prospective mitigation measures that the PSC could have pursued.

Oswego's petition was dismissed by the Albany County Supreme Court.[45] The court determined that the petitioners did not have standing because their interests were solely "economic."[46] The court added, as dicta, that "the extensive records submitted to the court reveals that the PSC took the requisite 'hard look' at the environmental consequences of the proposed action," and also rejected the petitioners' segmentation argument.[47]

## Completion of Deregulation

With the approval of the rate and restructuring plans, deregulation of the electric industry was effectively completed. The investor-owned utilities proceeded to sell most of their generating assets, and, at least theoretically, implemented programs for retail choice. However, it is clear that the impacts of many important issues associated with a transition to competition were never considered in the context of an environmental review. Although the FGEIS considered the possibility of stranded cost recovery, the relative impacts of full or partial stranded cost recovery were never considered in the context of plans for individual utilities. Obviously, the amount of stranded cost which will be recovered will affect the viability of the transition to competition and will also have a variety of environmental consequences. These issues could not have been fully addressed in the FGEIS, and were simply ignored in the environmental review associated with the individual restructuring plans.

Furthermore, neither the FGEIS nor the individual restructuring plans considered those factors that we now know have adversely impacted the goal of competition. For example, there is a shortage of generating supply in New York State. With utilities in the process of transitioning to competition and selling their generating assets, the utilities, for the most part, did not engage in any new plant construction in recent years. Although there are a variety of proposals to build new generating plants, it is not clear whether these proposals will result in sufficient capacity in the near future, nor, for that matter, is it even clear whether the electricity that will be generated will be sold in New York State, or will be sold to customers outside of New York.

One of the issues discussed in Opinion 96-12 was whether the New York Power Authority should assume ownership of transmission facilities within New York State. This proposal does not appear to have been discussed at all in the context of the implementation of deregulation, nor were any environmental advantages or disadvantages associated with such a proposal ever considered. Similarly, even though Opinion 96-12 and the associated FGEIS discussed the creation of the Indepen-

dent System Operator, there is nothing to indicate that the environmental implications of the decision to create an ISO were ever considered after the 1996 FGEIS.

As noted above, the PSC never evaluated its experiences with wholesale competition before implementing retail competition. Furthermore, the PSC never considered what, at least with hindsight, appears to be self-evident: neither ESCOs nor non-utility generators are anxious to compete to sell power to residential customers in New York. This is especially true since the CTC makes it difficult for customers, especially residential customers, to obtain any cost savings. A reasonable cost-benefit analysis, conducted as part of a SEQRA review, would have evaluated these prospective events.

Nevertheless, even in 2001, the PSC continues to insist that all of the environmental impacts associated with the transition to deregulation were fully considered in the 1996 FGEIS, and refuses to perform additional environmental review in the context of ongoing decisions pertaining to the deregulation of the electric industry.

### Divestiture of Nuclear Generating Assets

As of 1996, there were six nuclear power plants operating in New York State, that generated approximately 18 percent of the total electric power generated within the state.[48] The 1996 FGEIS briefly discussed these facilities and how they would be treated in the transition to deregulation. The FGEIS noted that there would be liability for the ultimate decommissioning of these facilities and that it was

> improbable that the liability would be assumed by a competitive company. It has been suggested that a public entity such as the New York Power Authority might take over the operation of all the State's nuclear plants and thus assume the decommissioning liability (along with monies in the current decommissioning funds). Barring takeover by a public entity, it is probable that responsibility would devolve to the [utilities that owned them].[49]

The FGEIS also proposed that

> the Commission should review specific costs for nuclear power plant decommissioning on a utility by utility basis in rate or other proceedings, and the allowance in rates of reasonable costs for decommissioning consistent with NRC requirements. This would mitigate concerns regarding the provisions of adequate funding the effective and timely cleanup of nuclear plants.[50]

The issue of divestiture of nuclear power plants was not considered in the context of the individual rate and restructuring plans that were filed by any of utilities. However, the Commission did institute a generic nuclear proceeding,[51] Case No. 98-E-0405, to consider the issues involved in the divestiture of nuclear generating assets. In that proceeding, Department of Public Service staff initially asked, and the utilities agreed, to prepare a Supplemental Generic Environmental Impact Statement to address issues not adequately addressed in the 1996 FGEIS.[52] However, no draft SGEIS was ever completed or submitted to the Commission in the generic nuclear proceeding.

In 2001, Con Ed proposed to sell its Indian Point 2 generating facility to Entergy. Although this proposed sale was not contemplated in the context of Con Ed's rate and restructuring proposal, the transfer of an electric generating facility requires approval of the Public Service Commission pursuant to section 70 of the Public Service Law. Accordingly, Con Ed applied for approval of the sale, and submitted a Draft Supplemental Environmental Impact Statement in support of its application.[53]

This DSEIS claimed that there would be no adverse environmental impacts of the proposed transfer because "the change in ownership of Indian Point 2 is not expected to result in any significant changes in the operation of the facility."[54] The DSEIS also characterized "the transfer of the ownership of Indian Point 2 [as] a part of the restructuring process" and stated that "it can be concluded that [potential environmental] impacts will be well within the range of the impacts estimated in the [Competitive Opportunities 1996] FGEIS."[55]

Comments were received with respect to Con Ed's draft SEIS, but it was ultimately accepted by the PSC on April 15, 2001, without any changes.[56] The Commission determined that it was necessary to address the issue of possible loss of local property tax revenues, but, "nearly all of the impacts found and considered had already been adequately addressed in the [1996] FGEIS, and in most cases, the mitigation measures identified in the FGEIS that were adopted by the commission in its finding statement are sufficient."[57]

There are important environmental considerations in the transfer of nuclear power plants from regulated utilities to entities that are not subject to any regulation by the PSC. Although the NRC does require the owners of nuclear power plants to set aside money for the ultimate decommissioning of the plants, the NRC requirements are not necessarily sufficient to adequately fund decommissioning, and, in any event, the NRC does not require restoration of "greenfield status."[58] The Public Service Commission has a considerable amount of control over a regulated entity. The PSC can require the entity to raise additional money to fund any shortfall in decommissioning expenses, and can use its regulatory authority to

ensure that a regulated owner of a nuclear power plant complies with all environmental regulations.

The 1996 FGEIS did not address the question of costs for decommissioning of nuclear facilities. The FGEIS contemplated the possibility that the New York Power Authority might take over nuclear power plants. However, between 1996 and 2001, NYPA sold its two nuclear facilities (Indian Point 3 and Fitzpatrick) and completely got out of the nuclear generating business. Nor did the 1996 FGEIS contemplate that a "competitive" non-regulated facility would be willing to assume decommissioning liability. Thus, it should be clear that the particular issues involved in the sale of a nuclear power plant were not considered by the PSC in the 1996 FGEIS.

The Indian Point 2 facility has been one of the most troubled nuclear power plants in the nation. The plant has suffered a number of environmental problems, both nuclear and non-nuclear. These problems were acknowledged in Con Ed's DSEIS, which also described an environmental site assessment that had been conducted. Indian Point 2 is operating under a SPDES permit that last expired in 1992, and has been the subject of various proceedings before DEC since the mid-1970s. Furthermore, the transfer of the facility may also impact how long the plant continues to operate,[59] whether the new owner of the site will have a greater or lesser ability to handle spent nuclear fuel when Indian Point 2 exhausts its storage capacity in 2004, and the ability of the new owner to remedy the long-standing problems with the operation of the facility.

Furthermore, the PSC's reliance on the 1996 FGEIS ignored the fact that there had been considerable developments with respect to deregulation between 1996 and 2001. By the summer of 2001, the California energy crisis was a matter of national public debate. The concept that electric power generating facilities should be owned by non-regulated utilities should have been subject to reappraisal. Instead, the PSC chose to rely on the findings that it had made in 1996, and not to reevaluate them in the light of intervening years. The August 17 order approving the FSEIS stated

> there is no reason to generically examine the future treatment of New York's nuclear plants in Case 98-E-0405 [the generic nuclear proceedings], given this proceeding and Case 01-E-0011, related to the proposed sale of Nine Mile Point Units 1 and 2. The impacts of the move to a competitive marketplace have been addressed in the FGEIS and need not be repeated herein.[60]

The 2001 reliance on the FGEIS of 1996 is curious, inasmuch as the 1998 generic proceeding was instituted, and a new environmental impact statement proposed, precisely because the issue of nuclear divestiture was not considered in Opinion 96-12 or in the 1996 FGEIS.

Finally, it should be noted that the PSC has continually maintained that there are no environmental impacts associated with the mere transfer of ownership of an electric generating facility pursuant to section 70 of the Public Service Law. The PSC took this position with respect to the sale of non-nuclear generating assets, as well as with respect to generating assets. However, it is not necessarily true that there are no environmental impacts associated with the transfer of ownership. In the one reported case to address this issue,[61] the Third Department found that a negative declaration by the Green Island Power Authority was deficient because it failed to consider the environmental impact of the change in ownership of a hydroelectric plant as a result of an eminent domain proceeding. In the case of the Indian Point 2 transfer, the town of Cortlandt (the host community for the Indian Point facilities) pointed out a number of significant potential adverse impacts, including the possibility of other generating facilities being constructed on site.[62]

## Conclusion

As Justice Harris noted six years ago:

> Opinion 96-12 further sets forth the Commission's policy on how a competitive industry should be structured—not by direction, but by vision. Opinion 96-12 in no way restructures the electric industry. It represents an expectation, not a direction of utility action, and calls for the collaboration of the electrical energy industry to join the Commission in an exploration of a future blueprint for the industry.[63]

Nevertheless, the Environmental Impact Statement adopted in association with Opinion 96-12, the 1996 FGEIS, has been used as the basis of a conclusion that all of the environmental impacts of the deregulation of the electrical industry were already fully considered at that early stage. Such a conclusion enabled the PSC to avoid its responsibilities to consider the environmental impacts of numerous details that had to be worked out in the context of individual restructuring plans. Furthermore, uncritical reliance on the 1996 FGEIS enabled the PSC to stick its head in the sand and ignore the issues pertaining to the failure to implement wholesale competition, the California energy crisis in 2001, the failure of energy marketers to enter the market, and the declining amount of energy supplies, while the PSC continued to insist that a goal of retail competition would somehow magically solve the problems of the New York State electric industry.

It is too late to put the genie back in the bottle; we cannot go back to 1996 and restore a regulated environ-

ment. Nevertheless, the failure of deregulation, and, more particularly, the failure of the PSC to adequately consider the environmental impacts before it placed the future of New York ratepayers and consumers at the mercy of a poorly understood competitive market, should stand as an object lesson in the necessity for better enforcement and administration of SEQRA.

## Endnotes

1. PSC Op. and Order No. 96-12, Cases 94-E-0952 et.al., "In the Matter of Competitive Opportunities Regarding Electric Service," issued May 20, 1996 (cited as Op. 96-12).
2. Environmental Conservation Law § 8-0109(8) (ECL).
3. Case No. 93-M-0229, "Proceeding on Motion of the Commission to Address Competitive Opportunities Available to Customers of Electric and Gas Service and Develop Criteria for Utility Responses," subsequently renumbered as Case No. 94 -E-0952.
4. Niagara Mohawk Power Corp. ("Niagara Mohawk") was exempted from the requirement to file a restructuring plan because it had already submitted its PowerChoice proposal, discussed below, and Long Island Lighting Co. (LILCO) was exempted because the PSC had already initiated an investigation into its rates.
5. Op. 96-12, 76-81.
6. Stephen P. Sherwin, *Deregulation of Electricity in New York: A Continuing Odyssey 1996-2001*, 12 Alb. L.J. of Sci. & Tech., 263, 265 (2001) (cited as "Sherwin"), quoting NYISO 2000's Annual Report of the New York Independent System Operator at 15.
7. The enactment of the Public Utility Regulation and Policy Act in 1978 assisted the rise of the independent power-producing industry. The Energy Policy Act of 1992 specifically authorized the creation of "exempt wholesale generators," entities that were engaged solely in the generation of electric power, and which could be owned as separate corporations by utilities. Consequently, there are now a number of entities that are engaged in the generation and sale of electric power besides regulated utilities. In addition, the rise of energy marketing companies, such as the now infamous Enron, have also assisted the separation of the power generation function from the function of transmitting and distributing electricity.
8. November 2001 Electric Retail Access Migration Summary, available on the PSC Web site, http://www.dps.state.ny.us/Electric_RA_Migration.htm, last modified February 14, 2002. The 4.8 percent of customers who no longer purchase power from the utility purchase 17.6 percent of the electric power generated, because of significantly higher "migration" rates for non-residential customers, who represent 6.3 percent of customers and use 24.9 percent of the total non-residential load.
9. Sherwin, at 295, citing U.S. Dep't of Energy Web site.
10. "Environment" is defined as "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, *existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character,*" ECL § 8-0105(6) (emphasis added). *See also Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359 (1986), holding that social and economic impacts must be considered in SEQRA analysis.
11. For example, in the city of Oswego, the steam station formerly owned by Niagara Mohawk comprised approximately 71 percent of the local tax base. The sale of this plant as a result of the deregulation of Niagara Mohawk had a tremendous impact upon the city's tax base.
12. *Town of Henrietta v. Dep't of Envtl. Conservation*, 76 A.D.2d 215, 222 (4th Dep't 1980).
13. *Id.* at 220.
14. A status report of deregulation/restructuring efforts by state is available on the U.S. Dep't of Energy Web site, www.eia.doe.gov/cneaf/electricity.
15. ECL § 8-0105 (1), which does not include the Legislature in the definition of a "state agency." *Compare* ECL § 8-0105(2), which includes a "governing body" in the definition of a "local agency."
16. Op. 96-12 at 24-28.
17. *Id.* at 47-51.
18. *Id.* at 53.
19. *Id.* at 56–57.
20. *Id.* at 60.
21. *Id.*
22. *Id.* at 67.
23. *Id.* at 73.
24. *Id.* at 73-76.
25. *Id.* at 74.
26. *Id.* at 75-76.
27. The ISO's first year of operations was hardly encouraging, as the system was plagued with software problems, lack of staff, and the ISO, at least in the first year, was unable to adequately monitor and prevent the exercise of market power by electric producers, see Sherwin at 288-293.
28. Op. 96-12 at 76-77.
29. *Id.* at 77.
30. *Id.*
31. *Id.* at 78.
32. *Id.* at 78.
33. *Id.* at 79.
34. Order 888, which was issued approximately one month before the PSC's Op. 96-12, provided an environmental analysis under the federal National Energy Policy Act, which was largely limited to the issue of whether increased air emissions would be the result of open access. This FEIS was criticized at the time by the U.S. Envtl. Protection Agency for failing to adequately consider potential adverse environmental impacts.
35. PII was comprised of the Natural Resources Defense Council, Pace Energy Project, Citizens Advisory Panel, New York Public Interest Research Group, Environmental Advocates, New York Rivers United, American Wind Energy Association, New York Energy Efficiency Council, American Lung Association, Hudson River Clearwater Citizen Action of New York, Association for the Protection of the Adirondacks, Hudson River Keeper, Scenic Hudson, Adirondack Council, and Citizens Campaign for the Environment.
36. Ruling on motion for Supplemental Environmental Impact Statements, Case Nos. 94-E-0952 (issued June 19, 1997), 17.
37. Central Hudson, Case No. 96-E-0909, Op. No. 98-14, 41-42 (June 30, 1998); New York State Electric and Gas, Case No. 96-E-0891, Op. No. 98-6, 40 (Mar. 5, 1998); Rochester Gas and Electric, Case No. 96-E-0898, Op. No. 98-1, 45 (Jan. 14, 1998); Consolidated Edison, Case No. 96-E-0897, Op. No. 97-16, 63 (Nov. 3, 1997); Orange and Rockland, Case No. 96-E-0900, Op. No. 97-20, 29-30 (Dec. 31, 1997); Niagara Mohawk, Case No. 94-E-0098, Op. No. 98-8, 58 (Mar. 20, 1998).

38. Op. and Order No. 98-8, Case 94-E-00098, "Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric Service," 4-5 (cited as Op. 98-8) (Mar. 20, 1998).

39. The six cent provision was repealed by Ch. 512 of the Laws of 1992.

40. Op. 98-8, app. C, 9–12.

41. The 71 percent figure was cited by Niagara Mohawk in connection with the PowerChoice proceeding.

42. FGEIS Case 94-E-0952, *The Matter of Competitive Opportunities Regarding Electric Service* 9–5, 9–7 (May 3, 1996).

43. Specifically, Oswego alleged the PSC: 1) had failed to comply with its own procedural rules pertaining to SEQRA because of the alleged failure of the recommended decision to make a SEQRA determination, 2) failed to prepare and file an EAF until shortly before the Commission rendered its decision, which violated SEQRA, 3) failed to prepare an Environmental Impact Statement specifically addressing Niagara Mohawk's restructuring, 4) failed to treat the PowerChoice settlement as a Type I action under SEQRA, 5) impermissibly segmented its environmental review, and 6) failed to comply with SEQRA procedures in connection with the auction plan and the adequacy of the Environmental Impact Statement for the auction plan. Oswego also challenged the PSC's substantive compliance with SEQRA because of its alleged failure to take a hard look at the environmental consequences of its action. The author represented petitioners in this proceeding.

44. *Oswego v. Pub. Serv. Comm.*, Index No. 2115-98, Petition ¶ 161 (Sup. Ct., Albany Co. 1998).

45. *Oswego*, Index No. 2115-98 (Sup. Ct., Albany Co., May 21, 1998) (Keegan, J.).

46. For a discussion of how *Society of Plastics v. County of Suffolk*, 77 N.Y.S.2d 761 (1991), has radically reshaped the notion of SEQRA standing, see Peter Henner, *Great Future in* Plastics? *The Judicial Repeal of Standing for Environmental Organizations in SEQRA Cases*, 21-4 N.Y. Envtl. Lawyer (Fall 2001).

47. *Oswego*, slip op. at 5-6.

48. FGEIS, Case No. 94 -E-0952, 5-86. This includes the Indian Point 3 and Fitzpatrick nuclear plants, formerly owned by NYPA, that generated 7.2 percent of the state's electric power.

49. *Id.* at 5-87.

50. *Id.* at 6-45.

51. Case No. 98-E-0405, *In the Matter of Nuclear Generation in a Competitive Market for Electricity*, filed in Case 93-M-0229.

52. Interim Report, Case 98-E-0405, Nuclear Generation and the Competitive Electric Market 11-13 (June 1999), *see also* DSGEIS filed by Niagara Mohawk in support of its proposed transfer of Nine Mile I and II in Case No. 01 -001, 4, which states that the "investor-owned utilities volunteered to prepare a . . . " DSGEIS.

53. Draft Supplemental Environmental Impact Statement, Public Service Law § 70 transfer of Indian Point Units 1 and 2 Facility to Entergy Nuclear Indian Point II, LLC (Jan. 19, 2001).

54. This sentence is repeated 14 times verbatim, and paraphrased in several locations in the course of the 25-page DSEIS, with respect to almost all of the specific sections addressed in the DSEIS.

55. *Id.* at 25

56. Order adopting and approving issuance of Final Supplemental Environmental Impact Statement in Case No. 01-E-0040, one commissioner order (Aug. 17, 2001). In accepting the FEIS, the PSC determined that "the purpose of this final SEIS is to examine the site-specific impacts of the proposed transfer" (p. 4).

57. *Id.* at 52.

58. The NRC decommissioning requirements are set forth in 10 CFR § 50.75. In the case of Indian Point 2, a decommissioning study performed for Con Ed by Scientech NES, Inc. indicated that the decommissioning of Indian Point would cost $20 million more than the NRC minimum. Furthermore, if the site is restored to "greenfield" conditions, the total cost will exceed the NRC minimum by an additional $47 million, for a total of $67 million.

59. The new owner of Indian Point, Entergy, has now applied for a certificate pursuant to Article X to construct a natural gas facility adjacent to the two nuclear facilities, an action that Con Ed would obviously not have pursued. Thus, it is likely that the transfer will result in a an extensive delay, if not cancellation, of any plans to restore the site to greenfield status.

60. This statement should be contrasted with the interim report referenced in note 52 above, which stated that staff have requested that the investor-owned utility companies prepare a DSEIS which would "include, among other issues, the effect of the various operational scenarios on reliability, systemwide environmental and economic impacts, changes in quantities of nuclear materials generated or used, local impacts such as local tax revenues, local employment and economic activity and a discussion of health and safety for nuclear plant workers and the public resulting from possible implementation of the various economic alternatives . . . " June 1999 Interim Report in Case No. 98-E-0405, 12-13.

61. *Niagara Mohawk Power Corp. v. Green Island Power Authority*, 265 A.D. 2d 711 (3rd Dep't 1999)

62. Cortlandt referenced Entergy's intentions with respect to a gas-fired generating facility adjacent to the Indian Point 2 and 3 nuclear facilities, loss of oversight from the PSC, possible extension of the plant life, and a concomitant delay in restoration of "greenfield" status at the site, and with respect to the ultimate resolution of Indian Point 2's long-standing environmental problems, including problems with its SPDES permit. Cortlandt pointed out that mitigation measures could be ordered by the PSC in the context of approving the transfer, but the PSC refused to do so.

63. *Energy Ass'n v. Pub. Serv. Comm.*, 169 Misc.2d 924, 941 (Sup. Ct., Albany Co. 1996).

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# The New York State Voluntary Cleanup Program

By Mark A. Chertok and Dale A. Desnoyers

"Brownfields" is a label that broadly describes a range of underused or abandoned industrial sites. The reuse or redevelopment of these sites is complicated by real or perceived contamination and related problems. The brownfields problem cuts across all geographic and political boundaries. These properties exist in all settings—big cities, small towns, sprawling suburbs and the countryside. Often these brownfields can be found in poorer communities and neighborhoods, areas that could benefit the most from economic investment and job creation. Brownfields impact urban and rural communities by creating health risks and fears, despoiling the environment, contributing to unemployment, lost revenue, urban sprawl, blight, and societal decline.

Such sites often seem to be permanent fixtures in the landscape of our daily lives—near where we work, go to school, shop or recreate. They are the boarded-up gas stations on Main Street, the decaying warehouses and printing plants in former industrial areas of major cities, and the vacant industrial facilities surrendering to rust and weeds at the edge of town. These facilities once were powerful engines for economic vitality, jobs and community pride. But in too many cases, these properties now lie broken and discarded, testament to changes in economic fortune and what are now recognized to have been flawed environmental practices. During the past two decades, efforts to return these sites to productive use have been hindered—and often thwarted—by a seemingly ever-increasing environmental regulatory regime, particularly the joint and several, retroactive, strict liability of current property owners imposed under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," and commonly known as "Superfund")[1] and its state counterparts. The U.S. Environmental Protection Agency (EPA) has defined a "brownfield" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence of a hazardous substance, pollutant, or contaminant."[2]

Despite the potential liability created by CERCLA and its state progeny, brownfields frequently offer excellent opportunities for development due to their proximity to existing infrastructure, including highways, water systems, sewage and solid waste facilities.[3] Since the mid-1990's, federal and state initiatives have begun to remove some of the barriers to redevelopment of brownfields created by CERCLA and state laws. For instance, on January 11, 2002, the President signed the Small Business Liability Relief and Brownfields Revitalization Act (the "Federal Brownfields Act"). The Federal Brownfields Act combines liability relief and brownfield funding. This legislation is considered one of the major brownfields initiatives in recent times and is sure to be a cornerstone in strengthening state brownfield programs.

Currently, there are two programs administered by the New York State Department of Environmental Conservation (DEC) intended to encourage brownfield redevelopment by both private and public entities: the New York State Voluntary Cleanup Program (VCP) and the 1996 Clean Water/Clean Air Bond Act.[4] This article summarizes the VCP, which was developed in 1994 by the DEC to promote redevelopment of brownfields. In implementing this program, New York became one of the majority of states that have adopted some type of program designed to foster and facilitate the cleanup and reuse of brownfields sites.[5] The VCP has become a common element in real estate transactions. With increasing frequency, purchasers and/or financial institutions are insisting upon DEC issuance of a release under the VCP as a contractual provision to provide assurance that an adequate investigation and, if necessary, remediation sufficient for the intended use has been conducted under DEC auspices. As of March 31, 2002, VCPs have been executed covering 303 brownfield sites and applications for another 100 sites are pending. The number of applications received by the DEC has doubled in each of the last two years. The increase in usage and popularity is not surprising, given lenders' increasing demands for the state imprimatur in real estate transactions, coupled with the streamlined process offered by the VCP, as compared to the state Superfund program (discussed below).

What is unusual about New York's program is that it is neither codified in statute nor established by regulation. Nor is it set forth in formal guidance documents. Rather, the program was initiated under the auspices of DEC's exercise of general authority, and was based on informal publications by DEC staff. As a consequence of this status, the program has had the advantage of flexibility, as DEC is generally unencumbered by constraining statutory or regulatory language. Thus, modifications to the program and the key documents, discussed below, can be implemented expeditiously and without the need for formal process. Indeed, the program has undergone the rough equivalent of "common law" development, with principal program elements modified to address exigent circumstances.[6] On the other hand, the program lacks the constraints on government

positions that invariably accompany a statutory enactment.

## Program Coverage

The VCP is, in many respects, the broadest of a number of overlapping state and federal programs that encompass the remediation of contaminated properties. There are primarily three types of contaminated sites that may fall within the ambit of the VCP: "hazardous substance" sites, more narrowly defined "hazardous waste" sites and petroleum sites.[7] Under New York law, "hazardous substances" include petroleum and petroleum products.[8] In contrast, the state Superfund program applies only to hazardous waste sites, i.e., locations where consequential amounts of "hazardous waste," a discrete subset of "hazardous substances," are suspected or confirmed to be present.[9] The federal Superfund program (CERCLA) applies to hazardous substances, but not to petroleum. Thus, only the state VCP applies to hazardous substance, hazardous waste and petroleum sites.

In essence, the VCP covers any contaminated properties located in the state except for those that are: (i) listed on CERCLA's National Priorities List (NPL) of the nation's most seriously contaminated sites (the Onondaga Lake NPL subsites, however, are VCP eligible); (ii) listed on the New York State Registry of Inactive Hazardous Waste Disposal Sites (State Registry) as a Class 1 site (presenting an imminent danger of irreparable harm to public health or the environment);[10] or (iii) regulated pursuant to ECL, Article 27, Title 9, and 6 NYCRR Part 370 (industrial hazardous waste management).

As a practical matter, most VCP participants (volunteers) are site owners; increasingly, however, prospective purchasers of contaminated property are becoming volunteers, due both to demands by financial institutions and the desire of purchasers to obtain the benefits of the release described below. But, in general, any person or entity is eligible to participate in the VCP as a "volunteer," the exception being a Potentially Responsible Party (PRP) at property that is: (1) listed on the State Registry as a Class 2 Inactive Hazardous Waste Disposal Site;[11] (2) a petroleum site where such party's liability does not arise solely as a result of ownership after the cessation of the discharge; or (3) subject to any state or federal "enforcement action" requiring the PRP to remove or remediate a hazardous substance.[12]

An "enforcement action" has commenced against a PRP, and thus renders the charged party ineligible as a volunteer: (1) under state law, upon issuance of a notification of violation or upon commencement of enforcement under ECL, Article 71, or upon issuance of an accusatory instrument under the Criminal Procedure Law; or (2) under federal law, upon issuance of any notification pursuant to federal law that commences an administrative or judicial proceeding seeking to require the removal or remediation of hazardous substances.

## The Voluntary Cleanup Agreement and Work Plan(s)

The VCP process typically follows the following steps. The prospective volunteer files an application for participation in the VCP with DEC that includes the prior history and uses of the site, potential or actual contamination on the site, and the applicant's responsibility for that contamination. DEC reviews the information, in conjunction with information contained in its files, to ascertain whether the applicant is eligible to serve as a volunteer and whether remedial activities, investigation and/or remediation may be required at the proposed site. Once the Department determines that a volunteer is eligible to participate in the VCP and that the site may require investigation and/or remediation, it sends the volunteer a model Voluntary Cleanup Agreement (VCA). The agreement identifies the site, the contamination to be addressed (to the extent known), the contemplated use (which drives the cleanup levels), and a variety of provisions relating to procedures to be followed, reports to be submitted to DEC, *force majeure,* dispute resolution, and certain other elements discussed below. In addition, the agreement requires a volunteer to pay DEC's administrative oversight costs.

The model VCA, first released in August 2000, is the product of several years of experience with variants of an earlier, more prolix contract. Prior to the release of the August 2000 model, the volunteer could negotiate numerous provisions of the agreement; the DEC's reliance on the model agreement has substantially reduced the range of negotiations. The use of the model provides predictability and expedition. DEC's strict adherence to the model VCA, however, limits the ability of both parties to tailor elements of the agreement for the particular circumstances at hand.

The DEC requests that the VCA be signed and returned within 15 days. The proposed work plan is submitted by the volunteer for agency review and approval, which generally entails several rounds of negotiations between the volunteer (principally its consultants) and DEC staff after the VCA has been executed by the volunteer and DEC. The approved plan becomes incorporated into the VCA. This plan may provide for investigation and/or remediation. Often, there is initially only an investigation work plan and, after the investigation is completed, a report setting forth the results of the investigation is filed with DEC. The scope of the site's investigation is the same under both the state Superfund program and the VCP. After reviewing the final investigation report, the agency determines

whether remediation is necessary. If no remediation is found necessary, DEC issues the release discussed below. If a cleanup is deemed by DEC to be necessary, the volunteer submits a proposed remediation work plan for agency review and approval. That work plan contains the proposed remediation (e.g., the methods of cleanup) and cleanup levels.

The proposed remediation must meet DEC-specified cleanup levels, which are established on a site-by-site basis in connection with the intended use of the property (i.e., establish a use-based cleanup level). State cleanup standards must be accounted for in the site-specific decision-making process. Often, institutional controls, such as deed restrictions, are required to limit future uses of the property consistent with the use-based remediation allowed under the work plan.

Remedy selection under the VCP is streamlined compared with the state Superfund. Under the VCP, the DEC does not require a Feasibility Study (FS), a study which compares and contrasts in some detail various remedial alternatives, including the cost-effectiveness of different remedial approaches. Under the VCP, the volunteer submits a proposed remedial work plan, which provides for one remedial approach for the site. This work plan must include an evaluation of the proposed remedy considering the factors set forth in 6 NYCRR 375-1.10(c)(1)(c)–(6), excluding consideration of cost-effectiveness.[13] At a minimum, the remedial activities contemplated by the proposed remedial work plan must eliminate or mitigate all significant threats to the public health and/or the environment and must result in the site being protective of public health and the environment for the use. The proposed remedial work plan, submitted by the volunteer, substitutes for the more formal Proposed Remedial Action Plan (PRAP) utilized under the state Superfund. As described below, the public participation requirements related to remedy selection under the VCP require public notice with a 30-day comment period, whereas a public meeting is required under the state Superfund. The DEC does not issue a Record of Decision (ROD) upon its selection of the site's remedy. Moreover, land use is expressly considered at the beginning of remedy selection under the VCP, as opposed to the end under the state Superfund. This allows for a more economical, timely and efficient process. These significant distinctions permit the implementation of the remedial program at a site under the VCP on an accelerated timetable when compared with the state Superfund program.

Volunteers who are legally responsible for site remediation, other than solely as a result of ownership (e.g., an owner of property when hazardous substances were released), must not only remediate on-site contamination to agreed-upon levels but must also address consequential off-site impacts of that contamination. All other volunteers (e.g., an owner who did not actively cause the release of the hazardous substances) must remediate on-site contamination to the agreed-upon levels, including sources of on-site contamination that cause off-site impacts; however, they generally need not remediate off-site contamination except in the case of petroleum spills, where such remediation may be required under Article 12 of the Navigation Law.

The level of public participation in voluntary cleanups differs depending on the site.[14] For sites which are not on the State Registry as Class 2 sites, DEC will provide notice to the public which differs depending on the nature of the work plan. For investigation work plans, DEC will provide notice through fact sheets to adjacent property owners and to local governments. For remediation work plans, DEC will provide notice through fact sheets, a notice in the *Environmental Notice Bulletin*, and a letter to local governments. A 30-day opportunity to comment on the proposed remediation work plan follows such notice. For sites that are listed on the State Registry as Class 2 sites, the citizen participation procedures required by the Inactive Hazardous Waste Disposal Site Remedial Program[15] and the *Citizen Participation in New York's Hazardous Waste Site Remediation Program: A Guidebook*, dated June 1998, must be followed to the extent practicable.[16] These provisions require a public meeting on the proposed remediation.

## The Qualified Release

Once a site is remediated to the cleanup levels established in the work plan or, if DEC has determined, after an investigation is performed under the VCP, that no remediation is necessary, the agency will issue a limited release from liability for "covered contamination"—the agreed-upon levels to which the volunteer will remediate the contamination existing as of the effective date of the agreement—whether known or unknown (the "existing contamination"). Thus, for example, if a volunteer encounters contamination that was previously unknown while implementing the work plan, that contamination is also considered to be existing contamination.

The release declares that DEC does not contemplate the necessity for further action to be taken at the site. For volunteers, other than PRP-volunteers, the VCP release provided by the Department includes a release from natural resource damages. All of the volunteer's successors and assigns (except the site's PRPs) benefit from the release.

The VCP release, typical of governmental releases, is subject to "reopeners": (1) migration of petroleum contamination off-site and, if the volunteer is a PRP-volunteer, migration off-site of contaminants resulting in impacts to environmental resources, human health,

or other biota that are not inconsequential; (2) if the response action is not sufficiently protective to allow the contemplated use of the site to proceed safely, from a human health and/or environmental protection perspective; (3) failure to implement the agreement to the DEC's satisfaction; (4) fraud in implementing the VCA; (5) if the volunteer, or its successor, changes the site's use to one requiring a lower level of residual contamination before that use can be implemented safely; (6) upon the discovery of environmental conditions related to the site which are unknown to the DEC upon issuance of the release and which indicate that the use cannot be implemented with sufficient protection of human health or the environment; and (7) a new release or threat of release at the site of any hazardous substance or petroleum.

A volunteer is not protected by the VCP release from third-party claims arising out of contamination emanating from the site (e.g., third-party toxic tort claims). In addition, because EPA has not entered into a Memorandum of Agreement (MOA) with DEC relative to the VCP, the DEC's agreement as to a specified cleanup level binds only the agency—not EPA—under present law.[17] However, the Federal Brownfields Act restricts EPA's authority to take enforcement action or seek cost recovery under CERCLA at "eligible sites" cleaned up in compliance with a qualifying state response program. "Eligible sites" include brownfields (as defined by the legislation), Leaking Underground Storage Tank Fund sites and some otherwise excluded sites on a site-by-site basis.[18] Thus, the value of an MOA with EPA may be lessened so long as a state response program meets EPA's four criteria[19] for a qualifying state response program. New York's VCP should meet each of the criteria, thus providing volunteers with protection, subject to some limitations, from EPA's enforcement authority.

In oil spill matters, the VCP release by DEC does not affect the state's right to seek recovery of DEC's investigation or remediation costs. This limitation is due to Article 12 of the Navigation Law, which mandates that the State Oil Spill Fund administrator (through the Attorney General's Office) seek reimbursement of such costs from responsible dischargers. As a consequence, a volunteer may want to obtain an Oil Spill Fund site release through direct negotiations with the Attorney General and the Comptroller (who serves as the Oil Spill Fund Administrator). Similarly, the DEC release does not prevent the state Attorney General from commencing litigation to abate a common law nuisance resulting from contamination, although a volunteer that is not responsible for the site's remediation may seek such a release from the Attorney General. While these releases can theoretically be negotiated, that process is invariably time-consuming. As a result, few volunteers go through the arduous process of obtaining these releases.

The VCA allows the volunteer to terminate for any reason or no reason, while the DEC can only terminate for cause. The termination must be upon written notice and is subject to certain restrictions, including the volunteer's obligations to pay state oversight costs. The volunteer must not leave the site any worse, from an environmental and public health perspective, than before it entered into the VCA. The agreement can be enforced by either side as a contract. DEC cannot bring an enforcement action based upon the VCA even if it believes that a volunteer has not complied with the terms of the agreement, including the work plan. Because DEC, as a practical matter, does not generally bring contract litigation under the VCP, the volunteer can opt out without a meaningful risk of litigation. However, the volunteer pursuing that course of action must keep in mind that the VCA and activities carried out under the work plan may have revealed contamination that would subject the site to DEC jurisdiction under one of the myriad environmental statutes. Thus, a volunteer would be prudent to assume, when it determines to enter the VCP, that it will pursue the investigation and cleanup through DEC's issuance of the release.

## The Proposed Formalization of the Program

Governor Pataki has proposed programmatic changes to the VCP as part of his comprehensive legislation to reform and finance New York's remedial programs, including the state's Superfund program. The proposed enhancements to the VCP are designed to make the program more transparent, predictable and consistent, as well as more financially attractive to parties.

The Governor's proposal would codify the VCP in its present form. In addition to codifying the existing VCP, the proposed legislation provides for the promulgation of use-based soil cleanup standards, creation of tax credits to parties that were not involved in the disposal or discharge of contaminants on the property and voluntarily clean up such sites under the VCP. A brownfield redevelopment tax credit for remediation and improvements to a site would be allowable under the five major tax articles of the state: franchise taxes on transportation and transmission companies, agricultural cooperatives and utilities; general business corporations; personal income tax; banking corporations; and insurance corporations. The base credit would increase if a site is cleaned up to the most stringent soil levels, allowing unlimited use. In addition, the proposal includes a tax credit for real property taxes paid at qualifying sites. This credit, the Remediated Real Property Tax Credit, would be available to taxpayers under

the same five major tax articles as the previous tax credits.

The legislation expands the Department's current release from liability. The Department would provide a covenant not to sue to parties that have remediated a site to the Department's satisfaction under the state Superfund, Oil Spill and Voluntary Cleanup Programs. The covenant not to sue would apply to the contamination identified and remediated, would be binding on the state, and would contain certain reservations. As noted above, the covenant is currently issued by the Department and binding only on the Department. The proposed covenant would be more valuable to the holder than the current covenant, especially in the context of real estate transactions. Some reservations would not apply if the party cleaning the site remediated the soil contamination to unrestricted use. In addition, a party receiving this covenant would not be liable for contribution claims regarding the contamination identified and remediated. The covenant would continue to be assignable to non-responsible party successors and assigns. Parties that were not involved in the disposal or discharge of contaminants on the property who clean up a site would also receive a release from liability for natural resources damages.

The bill provides liability limitations, exemptions and defenses contained in the federal Superfund that have proven to be fair and feasible. The provisions in the Governor's legislation maintain liability for polluters and provide liability relief (whether by limitation, exemption or defense) for innocent owners, municipalities, lenders, fiduciaries and industrial development agencies that take title to properties they had no role in polluting. These reforms are geared at removing liability obstacles that prevent parties from entering the brownfields arena.

## Conclusion

Currently, the VCP is a successful part of returning contaminated property to productivity. The recent changes in federal law make this program even more attractive. In addition, the proposed legislative changes will further expand and enhance this successful program, thus promoting and improving our environment and creating new economic development opportunities.

## Endnotes

1. 42 U.S.C. § 9601, *et seq.*, section 9607 imposes strict liability upon current "owners" or "operators" except as provided at 42 U.S.C. §§ 9601(20), 9601(35) and 9607(b)(3). *Cf.* 33 U.S.C. § 1321, which is adopted by reference at 42 U.S.C. § 9601(32).
2. The Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118.
3. *See* Mark A. Chertok and Mark A. Levine, *States Address Development of "Slightly" Contaminated Land*, N.Y.L.J., Nov. 17, 1993.
4. ECL, Art. 56, Tit. 1.
5. In 1997, the federal General Accounting Office (GAO) reported that 34 states have implemented VCPs, and that numerous others have pending legislation to adopt such programs.
6. Ultimately, as discussed below, the program likely will take the form of statute or regulation.
7. *See* 6 NYCRR Pt. 597 (hazardous substances); 6 NYCRR Pt. 371 (hazardous waste); and Navigation Law § 172 (petroleum).
8. *See* 6 NYCRR Pt. 597.
9. *See* ECL § 27-1301 *et seq.*
10. ECL Art. 27, Tit. 13. There are currently no Class 1 sites on the State Registry.
11. Class 2 sites are those which present a significant threat to public health or the environment and require remedial attention. New York has listed several hundred Class 2 inactive hazardous waste sites.
12. Under New York law "hazardous substances" include oil and petroleum. *See* 6 NYCRR Pt. 597.
13. In the absence of multiple alternatives, the cost-effectiveness factor is not relevant. The DEC's evaluation is not whether the proposed remedy is expensive or inexpensive; rather whether the proposed remedy is protective of public health and the environment.
14. DEC classifies inactive "hazardous waste" sites under the state Superfund law pursuant to 6 NYCRR § 375-1.8. DEC does not classify "hazardous substance" sites.
15. 6 NYCRR Pt. 375.
16. The public participation provisions may be waived if a release or threatened release of contaminants at the site presents an imminent threat to life, health, property, or natural resources.
17. EPA was negotiating a voluntary cleanup MOA with New York State in 1997, but those talks terminated.
18. EPA is authorized to provide financial assistance to sites that are statutorily excluded from the definition of a "brownfield site" if EPA determines on a site-by-site basis that financial assistance will protect human health and the environment, and either promote economic development or enable the creation, preservation, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.
19. The four criteria that must be met by a state response program are: timely survey and inventory of brownfield sites; oversight and enforcement authorities to ensure protection of public health and environment; meaningful public participation; and a mechanism for approval of a cleanup plan and certification that response is complete.

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# Supposed Circuit Split Regarding CERCLA Liability for Passive Migration: The News Is That There Is No Circuit Split

By Jon P. Sanders

This article addresses a possible split among the federal circuits regarding whether the passive migration of hazardous substances satisfies the definition of "disposal" on which CERCLA liability is premised. Recently, the U.S. Supreme Court, for the second time, has denied *certiorari* to an appellant seeking a review of this legal question.[1]

CERCLA § 107 authorizes an action to recover the costs involved in the cleanup of hazardous wastes from those responsible for the creation of the waste. To prevail in a cost recovery action, a plaintiff must establish that: (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition,[2] (2) a "release" or "threatened release" of a "hazardous substance" from the facility has occurred,[3] (3) such release has caused the plaintiff to incur necessary response costs consistent with the National Contingency Plan, and (4) the defendant is within one of four classes of persons subject to the liability provision of section 107(a).[4]

With respect to the last element, classes of liability, 42 U.S.C. § 9607(a) identifies four classes of Potentially Responsible Parties (PRPs). The second PRP category, at issue in this alleged circuit split, is that of owners and operators of contaminated property at the time of the "disposal" of any hazardous substances.[5] The alleged circuit split lies within the question of what constitutes a "disposal" within this statutory meaning.

The circuit split has been discussed before and is addressed in "Recent Developments in Environmental Law: CERCLA."[6] Briefly, the majority rule among the circuits is that "disposal" has an active meaning and that passive migration of hazardous waste[7] will not constitute a disposal. In the minority view, passive migration will constitute disposal. As discussed in the law review article, there are opposing main points from both the "active" and "passive" camps in this debate. In sum, the Fourth Circuit articulates a view regarding disposal, whereas cases from the Second, Third, and Sixth Circuits indicate a more restrictive active view of what constitutes CERCLA disposal. The Ninth Circuit's most recent review of this issue held that passive migration only imposes liability on an owner or operator of a container or vessel that subsequently leaks.[8]

Contrary to the notion that it added further complexity to a brewing circuit split, when reviewed in its entirety the Ninth Circuit's *Carson Harbor* opinion reveals that there is in fact not a circuit split. The circuit opinion thoroughly reviewed the prior holdings and it is indeed the case that the circuits agree on the holding of *Carson Harbor*: that passive migration of contaminants will only impose liability on the owner or operator of a container or vessel that subsequently leaks.

The Ninth Circuit, in analyzing the cases, stated that they fall more along a continuum than on opposite sides of the classic dichotomy circuit split, with the Sixth Circuit taking an "active-only" approach, the Third and Second Circuits addressing only the spread of contamination (and leaving open the question of whether migration must always be active to constitute disposal), and the Fourth Circuit holding the view that disposal includes passive migration—at least in the context of leaking Underground Storage Tanks (USTs).[9]

## Recent Ninth Circuit Holding (*Carson Harbor*)

In *Carson Harbor*, the Ninth Circuit held that fact issues existed as to whether CERCLA § 107 response costs were necessary for the cleanup of the petroleum site[10] and that gradual passive migration of contamination through soil that took place during a former owner's ownership was only a "disposal" under CERCLA if it originated from a container or vessel.[11]

The circuit court noted that it had not addressed whether "disposal" included the passive movement of contamination. It cited earlier Ninth Circuit holdings that: (1) movement resulting from human conduct was disposal[12] (wherein the liable party had spread contaminated soil); (2) Congress did not limit "disposal" to the initial introduction of material;[13] and (3) "disposal" refers only to an affirmative act of discarding a substance, and not to the productive use of the substance.[14]

Turning to statutory construction, the court first addressed plain meaning, looking to the terms constituting a disposal under 42 U.S.C. § 6903(3).[15] Comparing this with "release" as defined in CERCLA at 42 U.S.C. § 9601(22), which includes "emit" and "leach," the court found that "disposal" had a narrower meaning.[16] Reasoning that Congress has employed language such as "leaching" where it meant to include passive migration, and examining the facts, the court held that

the gradual passive migration of contamination through the soil that took place during the previous owners' tenure was not a "disposal."[17]

The court then supported this reading by "reading the statute as a whole," addressing both the statutory purpose and illogical results that might arise under its interpretation. The court left room for the proposition that, though passive soil migration was excluded, other types of passive migration might fall within the meaning of disposal.[18] The court also noted that its restrictive view did protect the innocent landowner defense, which would otherwise have been all but abolished, while not obviating the defense by eliminating all passive migration liability.[19]

## The Prior Fourth Circuit Ruling and the Circuit Split Discussed in *Carson Harbor*

*Nurad, Inc. v. Wm. E. Hooper & Sons Company*[20] holds that CERCLA "plainly imposes liability on a party who owns a facility at the time hazardous waste leaks from an underground storage tank on the premises. Any other result would substantially undermine CERCLA's goal of encouraging voluntary cleanup on the part of those in a position to do so."[21] Though this result seems contrary to the *Carson Harbor* holding, analysis reveals that it is not.

Nurad, an antennae manufacturer, sued to recover costs under CERCLA § 107 for the expense it incurred in removing several USTs from property it owned in Baltimore, Maryland. Nurad never used the USTs. Wm. E. Hooper & Sons owned the site and installed tanks for the storage of textile-industry mineral spirits sometime before 1935. In 1962, Hooper & Sons abandoned the USTs without removing the spirits. Property Investors, Inc., Monumental Enterprises, Inc., and Kenneth Mumaw were later owners of the property. As well, each of these persons leased the property during their ownership.

The district court found that: (1) the original owners were liable; (2) the tenants at the site were not liable (as they had no authority or control over the hazardous waste at the site and therefore were not operators); and (3) the later owners were not liable because they were not owners at the time of disposal. The circuit affirmed the first two holdings and reversed the third.

The court looked to whether recovery from the later owners was barred because no "disposal" occurred during their ownership.[22] The district court had taken the narrow view of "disposal," limiting it to active conduct. The circuit stated this construction ignored the language of the statute, contradicted the clear circuit precedent, and frustrated the fundamental purposes of CERCLA.[23] The court reasoned that because the definition of "disposal" under CERCLA includes both active words (e.g., inject, dump) and passive words (e.g., leak, spill), a reading of the statute requiring active human involvement would deprive the passive words in the statute of any meaning.[24]

For precedent, the Fourth Circuit cited *United States v. Waste Industries, Inc.*,[25] wherein the circuit held that Congress intended the 42 U.S.C. § 6903(3) definition of "disposal" under RCRA "to have a range of meaning, including not only active conduct, but also the reposing of hazardous waste and its subsequent movement through the environment."[26] Congress expressly imposed the RCRA meaning of "disposal" in the CERCLA statute, therefore the Fourth Circuit held the earlier *Waste Industries* holding was binding on the district court.

As a commentator in the *Tulane Environmental Law Journal* argues, given this language it is easy to conclude that the Fourth Circuit has indicated that "disposal" will be construed as passive. However, the distinguishing factor about *Nurad* is that the court defined "facility" to be confined to the USTs at issue.[27] The court relied on the CERCLA definition of "facility" to include a "building structure . . . storage container" or other "area where a hazardous substance has been [located]."[28]

During the time period at issue, the parcel where the USTs were located was subdivided and separate portions were leased. The court narrowly construed the facility, and held those who had not owned or operated (i.e., controlled) the USTs themselves not liable. The court was explicit, stating that CERCLA "places accountability in the hands of those capable of abating further environmental harm, while *Nurad*'s proposed definition of 'facility' would rope in parties who were powerless to act."[29]

Thus, to be accurate, the Fourth Circuit did not hold that passive migration across a property would confer liability to a property owner which had a facility on it. Rather, it held that the owner of the tanks that constituted the facility would be liable for any leaking or spilling from the tanks, while owners or lessors of the parcel who did not have control of the tanks would not be liable as PRPs. So while it noted that passive migration could confer liability, the Fourth Circuit held narrow the definition of the facility from which passive migration could emanate.

Once this narrow holding in *Nurad* is identified, it becomes clear that the Third Circuit's holding in *United States v. CDMG Realty*[30]—that the passive migration of contamination dumped on the land prior to the ownership is not disposal—was in keeping with *Nurad*, which specifically held similar alleged PRPs not liable. Similarly, the Second Circuit's holding in *ABB Indus. Sys.,*

*Inc. v. Prime Tech., Inc.*[31]—that owners of the site are not liable for passive migration—was once again the same legal conclusion, and even specifically stated it expressed no opinion on whether such prior owners were liable if they acquired a site with leaking barrels. As well, the opinions following *Nurad* all stated that disposal is not a purely active occurrence, though it did not apply in the instances at hand.

## Conclusion

The Ninth Circuit's most recent review of this "disposal" issue held that passive migration only imposes liability on an owner or operator of a container or vessel that subsequently leaks.[32] This has been the holding of the previous circuit court reviews of the issue as well. Though dicta cited from the decisions may indicate what the Ninth Circuit identifies as a continuum of views, all cases have held similarly. Additionally, the discussions in all cases agree that passive migration may in fact constitute PRP liability in some instances—with the instance of UST ownership being at least one example thereof.

These narrow holdings have not diverged enough to get recognition from the U.S. Supreme Court, which has now twice denied *certiorari* on the issue. That denial alone prompts the search for reconciliation among these supposedly divergent cases. Ultimately, it seems there is good cause for the ongoing denial of *certiorari* to this issue, at least until a set of facts arise that fall outside the realm of what is already known.

## Endnotes

1. *Carson Harbor Village, Ltd. v. Unocal Corp., et al.*, 270 F.3d 863 (9th Cir. 2001).
2. 42 U.S.C. § 9601[9].
3. 42 U.S.C. § 9607[a][4].
4. 42 U.S.C. § 9607(a). *See Carson Harbor*, 270 F.3d at 870.
5. *See Carson Harbor*, 270 F.3d at 870, *see also* 42 U.S.C. § 9607(a)(2).
6. 14 Tul. Envtl. L.J. 245 (2000). Note that this article discusses the first *Carson Harbor* holding (by a three-judge panel), which was withdrawn in February 2001 after an *en banc* rehearing, and has limited value for interpreting that particular case. Also note that two other legal periodicals addressing this issue are: *Site Owner Asks High Court to Review CERCLA Liability for Passive Migration*, 22 No. 11 Andrews Hazardous Waste Litig. Rep. 7 (March 1, 2002); and *Environment: Owner/Operator Liability for Passive Migration*, 30-FEB Real Est. L. Rep. 5 (February 2001).
7. *I.e.*, where waste that was previously disposed of on the property seeps, spills, or leaks during the owner's tenure.
8. *See Carson Harbor*, 270 F.3d 863.
9. *Id.* at 876.
10. There is a petroleum exclusion under CERCLA that would exempt pure petroleum contamination from liability. However, at this site, the contamination found was tar-like slag material visible on the surface that was a waste or by-product of petroleum production and constituted hazardous waste.
11. *Carson Harbor*, 270 F.3d at 874. The exception left for a vessel or container is based on language specifically including the abandonment of barrels or containers in the definition of release under 42 U.S.C. § 6903(3), incorporated by the definition of "disposal" found in CERCLA (*see* note 15 *infra*).
12. *Kaiser Aluminum Corp. v. Chem. Corp.*, 976 F.2d at 1342.
13. *Id.*
14. *3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355, 1362 (9th Cir. 1990) (wherein asbestos was not "disposed" when used in a building as a fire retardant).
15. CERCLA defines disposal with reference to the "disposal" definition in RCRA, at 42 U.S.C. § 6903(3). *See* 42 U.S.C. § 9601(29). Disposal means the discharge, deposit, injection, dumping, spilling, leaking, or placing of contaminants on the property during ownership.
16. *Carson Harbor Village, Ltd. v. Unocal Corp., et al.*, 270 F.3d 863, 878 (9th Cir. 2001).
17. *Id.* at 879.
18. *Id.* at 881.
19. *Id.* at 882.
20. 966 F.2d 837 (4th Cir. 1992).
21. *Id.* at 840.
22. *Id.* at 844.
23. *Id.*
24. *Id.* at 845.
25. 734 F.2d 159 (4th Cir. 1984).
26. *Id.*
27. *See Nurad*, 966 F.2d at 837.
28. *See* 42 U.S.C. § 9601(9).
29. *Nurad*, 966 F.2d at 843.
30. 96 F.3d 706 (3rd Cir. 1996).
31. 120 F.3d 351 (2nd Cir. 1997).
32. *See Carson Harbor*, 270 F.3d 863.

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# THE MINEFIELD
# Enron, Andersen, and Multidisciplinary Practice: Be scared—be very scared

By Marla B. Rubin

Several years ago, an Arthur Andersen official stood up in front of hundreds of members of the ABA's Center for Professional Responsibility and stated: "Our lawyers are not practicing law."[1] The Andersen official was on one of the early panels examining the issue of multidisciplinary practice (MDP). The statement was in response to the question, "Aren't the lawyers in your firm obligated to comply with the applicable Code of Professional Responsibility, no matter what their nonlawyer bosses tell them?" Even MDP advocates had to snicker at the answer. No one, however, is snickering now.

The Andersen official and one or two other representatives from the "Big Five" accounting firms were on that panel to convince the ABA that the ethics rules should be altered so that MDP would not violate them. The ABA, ultimately, rejected the accounting firms' appeal. What we finally find out about Andersen's part in what happened at Enron may validate the ABA's decision.

New York, on the other hand, obviously thinks the idea is great. New disciplinary rules, effective November 1, 2001, allow MDP within a certain framework. They attempt to address the concerns voiced by the bar about regulation of nonlawyer services provided by a law firm. These issues include protection of client confidences, avoidance of conflict of interest, and preservation of lawyer independence.[2]

They do not address regulation of the provision of legal services by an entity other than a law firm or traditional legal services provider. This column discusses (1) the new rules addressing MDP, (2) why the pitfalls of MDP may have led to the Enron debacle and the fall of Andersen, and (3) why the new rules offer little or no protection against similar occurrences.

### The New Rules

New DR 1-106(a) makes the disciplinary rules of *The Lawyer's Code of Professional Responsibility* applicable to nonlegal services "not distinct from legal services" provided by lawyers and law firms. Thus, a violation of the disciplinary rules by a nonlawyer in a law office or law firm could result in sanctions against the lawyer or lawyers with whom the nonlawyer works. If nonlegal services are distinct from legal services, the nonlawyer would still have to comply, and the lawyer or law firm could still be sanctioned for violation of the disciplinary rules "if the person receiving the nonlegal services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship." Lawyers are directed to presume that a person receiving nonlegal services believes that such services are subject to the attorney-client relationship. To rebut that presumption, the lawyer or law firm must affirmatively and in writing state that the services are not legal services and are not protected by the attorney-client privilege. There is an exception for "de minimis," but what that means is not clear.

This provision also makes the disciplinary rules applicable to an entity providing nonlegal services if a lawyer or law firm is the owner of, agent of, controlling party of, or "is otherwise affiliated with" the entity. This rule might be a little broad.

New DR 1-106(b) requires that a lawyer or law firm that owns, controls, or is otherwise affiliated with an entity ensure that nonlawyers providing nonlegal services do not direct or regulate the professional judgment of the lawyer or law firm in rendering legal services or cause the lawyer or law firm to compromise the duties to protect client confidences and secrets found in DR 4-101.

A most unusual rule is new DR 1-107, in which the Appellate Divisions found it necessary to repeat the core values of the legal profession in a disciplinary rule, rather than in the ethical considerations, the traditional placement of precatory language. An explanation, perhaps a thinly disguised self-justification, for the new rules, this rule ends with a statement that MDP is incompatible with the core values. That's what we've been trying to tell you. Nevertheless, the rule issues an imprimatur on maintaining contractual relationships with nonlegal professionals or services "on a systematic and continuing basis," for the purpose of providing legal and nonlegal services.

The nonlegal professionals contemplated by the new rules are those that are on a list that will be generated by the Appellate Divisions. At a minimum, those nonlegal professionals must have a certain level of education and be subject to some code of ethics of their own professions. Finally, the nonlegal professional may have no ownership, "managerial or supervisory right" or power "in connection with the practice of law." The nonlegal professional may not share legal fees or receive referral fees. Attorneys must disclose a contractual relationship with a nonlegal services provider before a client is referred to it. The client must give written informed consent and be given a copy of the

"Statement of Client's Rights in Cooperative Business Arrangements" set forth in new Part 1205 of the Appellate Division Rules.

There are also changes to Canon 2, allowing lawyers to communicate information about nonlegal services provided (DR 2-101(c)), but prohibiting the names of nonlawyers or nonlegal professional services in a firm name (DR 2-102).

## Do the New Rules Protect Clients?

New York has blazed the trail, once again, to enable lawyers to make more money. However, there at least two groups of clients that will not benefit from the new rules' protection against potential MDP harm. MDP in law firms poses less potential harm to sophisticated clients, who are more likely to understand (1) informed consent, and (2) that a nonlegal services firm controlled by their lawyer or law firm will not be subject to the same duties as the lawyer or law firm with respect to client secrets, confidences, and interests. Less sophisticated clients, however, may not be able to separate their attorney from the services she is hawking. An expectation of some extension of the attorney-client relationship could make the decision to use nonlegal services provided by an attorney's collateral business a harmful one for reasons previously cited in this column.[3] Making the lawyers responsible at some level for the provision of nonlegal services in their names or for their profit is unobjectionable. It does not ensure that the nonlawyers will protect the "core values of the legal profession." It does not address potential conflicts between the nonlawyer professional's code of ethics or statutory duty and *The Lawyer's Code of Professional Responsibility*.[4] Other than the loss of their employment or financial support, nonlawyers have little incentive to be as familiar with a lawyer's duties to a client as a lawyer does.

Clients of a consulting firm offering legal services gain no protection from the new rules. The new rules do not apply to nonlawyer supervisors. Nonlawyer supervisors are not subject to sanctions for violation of the rules. Lawyers working for nonlawyer supervisors finding themselves in a conflict between ethical duties and employment obligations will continue in the same dilemma—a dilemma that affects not only their interests, but the interests of those they might be tempted to call clients.

## Where Were the Lawyers?

Only the people at Arthur Andersen really know what happened there that contributed to the Enron debacle. Paul Volcker, former Chairman of the Federal Reserve Board, had some ideas. When Mr. Volcker was retained to develop a firm-wide reform plan, his most emphatic recommendation was to separate the audit arms of the Andersen business from the consulting arms.[5] He stated that his proposal "would eliminate 'the actual and potential conflicts of interest arising from being part of a financial conglomerate.'"[6] At first, it appeared there was resistance to Mr. Volcker's recommendation. However, on March 29, 2002, Andersen announced that the consulting arms would be spun off, in what appears to be a desperate effort to salvage something of the once mighty conglomerate.[7]

In order to understand why the linchpin of Mr. Volcker's reform plan was the consulting arms separation, it would be useful to understand what Andersen, as a whole, was offering clients. There was, of course, the traditional accounting firm services of outside auditing and preparation of financial documents like SEC filings, annual reports, and tax returns. By the mid-1990s, Andersen (and most of the accounting "Big Five") was offering "consulting" services like internal financial management; financial planning that included mergers and acquisitions involvement; tax planning; systems management; technology services; environmental, health, and safety auditing services; and whatever they called the services provided by the Andersen lawyer/consultants, just to name a few. According to one account, " 'Enron had over a thousand Anderson people working on jobs . . . ' "[8] Firm clients worked with their own Andersen representatives whose incomes were directly related to the fortunes of the clients.[9] Thus, Andersen worked with its clients to maintain and/or increase profit, minimize operational costs, and maximize tax advantages, earning the firm handsome consulting fees. At the same time, Andersen would provide outside auditing services, whose purpose traditionally is to ensure that a company properly account for its financial transactions, including the reporting of income and expenses within the law.[10] Mr. Volcker believed that his proposal to separate the audit and consulting arms would result in " 'no partner interlocks, no revenue- or profit-sharing, and no cross-subsidies between the "auditing" and "consulting partnerships." ' "[11]

An Enron executive, in a now-famous memo to Kenneth Lay, former Chairman and Chief Executive Officer of Enron, suggested that he dispose of the services of both Andersen and Vinson and Elkins, a Texas law firm. The firms, she said, "had both grown too wealthy off Enron's yearly business and no longer performed their roles as Ken Lay, the board and just about anybody on the street would expect as a minimum standard for CPAs and attorneys."[12] In an article about conflicts inherent in some practices of Wall Street analysts that contributed to Enron's fall, it was stated that "Congressional investigators are asking whether the company's auditors, Arthur Andersen, was blinded to that conflict by the consulting fees Enron was paying it."[13] In other words, both size and profit worked to blur vision at Andersen. This is the MDP nightmare come true.

Somewhere in the mix of these already potentially conflicting services were thousands of Andersen lawyers worldwide whose supervisors were the nonlawyers selling the consulting services. Obviously, the success of the services salespeople impacted the lawyers' financial and employment status. If a conflict arose between what the

salesperson wanted the lawyer to do for a client, and what the lawyer believed was ethically permitted, the lawyer would be in a dilemma not dissimilar to that often experienced by in-house counsel which has a difference of opinion with management. The lawyer can protest, possibly falling into political disfavor; the lawyer can go around the requester, with the same result; or the lawyer can refuse to do the ethically objectionable act, and risk dismissal. Codes of legal ethics offer no protection to such attorneys. They enter this employment running the risk that their nonlawyer supervisors may require them to perform tasks or take positions proscribed by the legal ethics codes, even if "legal." The nonlawyer supervisors are not subject to the legal ethics codes. They are not required to take the legal ethics codes into consideration in their decision-making that lawyers are, no matter where they are practicing law. On the other hand, it was Andersen's position that its lawyers were not practicing law. Did the Andersen lawyers take the same position, conducting their duties without regard to the applicable legal ethics codes? Did they believe that the services they rendered to the Andersen clients were not the practice of law or that no attorney-client relationships were being formed?

If so, it would not be far-fetched to imagine Andersen "legal consultants" either creating or refining the various schemes developed with Enron in the presentation of its financial data, something described in one account as "aggressive accounting."[14] Even if the legal ethics codes did enter their thinking, it would not be far-fetched to imagine Andersen legal consultants warning against such schemes, and being helpless to stop them. (What could they do—report their nonlawyer supervisors to the local bar grievance committees?) It would not be far-fetched for Andersen legal consultants to receive directions to destroy documents in their files about certain Enron business, not questioning why the directions were made or that the destruction of such documents could be both an unethical and illegal obstruction of justice.[15]

In sum, it would not be beyond consideration that at least some of the Andersen legal consultants believed that their work at Andersen was outside the practice of law and not subject to legal ethics codes. Much freedom of discretion could be bought with that belief. A lot of client protection and protection of the public-at-large could be lost with that belief.

Are the large accounting firms less enthusiastic now about their "one-stop shopping" conglomerates? Last February 12, all Big Five accounting firms "announced that they will no longer sell consulting services to companies they audit and that they will not serve simultaneously as a company's external auditor and as its internal auditor. . . ."[16]

## Conclusion

Certainly, the new rules address many of the concerns voiced against MDP in this column and many other media. On careful review, however, they are a step in the wrong direction. It seems obvious that size and reach, both at Andersen and Enron, were major contributors to the internal conflicts at both entities that went undetected or unaddressed before major harm was inflicted. The new rules make it easier—in fact, encourage—law firms to expand internally and by collateral extension. Multiply the layers, extend the arms, and the brain has more barriers to control. Unlike Andersen's legal consulting business, the newly sanctioned MDPs in New York will have lawyers directing them, but the perils to clients are the same. MDP is about increased profit. Only extremely tight control and a little luck will guarantee that increased profit will not come at the expense of clients—but the bigger an organization, the more difficult the control. (Another column could be devoted to the harm to clients from law firms grown out of control.)

In the meantime, it is hoped that the accounting firms will consider getting out of the "legal consulting" business, or at least that lawyers will seek employment where the legal ethics codes unequivocally govern their actions.

## Endnotes

1. This writer was present at the conference in Montreal, Canada.
2. Marla B. Rubin, *The Minefield: Multijuridictional Practice*, 21-4 N.Y. Envtl. Lawyer at 16 (Fall 2001).
3. *Id.*
4. *Id.*
5. Floyd Norris, *Andersen Told to Split Audits and Consulting*, N.Y. Times, Mar. 12, 2002, at C1.
6. *Id.*
7. Kurt Eichenwald and Jonathan D. Glater, *Andersen Plans a Split, as U.S. Signals Continued Representation*, N.Y. Times, Mar. 3, 2002, at C1.
8. Jonathan D. Glater, *As Enron Searches for Auditor, Some Big Names Don't Apply*, N.Y. Times, Jan. 31, 2002, at C7.
9. Jonathan D. Glater, *Doubts on Changes Planned by Big Five*, N.Y. Times, Feb. 7, 2002, at C6.
10. *Ernst & Young Latest Auditor Moving to Alter Some Practices*, N.Y. Times, Feb. 5, 2002, at C1.
11. *See* endnote 5, *supra*.
12. *An Enron Official is Expected to Say That Many Knew of Irregularities*, N.Y. Times, Feb. 14, 2002, at C1.
13. Patrick McGeehan, *Varied Roles Cause Some Conflicts, Brokers Say*, N.Y. Times, Feb. 5, 2002, at C6.
14. Floyd Norris and Kurt Eichenwald, *Fuzzy Rules of Accounting and Enron*, N.Y. Times, Jan. 30, 2002, at C6.
15. Richard A. Oppel, Jr. and Stephen Labaton, *Hearings on Enron Open, Focus on Destroyed Data*, N.Y. Times, Jan. 25, 2002, at A1.
16. *See* endnote 9, *supra*.

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# Threats to the Continued Existence of Conservation Easements

By Jeffrey M. Tapick

## I. Introduction

Over the last several decades, land preservation has become one of the most pressing issues on the nation's environmental agenda. As the tides of urban sprawl continue to sweep away acres of agricultural, forest and wilderness areas, land preservationists are stepping up their efforts to protect the nation's remaining natural spaces from further development and destruction. With growing political support from a populace that is fed up with snarling traffic jams and the replacement of scenic landscape with endless stretches of strip malls, both the public and private sectors have begun devising and implementing numerous strategies for preserving land. These strategies involve measures such as "smart growth" plans and regulations at the municipal and state levels; the designation of more national parks, monuments and roadless areas at the federal level; and the acquisition of undeveloped land by private conservation groups. Two notable obstacles have impeded the implementation of these measures: the high costs associated with preserving land in its natural state, and political opposition from property rights advocates. To overcome these hindrances, land preservationists are increasingly turning to a legal device designed to achieve their goals at a relatively low cost and in a manner that comports with free market principles: the conservation easement.

A conservation easement is a nonpossessory interest in land that imposes use restrictions on a landowner in order to achieve a conservation purpose. In other words, a conservation easement is a legal instrument that requires property owners to abide by certain rules and restrictions to preserve their land. If a conservation easement is placed on a parcel of land, the landowner is restricted from using that land in a manner that is inconsistent with the easement's terms, and the easement holder has the right to enforce the easement's restrictions against the landowner. Typically, a conservation easement is designed to protect and preserve land in its natural state; however, many easements are designed to achieve a more specific conservation purpose, such as the preservation of land for agricultural or recreational use.[1]

The conservation easement has emerged in recent years as one of the principal legal devices for achieving the goals of land preservationists. Recent studies show that over 2.6 million acres of land are currently protected by conservation easements, up from 290,000 acres in 1988.[2] In the words of one commentator, conservation easements have become "the single most important tool to protect privately owned land across the nation."[3] The proliferation of conservation easements can be attributed to the incentives and attractive characteristics that they offer to landowners and land preservationists alike. Conservation easements are created through voluntary, free-market transactions between landowners and easement holders. The parties freely negotiate the terms of the easement's restrictions and determine a price that the easement holder will pay the landowner for the burden that the easement imposes on the land.[4] Consequently, advocates of private property rights are somewhat more receptive to conservation easements than they are to less voluntary methods of land preservation.[5] Moreover, conservation easements are usually far less expensive than the purchase of the full title to a parcel of land. Thus, they allow land preservationists to achieve their goals at a lower cost.

Despite the growing popularity of conservation easements, some of their most important and attractive provisions remain untested in a legal context.[6] Specifically, a number of legal challenges could be made to the enforcement provisions and the duration of conservation easements. If successful, these challenges would significantly impair the continued viability and attractiveness of the conservation easement as a land preservation tool.

I will begin with a description of the benefits and legal framework of conservation easements, followed by an overview of the different kinds of statutory, common law, and public policy challenges that could be made against an easement. I then propose several defenses that might serve as a means for protecting conservation easements from such threats. Throughout this article, the term "conservation easement" is meant to signify a nonpossessory property interest created for the purpose of land preservation.[7]

## II. Benefits of Conservation Easements

Aside from the aforementioned ideological and financial advantages, conservation easements have a number of other features that make them attractive as a method of land preservation. These benefits include the ability of the landowner to continue enjoying land burdened with a conservation easement; the flexibility of conservation easements to be tailored to meet the specific needs of the parties; significant financial benefits

for landowners; the ability to establish conservation easements in perpetuity, and the public benefit created by conservation easements.

### A. Continued Enjoyment by the Landowner

Landowners are allowed to retain significant property rights and to preserve certain economic uses of land burdened with a conservation easement. The only property right that a landowner surrenders when placing a conservation easement on her land is the right to develop the land in a manner that violates the terms of the easement; the land itself still belongs to the landowner. Accordingly, the landowner keeps all of the other property rights in the "bundle of sticks" associated with that property, including the rights of exclusion, conveyance, and limited, non-development use.

Depending on the specific terms of the conservation easement, land burdened with a conservation easement can continue to be used for non-development purposes such as farming, grazing, or low-impact recreational activity. Existing developments on the property are unaffected; the landowner can continue to utilize an existing barn, or reside in an existing house, on land that is burdened with a conservation easement. In this way, conservation easements aim to preserve the affected land while also preserving much of the landowner's ability to use and enjoy her land.

### B. Flexibility to Tailor Easements to Specific Needs of Parties

Flexibility is another important advantage of conservation easements. The terms of each conservation easement can be tailored to meet whatever restrictions the landowner and easement holder agree upon, provided that the net result is the achievement of a recognized conservation purpose. This sort of flexibility allows land preservationists to reach a mutually beneficial arrangement with willing landowners, as both parties have the freedom to negotiate terms that will maximize their benefits from the conservation easement. Since each parcel of land has different conservation needs and values, and each landowner has different desires for the use and enjoyment of the land, flexibility in drafting the conservation easement's terms is a particularly attractive characteristic of this land preservation device.

### C. Financial Benefits to Landowner

From the landowner's perspective, the most attractive aspects of a conservation easement are likely to be the various tax deductions and benefits that arise from placing an easement on one's property. In order to create a conservation easement, a landowner chooses to either donate or sell the property interest represented by the easement to an eligible easement holder.[8] If she chooses to donate the easement, the landowner can receive an income tax deduction for the appraised value of the land's development rights, but *only* if the easement is created in perpetuity.[9] Also, recent revisions to the Tax Code permit the value of perpetual conservation easements to be deducted from the value of the land for estate tax purposes.[10]

These income tax and estate tax deductions create incentives for landowners to donate a conservation easement on their property. However, even if she chooses to sell a conservation easement on her property, the landowner will still benefit from a reduction in state and local property taxes. Since the conservation easement puts a restriction on the "highest and best use" of the land, the landowner will pay property taxes based on a lower assessed value of the land in states that impose an *ad valorem* property tax.[11] These various tax benefits that are associated with conservation easements have allowed landowners to retain title to property on which they would not have otherwise been able to afford tax payments.[12]

### D. Ability to Protect Land Forever

For land preservationists, probably the most attractive characteristic of a conservation easement is that the contracting parties can elect to establish it in perpetuity. This perpetual duration of a conservation easement is a unique feature. Traditionally, the common law has disfavored perpetual arrangements concerning land.[13] Yet, lawmakers in most states, presumably recognizing the importance of permanent land preservation arrangements, have authorized conservation easements to be established in perpetuity.

Owing to their perpetual duration, conservation easements are unlike other land preservation measures in that they cannot be circumvented easily. "Smart growth" plans can be altered or repealed; zoning regulations can be trumped by use variances or amended; and private lands owned by conservation groups can be sold to developers at a later date.[14] Conservation easements, however, provide a more permanent solution for preserving land by "locking up" the land's development rights in perpetuity. The perpetual duration of conservation easements is undoubtedly a primary reason that land preservationists increasingly turn to this legal device for achieving their goals. Yet, as will be explored further in Part IV, the perpetual duration of conservation easements is a cause of alarm for many advocates of private property rights, and could potentially incite a number of legal attacks on conservation easements.

### E. Public Benefit

While the creation of a conservation easement arises from a transaction between private parties, the easement itself creates a benefit that is inherently public in

nature.[15] The general public stands to gain from the achievement of an easement's conservation purpose, be it the preservation of open space, the protection of natural resources, or the maintenance of healthy air quality. Indeed, each of the statutorily recognized conservation purposes of an easement is considered to be a public benefit.[16]

Of course, the notion that undeveloped land could constitute something beneficial to the public runs counter to the land use philosophies that have shaped the common law for much of the past century. American property law doctrine has developed largely around the principle that it is in the public interest to put land to its "best use," which traditionally has meant the land's "most profitable use."[17] However, thanks to mounting evidence of the substantial benefits that can be derived from conservation efforts, lawmakers have started to recognize that land preservation affords as much, if not more, of a public benefit than the unchecked development of land.[18] Accordingly, state legislatures have taken steps to authorize and encourage the use of land preservation methods such as the conservation easement to achieve this newfound public benefit.

## III. Common Law vs. Statutory Conservation Easements

The conservation easement is a relatively new concept in the field of land-use law, having first gained widespread recognition and use in the mid-twentieth century.[19] William H. Whyte is credited as being the first land-use practitioner to champion the use of the conservation easement in 1959.[20] Shortly thereafter, Congress and many states began passing legislation known as conservation easement enabling statutes, which sanction the creation and use of conservation easements.[21] Since then, two types of conservation easements have emerged in practice: (1) *common law conservation easements*, which are created under the common law, and (2) *statutory conservation easements*, which are created pursuant to statutory authority. Recognizing the distinction between these types of easements is crucial for evaluating the continued viability of a conservation easement.

### A. Common Law Conservation Easements

A common law conservation easement is an easement that is created in a state that does not have an enabling statute, or an easement that fails to conform to an enabling statute's requirements.[22] Common law conservation easements are formed under state property law, in much the same manner as any other limited property interest: the easement is negotiated, its terms are inserted into the deed to the land, and the deed is filed and recorded with the county clerk. Common law conservation easements are similar in almost every respect to statutory conservation easements. The only significant distinction between the two is that common law conservation easements lack statutory protections against hostile legal doctrines.

Under the tenets of American property law, a common law conservation easement is a servitude property interest. Only three types of servitudes exist at common law: easements, real covenants, and equitable servitudes. A common law conservation easement must be characterized as one of these three types of servitudes in order for it to be valid under the common law.

Perhaps surprisingly, a conservation easement does not actually qualify as a true "easement" in most jurisdictions; hence, the property interest represented by a conservation easement is sometimes more appropriately referred to as a "conservation restriction" or "conservation servitude."[23] In fact, upon closer examination, it becomes obvious that conservation easements may fail to comply with the legal requirements of any of the three types of common law servitude designations.[24] As a consequence, a fundamental question arises: what kind of servitude is a common law conservation easement?

#### 1. Conservation Easements Should Not Be Classified as "Easements"

From a legal standpoint, an easement is the type of servitude designation that would be most advantageous for the continued implementation and application of common law conservation easements. Of the three types of servitudes, easements enjoy the most legal protection because they represent a *bona fide* property right.[25] An easement confers upon its holder the legally recognized right to a "limited use or enjoyment" of the land on which the easement has been placed.[26] In other words, an easement will provide its holder with a partial property right to use or enjoy another person's land in a manner defined by the easement. Easements are often used to provide the easement holder with the legal right to drive across another landowner's property, or to place utility lines across a neighboring parcel of land.

There are two general kinds of easements at common law, which are distinguished according to the type of interest created by the easement.[27] If an easement grants the right to make active use of the servient estate or to perform a specific type of activity on the servient estate, then it is said to be an "affirmative easement."[28] By contrast, if the easement grants the right to restrict the types of activities that are performed on the servient estate, it is characterized as a "negative easement."[29] Easements are then further distinguished according to who receives the benefit created by the easement. If the easement is designed to benefit a specific dominant parcel of land, it is called an "appurtenant easement."[30] On

the other hand, if the easement is designed to benefit a specific individual, then it is classified as an "easement in gross."[31]

The common law traditionally has held a somewhat unfavorable view of negative easements, recognizing only four types: easements created to protect the flow of air, to protect the flow of light, to ensure the support of buildings or structures, and to protect the flow of streams.[32] Moreover, modern-day courts have generally been loath to expand the types of permissible negative easements, and would likely invalidate any negative easement that does not fit into one of those four categories.[33]

In addition, the common law has placed limitations on the duration of an easement that is held in gross. Generally, the law has not permitted easements in gross to "run with the land," or be binding upon successive landowners who were not privy to the transaction that created the easement.[34] This means that an easement that is held in gross would not be permitted to be established in perpetuity.

Given these parameters, common law conservation easements clearly do not meet all of the necessary criteria to qualify as an easement. Since it imposes restrictions on a landowner's ability to use his property, a common law conservation easement would be classified as a "negative easement." Yet, the protection of open or natural space is not one of the four traditionally recognized types of negative easements. Accordingly, the common law would not permit this type of negative easement.

Moreover, since common law conservation easements are not designed to benefit the holder of an adjacent parcel of land, they would be classified as "easements in gross." Consequently, the common law would not allow such an easement to be established in perpetuity, as that would violate the prohibition on allowing easements in gross to run with the land.[35] For these reasons, a common law conservation easement should not be classified as an easement.

### 2. Conservation Easements May Fail to Qualify as Real Covenants

Another potential servitude designation for common law conservation easements is the real covenant. Legal scholars suggest that it was the common law's prohibitions on the expansion of new negative easements that gave rise to the law of real covenants.[36] Real covenants are characterized as less of an actual property interest and more of a formal agreement that concerns the use of land.[37] A real covenant is a promise between two parties regarding the use of property, stated as a formal agreement.[38] Generally, real covenants stipulate that "the landowner promises to do or refrain from doing something relative to his or her property."[39] Real covenants are commonly used to impose restrictions on the size, type and design of structures and developments on a particular parcel of property. At heart, real covenants have their roots in contract law, as evidenced by the fact that the only available remedy to a breach of a real covenant is monetary damages rather than equitable relief.[40]

At first glance, it seems that a common law conservation easement would readily qualify as a real covenant, since it imposes restrictions on landowners in the same manner as other real covenants. Yet, conservation easements may fail to qualify as real covenants because they are designed both to be held "in gross" and to run with the land. In order for a real covenant to run with the land, the common law of most states requires, *inter alia,* that the terms of the covenant must "touch and concern" the land.[41] However, courts have generally held that a real covenant held "in gross" does not satisfy the "touch and concern" rule.[42] Thus, these common law requirements would not allow a real covenant that is held in gross to run with the land. Accordingly, a conservation easement may not qualify as a real covenant in all jurisdictions.

Moreover, the enforcement provisions of a conservation easement would also prevent them from being classified as real covenants. If a landowner breaches a conservation easement, the easement holder is allowed to seek equitable enforcement of the easement's terms in court. For real covenants, however, the only remedy available to the covenant holder is a court order of monetary damages. Since conservation easements have enforcement provisions that allow for equitable remedies, they could not be classified as real covenants.

### 3. Conservation Easements May Not Meet the Criteria for Equitable Servitudes

The equitable servitude is the third servitude possibility for a common law conservation easement. This servitude designation is somewhat more fitting than the easement or the real covenant for common law conservation easements. In light of the restrictions that the common law set on the enforceability of real covenants, equitable servitudes emerged as a "more flexible," alternative form of property interest.[43] Like real covenants, equitable servitudes are formal agreements regarding land, yet they are enforceable in equity rather than at law. Thus, courts have greater latitude in the enforcement of an equitable servitude's terms.[44] If a landowner were to violate the terms of an equitable servitude on her land, then a court could enforce the servitude's terms by ordering the landowner to abide by them. Since equitable servitudes provide a more effective enforcement mechanism, land preservationists maintain that they are "more suitable than real covenants for use as land protection devices."[45]

Equitable servitudes are somewhat more favorable than real covenants because there are fewer legal requirements in order for an equitable servitude to run with the land. Notably, the common law does not require that "privity of estate" be established for the equitable servitude to be binding on successive landowners.[46] As one legal scholar notes, "this lack of a privity requirement makes equitable servitudes more attractive than real covenants for land preservation purposes because it makes equitable servitudes more likely to run with the land."[47]

However, like the requirement for real covenants, the common law of most jurisdictions holds that in order for an equitable servitude to run with the land, it must satisfy the "touch and concern" rule. As previously noted, courts in several jurisdictions have held that a servitude that is held in gross does not satisfy the "touch and concern" rule.[48] Consequently, since conservation easements are held in gross and are designed to run with the land, they would not comply with the requirements of an equitable servitude.

#### 4. Threats Arising from Questionable Servitude Status

Given that conservation easements contain characteristics of all three types of servitudes while failing to completely meet the legal definitions of any of the three, it is unclear how a court would view a common law conservation easement. A number of legal scholars opine that conservation easements are closer to real covenants or equitable servitudes than they are to easements, and should be treated by the courts accordingly.[49] Others suggest that courts should have the discretion to determine on a case-by-case basis what type of servitude was created by a particular conservation easement.[50] Ultimately, the issue has yet to be the subject of reported litigation in any jurisdiction, so a definitive resolution is still wanting.[51]

Notably, the questionable servitude status of common law conservation easements could subject them to invalidation or modification by a court.[52] If a court were to rule that a common law conservation easement actually qualifies as an easement, the court could then invalidate the easement because it is not one of the four recognized types of negative easements at common law. Other problems would arise if a court were to hold that a common law conservation easement constitutes a real covenant or an equitable servitude. In those cases, the court may decide to modify the perpetual duration of the conservation easement, since it would violate the common law prohibition against allowing in gross real covenants or equitable servitudes to run with the land.

These are but a few of the possible scenarios that could threaten the continued existence of a common law conservation easement due to their questionable servitude status. As explored further in Part IV, a number of other common law doctrines and policies could also be used to undermine common law conservation easements.

### B. Statutory Conservation Easements

In response to the problems arising from the common law of servitudes, many states have enacted legislation that defines and legitimates the property interest created by conservation easements.[53] Massachusetts became the first state to adopt conservation easement legislation in 1956; California followed suit several years later.[54] To encourage more states to pass such legislation, the National Conference of Commissioners on Uniform State Laws published the Uniform Conservation Easement Act (UCEA) in 1981. At present, 46 states and the District of Columbia have enacted such statutes, a fact that reflects the widespread appeal and appreciation for the conservation easement as a preservation device.[55]

The primary purpose of these state enabling statutes is to circumvent the restrictions and uncertainties that arise when the common law of servitudes is applied to conservation easements. To this end, most statutes explicitly state that common law servitude proscriptions will not apply to conservation easements created under statutory authority.[56] In effect, the state enabling statutes create an entirely new type of servitude that does not exist in common law.

The manner in which this newly created servitude is interpreted and enforced by the courts depends on the language of the specific statutes as well as the legislative intent behind that language.[57] A brief examination of the different state conservation easement statutes shows that there is a degree of similarity among them, particularly among states that have modeled their statute on the UCEA.[58] One such similarity is that all states seem to recognize that conservation easements are created for the public benefit rather than for the benefit of either of the contracting parties.[59] However, the statutes vary significantly in terms of their specific requirements and restrictions. The most significant differences between the statutes are the ones regarding an easement's eligible holders, its duration, its third party enforcement provisions, and its procedures for modification or termination.

#### 1. Eligible Easement Holder

Many of the enabling statutes differ somewhat in their definition of an eligible holder for a conservation easement. Under the original Massachusetts and California conservation easement statutes, the only eligible holder was a government entity.[60] In the years since, nearly all states, including Massachusetts and California, have expanded the list of eligible easement holders

to include such entities as charitable corporations, charitable associations, and charitable trusts.[61] For an organization to qualify as one of these charitable entities, the statutes generally require that the purpose of the organization must be to carry out some conservation goal or mission.[62] Yet, some states place even more stringent requirements on charitable easement holders, mandating that the holder must qualify as a 501(c)(3) tax exempt organization, or that the holder must have been in existence for a specified period of time prior to acquiring the conservation easement.[63]

### 2. Duration

Another aspect in which the state enabling statutes differ is in the duration of a conservation easement. As originally envisioned, most conservation easements are designed to last in perpetuity; yet some state statutes allow for, and still others require, that the duration of the easement be for a fixed number of years.[64] Of course, as previously noted, conservation easements that are not established in perpetuity do not entitle the landowner to federal income and estate tax benefits.[65] Four states actually require that a conservation easement be established for a perpetual duration.[66] As for default duration provisions, the vast majority of statutes mandate that if an easement doesn't state otherwise, it has been created for a perpetual term by default.[67]

### 3. Third-Party Enforcement

Many conservation easement statutes that were modeled after the UCEA allow for a third party to enforce the terms of the easement in case of breach.[68] This means that if a landowner violates the terms of a conservation easement, then a third party would have standing to bring the landowner to court for failing to adhere to the easement's terms. In states that do not have such third-party enforcement provisions, the easement holder itself must bring suit against the landowner. Yet, some of these statutes limit third-party enforcement rights by requiring that a third-party enforcer actually be named in the conservation easement document. Such limitations raise considerable doubt as to whether courts would allow unnamed third parties to enforce the instrument in those states.[69] However, it should be noted that in all states, the attorney general probably also has third-party enforcement power over conservation easements.[70]

### 4. Modification, Release and Termination

One of the most notable differences between the enabling statutes is whether they allow for the modification or termination of a conservation easement. A number of lawmakers and legal scholars have expressed concern about the possibility that conditions might one day arise that require a conservation easement to be modified or terminated. Recognizing this, the drafters of some state enabling statutes included provisions that specifically address the issues of modification, release and termination. The UCEA and its progeny allow courts to modify or terminate conservation easements "in the same manner as any other easement," or "in accordance with the principles of law and equity."[71] The vagueness of these provisions reflects the fact that common law modification and termination procedures for servitudes vary from state to state.[72] Many state statutes also include provisions that allow for the release of a conservation easement—usually without additional requirements such as compensation for the lost property interest, or judicial evaluation of the release's effect on the public benefit.[73]

State enabling legislation is an important step toward establishing legal certainty for the application and enforcement of conservation easements. However, as will be examined in the next section, these statutes still leave conservation easements open to a number of legal challenges that threaten the easement's continued existence.[74]

## IV. Potential Challenges to Conservation Easements

Conservation easements are an attractive land preservation device because they ostensibly represent a legally enforceable property right, and because they can be established in perpetuity. Together, the conservation easement's enforceability and durability ensure that this legal device will be an effective means for preserving land in the long term.[75] Relying on these attributes, governments and private land trusts have expended and continue to expend time and resources on acquiring and administering conservation easements. Meanwhile, the federal government, believing in the perpetual viability of these easements, has granted a substantial amount of tax benefits to landowners who place conservation easements on their property. However, if either the enforceability or the durability of a conservation easement were successfully challenged in a court, then the conservation easement would cease to be an effective tool for land preservation, and the time and resources expended in acquiring and maintaining them will have been largely wasted.

The increasingly vocal opposition to land preservation measures suggests that such challenges to the continued existence of conservation easements are likely to occur in the near future. Generally, the most vocal opponents of conservation easements have been those who harbor ideological qualms about perpetual servitudes held in gross.[76] Yet, a number of other groups have voiced opposition to conservation easements as well, including landowners who no longer wish to be burdened with an easement, and developers who wish

to put burdened property to commercial use.[77] Less frequently, local and state tax assessors have disputed the validity of conservation easements in order to eliminate the tax benefits that a landowner has claimed as a result of the easement. These are the groups that are most likely to challenge a conservation easement's continued existence. As described in more detail below, there are a number of legal arguments based on the common law and on state enabling statutes that these groups could employ to attack a conservation easement.

It should be noted at the outset of this section that, as a policy matter, it is clear that not all conservation easements should be impervious to modification or dissolution in certain circumstances. For example, in cases where an easement can no longer fulfill its intended conservation purpose, then the easement should be modified or terminated. Likewise, in cases where an easement holder is given the opportunity to "swap" a viable conservation easement for another easement or property interest of greater conservation value, then the easement holder should have the ability to make the swap even at the expense of terminating an easement. In these types of situations, the public interest would clearly be better served by the modification or dissolution of an easement, rather than by the easement's continued existence. However, opponents of conservation easements may try to modify or dissolve a conservation easement without regard for the best interests of the public. Thus, this section aims to identify the ways in which these groups could challenge a conservation easement for opportunistic, rather than benevolent, reasons.

### A. Common Law Challenges

Several common law doctrines and public policy considerations could be used in the courts to challenge the continued existence of a conservation easement. The doctrinal challenges under the common law are the doctrine of changed conditions and the doctrine of merger, while the public policy challenge emanates from the theory of the "dead hand."

There are two likely scenarios in which these common law doctrines would threaten a conservation easement. The first scenario is that an opponent of a conservation easement could affirmatively challenge the easement's continued existence in a court proceeding. The second scenario could arise if an easement holder brings a landowner to court to enforce the conservation easement's terms; in that case, the landowner could raise these common law doctrines and policies as a defense to the enforcement of the easement.

The following common law doctrines and policy considerations could be used to either modify or terminate both common law and statutory conservation easements.[78] While the consequences of terminating an easement are obvious, it should be noted that the modification of a conservation easement can be equally deleterious to its continued existence—particularly when the duration, restrictions or purposes of the easement are modified.

#### 1. Doctrine of Changed Conditions

Many legal scholars recognize the doctrine of changed conditions as the common law doctrine that is best suited for modifying or terminating a conservation easement.[79] The basis of a challenge under the doctrine of changed conditions is that circumstances have sufficiently changed since the creation of the servitude so as to render its purposes or restrictions as "obsolete or unduly burdensome."[80]

The doctrine of changed conditions would likely be raised as a defense in an enforcement proceeding for breach of the servitude. If a landowner violates the terms of an easement and the easement holder brings the landowner to court, the landowner could assert the doctrine of changed conditions as a defense for his failure to abide by the easement's restrictions. If a landowner breaches the terms of a conservation easement and asserts this doctrine as a defense, she must show that conditions have significantly changed since the time that the easement was created so as to render the easement's purpose unattainable.[81] The likelihood that a court would accept this defense depends on the circumstances of the particular case. However, if the landowner prevails under this doctrine, the court may refuse to grant equitable relief for breach of the conservation easement. If the court reaches such a decision, the conservation easement would be unenforceable, and would be effectively destroyed for land preservation purposes.[82]

Under the proper circumstances, the doctrine of changed conditions could actually prove beneficial to conservation easements. In cases where a perpetual easement can no longer fulfill its intended purpose, the doctrine of changed conditions provides a legal remedy to remove the conservation easement.[83] However, the danger that this doctrine poses to conservation easements is that landowners and developers could attempt to use the doctrine opportunistically to destroy perfectly viable conservation easements in order to develop burdened properties. It is this sort of opportunistic use of the doctrine of changed conditions that stands as a real threat to conservation easements.

It should be noted, however, that there is some uncertainty as to whether the doctrine of changed conditions should apply to conservation easements at all. This uncertainty stems from the fact that, at common law, the doctrine of changed conditions traditionally applied only to real covenants and equitable servitudes.[84] As shown in Part III above, it is not clear

that a common law conservation easement actually qualifies as either a real covenant or an equitable servitude. Furthermore, in states where a conservation easement is classified as an easement, the doctrine of changed conditions would probably not be applicable. To date there have been no recorded challenges to a conservation easement under the changed conditions doctrine. Consequently, the kind of threat that this doctrine poses to conservation easements remains unclear.

### 2. Doctrine of Merger

The property law doctrine of merger could also be used to terminate a conservation easement. The merger doctrine states that if the owner of the burdened property comes into possession of a servitude that burdens the property, or if the servitude holder comes into possession of the burdened property, then the servitude is automatically extinguished. The most likely scenario in which the merger doctrine would apply to a conservation easement is the case of an easement holder coming into possession of the full title to the land that is burdened by the conservation easement. For example, a landowner that donates a conservation easement to a local land trust could devise the full title to her land to the land trust upon her death. In that case, upon the landowner's death, the land trust would come into possession of the full title to the land while it also held the conservation easement. Under the doctrine of merger, the conservation easement would then be extinguished. Conceivably, the merger doctrine could also apply if the burdened landowner somehow comes into possession of the conservation easement, though this scenario is far less likely. Several state statutes have provisions specifically addressing whether the merger doctrine can terminate an easement.[85] Notably, the merger doctrine has been used, albeit unsuccessfully, to challenge the validity of a conservation easement in Massachusetts.[86]

### 3. Public Policy Against the "Dead Hand"

An important property law maxim that could be used to challenge a conservation easement is the prohibition against the "dead hand" control of land. The "dead hand" refers to unalterable decisions made by parties long dead that "lock up" the use of land. The public policy disfavoring "dead hand" control is embodied in property law rules such as the rule against perpetuities. Opponents of conservation easements could conceivably use this policy argument to persuade a court to invalidate or modify conservation easements that are established in perpetuity.

The public policy against "dead hand" land controls represents the concern that many legal scholars voice about the perpetual nature of conservation easements.[87] These concerns stem primarily from the fear that a permanent decision regarding the use of land today may cease to be a desirable decision at some point in the future.[88] These scholars generally believe that it "is socially desirable that the wealth of the world be controlled by its living members and not by the dead."[89] Thus, legal scholars who oppose conservation easements might assert that perpetual easements violate public policy against the "dead hand" control of property interests. Courts could consider public policy concerns about the "dead hand" control of land when deciding whether to impose equitable remedies for the enforcement or modification of a conservation easement.[90] In extreme cases, a court could use the public policy against the "dead hand" as a basis for a decision to terminate a perpetual conservation easement.

## B. Statutory Challenges

Many state enabling statutes provide ways to challenge statutory conservation easements. It is likely that some of these ways were deliberately put in place by state legislatures wary of creating a "bulletproof" perpetual property interest.[91] Under certain conditions, these statutory procedures provide a direct means of dissolving an easement in its entirety. However, these explicit provisions are not the only statutory means through which a conservation easement can be challenged. Many easements could also be challenged for failing to fulfill the basic requirements set forth in these statutes. If such challenges were successful, they would threaten an easement's continued viability because the easement would lose its statutory protections, and thereby be subjected to the various hostile common law doctrines described above. A closer look at these various statutory challenges reveals that state enabling legislation may not offer as much protection for conservation easements as previously thought.

### 1. Failure to Satisfy Statutory Requirements

In order to qualify as a statutory conservation easement, an easement must meet a number of requirements set forth by the enabling statutes. If an easement fails to meet one of these requirements, then its opponents could challenge its legal status as a statutory conservation easement. One example of a statutory requirement that may not be fulfilled is that the conservation organization that holds an easement must properly qualify as an eligible easement holder. Prof. Frederico Cheever asserts that if an easement is held by a private organization that changes its conservation mission or purpose, or that fails to maintain the requisite tax status to qualify as a charitable conservancy, then the organization may cease to qualify as an eligible easement holder.[92] In such a case, the easement's legitimacy as a statutory conservation easement could be called into question, and the easement could ultimately be reduced to a common law conservation easement.[93] In that event, the conservation easement would become sus-

ceptible to the hostile common law doctrines aforementioned.

Another way that a conservation easement could be challenged for statutory inadequacy lies in the durational aspect of the easement. In most states, if a statutory conservation easement fails to explicitly state its duration, then by default it is established in perpetuity. Yet, in states that do not have such a default rule, the courts may interpret the easement's silence on the matter of duration to mean that the parties did not intend for the easement to be perpetual. Alternatively, a court in one of these states could decide to invalidate an easement that fails to explicitly state its duration on vagueness grounds.[94] In either case, a party seeking to challenge an easement could prey on the fact that the easement in question failed to meet the statutory requirement of stating its duration. As a consequence of this failure, a court could reduce the term of a conservation easement, or could invalidate the conservation easement altogether.

### 2. Termination

At first glance, it might seem that statutory termination provisions pose the biggest threat to the continued existence of a conservation easement. After all, 26 state enabling statutes and the UCEA explicitly include a provision for wiping out the conservation easement.[95] The very idea of terminating a "perpetual" easement, as Todd D. Mayo points out, "is anathema to some landowners and land conservation professionals, yet it is a real possibility."[96] However, these termination provisions do not create an easy way to destroy a conservation easement. Rather, these statutory provisions simply mandate that a conservation easement *may* be terminated by a court of law "in accordance with the principles of law and equity."[97]

Moreover, the "principles of law and equity" referenced in the UCEA and state enabling statutes are not merely a pretext that gives a court *carte blanche* to terminate conservation easements at will. Rather, the "principles of law and equity" refer to traditional common law termination doctrines that require a number of legal and factual elements to be established before an easement can be terminated.[98] Thus, those who seek to employ such termination procedures must build and support a case under one of these common law termination doctrines in order to prevail. The likelihood of success for such challenges would depend on the factual circumstances surrounding each easement. Yet, since this type of challenge must adhere to rigid common law doctrines and survive the scrutiny of a reviewing court, the termination provision does not pose a significant threat to most conservation easements.

### 3. Release

By contrast, statutory release provisions pose a much more salient threat to conservation easements, as they do not similarly provide for the application of a legal framework with judicial oversight in order to be carried out. Instead, these provisions often allow for the release of an easement upon the fulfillment of a few relatively simple requirements. Although provisions for an easement's release are notably absent from the UCEA, 29 states allow an easement holder to release a conservation easement.[99] It is likely that legislatures included these release provisions in their statutes because they wanted to preserve an easement holder's decision-making capacity in regard to the easement. Whatever the legislature's intention, these release provisions could subject the continued existence of a conservation easement to the easement holder's whim.

Of course, it can be presumed that most conservation easement holders would not choose to exercise the release provision of an enabling statute. The state legislatures probably hoped that by limiting the eligible holders to government entities and charitable organizations, the easement holder would not be inclined to release a conservation easement without good cause. These eligible easement holders are obligated to base their actions and decisions primarily out of concerns for the public interest and the interest of land preservation.[100] However, it is not inconceivable that a government entity or private conservation organization could ignore this mandate and base its decision to release a viable easement on the best interests of the landowners rather than the best interests of the public.[101] Thus, the threat posed by statutory release provisions should be considered serious despite the fact that the easement holder herself must initiate this challenge.

In most states, the statutory release provisions do not require even minimal procedural or substantive safeguards. Only two states mandate that a public hearing must be held prior to the easement's release.[102] One of these states, New Jersey, also requires that the Commissioner of Environmental Protection approve the release of a conservation easement if the easement holder is a government entity.[103] Nebraska's statute is the only one that imposes a substantive requirement on the release provision: it allows for the release of an easement only if "the conservation easement's purpose is not substantial."[104] In states that do not mandate public hearing or substantive requirements, statutory release provisions could provide opponents of conservation easements with a relatively easy way to extinguish an easement. The opponents seeking to destroy the easement could approach the easement holder and try to convince them to release the easement, perhaps using political pressure if the holder is a government entity, or

through financial inducements if the holder is a private organization.

## V. Possible Defenses to Conservation Easement Challenges

The steady growth in the number of conservation easements suggests that land trusts and government agencies will continue to use this land preservation device despite potential threats to an easement's continued existence. However, land preservationists would do well to formulate a defense strategy to respond to these threats. Although there are a number of common law maxims that could be used to challenge a conservation easement, other common law doctrines could be asserted to defend an easement from such threats of dissolution. This section proposes two such common law defenses, both of which focus on the public benefits that are derived from conservation easements. Both of these common law defenses are rooted in the trust-like nature of conservation easements: one emanates from the law of charitable trusts, and the other from the public trust doctrine.

Since these two proposed legal strategies are untested, an even more effective defense would be to eliminate the debilitating features of existing conservation easement statutes through statutory amendments. These proposals could conceivably forestall or eliminate some of the most significant threats to conservation easements.

### A. Conservation Easements as "Charitable Trusts"

One defense that could be asserted in the face of a threat to dissolve a conservation easement is the argument that such an act would constitute a breach of the "charitable trust" that exists between the easement holder and the general public. Essentially, this defense is predicated on the notion that a conservation easement constitutes a trust-like legal arrangement, with the easement holder acting as trustee and the general public standing as beneficiary of the trust. In order for such a defense to succeed, a court would have to be convinced that a conservation easement indeed operates in a trust-like manner, and that in turn it amounts to a "charitable trust."

A fairly strong case can be made that a conservation easement functions similarly to a trust. First, the general public clearly seems to represent a trust "beneficiary," as state legislatures and courts have acknowledged that the general public receives significant benefits from conservation easements.[105] Similarly, charitable organizations and government entities, which are the eligible holders of statutory conservation easements, appear to stand in the role of "trustee," since their actions in maintaining the easement are presumed to be in the interests of the general public.[106] This presumption is supported by the fact that charitable organizations are obligated to act in the interests of the general public, rather than in the organization's own self-interest.[107] Likewise, when a government entity takes action pursuant to statutory authority—by acquiring and holding a conservation easement, for example—that action is also perceived to be in the general public interest.[108] Moreover, the fact that the conservation easement's legal title rests with the holder while the easement's benefits flow to a separate beneficiary is also highly analogous to a traditional trust framework.[109] Taken together, these factors strongly suggest that a statutory conservation easement functions as a legal trust.

Courts recognize similar trust relationships, where a trustee manages the trust *res* for the benefit of the general public, as "charitable trusts" under state law.[110] Generally, courts have found that charitable trusts exist when three criteria are met: there is a trust property, the trust is managed for a proper charitable purpose that promotes the welfare of mankind or the public at large, and the grantor intended to create a trust.[111] On its face, a statutory conservation easement plainly satisfies the first two of these criteria. As a *bona fide* property interest, a conservation easement certainly could qualify as a legitimate trust property. Moreover, the statutorily recognized purposes for creating an easement would almost definitely meet the requirements of "proper charitable purposes."[112]

The third requirement of a "charitable trust," that the grantor intended to create a trust, is more difficult to satisfy. First, since conservation easements are not always donated, it is unclear that a landowner who sells a conservation easement could be considered a "grantor" for purposes of this definition. Second, since conservation easements traditionally have not been regarded as "trusts," it is unlikely that a landowner's action to create a conservation easement was *actually* intended to create a trust *per se*. Literally speaking, the only intent that actually could be discerned from a landowner's actions is the intent to create a conservation easement. However, given that the framework of a conservation easement closely *resembles* that of a trust, it is arguable that the landowner's action manifests intent to create a quasi-trust. Furthermore, courts have held that the law of trusts will apply in situations where parties engage in conduct of a trust-like nature.[113] Thus, it appears that a statutory conservation easement may indeed contain all of the necessary elements to be considered a "charitable trust."

If a court could be convinced that a conservation easement is indeed a "charitable trust," then it could thwart an effort to terminate or release the easement by ordering that the terms of the trust be enforced in equity.[114] Thus, the argument that a conservation easement constitutes a "charitable trust" could be a powerful

defense against an attack on an easement's continued existence. However, private citizens and conservation organizations would probably not have standing to assert this defense, as courts have generally held that state attorneys general have sole standing to bring an action for the enforcement of charitable trusts.[115] Moreover, it is important to note that this defense would probably not protect conservation easements against all release, termination or dissolution proceedings, because a court would likely order the equitable enforcement of an easement only in cases where it would serve the public interest to do so.[116] Thus, in cases where the public interest would clearly be *better* served by an easement's dissolution, termination or release, a court would probably not order that the trust be enforced. Nonetheless, the argument that a conservation easement is a "charitable trust" could be an effective defense against opportunistic or ill-conceived efforts to destroy an easement.

### B. Public Trust Doctrine

Another common law doctrine that could be used to defend conservation easements is the public trust doctrine. This ancient legal doctrine, which traces its origins back to Roman law, is based on the principle that "the public possesses inviolable rights in certain natural resources."[117] Courts have held that any activity that jeopardizes the public's rights in these natural resources will trigger the protections of the doctrine.[118] Furthermore, the obligations of the doctrine apply equally to private actors as well as public entities holding public trust resources.[119] Yet, in order for this defense to be viable, a court would have to be convinced that a conservation easement qualifies as a public trust resource.

Historically, the courts applied the public trust doctrine only to the resources of navigable waters and the submerged lands beneath them, and to the rights of navigation, commerce, and fishing that were associated with these resources.[120] However, some states have expanded the scope of the doctrine to include such natural resources as dry beaches, rural parklands, historic battlefields, wildlife, and archeological remains.[121] Additionally, a number of courts in some states have broadened the public interests protected by the doctrine to include recreation and scenic beauty.[122] Given the inclination of some state courts to expand the scope of the public trust doctrine, it could be argued that lands protected by conservation easements also should be included in this growing category of public trust resources.

One argument for including conservation easements in the category of public trust resources is that conservation easements function in a similar manner to other trust resources. Like other public trust resources, conservation easements are held in a trust-like manner for the benefit of the public.[123] Moreover, many conservation easements are created to promote the same interests that are protected under the doctrine in some states, including the preservation of land for its scenic beauty and the conservation of land for recreational uses. It is true that a substantial distinction between conservation easements and other trust resources does exist: conservation easements are the product of a legal transaction, whereas most other trust resources are said to be inherently public by nature. Yet, the inclusion of battlefields and municipal parks as legitimate public trust resources by some state courts suggests that the artificial basis of a conservation easement should not disqualify it from garnering the doctrine's protection.

A more concrete way of arguing that a conservation easement falls under the protection of the doctrine is to assert that conservation easements are the functional equivalent of "parks," which are a recognized trust resource in a number of jurisdictions.[124] Although conservation easements are not technically regarded as "parks," they could be characterized as such in jurisdictions that embrace a broad definition of the term "park." For example, some courts have broadly described a park as "a tract of ground kept more or less in its natural state," and a "piece of ground set apart and maintained for public use."[125] Most conservation easements would easily fit within this description, as they are indeed "set aside" from other lands to be preserved in their "natural state." What's more, although not all conservation easements grant public access, all easements arguably do provide other forms of public *use* by maintaining scenic beauty for the public's aesthetic enjoyment, or by conserving natural resources for the general public benefit. To this end, some courts have defined a park's "recreation" purpose as including "aesthetic recreation," and have held that areas devoted to the "conservation of natural resources" indeed qualify as "parks."[126] Thus, a conservation easement arguably could qualify as a "park" in some jurisdictions, and therefore be included as a public trust resource.

The practical consequence of designating a conservation easement as a public trust resource is that the doctrine's protections would be triggered if the easement were threatened with dissolution, termination or release. The protections of the public trust doctrine are considered to be more procedural than substantive, generally requiring that a "compelling public purpose" be shown in order to allow the destruction of a public trust resource.[127] Thus, as in the "charitable trust" defense, the doctrine probably would not provide conservation easements with a blanket protection against all attempts to eliminate the easement. Moreover, because the scope of the doctrine varies greatly state by

state, the doctrine would probably only protect conservation easements in states that have considerably expanded the doctrine's scope, such as New Jersey or California. Nevertheless, the public trust doctrine represents another common law argument that could be used to defend an easement from opportunistic or ill-conceived legal attacks.

### C. Statutory Amendments

The two common law arguments proposed above represent novel legal strategies for conservation easements; however, until they have been litigated, there remains considerable doubt as to how effective these strategies would be against a threat of destroying a conservation easement. A more certain strategy would be to amend the existing state enabling statutes to eliminate the requirements and provisions that render conservation easements more vulnerable to attack. These amendments should include: broadening the scope of eligible easement holders; allowing for greater transferability of easements; explicitly permitting unnamed third-party enforcement; and allowing for modification or termination in limited circumstances under judicial supervision.

#### 1. Expand the Scope of Eligible Easement Holders

The first such amendment to state enabling legislation would be to incorporate the UCEA's list of eligible easement holders, which includes *all* of the following: charitable corporations, charitable associations, and charitable trusts—provided that the purpose of the organization includes the same purpose for which the easement is created, regardless of the organization's tax status.[128] This amendment aims to redress the potential problems that may arise if a charitable organization that holds an easement alters its primary mission or purpose.[129] Under this amendment, as long as the charitable organization retains a recognized conservation purpose as one of its aims, it would remain an eligible easement holder under the statute. This amendment would also permit a number of charitable organizations to hold conservation easements in states that do not presently allow them to do so on account of their failure to achieve 501(c) tax status.[130] Moreover, this amendment would allow more kinds of charitable organizations to hold conservation easements than some state statutes currently permit.[131]

#### 2. Permit Transferability of Conservation Easements

A related statutory amendment would allow a conservation easement to be transferable from one eligible easement holder to another. This amendment would address the problems that could arise in the event that a private easement holder ceased to exist, by allowing the easement to be assigned or transferred to another eligible holder without fear that the validity of the easement would be jeopardized in the process. Most current state enabling statutes fail to address the issue of transferability, which could lead a court to declare an easement invalid in the case that the easement holder ceases to exist or in case of transfer.[132]

#### 3. Permit Unnamed Third-Party Enforcement

Another proposed statutory amendment is to explicitly permit unnamed third parties to bring suit for the enforcement of a conservation easement. Such a provision would extend the opportunity for enforcement to various conservation and public interest organizations, which do not have standing to bring enforcement suits under current state statutes.[133] With such an amendment, conservation organizations that are more diligent in bringing enforcement litigation actions for the violation of conservation easements would be able to do so, while the conservation organization that holds the easement would not be compelled to incur the trouble and expense of enforcing the easement's terms in court. This amendment would comport with the notion that the enforcement of the conservation easement serves the public interest, rather than simply the interests of the easement holder.

#### 4. Limited Termination or Modification under Judicial Supervision

The most important statutory amendment that could be made is to allow for the modification, termination or release of a conservation easement in certain limited circumstances and under judicial supervision. This should be accompanied by the omission of current provisions that allow an easement to be terminated or modified "under the principles of law and equity." The specific "limited circumstances" of this provision would be determined by the individual states, but they should be confined to situations where an easement no longer serves its intended conservation purpose, or where the easement's termination or release would provide a greater public benefit than the easement's continued existence. This determination would be made in a judicial proceeding, such as an action to quiet title or a special probate hearing, depending on the property law norms of each state. This amendment would eliminate the uncertainty about which common law doctrines, such as the doctrines of changed conditions or merger, should apply to a conservation easement.[134] Moreover, the amendment would shield conservation easements from opportunistic or ill-conceived attacks, while maintaining the possibility of modifying or extinguishing an easement in cases where it would benefit the public to do so.

As a final related matter, land preservationists should make a concerted effort to replace all common law conservation easements with statutorily authorized

easements, since easements created under statutory authority enjoy the maximum protections against hostile property law doctrines. Further, land preservationists should lobby aggressively for the passage of enabling statutes in the few states that have yet to enact such legislation.[135] The statutory amendments proposed above, together with an effort to expand statutory protections to all of the nation's conservation easements, represent the best type of defense against future attacks to conservation easements.

## VI. Conclusion

As a land preservation device, the conservation easement is truly remarkable in a number of ways. A conservation easement can be used to achieve myriad conservation purposes, ranging from the protection of a scenic wilderness area to the perpetuation of a baseball field to the preservation of a colonial homestead. The conservation easement is created by a voluntary agreement that yields significant benefits to landowners, land preservationists, and the general public. Above all else, a conservation easement provides what no other land preservation device does: a cost-effective, free-market means for the permanent protection of land.

However, as a legal instrument, the conservation easement contains some serious shortcomings that ultimately threaten its continued viability. Common law conservation easements fail to adhere to traditional servitude requirements, and consequently could be invalidated as illegitimate servitude interests. Statutory conservation easements are authorized by law, but certain requirements and provisions of these statutes threaten to undermine the easement's enforceability and durability. In their current form, both common law and statutory easements are susceptible to attack by common law doctrines and public policy arguments that strongly disfavor the type of property interest created by conservation easements. In the years since the creation of the first conservation easements, few of these types of challenges to an easement's continued existence have been made in the courts. However, the number of challenges to conservation easements is sure to rise in coming years, particularly as burdened lands are passed on to successive generations who may not share their forebears' preservationist inclinations.

In light of these threats, land preservationists must develop a legal defense strategy if conservation easements are to continue to be an effective land use device. This note has suggested two such defense strategies that rest on the characterization of conservation easements as a kind of "trust" that benefits the general public. An even more effective defense strategy would be to strengthen and improve conservation easement enabling statutes, while replacing common law conservation easements with statutory conservation easements to provide them with maximum statutory protection.

Overall, the conservation easement is a highly beneficial legal device that can be extremely effective in solving some of the more pressing land use problems confronting our nation today. With some adjustments to its legal structure, the conservation easement could continue to play an important role in land preservation for generations to come.

## Endnotes

1. The recognized purposes of conservation easements include "retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaelogical, or cultural aspects of real property." National Conference of Commissioners on Uniform State Laws, Uniform Conservation Easement Act § 1(1) (1981) (hereinafter UCEA).
2. These figures refer only to those conservation easements held by private land trusts. The acreage total for conservation easements held by government entities, such as state agencies and municipalities, is not represented in this figure. Katharine Q. Seelye, *More Families Adopting Lasting Limits to Preserve Land*, N.Y. Times, Sept. 12, 2001, at B1; Julie Ann Gustanski, "Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands," in Protecting The Land: Conservation Easements Past, Present, And Future 14 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).
3. Gustanski, *supra* note 2, at 9.
4. Not all conservation easements are purchased by the easement holder; many landowners choose to donate a conservation easement in order to receive certain tax benefits. *See* discussion *infra* Part II.
5. Unlike "command and control" regulatory devices, conservation easements are perceived as a free-market solution for preserving undeveloped land. Consequently, conservation easements have a broader ideological appeal than other regulatory impediments to land development, particularly among proponents of private property rights in Western states. Frederico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 Denv. U. L. Rev. 1077, 1078 (1996).
6. *See* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 Stan. Envtl. L.J. 2, 3 (1989).
7. Different states classify this property interest using terms such as "conservation servitude," "preservation easement," or "conservation restriction." *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433, 435-436 (1984).
8. The UCEA defines an eligible easement holder as: 1) a governmental body empowered to hold an interest in real property under the laws of this state or the United States; or 2) a charitable corporation, charitable association, or charitable trust, whose mission is to achieve conservation purposes. UCEA, *supra* note 1, at § 1(2). *See also* Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 Land & Water L. Rev. 89, 105 (1997).
9. The Internal Revenue Code of 1986 § 170(h)(1)(C) allows the landowner to take an income tax deduction for a "qualified con-

servation contribution," which is defined as a contribution of a "qualified real property interest to a qualified organization exclusively for conservation purposes." I.R.C. § 170(h)(1)(C) (West Supp. 1998) *cited in* Stephanie L. Sandre, *Conservation Easements: Minimizing Taxes and Maximizing Land*, 4 Drake J. Agric. L. 357, 369 (1999); Todd A. Etzler, *Conservation Easements in Real Estate Development*, 41-DEC Res Gestae 24, 25 (1997).

10. Estate tax provisions for conservation easements were added in § 2031(c) of the Internal Revenue Code by the 1997 American Farm and Ranch Protection Act. This provision allows the landowner to exclude up to 40 percent of the land's value, so long as the conservation easement meets the requirements of § 170(h). I.R.C. § 2031(c) (West Supp. 1998) *cited in* Stephen J. Small, "An Obscure Tax Code Provision," *in* Protecting the Land: Conservation Easements Past, Present, and Future 60 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

11. States that impose property taxes on an *ad valorem* basis generally allow for conservation easements to significantly reduce the fair market value of the land. As of 1997, at least 24 states mandated that conservation easements be considered when calculating the value of land for property tax purposes. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 Envtl. Law. 319, 359-360 (1997).

12. Skyrocketing land prices have forced many families and farmers to sell property that they can no longer afford to pay taxes on. Yet, many landowners are discovering that conservation easements enable them to continue living or farming on such lands because they lower the property's assessed value. Seelye, *supra* note 2, at B1.

13. *See* discussion *infra* Part IV.

14. As one commentator notes, conservation easements tend "to be more permanent and more restrictive than zoning and land use regulations, which can shift with the political winds." John Walliser, *Conservation Servitudes*, 13 J. Nat. Resources & Envtl. L. 47, 50 (1997) (quoting Timothy J. Houseal, *Forever a Farm: The Agricultural Conservation Easement in Pennsylvania*, 94 Dick. L. Rev. 527, 532 (1990)).

15. Prof. Cheever explores the public/private duality of conservation easements. Cheever, *supra* note 5, at 1078.

16. *See supra* note 1.

17. Walliser, *supra* note 14, at 86.

18. Prof. Walliser asserts that "[m]ore recently, the notion of what is 'best' for the public has changed, particularly in regard to land conservation." Walliser also notes that "considered against a backdrop of direct public and legislative support for conservation servitudes, including favorable tax relief at both the state and federal level, there is definitive evidence that conservation servitudes have recognized public benefit." *Id.*

19. The earliest recorded conservation easements in this country date back to the late 19th century, when they were used to help preserve "greenways" in the Boston area. Federal agencies used conservation easements to preserve scenic views along highways in Virginia and North Carolina during the 1930s. Hollingshead, *supra* note 11, at 333; Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 Hastings L.J. 1187, 1190 (1989).

20. Julie Ann Gustanski & Roderick H. Squires, Protecting the Land: Conservation Easements Past, Present and Future at xvii (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

21. Massachusetts became the first state to enact legislation authorizing conservation easements in 1956, followed by California in 1959. Cheever, *supra* note 5, at 1080 (citing 1956 Mass. Acts, ch. 631 and The Scenic Easement Deed Act of 1959, Cal. Gov't Code §§ 6950-6954 (1959)). In 1965, the Federal Highway Beautification Act created financial inducements for other states to enact conservation easement legislation. Hollingshead, *supra* note 11, at 334 (citing 23 U.S.C. § 319 (1990)).

22. Even in states that have enabling statutes, if an easement predates the passage of the enabling statute, it may be classified as a common law conservation easement. *See Friends of Shawangunks, Inc. v. Knowlton*, 487 N.Y.S.2d 543, 545-46 (1985) (asserting that a common law easement appurtenant created prior to passage of an enabling statute did not receive the statute's protections).

23. *See supra* note 7.

24. Hollingshead, *supra* note 11, at 324.

25. Prof. Walliser notes that, "traditionally, courts have treated easements as 'valuable and protected property rights, while treating real covenants with suspicion and subjecting them to greater barriers against enforcement.'" Walliser, *supra* note 14, at 73-74 (citing *Waldrop v. Brevard*, 233 N.C. 26, 31 (1950)).

26. Walliser, *supra* note 14, at 64 (citing Judith S. H. Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. Energy L. & Pol'y 55, 57 (1985)). *See, e.g.*, *Columbia Gas Transmission Corp. v. Adams*, 68 Ohio Misc. 2d 29, 33-34 (Com. Pl. 1994).

27. *See generally*, Jesse Dukeminier & James E. Krier, Property 229 (Fourth Edition 1998); Hollingshead, *supra* note 11, at 326.

28. *See, e.g., Rahabi v. Morrison*, 440 N.Y.S.2d 941, 946 (1981).

29. *See, e.g., Kiernat v. Chisago County*, 564 F. Supp. 1089, 1093 (D. Minn. 1983).

30. *See, e.g., Kikta v. Hughes*, 766 P.2d 321, 323 (N.M. Ct. App. 1988).

31. *See, e.g., Stiefel v. Lindemann*, 638 A.2d 642, 647 (Conn. App. Ct. 1994).

32. Dana & Ramsey, *supra* note 6, at 13; Blackie, *supra* note 19, at 1205.

33. Dana & Ramsey, *supra* note 6, at 13; Blackie, *supra* note 19, at 1205. However, some jurisdictions have expanded the negative easement doctrine to include easements that protect scenic views and easements that include building restrictions. *See* Dukeminier & Krier, *supra* note 27, at 857 (citing *Petersen v. Friedman*, 328 P.2d 264 (Cal. Ct. App. 1958)); Blackie, *supra* note 19, at 1199 (citing *Johnstone v. Detroit, G.H. & M. Ry. Co.*, 222 N.W. 325, 330 (Mich. 1928)).

34. If the benefit of an easement is held in gross, some courts disallow the burden of the easement to run with the land. Walliser, *supra* note 14, at 65; Hollingshead, *supra* note 11, at 327.

35. Prof. Walliser argues that, "the effectiveness and purposes of conservation servitudes would be all but destroyed if their restrictions could not run to successive owners of the servient estate." Walliser, *supra* note 14, at 56.

36. Blackie, *supra* note 19, at 1204.

37. "[U]nlike a real covenant, the easement is consistently viewed as an individual property right, as opposed to a promise respecting the use of land." Walliser, *supra* note 14, at 64. *See, e.g., Citizens for Covenant Compliance v. Anderson*, 12 Cal. 4th 345, 353 (1995); *First United Pentecostal Church v. Seibert*, 22 Md. App. 434, 440 (Ct. Spec. App. 1974).

38. Dukeminier & Krier, *supra* note 27, at 857.

39. Walliser, *supra* note 14, at 66.

40. Hollingshead, *supra* note 11, at 331.

41. The common law requires the following conditions to be met for a real covenant to run with the land: the covenant must be in

writing, the original parties must have intended the covenant to be binding on successors, there must be "privity of estate," and the "touch and concern" rule must be satisfied. *See, e.g., Sonoma Development, Inc. v. Miller*, 515 S.E.2d 577, 579 (Va. 1999); *Brody v. St. Onge*, 563 N.Y.S.2d 251, 252 (App. Div. 1990). The "privity of estate" and "touch and concern" requirements are the most difficult to satisfy. "Privity of estate" refers to the relationship between the landowners who negotiated the real covenant and successive owners of the dominant and servient properties. Because common law conservation easements are real covenants "in gross," the "privity of estate" requirement would only apply to the servient landowner, and is only relevant in those few jurisdictions that permit an "in gross" real covenant to run with the land. Walliser, *supra* note 14, at 66; Hollingshead, *supra* note 11, at 330.

42. Walliser, *supra* note 14, at 70. *See, e.g., City of Perryburg v. Koenig*, 1995 WL 803592, at *3 (Ohio Ct. App. 1995); *Waterville Industries, Inc. v. First Hartford Corp.*, 124 B.R. 411, 414 (D. Me. 1991). Most jurisdictions, as well as the *Restatement of Property,* do not allow the burden of a real covenant to be binding on successive owners if the benefit of the real covenant is held in gross. Hollingshead, *supra* note 11, at 330-331 (citing Restatement of Property § 537 (1944)). The "benefit" of a conservation easement is considered to be the conservation purpose that the easement aims to achieve, while the "burden" is the negative restriction on the landowner's use of his property. Walliser, *supra* note 14, at 49.

43. Prof. Walliser asserts that "equitable servitudes were developed 'to circumvent the common law's traditional hostilities toward . . . covenants restricting the use [of land].'" Walliser, *supra* note 14, at 68 (quoting Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 Real Prop. Prob. & Tr. J. 540, 541 (1979)); Hollingshead, *supra* note 11, at 331. The doctrine of equitable servitudes was established in the case of *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ch. 1848). Dukeminier & Krier, *supra* note 27, at 863; Walliser, *supra* note 14, at 68.

44. *See, e.g., Citizens for Covenant Compliance v. Anderson*, 12 Cal. 4th 345, 353-54 (1995); *First United Pentecostal Church v. Seibert*, 22 Md. App. 434, 440 (Ct. Spec. App. 1974).

45. Hollingshead, *supra* note 11, at 332.

46. *See, e.g., Fitzstephens v. Watson*, 344 P.2d 221, 231 (Or. 1959); Hollingshead, *supra* note 11, at 332.

47. Hollingshead, *supra* note 11, at 332.

48. *See supra* note 42.

49. Walliser, *supra* note 14, at 74-75.

50. *Id*. at 75.

51. Although Prof. Walliser notes two cases, one state and one federal, that identify conservation easements as permissible in gross easements, in neither case was the court addressing a common law conservation easement. Rather, both courts were addressing conservation easements created pursuant to statutory authority. *Id*. at 75-77.

52. Prof. Baldwin notes that "the lack of enabling legislation makes the use of this preservation tool precarious, since grantors and grantees are implicitly relying on easement common law to ensure the validity of their actions." She further notes that some land trusts have employed clever tactics for adhering to the letter of servitude law while creating common law conservation easements. Baldwin, *supra* note 8, at 109-110.

53. Prof. Hollingshead asserts that "the uncertainty created by the old common law principles has led most states to enact legislation designed to eliminate the common law impediments to the effective use of conservation easements." Hollingshead, *supra* note 11, at 332-333.

54. *See supra* note 21.

55. Roderick H. Squires, "Introduction to Legal Analysis," *in* Protecting the Land: Conservation Easements Past, Present, and Future 26 at Table 4.1, 4.2 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

56. For example, the UCEA states that "a conservation easement is valid even though: 1) it is not appurtenant to an interest in real property; 2) it can be or has been assigned to another holder; 3) it is not of a character that has been recognized traditionally at common law; 4) it imposes a negative burden; 5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; 6) the benefit does not touch or concern real property; or 7) there is no privity of estate or contract." UCEA, *supra* note 1, § 4.

57. Blackie, *supra* note 19, at 1195.

58. Twenty-one states and the District of Columbia have conservation easement legislation that has been influenced by the UCEA. Todd D. Mayo, "A Holistic Examination of the Law of Conservation Easements," *in* Protecting the Land: Conservation Easements Past, Present, and Future 26 at Table 2.2 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

59. Prof. Walliser asserts that "essential to the validity of the interest defined by the Uniform Act is the public nature of the conservation easement. Allowing land trusts or governmental entities to 'own' the interest does not intrude upon this purpose, as neither obtains any individual or discrete benefit that does not also inure to the public as a whole." Walliser, *supra* note 14, at 116.

60. Cheever, *supra* note 5, at 1080.

61. Mayo, *supra* note 58, at 35. Mayo points out that New Mexico is the only state that has excluded government entities from the list of eligible holders.

62. *Id.* at 38. The UCEA, for example, requires that "the purposes of the holder include these same purposes for which the conservation easement should have been created in the first place." UCEA, *supra* note 1, Comment, § 1(2)(ii).

63. The states that require an easement holder to be a tax-exempt organization are Alaska, New York, Utah, Vermont, Virginia, Washington, Hawaii, Montana, New Jersey, and West Virginia. Colorado and Virginia require that a private easement holder must have been in existence for a certain period of time in order to qualify as an eligible easement holder. Mayo, *supra* note 58, at 38-39.

64. Kansas and Alabama require that a conservation easement be created for a fixed term, rather than in perpetuity. *Id.* at 40.

65. *See supra* notes 9-11 and accompanying text.

66. California, Colorado, Florida, and Hawaii require that conservation easements be established in perpetuity. Mayo, *supra* note 58, at Table 2.4, 42.

67. In statutes that directly address the issue of duration, perpetual easements are the default rule in all but three states—Alabama, Kansas and West Virginia. *Id.* at 40.

68. Twenty-four states explicitly permit third-party enforcement of conservation easements. *Id.* at Table 2.6.

69. In the comment to § 1(3) of the UCEA, the drafters state that "recognition of a 'third-party right of enforcement' enables a party to *structure into the transaction* a party that is not an easement 'holder,' but which, nonetheless, has the right to enforce the terms of the easement." UCEA, *supra* note 1, at Comment to § 1(3) (emphasis added). New Mexico's statute requires that a third party enforcer be "specifically identified" in the statute. Mayo, *supra* note 58, at 48-50. In order to qualify as an eligible third-party enforcer in Virginia, a party must have signed the original conservation easement document. *Id*.

70. Mayo, *supra* note 58, at 48. The comment to § 3 of the UCEA recognizes that state attorneys general probably have a third-party right of enforcement of easements. This likely stems from the fact that the attorney general represents the interests of the general public, who are the beneficiaries of conservation easements. In addition, for states that do not explicitly permit a third party to enforce a conservation easement, beneficiaries to the easement may have standing to enforce the terms of the easement under the citizen suit provision of state environmental rights legislation. UCEA, *supra* note 1, Comment to § 3. *But see infra* note 133 and accompanying text.

71. Mayo, *supra* note 58, at 45. The specific ways in which courts may modify or terminate conservation easements are examined *infra* in Part IV.

72. The comment to § 3 of the UCEA reflects this fact and notes that "the act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements. . . ." UCEA, *supra* note 1, Comment to § 3.

73. In some states, the only requirement for the release of conservation easements is a public hearing; other states also require the approval of the state Department of Environmental Protection or its agency equivalent. Mayo, *supra* note 58, at 43-45.

74. Dana & Ramsey, *supra* note 6, at 18-21.

75. It goes without saying that without the rights of enforcement, the fact that an easement is created in perpetuity is virtually meaningless, as the violation of the easement would go unchecked in the courts.

76. *See, e.g.,* Korngold, *supra* note 7. The policy position of these scholars is outlined *infra* in notes 101-104 and accompanying text.

77. These two groups have long been recognized as posing the most serious threat to the existence of conservation easements. Jeffrey Blackie, writing in 1989, notes that "environmentalists have expressed concern that development-minded landowners" would pose legal challenges to the durability of conservation easements. Blackie, *supra* note 19, at 1189.

78. Almost all state conservation easement enabling legislation contains provisions stating that courts are empowered to apply the same "principles of law and equity" that apply to other easements, or provisions that contain specific references to the common law modification and termination doctrines that can apply to them. Mayo, *supra* note 58, at 43-45.

79. *See, e.g.,* Blackie, *supra* note 19, at 1187-1190.

80. Walliser, *supra* note 14, at 109.

81. *See, e.g., Cortese v. U.S.*, 782 F.2d 845, 850-51 (9th Cir. 1986).

82. Some scholars have argued that if a court accepts a theory of changed conditions, it should apply the *cy pres* doctrine as an alternative to effectively terminating the easement. This doctrine allows a court to modify "charitable trust assets" in such a way as to allow them to better achieve their intended purpose. However, the applicability of this doctrine to conservation easements is unclear. *See* George M. Covington, *Conservation Easements: A Win/Win for Preservationists and Real Estate Owners*, 84 Ill. B.J. 628, 633 (1996). *See also* Blackie, *supra* note 19, at 1190.

83. Walliser, *supra* note 14, at 104.

84. The uncertain servitude designation of common law conservation easements leaves such instruments open to challenge by this doctrine. However, for common law and statutory conservation easements that are designated or treated as easements for modification and termination purposes, the applicability of this doctrine is unclear; the UCEA itself notes that the doctrine of changed condition's "application to easements is problematic in many states." UCEA, *supra* note 1, Comment to § 3.

85. Mayo notes that the Colorado and Utah state enabling statutes specifically allow for termination by merger. Mayo, *supra* note 58, at 46. By contrast, Mississippi and New York prohibit this doctrine from terminating an easement. *Id*.

86. *See Parkinson v. Bd. of Assessors of Medfield*, 495 N.E.2d 294 (Mass. 1986) (in a case where a landholder conveyed all of his interest in a parcel of land to a land trust, reserving for himself a life estate subject to a conservation easement, with the remainder interest vesting in the land trust, the court rejected a claim that the landowner's conveyance of a remainder interest to the land trust extinguished the conservation easement under the doctrine of merger).

87. Dana & Ramsey, *supra* note 6, at 22-23.

88. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 20 Va. Envtl. L.J. (Fall 2001).

89. Dana & Ramsey, *supra* note 6, at 24 (quoting L. Simes, Public Policy and the Dead Hand 59 (1955)).

90. A number of courts have considered the public policy against the "dead hand" in resolving property disputes. *See, e.g., Procter v. Foxmeyer Drug Co.*, 884 S.W.2d 853, 862 (Tex. App. 1984) (stating that social welfare is served by balancing "the current property owner's desire to prolong control over his property and a latter owner's desire to be free from the 'dead' hand"); *H.J. Lewis Oyster Co. v. West*, 107 A. 138, 144 (Conn. 1919) (stating that "it is not consistent with the public policy of Connecticut . . . that the dead hand of [the property owner] should rest on this property.").

91. Public policy concerns about perpetual easements generally arise from the idea of the dreaded "dead hand" of property law: that the decisions made by parties long dead should not be allowed to dictate our choices regarding property use far into the future. *See* discussion *supra* Part IV.

92. Cheever, *supra* note 5, at 1095.

93. *Id.* This latter assertion is similar to the common law termination doctrine of changed conditions, which is examined more thoroughly *supra* Part IV(A)(1).

94. A Massachusetts trial court voided a conservation easement that failed to state its duration; however, this decision was reversed on appeal. Dana & Ramsey, *supra* note 6, at 21-22 (citing *Parkinson v. Board of Assessors of Medfield*, 481 N.E.2d 491, 493 (Mass. 1985) *rev'd.* 495 N.E.2d 294 (Mass. 1986)).

95. Mayo, *supra* note 58, at 42-45.

96. *Id.* at 45.

97. UCEA, *supra* note 1, at § 3(b).

98. *See supra* Part IV.

99. Mayo, *supra* note 58, at 42-45.

100. *See infra* notes 107-108 and accompanying text.

101. For example, if an influential landowner stood to gain from the release of an easement, a government entity could decide to release the easement for the landowner's benefit rather than choose to keep the easement for the public benefit. As for private holders, Prof. Julia D. Mahoney asserts that "it is far from clear that the decisions of easement holders to amend or extinguish the servitude will further societal interests." She speculates that nothing would prevent a group of landowners from forming their own private preservation organization that would be eligible to hold easements and would be motivated by concerns for the well-being of the constituent landowners. Mahoney, *supra* note 88.

102. New Jersey and Massachusetts require a public hearing before an easement can be released. Mayo, *supra* note 58, at Figure 2.5.

103. N.J. Stat. Ann. § 13:8B-6 (West 2001).

104. Mayo, *supra* note 58, at Table 2.5.

105. *See, e.g., Village of Ridgewood v. Bolger Foundation*, 517 A.2d 135 (N.J. 1986); *Bennett v. Comm'r of Food and Agric.*, 576 N.E.2d 1365, 1367 (Mass. 1991) (stating that "the beneficiary of the [conservation] restriction is the public and the [conservation] restriction reinforces a legislatively stated public purpose").

106. It is not by happenstance that state enabling statutes allow "charitable trust" organizations to be eligible easement holders, or that a significant percentage of the nation's conservation easements are held by organizations known as "land trusts." As their names express, these organizations hold themselves out as *de facto* trustees by acquiring and maintaining conservation easements for the interests of the general public. *See, e.g.*, Cheever, *supra* note 5, at 1077-78.

107. *See, e.g., Coeur d'Alene Pub. Golf Club, Inc. v. Kootenai Bd. of Equalization*, 675 P.2d 819, 820 (Idaho 1984) (stating that "a charitable organization must provide some general type of public benefit"); *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. App. 1986) (holding that "because a charitable corporation is organized for the benefit of the public, and not for private profit or its own benefit, the public has a beneficial interest in all the property of a public benefit, non-profit corporation").

108. *See, e.g., Cooper v. New York State Dep't of Mental Health*, 2001 WL 228127, *1 (S.D.N.Y. 2001) ("where the government action is taken pursuant to a statute . . . that action is presumed by the court to be in the public interest"); *Doe v. Bridgeport Police Dep't*, 2000 WL 33116540 (D. Conn. 2000).

109. "The legal title of the res or corpus of any trust is held by the trustee, but the beneficiaries own the equitable estate or beneficial interest." *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859, 866 (Ct. App. 1999).

110. Courts have generally defined "charitable trusts" as "a fiduciary relationship with respect to property arising as a result of the manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." *Living Desert Reserve*, 82 Cal. Rptr. 2d at 865 (quoting Restatement (Second) Trusts, § 348 (1959)). *See also Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998).

111. The legislative authority for a "charitable trust" is derived from the English "Statute of Charitable Uses," 43 Elizabeth Ch. 4 (1601), *cited in Rosser v. Prem*, 449 A.2d 461, 464 (Md. Ct. Spec. App. 1982). A number of states have enacted statutes authorizing charitable trusts. *See, e.g.*, N.Y. Est. Powers & Trusts Law § 8-1.1 (Gould 1992); Cal. Prob. Code § 15201 (Deering 1991).

112. A court has held that the "proper charitable purposes" of a charitable trust include activities very similar to the creation of a conservation easement, such as the creation or maintenance of public parks. *Living Desert Reserve*, 82 Cal. Rptr. 2d. at 866.

113. "Parties engaging in conduct indicative of a purpose to create a trust relationship will invite the application of the law of trusts to their transaction, notwithstanding the lack of an express declaration of a trust." *Matter of Gonzalez*, 621 A.2d 94, 95 (N.J. Ch. 1992).

114. Courts have generally held that a charitable trust is enforceable in the public interest. *See, e.g., Trustees of New Castle Common v. Megginson*, 77 A. 565 (Del. 1910); *Dykeman v. Jenkines*, 101 N.E. 1013 (Ind. 1913); *Wilson v. First Nat. Bank of Independence*, 145 N.W. 948 (Iowa 1914).

115. *See Living Desert Reserve*, 82 Cal. Rptr. 2d at 866; *Matter of De Long*, 565 N.Y.S.2d 569 (App. Div. 1991). *But see Warren v. Bd. of Regents of Univ. System of Ga.*, 544 S.E.2d 190, 193 (Ga. Ct. App. 2001) (holding that a party with "a special interest in the enforcement of [a] charitable trust" is allowed to "enforce its provisions," but that a member of the general public does not have such a "special interest").

116. *See, e.g., Mercantile Trust Co. Nat. Ass'n v. Shriners' Hospital for Crippled Children*, 551 S.W.2d 864, 868 (Mo. Ct. App. 1977); *Att'y Gen. v. Trustees of Boston Elevated Ry. Co.*, 67 N.E.2d 676, 685 (Mass. 1946).

117. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 632 (1986).

118. The Supreme Court applied the public trust doctrine in the 1898 case *Illinois Central Railroad v. Illinois*, in order to void the conveyance of a public trust resource by the state to a private party. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452-53 (1892). From the *Illinois Central* case and subsequent decisions, legal scholars have interpreted the modern public trust doctrine to mean that "the state cannot destroy or alienate the public's rights or abdicate its control of public trust resources without a compelling public purpose." See Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 Envtl. L. 723, 728 (1989).

119. Lazarus, *supra* note 117, at 645-646. *See, e.g., Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984); *Thomas v. Sanders*, 413 N.E.2d 1224 (Ohio Ct. App. 1979).

120. Lazarus, *supra* note 117, at 647. However, in a ground-breaking 1970 law review article, Prof. Joseph Sax urged that the public trust doctrine be expanded to include other natural resources, and that it be used to protect public rights in these resources. Ever since Sax revived it from the forgotten annals of legal history, the public trust doctrine has become a favored tool of environmentalists and land preservationists. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); Matthew J. Kiefer, *The Public Trust Doctrine: State Limitations on Private Waterfront Development*, 16 Real Est. L. J. 146, 151 (1987); Lazarus, *supra* note 117, at 632.

121. Lazarus, *supra* note 117, at 649. *See, e.g., Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978) (holding that the doctrine applies to the dry sand area of beaches); *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966) (applying the doctrine to rural park land); *Commonwealth v. Nat. Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Commw. Ct.) (asserting that the Gettysburg battlefield was protected by the public trust principles codified in the state constitution), *aff'd*, 311 A.2d 588 (Pa. 1973); *Wade v. Kramer*, 459 N.E.2d 1025 (Ill. App. Ct. 1984) (applying the doctrine to both archaeological remains and wildlife).

122. *See, e.g., Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) (stating that scenic beauty is an interest protected by the public trust doctrine); *Weden v. San Juan County*, 958 P.2d 273 (Wash. 1998) (holding that recreation and environmental quality are interests protected by the public trust doctrine).

123. *See* "Charitable Trust" discussion *supra* Part V(A).

124. *See, e.g., Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495, 511 (Sup. Ct. 1972) ("it is clear that . . . a public park is held in trust for the public at large"); *Parsons v. Walker*, 328 N.E.2d 920, 926-927 (Ill. App. Ct. 1975) (holding that a municipal park was covered by the public trust doctrine).

125. *See, e.g., Bernstein v. City of Pittsburgh*, 77 A.2d 452, 455 (Pa. 1951); *State v. Lopez*, 559 N.W.2d 264, 271 (Wis. Ct. App. 1996).

126. *See, e.g., Bernstein*, 77 A.2d at 455; *Oswald v. Westchester County Park Comm.*, 234 N.Y.S.2d 465 (Sup. Ct. 1962) (interpreting

statute's definition of "park" to include land acquired for conservation of natural resources).

127. For example, Washington state prohibits interference with a public trust resource "unless the action promotes the overall interests of the public." *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998). Prof. Lazarus notes that different jurisdictions apply different procedural standards to determine whether an activity that threatens a trust resource may proceed. Lazarus, *supra* note 117, at 651. *Compare* Superior Public Rights, Inc. *v. State Dep't of Nat. Resources*, 263 N.W.2d 290, 295 (Mich. Ct. App. 1977) (holding that there be no "substantial impairment" of trust resource) with *County of Orange v. Heim*, 30 Cal. App. 3d 694 (Ct. App. 1973) (impairment of trust resource is permitted only if it affects a "small percentage" of the resource).

128. UCEA, *supra* note 1, § 1(2)(ii).

129. *See supra* note 75. Enabling statutes in states such as California, Illinois, and Washington currently impose higher "purpose" standards for charitable organizations. Mayo, *supra* note 58, at 39.

130. *See supra* note 63.

131. Arizona, California, Colorado, and a host of other states do not permit a charitable association to hold an easement, while New York, Washington, Ohio, and Illinois do not permit charitable trusts *or* charitable associations to hold easements. Mayo, *supra* note 58, Table 2.3, 2.4.

132. Maryland is one of the few states with a statute that allows for the transferability of a conservation easement. *See* Dana & Ramsey, *supra* note 6, at 19.

133. A number of courts have limited standing for enforcement of conservation easements to easement holders. *See, e.g., Bleier v. Bd. of Trustees of Inc. Village of E. Hampton*, 595 N.Y.S.2d 102 (App. Div. 1993); *Bennett v. Comm'r of Food and Agric.*, 576 N.E.2d 1365, 1368 (Mass. 1991); *Burgess v. Breakell*, 1995 WL 476782 (Conn. Super. Ct. 1995).

134. *See supra* notes 78-84 and accompanying text.

135. Pennsylvania, Wyoming, North Dakota, and Oklahoma are the only four states that have not enacted conservation easement enabling legislation. Two of those states, Wyoming and Pennsylvania, have active conservation easement programs. Squires, *supra* note 55, at Table 4.1, 4.2; Small, *supra* note 10, at 65.

**Jeffrey Tapick tied for first place in the Environmental Law Section's Essay Contest. He is a member of the Columbia University School of Law Class of 2002; he received his B.A. from Amherst College in 1998. The author would like to thank Prof. Bradley Karkkainen, Columbia University School of Law, for his invaluable guidance and helpful advice in shaping and editing earlier drafts, and Prof. Edward Lloyd, Columbia University School of Law, for the ideas and inspiration that initially led to the research and writing of this article.**

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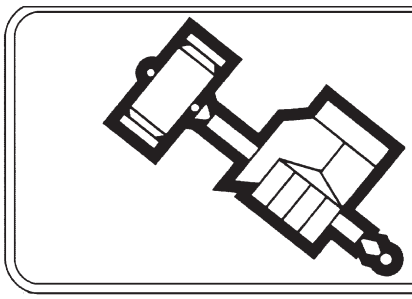

# Administrative Decisions Update

Prepared by Peter M. Casper

**CASE:** ***In re the application by Susan A. Danahy and Phillip Garofalo for a use and protection of water permit, and water quality certificate pursuant to the Environmental Conservation Law Article 15 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 608.***

**AUTHORITIES:** ECL Article 15 (Water Resources)

6 NYCRR Part 608 (Use and Protection of Waters)

**DECISION:** On March 14, 2002, New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (Commissioner) adopted a hearing report prepared by Administrative Law Judge (ALJ) Molly T. McBride in the matter of the application of Susan A. Danahy and Phillip Garofalo to construct a bulkhead on Canandaigua Lake in the Town of Canandaigua, Ontario County, and in doing so granted the application.

## A. Facts

Susan A. Danahy and Phillip Garofalo (the Applicants) filed an application for a protection of waters permit and water quality certification with the DEC to construct a 50-foot concrete bulkhead along the shoreline of Canandaigua Lake in an area in front of a residence owned by them. The DEC denied the application, stating that it did not meet permit issuance standards as set forth in 6 NYCRR § 608.8, Use and Protection of Waters. DEC Staff indicated that the proposed bulkhead location was measured to vary between 10 to 14 feet lakeward of the mean high water level and therefore was not reasonable or necessary to protect the Applicants' shoreline from the effects of erosion. The DEC Staff also stated that the bulkhead would result in unreasonable and unnecessary damage to the natural resources of the state. The Applicants timely filed a Request for Hearing.

The legislative hearing was convened first, and the landowners to the north of the project site came forward to speak in favor of the proposed bulkhead. They both stated that the lack of a bulkhead on the Applicants' property has resulted in excessive deposits of plant life, dead fish, seagulls and other debris on the Applicants' property. The accumulated waste creates a foul odor such that they are unable to use their backyard or patio during the spring and summer months. The neighbors commented that the lack of a bulkhead on the Applicants' property has caused erosion damage to their bulkhead and the bulkhead to the south of the Applicants' property as well. Additional written comments, which echoed the comments of the northern neighbors, were made by the neighbors to the south of the Applicants' property.

At the conclusion of an issues conference the adjudicatory hearing was commenced, where several witnesses testified on behalf of the Applicants, including an environmental consultant. The DEC provided testimony from several Staff biologists and the Ontario County Soil and Water Conservation District watershed inspector for Canandaigua Lake.

## B. Discussion

The Applicants argued that the requested permit was reasonable and necessary to prevent shoreline erosion and to protect their property from the dangers and nuisance posed by the debris that washes up on their property.

The DEC contended that the Applicants had not met the burden of demonstrating that the project meets the standards for permit issuance as detailed in Part 608.08. The DEC proposed that the bulkhead be placed closer to the shoreline than requested by the Applicants. The Applicants rejected this alternative, stating that the bulkhead will remain dry for several months of the year due to varying water levels in the lake, and debris and erosion will still be a serious and significant issue. The DEC also argued that the Applicants' application identified protection from erosion as the only reason for the project, and therefore, the issue of debris washing onto the property should not be considered.

As stated above, section 608.8 sets forth three standards the DEC must follow when issuing a water permit and water quality certification. Two of the three standards were identified as issues for adjudication. These were the two standards that DEC relied upon when denying the Applicants' permit request. The two standards are Part 608.8(a) & (c), which state that the proposal must be "reasonable" and "necessary" and "the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans, and aquatic and land-related environment."

The ALJ concluded that the issuance of the permits would not have an undue adverse effect on the present or potential value of the area immediately in front of the bulkhead. The ALJ determined that the alternative proposed by the DEC would not afford the same protection from the washing up of debris as the Applicants' proposed site. The ALJ referred to calculations of Canandaigua Lake Levels for 2001 and stated DEC's proposed location for the bulkhead would result in the bulkhead remaining dry for almost the entire year, except for the month of April and part of May, thereby not providing the property protection from the buildup of dead fish and debris.

The ALJ determined that the Applicants proved that the bulkhead, as requested in the application, was reasonable and necessary to prevent shoreline erosion and buildup of debris and thereby met the standards for issuance of the requested permits.

### C. Conclusion

The Commissioner sustained the determination by the ALJ and concluded that the permit issuance standards of 6 NYCRR 608.8 were met.

* * *

**CASE:** ***In re an application for permits to construct and operate a solid waste management facility in Ava, Oneida County, by the Oneida-Herkimer Solid Waste Management Authority.***

**AUTHORITIES:** ECL Article 15 (Water Resources)

ECL Article 19 (Air Pollution Control)

ECL Article 24 (Freshwater Wetlands)

ECL Article 27 (Collection, Treatment & Disposal of Refuse and Other Solid Waste)

6 NYCRR Parts 201 (Permits & Registration)

6 NYCRR Parts 360 (Solid Waste Management Facilities)

6 NYCRR Parts 364 (Waste Transporter Permits)

6 NYCRR Parts 608 (Use and Protection of Waters)

6 NYCRR Parts 663 (Freshwater Wetlands Permit Requirements)

**DECISION:** On April 2, 2002, New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (Commissioner) issued an interim decision with respect to appeals from the rulings of Administrative Law Judge (ALJ) Edward Buhrmaster on party status and issues rendered January 30, 2001. Following a public hearing and an issues conference, the ALJ found the following four issues for adjudication: (1) the proposed solid waste landfill's (project) impact on wetland resources, including several sub-issues related to wetland size and wetland mitigation measures; (2) need for the landfill in light of export options; (3) possible impacts to habitat of four threatened bird species; and (4) among other things, potential hydrogeological impacts related to the possibility that the site overlies a principal aquifer. Additionally, the ALJ ruled that 11 other proposed issues did not meet the requirements for adjudication.

The rulings concerned the permit application of the Oneida-Herkimer Solid Waste Management Authority (the "Authority" or "Applicant") to build and operate a solid waste landfill in the Town of Ava, Oneida County, New York. Legislation enacted in 1988 established the Authority and the Authority's efforts to site a landfill commenced in 1991. After analyzing various alternatives the Authority determined that a new, locally-sited landfill would be the best solution to provide environmentally sound and economically reliable long-term disposal for all non-recyclable and non-hazardous waste generated in Oneida and Herkimer Counties.

A group of Intervenors consisting of the Towns of Ava and Boonville, the Village of Boonville, the County and Town of Lewis, the Adirondack Communities Advisory League, the Harland J. Hennessey Post 5538 of the Veterans of Foreign Wars, the Charles J. Love D.S.C. Post 406 of the American Legion, and the Veterans defending Our Memorial Forest (collectively the "Intervenors") objected to the proposed landfill and sought appeal of several ALJ rulings.

The ALJ found that the proper size of the state and federal wetlands impact must be determined and therefore was a proper issue for adjudication. For reasons discussed in detail below, the Commissioner reversed the ALJ's ruling and determined that the size of the wetland had been clearly delineated on DEC wetland maps and there is no need to adjudicate the issue. The Commissioner also reversed the ALJ's ruling that mitigation measures proposed by the Applicant should be an issue of adjudication. The Commissioner indicated that the Applicant's proposal to re-create wetlands far outreaches the criteria mandated by DEC. This issue will be discussed in subsequent sections of this update.

The Commissioner reversed the ALJ's determination with respect to "need" of the project and stated that in this case "need" is not an appropriate topic for adjudication. The Commissioner stated that the issue of impacts to habitat will be supplemented by additional studies and surveys conducted since the appeals were submitted and shall be reviewed by the ALJ in hearing and subject to adjudication. The Commissioner also sustained the ALJ's ruling with respect to hydrogeological impacts, stating that several sub-issues will require adjudication.

The Commissioner also determined that several issues with respect to air-quality impacts were incorrectly ruled as issues not for adjudication. Specifically, the Commissioner stated that the issue of particulate matter and whether the landfill will exceed the NAAQS should be adjudicated. The Commissioner also determined that the issue of Hazardous Air Pollutant (HAPs) emission impacts must be adjudicated. Finally, the Commissioner, in reversing the ALJ's ruling, states that the proposed service area of the landfill cannot be limited by conditions placed on permits.

## A. Facts

Oneida-Herkimer Solid Waste Management Authority (Authority or Applicant) applied for several permits to construct and operate a solid waste landfill in the Town of Ava, New York. The proposed site is four miles west of the village of Boonville, and the landfill footprint would occupy 150 acres of a 252-acre construction zone within the 532-acre site. A total of 280 acres would remain in a natural state and serve as a buffer. The landfill has a proposed design capacity of 1,000 tons per day and planned useful life of 62 years. As lead agency, the Authority performed a coordinated review of the project pursuant to the State Environmental Quality Review Act (SEQRA). The Authority completed a Draft Environmental Impact Statement (DEIS) and a subsequent Final Environmental Impact Statement (FEIS). The Authority issued a SEQRA findings statement on September 16, 1998.

## B. Discussion

As stated above, the Commissioner's Interim Decision addressed the ALJ's rulings with respect to party status and issues. As a preliminary matter, an issue is adjudicable if "it is raised by a potential party and is both *substantive* and *significant*." (6 NYCRR § 624.4 (c)(iii). (Emphasis added)). An issue is considered "substantive" if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. An issue is "significant" if it has the potential to either: (1) result in the denial of a permit; (2) cause a major modification to the proposed project; or (3) impose significant permit conditions in addition to those proposed in the draft permit. (6 NYCRR § 624.4(c)(2), (3)). The burden of persuasion rests upon the potential party proposing the issue to be adjudicated. Additionally, the offer of proof at the issues conference need not be so convincing as to prevail on the merits, but the offer must not be mere assertions or conclusions. The remainder of this summary will discuss the Commissioner's reasoning behind her decisions mentioned above.

### Wetland Impacts

The ALJ identified a number of issues for adjudication with respect to wetland impacts. The ALJ indicated that the proper size of the state and federal wetlands impacted by the project must be determined and that this is an issue for adjudication. The ALJ determined that the effect of the landfill's groundwater suppression system on the water table must be adjudicated, as well as the effects of the leachate collection system on area hydrology. The ALJ also determined that flood flows should be examined to determine if additional unmitigated adverse impacts to the wetlands will result. Finally the ALJ found that the adequacy of the Authority's proposed wetland mitigation plan should be reviewed.

#### Size of Wetland

The DEC Staff argued that they lacked jurisdiction to impose permit conditions on the 22 acres the Intervenors wish to include in the project site and that the only way to assert jurisdiction over these lands, as freshwater wetlands, would be through a map amendment proceeding brought pursuant to 6 NYCRR § 664.7. DEC Staff argued that the Intervenors failed to petition the DEC to amend the wetlands map in July 1996 when the DEC confirmed the delineation of the wetland maps for the project area. DEC Staff pointed out that if the Intervenors had contested the delineation of the map in July 1996 they would have had to meet the burden of showing the DEC was arbitrary and capricious, a burden they will not have to meet if they are allowed to adjudicate the wetlands boundaries in the permit hearings. The Applicant's position paralleled the DEC Staff position and added that it should be entitled to rely upon the official delineation of wetlands as set forth in the policies and maps of the DEC.

The Intervenors argued that an additional 22 acres should be subject to the wetlands permitting process and that the DEC has the authority to readjust a wetland map at any time. The Intervenors seek to add three wetland areas which are contiguous to the wetlands found on the project site. The Intervenors argued that the DEC policy does not preclude adjustment of the delineation of wetlands when the original delineation is found to be incorrect as is alleged in this case.

The Commissioner stated that the DEC more precisely defined the boundaries of the proposed site upon field visits in 1996 and 1999; she reversed the ALJ's ruling agreeing with DEC Staff's position and stating that the project will impact only the 14.34 acres delineated on the official wetlands map. In support of her decision the Commissioner commented that the official map at issue in this proceeding is Wetland WL-2 of the Official Freshwater Wetlands Map of Oneida County, covering approximately 170 acres, which was duly promulgated and adopted pursuant to the procedures outlined in ECL § 24-0301 and 6 NYCRR Part 664. The Commissioner stated that no challenge to the map delineation was pursued in accordance with ECL § 24-1101 or CPLR Article 78.

#### Adequacy of the Wetland Mitigation Plan

The Intervenors raised additional issues as to the mitigation plan which proposes the creation of 32.62 acres of

wetlands on the site and its buffer area, thereby compensating the state for the lost state wetlands. The Applicant argued that the DEC approved a detailed plan for creating wetlands on the site and that the size of the acreage the Applicant is providing for new wetlands surpasses what DEC requested. The Applicant argued that its experimental on-site wetland was shown to successfully re-create the type of wetlands that largely comprise the site and that the DEC Staff concurred with its results. It should be noted that the U.S. Army Corps of Engineers issued a permit for the federally identified freshwater wetlands.

The Commissioner stated that the Intervenors failed to meet their burden of proof to raise an adjudicable issue with respect to the adequacy of the proposed mitigation comprising the 32.62 acres. Relying on the DEC's comments that wetlands of the type at the proposed site can be re-created, the Commissioner reversed the ALJ's ruling.

## Need for the Landfill

As stated above, the ALJ ruled that the issue of "need" for the landfill should be an issue for adjudication. On appeal the Applicant argued that this ruling should be reversed for several reasons. First, the showing of "need" pursuant to the regulations is only appropriate where the impacts to the freshwater wetlands are not completely mitigated. The Applicant contended that the 32.62 acres of re-created wetlands completely mitigate the impacts on the determined 14.34 acres of state wetlands. They argued that this ratio of 2.27 to 1 is in excess of the 1.5 to 1 ratio requested by DEC Staff. The Applicant also argued that the "need" for the project was fully addressed in the SEQRA review process, where the DEC, as an involved agency, fully participated in the extensive SEQRA process that led to the filing of the FEIS in this matter. The Applicant stated that by its creation, it was delegated the authority by the state legislature to address the solid waste issues in Oneida and Herkimer Counties, including the need for new facilities. The Applicant finally argued that it thoroughly evaluated waste exportation and rejected it as an acceptable long-term solution. The DEC Staff proposed similar arguments and sought to have the ALJ's ruling reversed.

The Intervenors raised several arguments in support of the ALJ's ruling that the "need" of the facility should be an issue for adjudication. Among them, they argued that the DEC Staff incorrectly applied SEQRA regulations in its arguments. They rely on 6 NYCRR § 624.4(c)(6)(ii)(b), which states that issues raised and resolved in a SEQRA review can be revisited in an adjudicatory permit hearing so long as those issues involve more than compliance with SEQRA. The Intervenors argued that such is the case here, since the project involves the resolution of issues not only under SEQRA, but also the Freshwater Wetlands Act.

The Commissioner found that the issue of "need" should not be adjudicated and reversed the ruling of the ALJ. She based her decision upon the case of need demonstrated by the Applicant and the failure of the Intervenors to "seriously challenge" the Department's determination that the need for the project outweighed the loss of the wetlands to be impacted. The Commissioner added that the Intervenors' evidence, unsupported by any proposed testimony, fell short of raising a substantive and significant issue requiring adjudication. Additionally, the Commissioner referred to the legislative act which created the Oneida-Herkimer Solid Waste Management Authority, and stated that it would be reasonable to conclude that in the performance of the Applicant's governmental function, the assessment of the need for the landfill is well within the purview of the Applicant and any conclusion to contrary would effectively be usurpation of the legislature's intent in creating the Authority/Applicant.

## Hydrogeological Impacts

The ALJ also identified three issues for adjudication regarding hydrogeological impacts of the proposed landfill: (1) whether the landfill would be constructed over a principal aquifer; (2) whether the Applicant accurately characterized the Critical Stratigraphic Section (CSS) beneath the site; and (3) whether the landfill's proposed groundwater suppression system would be adequate.

The Intervenors' expert indicated that the landfill would be sited over a "buried valley aquifer," the presence of which could greatly increase the impact of any future release to groundwater from the landfill. To counter this argument, the Applicant contended that the Intervenors' expert proof was inadequate. The Applicant argued that the Intervenors should have challenged the determination by DEC Staff that the site does not overlie a principal aquifer when it was made, more than four years ago. The Applicant asserted that the Intervenors' are now time-barred from raising the issue by the statute of limitations. The DEC Staff argued that the Intervenors failed to offer proof and that the testimony was unreliable, particularly in light of the DEC's contrary determinations. The Commissioner stated that the Intervenors' expert did indeed provide credible arguments which was based upon data compiled by the Applicant and therefore sustained the ALJ's ruling and joined the issue for adjudication.

The Intervenors also provided expert opinions that showed the model used by the Authority could result in groundwater beneath the proposed landfill flowing differently than modeled, thereby escaping the monitoring wells that are planned for the site. The Commissioner sustained the ALJ's ruling that this issue should be adjudicated, stating that the Intervenors expert presented proposed testimony based upon his review of the Applicant's site investigation report that called into question the Applicant's conclusions. Finally, the Commissioner, without detailed explanation, upheld the ALJ's determination that the groundwater suppression system's potential impacts on the water table should be an issue for adjudication.

## C. Conclusion

Based upon the foregoing determinations, the Commissioner remanded the matter to the ALJ for further proceedings consistent with her Interim Decision.

* * *

**CASE:** ***In re a State Pollutant Discharge Elimination System (SPDES) permit pursuant to Environmental Conservation Law (ECL) Article 17 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) parts 704 and 750 et. seq., and air pollution control permits consisting of a preconstruction permit and a Certificate to Operate, pursuant to ECL Article 19 and 6 NYCRR Parts 200 et. seq., by Mirant Bowline, LLC.***

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

ECL Article 19
(Air Pollution Control)

6 NYCRR parts 704 and 705

6 NYCRR parts 201 and 231

**DECISION:** On March 19, 2002, New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (Commissioner) reversed the DEC ALJ/Associate Examiner's conclusion in the Recommended Decision that rejected the Gunderboom™ as a technology available to meet BTA requirements at the Bowline Unit 3 facility. The Gunderboom is a geotextile porous curtain which provides a physical barrier between a cooling water intake structure and the aquatic biota of a water body. The Commissioner disagreed with the Associate Examiner's position that the Gunderboom is a technology that is experimental, and thus, unavailable to be considered as part of a "Best Technology Available" (BTA) for cooling water intake structures as required by the Clean Water Act and the state implementing regulations. Since the Commissioner determined that the Gunderboom is an available technology to be employed at Bowline, the Associate Examiner's dry cooling BTA recommendation for Bowline Unit 3 was rejected and his findings adjusted as discussed in the subsequent sections of this article.

## A. Facts

In August 2000, Mirant Bowline, LLC applied for a certificate of environmental compatibility and public need pursuant to PSL Article X and Air Pollution Control and SPDES permits pursuant to Articles 19 and 17 of the ECL, to construct and operate a 750-megawatt (MW) combined cycle electric generating facility (the "Facility").[1] The proposed primary fuel of the facility is natural gas with a fuel oil backup.

The Facility is located approximately 30 miles north of New York City in the Haverstraw Bay section of the Hudson River in the Town of Haverstraw, New York. The Facility would be located adjacent to existing units on a portion of the 257-acre site. The project site is bounded on the east by Bowline Point Park and the Hudson River, on the west by a public park, on the south by combined residential and light industrial properties, and on the north by an auto wrecker. Cooling Water Intake Structures (CWISs) are proposed to be located in Bowline Pond, which is connected to the Hudson River along the west bank of the Hudson River. Haverstraw Bay has been designated as a Significant Fish and Wildlife Habitat pursuant to New York's Coastal Zone Management Program (CZMP). The Hudson River at Haverstraw water classification provides that the best usage of the waters is recreation and fishing.

Mirant's initial application proposed that the facility would employ mechanical draft cooling technology requiring 7.5 million gallons per day (mgd) from the river. On February 13, 2001, Mirant revised its water intake and cooling proposal from a mechanical draft cooling system to a hybrid cooling system. Mirant explained that the primary reason for revising the cooling/intake proposal was to reduce cooling tower steam plumes, thereby further reducing adverse visual impacts of the project. As with the initial proposal, the intake structure would include a 2.0-millimeter wedge wire screen and a Gunderboom Marine Aquatic Life Exclusion System.[2]

## B. Discussion

The decision addresses several related issues. The first issue is whether Mirant's proposed hybrid cooling and Gunderboom technology is BTA as required by Clean Water Act § 316(b) and 6 NYCRR § 704.5. Additionally the Commissioner addressed whether dry cooling is the appropriate BTA for this specific facility and whether or not the use of the Gunderboom as part of an approved CWIS is premature and therefore unavailable.

### ALJ Ruling

Utilizing a previous decision by former Commissioner John Cahill in the *Athens Generating Company, L.P.*[3] application, the Associate Examiner determined that the appropriate BTA for the Bowline Unit 3 facility was dry cooling and that the Gunderboom was still an "experimental" technology and therefore not yet available to be utilized as a BTA. In making his ruling, the Associate Examiner specifically rejected a proposed approach to analyzing BTA as set forth in a DEC staff attorney memorandum, finding the memorandum lacked the weight of formal agency guidance. Additionally, the Associate Examiner did not consider the EPA's recently promulgated "Final BTA Rule" in reaching his recommendations.

### DEC Staff and Applicant Position on Appeal

The Applicant and Staff contend that the CWISs proposal of hybrid cooling coupled with wedge wire and an attached Gunderboom is the appropriate BTA for Bowline Unit 3. They argue that the additional cost of dry cooling is unnecessary, since hybrid cooling with proposed impingement and entrainment reduction technologies

would result in approximately equivalent protection of aquatic life. Both parties argue that differing circumstances and additional information with respect to this facility, as compared to what was available in the *Athens* case, mandate a different result with respect to the Gunderboom technology. In other words, that the technology is now a proven technology and can be considered as BTA.

The EPA recently promulgated the "Final BTA Rule,"[4] which the DEC Staff and Applicant rely on to support their position that the Associate Examiner's recommendation should be rejected. In addition to rejecting dry cooling as BTA, the Final BTA Rule sets forth performance criteria that technology must meet to be considered BTA. The DEC Staff and Applicant argue that hybrid cooling, wedge wire and Gunderboom technology meet the criteria in the Final BTA Rule.

### Joint Intervenors' Position

Riverkeeper and Scenic Hudson argued at the hearing and on appeal that in New York dry cooling technology is BTA for this site and that the Gunderboom is not available for the proposed Bowline Unit 3 project. They asserted that water capacity[5] is the primary factor in a BTA determination, since fish mortality is directly proportional to water withdrawn from a water body. Thus, dry cooling is BTA because it uses less water compared to other technologies, argued the Joint Intervenors. The Joint Intervenors also stated that the EPA's newly promulgated "Final BTA Rule" imposes minimum national standards, and states are authorized to impose more stringent conditions as necessary in order to protect state water quality standards.[6] They finally, disagreed with the results of the effectiveness of the Gunderboom and argued that it is still unavailable as an "experimental" technology.

### Commissioner Crotty's Decision

Commissioner Crotty noted that her decision, with respect to BTA, was not based solely upon the provisions of the recently promulgated Final BTA Rule, and although her decision is consistent with the Final BTA Rule, it was based both on federal and independent state authority. In making her determination as to what is BTA for CWISs, the Commissioner referred to the Interim Decision in *Athens*. In the *Athens* decision, the Commissioner[7] specifically rejected the ALJ's recommendation of hybrid cooling with Gunderboom technology at that specific site. In his decision, Commissioner Cahill stated that given the site-specific nature of BTA determinations, such determinations in New York are to be made on a case-by-case, site-specific basis. This conclusion is echoed in EPA's Final BTA Rule which is largely based upon technology-driven performance standards with consideration of site-specific circumstances.

Commissioner Crotty also revisits the *Athens* interim decision with respect to the Gunderboom issue. She noted that the Commissioner in the *Athens* interim decision never held that the Gunderboom was "experimental" and thus unavailable under the regulations as BTA; instead, the Commissioner held that hybrid cooling with Gunderboom was a technology that was a "bit premature," based upon the record before him in that specific case. Commissioner Crotty determined that unlike the record in *Athens*, the record in *Bowline* provides detailed information to determine whether or not the hybrid cooling/Gunderboom proposal is BTA for the proposed Bowline project. She therefore rejected the Associate Examiner's ruling that the Gunderboom is not available and determined that the Gunderboom is indeed a technology available to be designated as part of a BTA determination for CWISs.

The Commissioner concluded that the location, design, construction and capacity of hybrid cooling with wedge wire screen and the Gunderboom CWISs at Bowline reflects the best technology available for minimizing adverse environmental impacts at the Bowline in accordance with CWA and 6 NYCRR § 704.5. In making her decision the Commissioner noted that her decision with respect to the *Bowline* facility should not be interpreted to mean that dry cooling technology can never be BTA. As stated above, such determinations must be made on a case-by-case basis.

## C. Conclusion

Based upon the foregoing determinations, the Commissioner directed DEC Staff to modify the draft SPDES permit to reflect her determinations and issue the SPDES permit to the applicant.

### Endnotes

1. On March 25, 2002, the PSC Siting Board unanimously approved Bowline's application for a certificate of Environmental Compatibility and Public Need.
2. The Gunderboom curtain is comprised of three layers, two permeable polyester fabric layers with a mesh net layer in the middle, and is suspended at the surface of the water body by vinyl-covered floatation billets.
3. *See* 2000 WL 33341184 (N.Y. Dep't Env. Conserv.).
4. *See* National Pollutant Discharge Elimination System: Regulations Addressing Cooling Water Intake Structures for New Facilities, 66 Fed. Reg. 65256 (Dec. 18, 2001) (to be codified at 40 CFR Pts. 9, 122, 123, 124 and 125).
5. 6 NYCRR § 704.5, states, "The location, design, construction and capacity of cooling water intake structures shall reflect the best technology available for minimizing adverse environmental impact."
6. *See* EPA Rule at 65338.
7. *See* 2000 WL 33341184 (N.Y. Dep't Env. Conserv.) (Commissioner John P. Cahill's Interim Decision dated June 2, 2000).

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# Recent Decisions in Environmental Law

Student Editor: Elizabeth Vail

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

***In the Matter of Sunset Energy Fleet L.L.C. v. New York State Department of Environmental Conservation*,** 728 N.Y.S.2d 279 (3d Dep't 2001)

**Facts:** As a part of the approval process for the construction of a 520-megawatt electric generating facility in Brooklyn, petitioner Sunset Energy Fleet L.L.C. had to obtain a certificate of environmental compatibility and public need pursuant to Public Service Law article 10. Petitioner needed to demonstrate that the facility would comply with federal and state air quality emission standards, and not significantly add to the adverse impacts of existing pollution sources. Since emissions from the facility were expected to exceed permissible limits for sulfur dioxide and particulate matter (the "pollutants"), a cumulative air quality modeling analysis of the pollutants emitted from other facilities within a 55-mile radius of the proposed site was required.

Respondent New York State Department of Environmental Conservation and others identified 396 relevant facilities which petitioner screened to determine that 16 significantly emitted the pollutants. Petitioner conducted modeling of these facilities and an extensive verification of their emissions data to determine the cumulative environmental impact of the proposed facility. Over eight months, petitioner expended more than 2,200 hours and approximately $225,000 on researching, screening, analyzing and compiling the air emissions data. For each of the 16 facilities, this effort resulted in the production of Nearby Emission Source Verification Worksheets (the "worksheets"), which were submitted to respondent in accordance with its requirements for a permit.

Under the Freedom of Information Law (FOIL)[1] petitioner sought an exemption from disclosure, which respondent denied, of the worksheets as trade secrets. Petitioner accordingly sought a review of respondent's denial pursuant to CPLR article 78. The New York Supreme Court dismissed the petition, finding that petitioner did not prove that the worksheets were of commercial value to its competitors such that substantial competitive injury was likely if they were released. Petitioner then moved to renew its application on the basis that a competitor's request for the worksheets under FOIL, filed two months after the Supreme Court's decision, illustrated their commercial value. That motion, too, was denied. Petitioner appealed the judgment and order of the Supreme Court to the Appellate Division of the New York Supreme Court, Third Department.

**Issue:** Whether the likelihood of substantial competitive injury from the disclosure of the worksheets exists to warrant petitioner a trade-secret FOIL exemption.

**Analysis:** A presumption of discoverability exists under FOIL which is overcome by establishing "that the material falls, squarely within the ambit of one of [the] statutory exemptions"[2] to disclosure in Public Officers Law § 87. Petitioner therefore relied on Public Officers Law § 87(2)(d), which protects "records . . . that . . . are trade secrets or are derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise,"[3] in support of a trade-secret FOIL exemption to disclosure of the worksheets.

The Appellate Division agreed with respondent that the worksheets did not constitute trade secrets, which are defined as "any formula, pattern, process or compilation of information that is not published or divulged and which gives an advantage over competitors who do not . . . have access to such data."[4] The Appellate Division reasoned that the compiled information in the worksheets reflected publicly available data, which does not become exempt because petitioner compiled, verified and analyzed it. Petitioner also did not employ any unique or proprietary method of analysis, and instead utilized respondent's standard methodology. Furthermore, petitioner's time and money spent screening out which facilities were to be included in the analysis did not produce information that is not readily reproducible by a third party conducting their own investigative research and analysis using standard engineering methods.

The Appellate Division found that petitioner did not demonstrate the likelihood of substantial competitive injury from disclosure of the worksheets. Whether substantial competitive injury is likely to occur "turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means."[5] The availability and cost of the requested material to the competitors as well as damage to the submitting enterprise must also be considered.

Petitioner argued that a competitor's FOIL request for its worksheets was *prima facie* evidence that they had a commercial value equivalent to the cost and time required to produce them. The Appellate Division found that petitioner's costs to assemble the required regulatory information did not create an exemption since every such facility has regulatory costs attached to its operation. Petitioner did not demonstrate either that the cost of compiling the data was considerable relative to the cost of the proposed facility, or establish that other proposed facilities will similarly be required to conduct a cumulative air quality modeling analysis, or that these worksheets would be advantageous to another facility at a different location. The Appellate Division found petitioner failed to demonstrate the commercial value of the information in the worksheets to its competitors, as well as how disclosure would decrease their ability to secure the proper permits. The Appellate Division accordingly affirmed both the judgment and order of the Supreme Court, holding that the worksheets were not entitled to a trade-secret exemption from disclosure under FOIL.

**Jason P. Capizzi '03**

## Endnotes

1. N.Y. Pub. Off. Law art. 6.
2. *In the Matter of Sunset Energy Fleet L.L.C. v. N.Y. State Dep't of Envtl. Conservation*, 728 N.Y.S.2d 279, 281 (3d Dep't 2001).
3. N.Y. Pub. Off. Law § 87(2)(d) (2001).
4. *Sunset Energy Fleet*, 728 N.Y.S.2d at 281.
5. *Id.* (quoting *Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 420 (1995)).

* * *

### *Travelers Casualty and Surety Company v. Certain Underwriters at Lloyd's of London, et al.*, 96 N.Y.2d 583 (2001)

**Facts:** Appellant Travelers Casualty and Surety Company, known as the Aetna Casualty and Surety Company during the years underlying these lawsuits, provided primary, excess and umbrella general liability insurance policies from 1960 through 1981 to the Koppers Company (Koppers), presently known as Beazer East, Inc., and excess and umbrella liability insurance policies to E.I. DuPont de Nemours & Company (DuPont) from 1967 through 1985. In connection with these policies, appellant then purchased facultative, non-proportional reinsurance from defendants, a number of foreign reinsurance companies.

The primary policies appellant issued to Koppers from 1960 to 1972 established varying property damage liability limits per occurrence and beginning in 1971 contained "sudden and accidental" pollution exclusion clauses; the excess policies for 1966 to 1972 limited coverage to $10 million per occurrence. Similar policies were issued to DuPont during 1967 to 1985. In connection with the Koppers policy, appellant purchased reinsurance for 50 percent of the limits of its excess liability policies and secured catastrophic excess of loss reinsurance; the reinsurance treaties obligated defendants to pay appellant for "each and every loss" that exceeds the retentions established under the treaties. In connection with the DuPont policies, appellant also secured catastrophic excess of loss treaties from defendants to cover "disaster and/or casualty" in excess of a $10 million retention.

The relevant provisions in both the Koppers and DuPont treaties are identical. The treaties define "each and every loss" as:

> all loss arising out of any one disaster and/or casualty under coverage of any or all insureds of the Companies, or all loss under the products liability coverage of any one insured, or all loss arising out of the occupational disease hazard under Workman's Compensation and Employer's Liability coverage of any one insured.[1]

"Disaster and/or casualty" is defined as:

> each and every accident, occurrence and/or causative incident, it being further understood that all loss resulting from a series of accidents, occurrences and/or causative incidents having a common origin and/or being traceable to the same act, omission, error and/or mistake shall be considered as having resulted from a single accident, occurrence and/or causative incident.[2]

Both treaties also contain a "follow the fortunes" clause that reads:

> Any and all payments made by [appellant] in settlement of loss or losses under its policies, whether in satisfaction of a judgment in any Court against the Insured or [appellant] or made vol-

> untarily by [appellant] before judgment, in full settlement or as a compromise, shall be unconditionally binding upon [defendants] and amounts falling to the share of [defendants] shall be immediately payable to [appellant] by [defendants] upon reasonable evidence of the amount paid by [appellant] being presented . . . [defendants] agree to abide by the loss settlements of [appellant], such settlements to be considered as satisfactory proof of loss.[3]

In 1985, Koppers commenced an action seeking damages and a declaration that appellant was obligated to defend and indemnify them from a number of environmental actions. Similarly, in 1985 DuPont commenced an action against appellant seeking a declaration of insurance coverage for pollution-related claims arising from multiple hazardous waste sites. Appellant settled in both actions and apportioned its settlement payments among the underlying direct insurance policies, treating each site as a separate occurrence for allocation purposes.

Appellant thereafter sought reimbursement from defendants under its facultative reinsurance policies. Appellant treated the entire settlement as a single "disaster and/or casualty" to determine how much of the settlement to allocate to defendants under the applicable policies. Appellant rationalized that in both instances the loss resulted from a "common origin" and/or was "traceable to the same act, omission, error and/or mistake" (Koppers' deficient corporate environmental policy and DuPont's failure to implement and enforce its environmental policy).

After presenting its reinsurance claims, appellant commenced separate actions against defendants seeking money damages and declaratory relief. In both cases, the New York Supreme Court dismissed the complaints on the ground that appellant's allocation and "single loss" aggregation theory fell outside the terms of the applicable reinsurance treaties; the New York Supreme Court Appellate Division, First Department, unanimously affirmed, and the New York Court of Appeals granted appellant leave to appeal.

**Issue:** Whether losses from environmental injury claims involving decades of commercial activities at numerous industrial and waste disposal sites may properly be aggregated as a single "disaster and/or casualty," under certain reinsurance treaties.

**Analysis:** The New York Court of Appeals classified these appeals as common issues of contract interpretation. The Court of Appeals stated that in interpreting reinsurance contracts, meaning must be given to every sentence, clause and word, and thus looked to the plain language of the reinsurance treaties.[4] Appellant argued that the treaties' plain language requires the widest possible search for a unifying factor among the underlying claims. The Court of Appeals rejected this argument, reasoning that since the terms "common origin" and "traceable to" in both treaties are modified by the phrase "series of" in the definition of "disaster and/or casualty," inherent spatial and temporal boundaries exist such that any other reading would disregard the rules of contract interpretation.[5] The Court of Appeals further reasoned that a reinsured could properly aggregate claims if those "accidents, occurrences and/or causative incidents" had a temporal or spatial relationship to one another and shared a "common origin," but where that relationship did not exist, the reinsured could not ignore the words "series of" and point to any event as sharing a "common origin."[6] The Court of Appeals determined that by the use of the phrase "series of," the parties intended to only allow aggregation where the losses were linked spatially and temporally, and shared a "common origin."

In both the Koppers and DuPont litigations, the acts involved occurred over many decades at geographically diverse locations dispersed across the country, and covered a multitude of commercial processes, pollutants and contaminations.[7] Neither complaint contained an allegation that the sites had a spatial or temporal relationship to one another. The Court of Appeals concluded as a matter of law that appellant's single allocations of its settlements with Koppers and DuPont did not fall within the meaning of "disaster and/or casualty" in the reinsurance treaties; further, since appellant conceded that each site treated separately fails to pierce any of the treaties' retention levels, summary judgment was properly granted in favor of defendants in both actions.[8]

Additionally, appellant argued that the "follow the fortunes" clauses in both treaties require that defendants reimburse it for losses it allocates to them reasonably and in good faith. Agreeing that a "follow the fortunes" clause in most reinsurance contracts gives reinsurers little room to dispute the reinsured's conduct of the case, the Court of Appeals nonetheless stated that such clauses do not alter the terms or override the language of the reinsurance contract.[9] The Court of Appeals concluded that to allow the "follow the fortunes" clause to supplant the definition of "disaster and/or casualty" in the reinsurance treaties would be contrary to the parties' express agreement and to the settled law of contract interpretation.[10] The order of the Appellate Division was affirmed.

**Tara Stanchfield '03**

## Endnotes

1. *Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, et al.*, 96 N.Y.2d 583, 589 (2001).
2. *Id.*
3. *Id.* at 590.
4. *Id.* at 594.
5. *Id.*
6. *Id.*
7. *Id.* at 595.
8. *Id.*
9. *Id.*
10. *Id.* at 596.

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### ***Town of Lysander v. Paul Hafner, Jr., et. al.,*** 96 N.Y.2d 558 (2001)

**Facts:** Appellant Paul Hafner, owner and operator of a commercial farm located in an agricultural district in the Town of Lysander, appeals an injunction bound by the Appellate Division of the New York Supreme Court, Fourth Judicial Department. Appellant seeks removal of the injunction precluding him from erecting and using any mobile homes on his farm to house migrant workers; the structures were to be removed unless he obtained the necessary building permits from respondent, the Town of Lysander. Appellant attempted to erect several single-wide mobile homes on his farm. The mobile homes do not comply with Town Zoning Code § 139-56 [A] that "all one-story single family dwellings" have a minimum living area of 1,100 square feet.[1]

**Issue:** Whether Agriculture and Markets Law § 305-a(1)(a) supersedes town zoning ordinance § 139-56[A] as applied to appellant's installation of mobile homes to house migrant farm workers.

**Analysis:** The Agriculture and Markets Law § 305-a (1)(a) provides that local governments shall not "unreasonably restrict or regulate farm operations within agricultural districts unless it can be shown that the public health or safety is threatened."[2] The statute defines "farm operations" as "the land and on-farm buildings, equipment and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise."[3]

In 1971, article 25-AA of the Agriculture and Markets Law was enacted to protect and encourage the development of state agricultural lands. Recognizing the need to protect agricultural lands from local land use regulations impeding farming, the New York State Legislature gave county legislative bodies the power to create "agricultural districts." Agricultural districts are afforded various statutory protections and benefits. Agriculture and Markets Law § 305-a(1)(a) mandates local governments to exercise their power to regulate land use activities in a manner consistent with the policy objectives of articles 25-AA, to not unreasonably restrict the farm operations within agricultural districts.

The Commissioner of Agriculture and Markets concluded, and the New York Court of Appeals agreed, "mobile homes used for farm worker residences [are] protected 'on-farm buildings within the meaning of Agriculture and Markets Law § 301(11).' "[4] The Court of Appeals held that the literal language of "on-farm buildings" does not exclude "farm residential buildings" from the protective reach of the statute. The Court of Appeals recognized that the intent of the 1997 amendment to the statute was to remedy technical errors and to strengthen, as opposed to limit, the protections against unreasonably restrictive local laws and ordinances.[5]

The Court of Appeals gave deference to the Commissioner's conclusion that respondent's Zoning Code "insofar as it prohibits the siting of mobile homes having an area of less than 1,100 square feet for farm labor housing on farm operations . . . unreasonably restricts such farm operations, including Paul Hafner Farms."[6] The Court of Appeals explained that when interpretation or application of a statute requires knowledge of operational practices, the government agency charged with the responsibility for administration of the statute is entitled to deference. The Court of Appeals reasoned that the local government restrictions on mobile homes would inhibit farm operations due to farmers' reliance on such to house migrant laborers. The Court of Appeals held that respondents failed to demonstrate that the statutory exception to the ban on unreasonable regulations of farm operations should be applicable.

Town Zoning Code § 139-56[A] is superseded by Agriculture and Markets Law § 305a-(1)(a). The Court of Appeals reversed the order of the Appellate Division and granted appellant's motion for summary judgment, remitting the case for further proceedings in accordance with the opinion. Appellant's counterclaim for an order directing respondent to issue building permits and certificates of occupancy for the mobile homes remains pending.

**Anna Acquafredda '03**

## Endnotes

1. *Town of Lysander v. Paul Hafner, Jr. et al.*, 96 N.Y.2d 558, 561 (2001).
2. N.Y. Agric. & Mkts. Law § 305-a[1][a] (2001).
3. N.Y. Agric. & Mkts. Law § 301[11] (2001).
4. *Hafner*, 96 N.Y.2d at 563.
5. *Id.* at 564.
6. *Id.*

* * *

***In the Matter of Dieter Hach v. Zoning Board of Appeals of Town of East Hampton*,** 731 N.Y.S.2d 219 (2d Dep't 2001)

**Facts:** Petitioner Dieter Hach applied for a natural resources special permit to construct a rock revetment on his beachfront property to combat coastal erosion, alleged impacts of government dredging, and storm surge damage to his home. Measuring 247 feet in length, 42 feet in width, and 14 feet in height, the revetment would be constructed of 300- to 500-pound quarry stones and covered with 890 cubic yards of sand and beach grasses to augment an existing bluff and resemble a natural dune. Petitioner has already spent almost $40,000 on ineffectual "soft solutions" (sand which was dumped on the problem area and washed away by storms). The revetment is a more permanent "hard solution."

Respondent Zoning Board of Appeals of the Town of East Hampton denied petitioner's application following extensive SEQRA review and public hearings. Respondent's main concern was not the probable effectiveness of the revetment, but the exacerbation of erosion problems on adjacent lands should the revetment not be properly maintained and the underlying stones become exposed to tidal action. Respondent justified the denial based on a perceived lack of an enforceable mechanism to ensure the maintenance of sand over the revetment. Petitioner sought a review of respondent's decision denying the application pursuant to NY CPLR article 78.

**Issue:** Whether the denial of a natural resources special permit to construct a rock revetment is sufficiently justified given a perceived lack of enforceable mechanisms to ensure proper maintenance of the revetment.

**Analysis:** East Hampton Town Code § 255-5-50(6) (formerly § 153-5-50(6)) requires petitioner to satisfy three requirements in order to obtain a natural resources special permit: "that his [her] property was in imminent danger absent a coastal erosion structure, that soft solutions would not suffice, and that the proposed structure is the minimum necessary to control the erosion."[1] The New York Supreme Court Appellate Division, Second Department, found petitioner clearly met his burden and that respondent's decision was arbitrary and capricious. The Appellate Division reasoned that the approved revetments for neighboring properties indicated respondent's recognition of the imminent danger posed by coastal erosion, that petitioner's $40,000 expense on unsuccessful soft solutions presented no rational basis requiring him to spend more, and that petitioner's Environmental Impact Statement which explored alternatives to the proposal was designed to mitigate any adverse impacts.[2]

The Appellate Division therefore granted the petition to the extent that the denial of the application for the permit was annulled and the matter was remitted to respondent for further proceedings. Among other things, the Appellate Division suggested respondent should fix criteria to determine the conditions under which sand must be added to the revetment to replenish the covering and must determine how best to ensure that petitioner and his grantees and assigns remain legally obligated to comply with the conditions of the permit to assure that the revetment remains covered with sand so long as it exists.

**William Deveau '04**

## Endnotes

1. *In the Matter of Dieter Hach v. Zoning Bd. of Appeals of Town of East Hampton*, 731 N.Y.S.2d 219, 220 (N.Y. App. Div. 2001).
2. *Id.*

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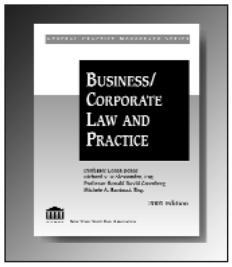


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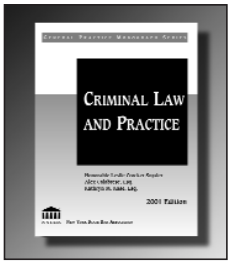


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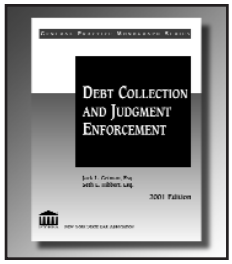


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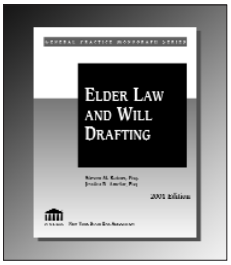


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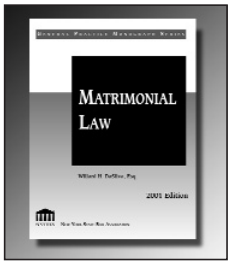


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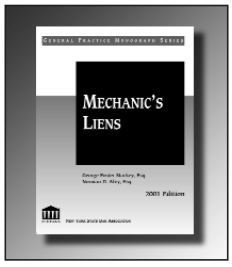


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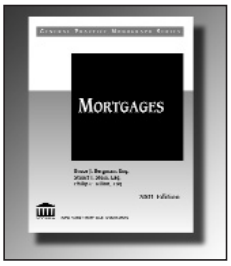


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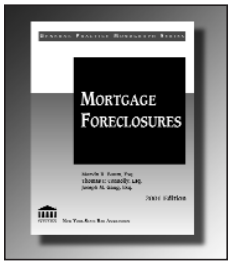


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