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A Message from the Chair

Recently, the Environmental Law Section's Executive Committee wrestled with the questions of whether it should submit comments on the Department of Environmental Conservation's draft Voluntary Cleanup Program Guide and, if so, how should the Executive Committee arrive at a decision of what comments to submit when there is not unanimous agreement within the Executive Committee on the issue.

If competing sets of comments are developed, should the Executive Committee take a vote and allow the majority to determine which set to submit on behalf of the Section? If there is significant dissent from the prevailing position, in terms of both the content of the dissent and the number of dissenters, should the Executive Committee instead determine not to submit comments from the Section at all and perhaps encourage a committee or group of similarly-minded Section members to submit comments on their own? Or, after a vote is taken, should both sets of comments be submitted, with one denominated the "majority" position and the other the "minority" position? Or, should all substantive comments be submitted with equal weight, i.e., with no information provided about how many Executive Committee members supported each set of comments?

There is a further question, and it may be the most important: Does it matter? And if the answer to that question is yes, the next question is: To whom?

Before probing these issues, it seems appropriate to go back to first principles:

What are the primary roles of the Environmental Law Section?

- Is one of them to educate its members? Through such activities as CLE programs at its annual and fall meetings, legislative forums and its committee work?

  — That is easy. Clearly, educating Section members is a critical responsibility. In fact, many attorneys join the Section exclusively in order to take advantage of opportunities for learning and training, and we need to serve that interest.

- Should the Section's educational efforts have a broader audience? Should the Section try to inform those outside its ranks as well as Section members? Should we seek to educate attorneys

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whose practice is primarily outside the field of environmental law—litigators, corporate lawyers, municipal lawyers, the real estate bar, etc.? What about government officials, appointed and elected? Corporate environmental managers? Consultants? The general public?

— That one is not particularly difficult either. Based on long-standing practice at least, the Environmental Law Section has always tried to target its efforts broadly. Our programs have frequently been presented in conjunction with environmental committees from other bar associations and with other Sections of the New York State Bar Association. Our spring legislative forum has featured members of the State Senate and Assembly as speakers and sought to have legislative staff members attend those programs. And the CLE programs we sponsor at various locations throughout the state have frequently attracted engineers, consultants generally, academics and citizens interested in the issue at hand.

- The educational roles that the Section has adopted for itself lead to the next inquiry (which is the one that I started with): Should the Section be an advocate? Should it take positions on legislative proposals or even offer its own? Should it comment critically on proposed regulations and policies?

  — That question is more difficult than the others. One is tempted to answer that the Section has an obligation to provide advice since that, in and of itself, is an important service. Who better than a collection of the most knowledgeable and the most experienced law practitioners to steer the Department of Environmental Conservation, the legislature, whomever, in such a way as to avoid pitfalls and problems?

One of the tough issues, however, is that what some Section members may regard as protecting DEC from a problem or a pitfall, others may see as a criticism of, or even worse an effort at weakening, a program. The different perspectives with which Section members approach an issue reflect their backgrounds, employment affiliations and philosophies.

The problem, in fact, seems most acute where the issue on which some want to advocate a Section position divides along lines between private practitioners and those representing public sector clients. Because the Section, including its Executive Committee, is dominated by those practicing in law firms and representing industry clients, is it generally the case that the Section will advocate positions that are espoused by the private sector? If the answer is yes, is there a risk, as a result, that the Section will be perceived as a lawyers' extension of industry trade organizations? Will that perception alienate public-sector attorneys and lead them to leave or not join the Section? Or, alternatively, should the Section simply let the chips fall where they may, adopting the attitude that if those with different viewpoints feel strongly enough, they should join the Section and its Executive Committee in sufficient numbers to tip the balance in the other direction?

I do not want to suggest that in putting forth our collective thinking on an issue, the Section is violating its deeply held belief that when we participate in Section activities, we leave our clients at the door. It is rather that, after working for clients, more often than not, we tend to adopt their view of the world—or we were attracted to enter the private sector or government or not-for-profit environmental organizations because those clients share *our* philosophy.

A closely related issue is the appropriate role of government attorneys in an Executive Committee discussion on whether the Section should advocate a position on an issue. If, for example, the Section is considering legislation, a regulation, a policy, etc., on which the Governor, the Commissioner of Environmental Conservation or the Attorney General has taken a position or, more likely, proposed the initiative, should the DEC attorney or Assistant Attorney General on the Section's Executive Committee serve as a strong advocate for the initiative? Alternatively, should he/she play no role in the process, remaining silent during the discussion and abstaining during any vote?

My personal feeling is that the state (or federal government) attorney should be an active participant in any deliberation undertaken by the Section. Presumably, there is an identity of interest between the attorney's professional and Bar Association positions, and the insights and rationales provided by the government attorney will enrich and enlighten the discussion within the Executive Committee immeasurably.

Although I am a strong proponent of the leave-your-client-at-the-door principle, I find it relatively easy to regard DEC, for instance, as a different kind of client. In the legislation, regulation or policy that is being proposed, there is clearly a different interest at issue than in the case of a private attorney advancing a position because it benefits his/her client. The legislation, regulation, or policy establishes rules and standards for governing *all* parties, as opposed to a matter-specific issue in which one client of one attorney may reap a particular benefit. For that reason, I have no problem with a decision by government attorneys, and would in fact encourage them, to participate actively in the Section's deliberations. By the same token, if a discussion were to

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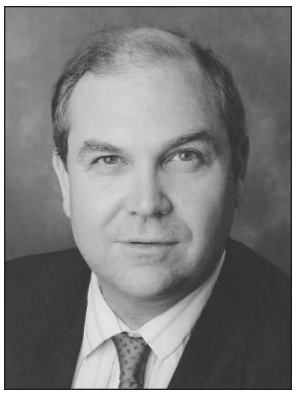
From the Editor



The Section met for the Fall Meeting at Cooperstown again, as we had a few years ago. For leaf enthusiasts anticipating an early foliage season, I can only hope that they also enjoy late summer weekends, which is the best way to describe the balmy and beautiful weekend as we nestled between the Catskills and the Adirondacks on Otsego Lake. I brought my children and, as has been the experience of the past few years, there was plenty to keep them occupied and happy. When my wife and I dined with the Section, they were kept occupied by babysitting arranged through the Section and we, therefore, were also quite happy. I've said it before and undoubtedly will say it again, but the Fall Meeting has turned into a family-friendly weekend and can be recommended as such. My only regret is that the Section's own schedule of activities was very busy—and very productive—so that the limited free time required choices. I had to choose between the Farmer's Museum (really a must) and canoeing on a gorgeous afternoon—the latter was more adventurous, but the former was drier and simpler. Sunday was reserved for the Baseball Hall of Fame, but the extensive Executive Committee session did limit that opportunity a bit. My resolve: next time I'll try to arrive a day early in order to maximize the benefits of a family weekend.

Of course, the principal reason for attendance was Section business. The results were very productive, following up on the last couple of years' worth of productive planning. The Saturday main seminar proved to be a valuable training exercise, with Walter Mugdan officiating at a panel exercise which drew on the audience's feedback on a previously distributed fact pattern. This proved to be a creative integrative exercise that elicited significant audience input, with helpful comments by a panel of diverse agency experts. Various breakout sessions followed—on water pollution, air pollution, hazardous waste and the like—in which basic points were reinforced and updates provided, also by agency personnel. The goal of the weekend was also, in part, to make an effort to create a role for the regulatory community in Section activities. The endeavor seems to have been successful. I believe that our Section leaders are open to more suggestions on how regulatory personnel, and Section members who represent or articulate a diverse array of interests, can be brought together for fruitful discourse.

In the present issue, Peter Bergen provides a reflection on three decades of the Clean Water Act. Many younger lawyers today may not appreciate that the 1972 version of the federal Clean Water Act represented a dramatic change from prior federal attempts to address water pollution. They also may not know that it was a revolutionary development in traditional norms of federalism that irrevocably (it would still seem so) shifted responsibility for water pollution controls from the local to the federal, and hence national, level. The distinction lay not in mere legal arcana over which governmental entity could issue permits, but rather in the level of review and dispassionate consideration of how to eliminate pollution nationally as contrasted with traditionally economic local concerns. The theory, once tested and proved, then facilitated federal regulation of other media of contamination and hence the evolution of modern environmental law. These constitutional and administrative developments, of course, have, in turn, revolutionized modern American business and life. So, being from someone who was there at the proverbial beginning, Peter's comments are well worth reading. The article was adapted from a presentation he made before the Hudson River Environmental Society.

Randall Young, of DEC, who has written previously for the *Journal*, submits some commentary on the "shrinking" doctrine of equitable estoppel as it may be applied (or may not be, as the case may be), in environmental enforcement and litigation. For instance, a polluter's reliance on a permit would not necessarily estop a related enforcement action. Randall indicates that the assertion of the doctrine against government entities undertaking statutory duties has become increasingly difficult according to judicial construction. He questions whether courts even have the constitutional power to review performance of such executive functions. Nevertheless, he observes, litigants routinely make the argument anyway. He argues for its elimination as a defense in enforcement cases.

Marla Rubin submits another article in her continuing discussion of professional ethics as applied in the field of environmental law. She discusses recent legislation, the Sarbanes-Oxley Act of 2002 and its ramifications for multi-jurisdictional practices. Jason Capizzi, the student editor, provides case summaries prepared by students at St. John's Law School. Cyane Gresham submits an extensive and interesting article on New York's municipal parkland, the application of the public trust doctrine (which has had a rebirth the last couple

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A Message from the Chair

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ever occur on the application of a law, rule or guidance to an actual fact pattern, recusal might then be in order.

So, where does this leave us? My answer is that the Section should provide its point of view where one has clearly emerged because in that way the Section will perpetuate its goal of serving as an educator. If there is dissent from the predominant point of view, it should be articulated clearly and fairly—for the same reason. In my opinion, when the Section has two or more perspectives, they should each be expressed and presented on behalf of the Section.

That approach is the one that was followed in the case of the comments on DEC's draft Voluntary Cleanup Program Guide. The Section's Ad Hoc Task Force on Superfund Reform, to which review of the draft Guide on behalf of the Section was originally assigned, drew up insightful comments—largely drawn from the private practitioner's perspective of working in DEC's Voluntary Cleanup Program.

Three sets of comments were received critiquing the Ad Hoc Task Force's report. The Section's officers decided to compile into one document those three sets of comments—all of which came from Executive Committee members not in private practice, including one set from a group of three USEPA Region 2 attorneys—and to submit them to DEC, along with the Ad Hoc Task Force's report, as the Section's comments. Neither submittal was given primacy over the other; the process which generated the two groups of comments was simply described to DEC in a transmittal letter.

Why This Approach?

1. It is fair. Two groupings of Executive Committee members spent time to come up with legitimate, albeit somewhat competing, analyses of DEC's Voluntary Cleanup Program.
2. DEC should not care about the diverse directions toward which the two sets of comments are pointed. If they are, in fact, intelligent well-articulated statements which draw from real-world experience, then DEC should take them all into consideration and profit from them, despite their being in some cases polar opposites. We must keep in mind that it is DEC's decision to sort through and determine what works for them and that DEC's decision is not arrived at by looking at vote tallies within the Environmental Law Section.
3. If one of our roles is truly to educate, then how better to do it than to present the views of our Section members—broad and different and, therefore, valuable.

Finally, back to the question of whether any of this matters and, if yes, to whom:

I think it matters a lot. To us as individuals and to the Section as an institution and, ultimately, to those we are seeking to influence.

It matters to us as individuals because we are expanding our knowledge through discussion and debate. We are expressing our views based on our experience and our best judgment, and we are listening to the views of others with their own experience and judgment applied to that experience. We are then synthesizing the result of that interchange into a coherent whole, whether it is a single document with one theme or a collection of documents with different points of view.

But the goal is the same—to educate ourselves, to thereby have an enriched experience built on thoughtful and reasoned communication, and to make us better lawyers in the process.

The Section is also a better institution for it. If the process by which our positions are formed is fair—and it is essential that it be fair—then the Section becomes *the* forum for the development of important and valuable thinking and analysis. The Section will thus become the body where lawyers of all practice backgrounds will gather to help in shaping environmental policy and in improving the processes by which that policy is implemented.

That matters to the world outside our Section—to the regulators, legislators, media, and public at large. We will be viewed as their consistent source of honest and unbiased views and perspectives, and, as a result, we will assist them in their work. The more intense the process by which we arrive at our statements, the more diverse the opinions expressed, the more worthy of attention our positions will be. And, in those situations where we speak unanimously and advocate one position, those receiving it will be hard-pressed to resist it.

I would very much appreciate your thoughts on these issues. Thank you.

John L. Greenthal

The Clean Water Act After Thirty Years: A Lawyer's Perspective

By G. S. Peter Bergen

The Clean Water Act was enacted thirty years ago, and it has been a huge success, probably more than any other of EPA's many environmental programs. It is useful, therefore, to reflect on the Act's successes, to learn and reflect on what went right, and why. For example, thirty years after the Act was passed, 98 percent of New York's river and stream miles support all designated uses, according to DEC.[1] In short, the Act's goal of "fishable and swimmable waters" has been largely achieved. On the other hand, there is more to be done. While water quality has improved dramatically, non-point source contamination is still a major problem, and perpetual funding and vigilance is necessary to maintain the water quality gains of the past quarter century.

Much of the credit for the Act's success belongs to the sewage treatment grant and point source permit programs, which funded new municipal sewage treatment works and set equitable and enforceable requirements for industrial discharges.

But, from a lawyer's perspective, the 1972 Federal Water Pollution Control Act's success was made possible by adopting two vital legal elements, each revolutionary for the time. The first was the legislative decision to regulate water pollution control at the federal level, based on the preemptive power of the federal government under the commerce clause. The second was the decision to preempt the common law doctrine that waste assimilation is a legitimate use of waters, and to impose technology-based minimum waste-water treatment requirements—effluent limitations—that apply to all point source discharges, regardless of where they are located within the United States. Under the Act, all point source waste-water discharges are required to be treated. The pollutant characteristics of treated effluent discharges from each comparable type of facility are limited equally, by effluent limitations guidelines, so that no individual source within a given category is advantaged as compared to a competitor. For example, no kraft pulp mill may discharge more than 2.8 pounds of oxygen demanding organic material (called "BOD") per ton of production.[2] Even where water quality standards in the receiving waters can be attained without treatment, treatment is required so that the applicable effluent limitations are attained in order to comply with the Act. Where needed to attain water quality standards, additional treatment is required. These elements are imbedded in the Act's outright prohibition of all discharges of pollutants (section 301), except as provided by the Act (for example, by a permit under section 402).

A Basic Policy Shift

The 1972 FWPCA uprooted two centuries of established law relating to water pollution control. Before the FWPCA, states and municipalities jealously guarded their primary role in setting standards and requirements for water pollution control. States that imposed less stringent requirements could have a competitive advantage over other states in attracting new industry.

"While water quality has improved dramatically, non-point source contamination is still a major problem, and perpetual funding and vigilance is necessary to maintain the water quality gains of the past quarter century."

At common law, persons owing lands bordering on streams, lakes and oceans are entitled to use adjacent waters reasonably, subject to the rights of other landowners. Reasonable uses of water include drinking, stock watering, development of mills, *and* disposal of wastes. Under the common law, waste assimilation is an attribute of riparian land ownership, and is rooted in real property law. Thus, before 1972, disposal of wastes into adjacent waterways was an attribute of land ownership, and the law carefully nurtures real property rights. Only a century ago, Justice Holmes stated the common law rule on behalf of the Supreme Court of the United States: "[T]hose residing upon the stream have the right to cast their waste into the stream so long as it does not substantially interfere with the convenience, health and comfort or the business interests of those residing on the river below."[3]

Thus, at common law, pollutant discharges to waters are a presumptively lawful use of riparian lands. *Not so under the FWPCA*. The FWPCA superseded the common law with respect to waste assimilation. By the 1970s, the nation's political will to change long-standing water pollution control practices and policies had been emboldened by widespread public concerns over environmental degradation, coupled with the realization that waste treatment technologies could be implemented, especially with federal financial assistance to localities. The FWPCA exemplified that the collective will of the public, together with new and feasible technologies, can and does drive development of new policies, which

in turn motivate changes in the law. In short, the law evolves in response to need, driven by changing technology, policy and political consensus.[4]

From this lawyer's perspective, the FWPCA, while a radical change from the legal foundations of the past, was a common-sense outcome, given the industrial and economic resources that had become available after the 1940s, coupled with the growing public belief that people, fish, and the environment deserved better protection in the face of our expanding population and economy.

Federal Supremacy Over Waters

Until 1972, water pollution control was largely a matter for the states, not the federal government. In the first century and a half of its existence, our nation, a federation of states under the Constitution, struggled over how to define the limits of federal authority. Federal power over interstate commerce had only begun to develop in the early 1800s. In a case arising on our own Hudson River in 1807, the New York legislature awarded Robert Fulton an exclusive right to operate steamboats (a new technology) on the Hudson River and in New York Harbor. A competing ferry service based in New Jersey complained in the Supreme Court of the United States against New York's exclusive franchise. The Court, in Chief Justice Marshall's now famous opinion in *Gibbons v. Ogden*[5] ruled in 1824 that New York's franchise, which precluded New Jersey steamboats from competing in New York Harbor, contravened the Commerce Clause of the Constitution. This decision thereby established the basis for federal supremacy over interstate commerce, including use of the navigable waters of the United States. A few years later, conflict arose between Pennsylvania and Virginia over the erection of a bridge across the Ohio River, resulting in an 1851 Supreme Court ruling that the bridge interfered with shipping and had to be raised in height.[6] Again, this was a water use case, dealing with an obstruction to navigation, and held that federal power superseded the power of a state. Next, in 1887, the Supreme Court held that it had no jurisdiction to interfere with construction of a bridge across the Willamette River between Portland and East Portland, Oregon, because Congress, while having the authority to regulate commerce and shipping on rivers, had not enacted any laws regulating bridge construction across rivers within a single state; and that, since there was no law of the United States to enforce, the Court had no jurisdiction to block the bridge's construction.[7] The *Wheeling Bridge* case was different, said the Court, because it concerned an interstate obstruction to navigation, while in *Willamette*, the obstruction was within a single state. In direct response to *Willamette*, Congress in 1890 enacted legislation that evolved into the Rivers and Harbors Act of 1899.[8] This legislation prohibited dams across navigable waters without express congressional authorization (section 9) and required a permit from the Chief of Engineers for dredging and most structures in waters (section 10). The Rivers and Harbors Act also prohibited discharges of refuse into navigable waters, "other than that flowing from streets and sewers . . . in a liquid state" unless authorized by a Corps permit [section 13], the so-called "Refuse Act."

"From this lawyer's perspective, the FWPCA, while a radical change from the legal foundations of the past, was a common-sense outcome . . ."

The Refuse Act

The Rivers and Harbors Act of 1899, familiar to many of us and which continues in effect today, was generally considered throughout the first half of the twentieth century to apply only to obstructions to navigation, not to pollution control generally. Speaking of the Rivers and Harbors Act, the Supreme Court said in 1927 that: "The true intent of the [1899 Rivers and Harbors] Act . . . was that unreasonable obstructions to navigation and navigable capacity were to be prohibited. . . ."[9] Despite the existence of the Refuse Act since 1899, federal attention was not seriously given to water pollution control until the 1950s.[10] States remained the primary water pollution control regulators until well after World War II. On the other hand, paramount federal power over physical obstructions in navigable waters began to be exercised early in the twentieth century with respect to dredging and inland water transport, hydroelectric development and flood control.[11]

Attitudes About Water Pollution Control in the Early 1900s

It would appear that early in the last century, interest groups could prod Congress to fund public works projects, while water quality was of little interest at the federal level. For example, in 1900, the flow of the Chicago River, which naturally drained into Lake Michigan, was reversed in order to divert water from Lake Michigan and flush Chicago's sewage southwesterly into the Des Plaines and Illinois Rivers, which drain into the Mississippi. The purpose was to protect the water quality of Lake Michigan, which is Chicago's drinking water source.

The state of Missouri, located downstream on the Mississippi River, sued Illinois to enjoin the diversion, citing risks of typhoid fever, cholera, dysentery, anthrax

and tetanus, especially at St. Louis, which used the Mississippi for water supply. But Missouri's complaint, after six years, was brushed aside. The following excerpts from Justice Holmes' opinion in *Missouri v. Illinois* reflect the tenor of the time. Justice Holmes wrote in 1906, in *Missouri v. Illinois:*[12]

> It is a question of first magnitude whether the destiny of great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. . . . [T]he discharge of sewage into the Mississippi by cities and towns is to be expected. . . .
>
> There is no . . . nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increases of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois River. . . . Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said, without evil results. [Missouri's] case depends upon an inference . . . that typhoid fever has increased considerably [and that] the bacillus of typhoid can and does survive . . . and reach the intake at St. Louis in the Mississippi.

The Court dismissed Missouri's complaint as not proved (and also because St. Louis and other cities also discharge their sewage into adjacent streams), implying that it would be inequitable to single out Illinois as the only source of sewage.

Missouri v. Illinois, when read today, shows how dramatically the policy pendulum has swung in the past 100 years. Justice Holmes began his opinion by admitting that whether streams are to be kept pure or to become sewers is indeed a major question worthy of debate. But he followed up saying essentially that the Supreme Court couldn't deal with such a question. He infers that such a "question of first magnitude" would need to be faced sometime in the future. He was correct, but it took Congress almost 70 years. Meanwhile Holmes had no better remedy than to dismiss Missouri's complaint with the observation that the Lake Michigan diversion had done some good by diluting the sewage. The Court took a practical approach, which followed the common law principle. At the time, municipal sewage treatment technology was only beginning to develop, and there was no practical alternative to disposal of untreated sewage into adjacent streams. Indeed, the Court noted in an opinion some years later that: "In 1900, only 4 percent of the urban population having sewerage facilities provided any treatment at all for domestic and trade wastes."[13] As widespread sewage treatment technology was not available in the early 1900s, the Court was not ready to impose a "technology forcing" outcome on its own, without public and congressional support.

"Formerly [the Illinois River] was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said, without evil results."

—Justice Holmes (1906)

Changing Attitudes After WWII

Public attitudes about water pollution control began to change after the Second World War. The first FWPCA was enacted in 1948, and was amended five times before the 1972 amendments were adopted. The early versions of the FWPCA maintained state primacy, and were largely limited to exhortative encouragement and limited financial assistance to states—which retained a veto power over federal action in most instances.[14] The underlying assumption that waste disposal and assimilation was permissible use of waterways was retained up to 1965, when it began to erode.

By the 1960s, the Refuse Act had been applied in several cases. In one, it was applied to force dredging of the Calumet Sag Canal in Illinois, where solids discharged from adjacent steel plants were blocking navigation.[15] In another, Standard Oil Co. was fined for spilling gasoline.[16]

A Refuse Act Permit Program, the predecessor to the NPDES program under section 402 of the FWPCA, was initiated in the late 1960s, but was overtaken by enactment of the 1972 FWPCA. Also, the 1965 FWPCA provided that States and the Federal Government should set water quality standards for the nation's interstate waters by 1967.

Enactment of the FWPCA

The 1972 FWPCA, making unlawful the discharge of any pollutant by any person, except as provided by the Act itself, ended the doctrine that waste assimilation was a legitimate water use. The amendments also set-

tled the ongoing debate as to whether pollutant discharges should be tolerated up to the point where water quality standards are exceeded. Instead, all point sources had to be treated at least to meet effluent limitations—and more if more treatment was needed to attain ambient water quality standards in the receiving waterway. The 1972 Act, being based on the supreme federal power over interstate commerce, had teeth, and ended state primacy over water pollution control management. And yet today the states still have a large role to play, as they have almost universally agreed to develop and administer state water pollution control programs of their own which meet the FWPCA's minimum requirements, and also qualify the states as eligible for federal funding for water quality programs. Continued funding and attention to water quality issues will ensure the Act's success over the next thirty years.

Endnotes

1. "New York State Water Quality 2000," DEC, Division of Water, October 2000, a report prepared biennially pursuant to section 305(b) of the Clean Water Act, available at http://www.dec.state.ny.us/website/dow/305b98.pdf.
2. 40 CFR § 430.32. The 2.8 figure is a 30-day average.
3. *Missouri v. Illinois*, 200 U.S. 496, 1906 US LEXIS 1494 at 14 (1906).
4. Whether the reverse is also true may be more problematic. For example, one can speculate whether contemporary clean air legislation will actually "force" researchers to come up with electric vehicle technology that the public will accept as a replacement for existing technology.
5. 9 Wheat 1, 22 U.S. 1(1824).
6. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 54 U.S. 518 (1851).
7. *Willamette Iron Bridge Co. v. Hatch.* 125 U.S. 1 (1888).
8. 33 U.S.C.A. §§ 401 *et seq*.
9. *See Wisconsin v. Illinois*, 274 U.S. 488 (1927).
10. *See Clean Water Desk Book*, Environmental Law Institute (1988) at pp. 5-8.
11. *See, e.g., United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899); *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); the Federal Water Power Act of 1920, 16 U.S.C.A. section 791a, *et seq.* (June 10, 1920); and *Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).
12. 200 U.S. 496 (1906) at 521-524.
13. *See United States v. Republic Steel*, 362 U.S. 482 (1960) at p. 506, fn 27 (dissent by Harlan, J.)
14. *See Clean Water Desk Book*, Environmental Law Institute (1988) at pp. 5-12.
15. *United States v. Republic Steel Co.*, 362 U.S. 482 (1960).
16. *United States v. Standard Oil Co*, 384 U.S. 224 (1966).

G. S. Peter Bergen practices environmental and energy law in Port Washington, New York. He was Assistant Commissioner at the New York State Department of Environmental Conservation between August 1995 and February 1999, and practiced environmental law in New York City between 1962 and 1995. He worked with operators of paper mills and electric generating plants to implement the Clean Water Act. He is a past Chair of the New York State Bar Association's Environmental Law Section, and a member of the State Bar's Public Utility Committee. Mr. Bergen is a member of the bar in New York and the District of Columbia.

From the Editor

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of years, compliments of several Section members who have litigated regarding the doctrine) and how the doctrine might be improved to achieve the goal of greater park protection. This article came in first place in the Section's Essay Competition. Ms. Gresham hails from Fordham Law School (i.e., across from Lincoln Center, a short stroll from Central Park and within walking distance of the developing new Hudson River Greenway).

With regard to the essay competition, I ask that student applicants very carefully review their footnotes in terms of sequence and especially for accuracy of cross-referencing. The CLE publications department often must expend significant time and effort on correcting footnotes, which interferes with timely scheduling.

Readers may have followed my own comments and published information on the restructuring of the Section. Part of the effort involves the use of the *Journal* as a vehicle for Committee work, and as a benefit to other Section members who want to keep pace not only with Committee efforts but also with recent developments in, and commentary on, the broader field of Environmental Law. To improve these efforts, we are also expanding the editorial board. In addition to the long-time members of the board, who have universally been unfailing in their efforts and advice, Glen Bruening, Phil Dixon, Mary Lyndon, Gail Port, Peter Ruppar, Larry Schnapf and Kevin Ryan have accepted invitations to join the editorial board. One goal of an expanded board will be to develop a liaison with committees and even other entities so as to generate increased resources for publication. My thanks to those who have served so long and my welcome to the new members of the board.

Kevin Anthony Reilly

Equitable Estoppel in Enforcement Proceedings

By Randall C. Young

If patriotism is the last refuge of scoundrels, equity is the last resort of the violator. Like patriotism, equitable estoppel in enforcement proceedings serves primarily as a tactical measure to draw attention from the misdeeds of the advocate. Unlike patriotism, equitable estoppel is almost always a Parthian shot.[1]

Estoppel (and the related concept of ratification) must normally be pled as an affirmative defense. The party seeking to assert the defense must affirmatively plead facts that would establish the elements of the defense in their answer or other responsive pleading.[2]

Most attorneys can probably cite the elements of equitable estoppel by rote: acts or words by the party to be estopped that reasonably induced the party asserting estoppel to change her position to her detriment.[3] This is often expressed in a nutshell as detrimental reliance.

However, equitable estoppel is only available against a governmental entity acting in its official capacity if the defendant demonstrates fraud, deceit, deception or similar affirmative misconduct. Herein lies the first trap for the unwary.[4]

Practically speaking, misconduct of a nature so severe that courts would prohibit enforcement of the Environmental Conservation Law or delegated Federal programs is difficult to imagine. Even if a case proceeded to hearing under such horrific circumstances, successfully estopping the State from an enforcement action might not eliminate liability for the violations. At least in programs delegated Federal programs, the EPA might successfully carry out an enforcement action after the State was estopped from doing so. Estoppel applies to the party who induced the detrimental reliance, not third parties. A defendant or respondent could argue that the facts justify penalty mitigation, but complete exoneration might not be possible.

As mentioned, the normal elements of equitable estoppel do not apply against the State or its subdivisions. To invoke estoppel against governmental subdivisions, the party pleading it must show affirmative misconduct in the nature of fraud that induced the defendant to commit the act in question.[5] Failure to plead the element of affirmative misconduct invites a motion to dismiss the affirmative defense.

Affirmative misconduct does not include mistakes or erroneous statements.[6] Even reliance on a permit that authorized the action subject to enforcement does not support a claim of estoppel.[7] Nor will estoppel be applied if a reasonable inquiry would reveal the true situation.

What the courts consider misconduct justifying the application of estoppel appears to be a shrinking universe. In 1976, the Court of Appeals first explicitly estopped a governmental subdivision from asserting improper notice of a claim as a defense.[8] The Court held that negligence or wrongful conduct was sufficient.[9]

"If patriotism is the last refuge of scoundrels, equity is the last resort of the violator."

Since then, the succession of cases regarding estoppel against government indicates a desire by the courts to circumscribe the application of estoppel.[10] In a strongly worded opinion, the Court of Appeals held that "undeviating precedents" prohibit the application of estoppel against governmental entities in all but the most egregious circumstances.[11] However, the Court refused to close the door completely on estoppel against the governmental entities, indicating it may apply in the extraordinary circumstances of affirmative misconduct.[12]

A decade later, the Court admonished the members of the bar again, saying: "We have repeatedly made clear that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties."[13]

Despite this strong statement, attorneys continue to argue for estoppel on behalf of their clients based on the traditional doctrines applicable to private parties. However, the effectiveness of the Court's holding in deterring frivolous estoppel claims is not as interesting as the phrase "discharging statutory duties."[14] This highlights an interesting point.

In many of the cases regarding estoppel against government, a governmental entity is a defendant.[15] In these cases, the plaintiff (often seeking damages for an alleged tort) wants to estop the government from raising a statutory defense.[16] The estoppel claim in these cases would not directly prevent the execution of a statutory duty.

Think of a personal injury case resulting from alleged negligent operation of a subway train. Estoppel to prevent the defendant city from interposing the statute of limitations as a defense has no direct effect on the operation of a subway. That is, estoppel has no

direct effect on the governmental function involved in the claim. The courts have not explicitly applied a separate standard to personal injury cases compared with cases in which estoppel was sought to prevent government from enforcing the law or carrying out a statutory mandate. Yet, a distinctly higher standard is justified, and appears to unobtrusively exist for cases in which a party seeks to estop the government from enforcing a statutory mandate.

The traditional rationale for limiting the application of estoppel against government is to limit opportunities for fraud and collusion.[17] When the government is enforcing laws to protect the public health and welfare, the need to protect the public from potential fraud is greater than where government is providing a service to a particular individual. The Court of Appeals has stated "If . . . [the State] could be prevented from enforcing the law . . . the possibilities for collusive behavior and large scale public fraud are not hard to imagine."[18]

"[A] distinctly higher standard is justified, and appears to unobtrusively exist for cases in which a party seeks to estop the government from enforcing a statutory mandate."

Moreover, it is not clear that the courts have any inherent equitable authority to prohibit the executive branch from enforcing the duly promulgated laws. The State constitution vests the governor, that is the executive branch, with the authority and responsibility to faithfully execute the laws of the State.[19]

Therefore, any ruling that estops the executive branch from enforcing duly enacted laws raises questions of the separation of powers. This may be a nearly insurmountable hurdle because the courts have held: "Within the Constitutional limits, the exercise of discretionary authority by the Chief Executive of the State in enforcing Statutes is not subject to judicial review."[20]

Equitable doctrines themselves supply another basis for prohibiting the application of estoppel and ratification to prevent enforcement. The rule stems from the doctrine of ratification. Ratification binds a principal to the unauthorized acts or agreements of her agent if the principal had knowledge of the material facts concerning the transaction and acted or spoke in a manner that approved of the agent's action.[21] In the doctrine of ratification, the principal cannot ratify an agent's action if the principal could not have authorized the action herself.[22] Similarly, estoppel does not apply where the party seeking to invoke estoppel had no right to change its position in reliance on the acts of the party to be estopped.[23] This mirrors legal doctrines which hold illegal contracts unenforceable. This is a perfectly rational limitation on the application of estoppel. It prevents a party from receiving a benefit from actions it was never entitled to take.

Imagine a mobster offering to distribute drugs. The mobster's boss did not direct him to deal drugs, the mobster took the initiative to impress his boss. But the boss learns about the deal and lets it happen. Just when things look good for the mobster, he gets arrested on unrelated charges. Should the drug supplier be able to force the mob don to distribute the drugs?

Absurd, you say. Perhaps, but it illustrates the point.

Applying this rule would eliminate estoppel as a defense in most enforcement cases. It eliminates estoppel as matter of law in cases involving activities undertaken without a permit, or in violation of permit standards because the government cannot ratify an illegal activity, nor does a party have the right to change its position in violation of the law.

At least one more impediment exists to the use of estoppel as a defense in an enforcement action. Estoppel is not available against the government if a diligent inquiry by the party asserting estoppel would have revealed the misconduct or applicable laws.[24] Additionally, those who deal with the government are expected to know the legal requirements applicable to them and may not assert that they reasonably relied on an official's advice that was contrary to the law as a basis to estop the government.[25] Because regulatory requirements, the requirement to obtain a permit, and permit conditions in particular are promulgated and readily accessible, no alleged inducement justifies a violation.

Most attorneys look at these situations from the perspective of their client. The client feels it was induced into a situation by government that hypocritically turned on them to penalize them. They want to shout *no fair!*

The perspective of the courts may be different. Asserting estoppel to prevent enforcement of a law is asking the Court to affirmatively authorize violation of a law or laws enacted by elected officials for the benefit of the public as a whole.[26]

Taken all together, these principles virtually eliminate the ability to use equitable estoppel to prohibit enforcement of a statutorily derived requirement.

Endnotes

1. For the purposes of this article, *estoppel* means equitable estoppel. Note that judicial estoppel may be applied to preclude a governmental agency from changing its stance or theory in a proceeding or related proceedings. *See City of New York v. Show World, Inc*., 178 Misc. 2d. 812 (Sup. Ct. 1998).
2. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 622.4(c); N.Y. Civ. Prac. L. & R. § 3018(b).
3. *See* 57 N.Y. Jur. 2d *Estoppel, Ratification and Waiver* §§ 12 *et seq.* (2000).
4. *See, inter alia, NYS Med. Transporters Assoc. v. Perales* 77 N.Y.2d 126 (1990); *see also Yassin v. Sarabu & Westchester County Health Care Corp*., 384 A.D.2d. 531 (2d Dep't 2001).
5. *See NYS Med. Transporters Assoc. v. Perales* 77 N.Y.2d 126 (1990).
6. *See Legal Aid Soc'y v. City of New York*, 242 A.D.2d 423 (1st Dep't 1993).
7. *See Park View Assocs. v. City of New York*, 71 N.Y.2d 274 (1988).
8. *See Bender v. New York City Health & Hosp. Corp*., 38 N.Y.2d 662 (1976).
9. *Id*. at 668.
10. *See NYS Med. Transporters Ass'n v. Perales*, 77 N.Y.2d 126 (1990); *Wedinger v. Goldberger*, 71 N.Y.2d 428, 441 (1988), *cert. denied*, 488 U.S. 850; *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359; *Park View Assocs. v. City of New York*, 71 N.Y.2d 274.
11. *See Wedinger v. Goldberger*, 71 N.Y.2d 428, 441 (citing *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359); *Park View Assocs. v. City of New York*, 71 N.Y.2d 274.
12. *Id*.
13. *See NYS Med. Transporters Ass'n v. Perales*, 77 N.Y.2d 126, 130 (citing *Wedinger v. Goldberger*, 71 N.Y.2d 428, 441 *cert. denied*, 488 U.S. 850; *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 369-370); *Park View Assocs. v. City of New York*, 71 N.Y.2d 274, 282, *cert. denied*, 488 U.S. 801; *Scruggs-Leftwich v. Rivercross Tenants Corp*. 70 N.Y.2d. 849, 852.
14. *Id*.
15. *See, inter alia, Bender v. New York City Health & Hosp. Corp*., 38 N.Y.2d. 662, 668; *Griffith v. Staten Island Rapid Transit Operating Auth.*, 269 A.D.2d 596 (2d Dep't 2000); *Yassin v. Sarabu & Westchester County Health Care Corp*., 284 A.D.2d 531 (2d Dep't 2001).
16. *Id*.
17. *NYS Med. Transporters Ass'n v. Perales*, 77 N.Y.2d 126, 132.
18. *Id*.
19. N.Y. Const. art. IV § 3 (1976).
20. *See Johnson v. Pataki*, 229 A.D.2d 424, 426 (1st Dep't 1997) (citing *Gaynor v. Rockefeller,* 15 N.Y.2d 120, 131).
21. *See NYS Med. Transporters Ass'n v. Perales,* 77 N.Y.2d 126, 131, 132.
22. 57 N.Y. Jur. 2d *Estoppel, Ratification, and Waiver* §§ 87, 88 (2000).
23. *See Lancaster at Freshmeadow, Inc. v. Suderov*, 6 Misc. 2d 12 (Sup. Ct. 1957), *aff'd*, 5 A.D.2d 1015 (2d Dep't 1958).
24. *See Park View Assocs. v. City of New York*, 71 N.Y.2d. 274, 279 (1988).
25. *See NYS Med. Transporters Ass'n v. Parales*, 77 N.Y.2d 126 (1990).
26. An interesting question would be whether a decision allowing a person or facility to remain in violation of a statute violates the 14th Amendment of the United States Constitution.

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Improving Public Trust Protections of Municipal Parkland in New York

By Cyane W. Gresham

> [T]rust principles provide a valuable underpinning, but no more than that, for . . . planning. Successful . . . regulation will rest on coherent legislative and administrative goals and on their intelligent and understanding implementation. . . . [L]egislators and coastal administrators can and should take an active role in shaping the application of the public trust doctrine and public trust principles in their state, by developing strategies and mechanisms to incorporate the public trust doctrine into state constitutions, statutes, and regulatory programs, as well as to structure court cases creating favorable judicial precedents.[1]

Introduction

The Angel of the Waters hovers above Bethesda Fountain in Central Park. The imposing bronze statue celebrates completion of the Croton Aqueduct, which brought clean surface water into New York City for the first time in 1842.[2] Piping water in from Westchester County had been a massive engineering achievement, designed to help stop cholera epidemics, fight fires, and provide for the masses crowding the metropolitan area.[3] The gift of fresh water bubbling out of fountains and pipes seemed to New Yorkers of the mid-nineteenth century a healing gift from angels worthy of a park statue.[4] One hundred and fifty years later, by the end of the twentieth century, it was clear that Croton water was no longer pristine and further treatment was needed.[5] This article discusses the controversy surrounding city attempts to place the water treatment plant in a municipal park. It also examines broader issues of park purposes and allowable park uses under New York common law. The article argues that common law protections of municipal parkland under the public trust doctrine[6] are important but not sufficient and suggests ways to strengthen the concept of a common public trust resource of municipal parkland while adapting to changing technologies and cultural expectations. This introduction discusses the public trust doctrine in a general way, introduces its application by New York courts to municipal parks, and provides a brief descriptive guide of the sections that follow.

Historically,[7] certain lands have been protected under common law as a public trust[8] resource held by the sovereign state[9] for the people.[10] A public trust requires that the trust land be accessible and used for public purpose; that it be put to traditional use or uses appropriate to the resource; and, in some cases, that it not be sold.[11] Public trust protections have been promoted as instruments of democratization and equal access to resources.[12] Although the doctrine has been applied to lands covered by tidal waters[13] and navigable freshwaters,[14] states have discretion in applying public trust authority.[15]

The public trust doctrine has been an important and controversial influence on environmental law at least since the early 1970s.[16] John Cronin and Robert F. Kennedy, Jr. propose that the common law public trust doctrine (as well as nuisance laws) provided the philosophical underpinning for the major environmental statutes.[17] Whether or not they are correct that it is the source of fundamental environmental rights,[18] a public trust approach has shaped environmental statutes,[19] and even constitutions,[20] of certain states. Professor Joseph Sax authored an influential 1971 article praising the public trust doctrine as an "instrument for democratization" and enhanced natural resource protection.[21] His scholarship provoked decades of debate about the value and role of judicial protection of common resources.[22] Pro-public trust writers applaud his efforts and tend to advocate for expansion of resources protected to include national parks,[23] groundwater,[24] and biodiversity,[25] among others.[26] Anti-public trust commentators criticize the theoretical[27] and historical[28] bases of the doctrine, finding it variously weak, dangerous,[29] and unconstitutional.[30] Other legal writers have taken a more nuanced approach, analyzing the resurgence of the public trust doctrine in a context of cultural history.[31] Finally, some academics have critiqued the doctrine as being based on outdated concepts of private and public property and making analysis and action more difficult.[32] In that vein, Richard Delgado argues that public trust theory has already been successfully incorporated into legislative and judicial approaches and now acts as a constraint on innovative new approaches to environmental protection.[33]

One thing that all commentators might agree on is the importance of context in any analysis of this topic. The states have formulated public trust protections in

differing ways.[34] Critics seize on the variability as proof that the public trust doctrine means everything and nothing and is an attempt to advance an environmental agenda by manipulation.[35] Proponents of public trust protections examine the details of evolution and application in different states.[36] Not surprisingly, each observer tends to find support in detailed study for his or her particular views on private property rights or environmental protection.[37] In the context of New York state, it is not clear why and how the courts initially applied public trust protections to municipal parks, as well as tidal lands and navigable waters.

However it may have evolved, New York courts have a long tradition of extending public trust protections to municipal parks by requiring specific state legislative authorization for sale, alienations,[38] or non-park uses[39] of the land.[40] New York protections of parkland[41] differ from application of the public trust to tidal or shore areas, which can be sold but still retain public trust protections.[42] In New York, municipal parkland may not be sold without legislative authorization.[43] However, common law offers little guidance on what are purposes and proper uses of land that remains as a park.[44] Great conflict arises over the uses of parkland allowed by the municipal agencies that administer them.[45] Suits to enjoin an activity or proposed action as an impermissible alienation of parkland are often brought against park agencies, park commissioners, or the municipality itself.[46] Statutory controls and regulations have not been as important as the common law in New York park protection cases.[47]

This article argues that common law public trust protections are important but not sufficient without support from other branches of government and acknowledged citizen involvement to provide meaningful protections for public parks. This article assumes, without trying to prove, that parks are important for all citizens, but especially for densely crowded urban populations.[48] The article relies largely on examples, cases and information from New York City, based on an assumption that issues faced by the city Department of Parks and Recreation (DPR) highlight or foreshadow conflicts and questions that may arise elsewhere in large urban areas.[49] Section I presents the three most important New York cases involving public trust protections of parkland. Section II contends that although public trust protections are essential, they are limited by lack of clear definitions and scope. Common law protections have also sometimes been ignored, resulting in a confusing mix of pre-existing alienating uses and customs that may undercut present guidelines. Finally, protections are limited in situations when it is not clear where park jurisdiction lies, or even whether a municipal park exists. Section III suggests that common law public trust protections can be improved by legislative and regulatory support, additional common law doctrines, and inter-governmental cooperation with citizen involvement. The article concludes that public trust protections are an interesting and useful judicial concept, but one that will become less relevant in a rapidly changing world without clearer guidelines from legislators, strong executive leadership and funding to protect parks and make them accessible to involved citizens.

I. New York Provides Public Trust Protections for Municipal Parkland

Under New York common law, a municipality holds parkland in trust for the people of the state, and it may not be diminished or infringed upon without specific authorization by statute from the state legislature.[50] Three landmark cases are useful introductions to how public trust protections of municipal parkland have been applied by New York's highest court. In 1871, it stated that municipal parkland could not be sold without legislative authorization;[51] in 1920, it held that a non-park use would require similar authorization;[52] and in 2001, it extended the requirement to a disruption of public access to a park by a non-park use.[53]

Brooklyn Park Commissioners v. Armstrong[54] clearly articulates public trust protections of municipal parkland by describing the city as a trustee holding lands for the purpose of public park use.[55] The court noted that the city could not sell or convey land held in trust for public use without legislative sanction.[56] The court in *Brooklyn Park Commissioners* suggested a rationale for public trust protections of municipal parkland,[57] giving a fascinating insight into the unprecedented investment in Prospect Park.[58] The process of setting up a public park is seen by the court as so long and so expensive that the public investment must be protected from private interference.[59] Although other municipal parks have not received the resources of Prospect (or Central) Park,[60] protection of public investment is still a compelling rationale for requiring limits on what can be done with parkland. In fact, the only other rationale of park purposes to be offered was articulated by the same court fifty years later in *Williams v. Gallatin*.[61]

In 1920, the New York Court of Appeals[62] extended public trust protections, barring non-park uses without legislative authorization.[63] Whereas *Brooklyn Park Commissioners* involved sale of parkland,[64] the *Williams* court found that when land remained public municipal park but was put to non-park uses, state legislation authorizing the use was also necessary.[65] The important point in *Williams v. Gallatin* is that activities with no connection to park purposes (that is non-park uses) require "legislative authorization plainly conferred."[66] The court does not clearly differentiate between park

purposes and uses, but mingles examples of both in its discussion.[67] In divining the meaning of this influential opinion, it is fair to say that park purposes are the general aims or goals of public parks, e.g., recreation, amusement, exercise or pleasure.[68] Park uses would logically then be the specific ways that parkland is employed to meet those goals. The court listed proper park uses of monuments and aesthetic embellishments, zoos and horticultural displays, playgrounds and restaurants.[69] Non-park uses such as "mere field or open space," a courthouse, or schools would require legislative authorization.[70]

Although *Williams v. Gallatin* is an influential decision, its distinctions are not clear or easy to apply. The theoretical base is vague.[71] The *Williams* decision, even in 1920, was not an adequate guide to when state legislative authorization would be required. For example, the *Williams* court did not clarify whether the lease itself was offensive, or the purposes and uses of the Safety Institute.[72] In fact, even given the court's own language, the purposes of the Safety Institute and park purposes are difficult to distinguish.[73] Finally, the court's vision of park uses and purposes sounds very dated eighty years later. In short, *Williams v. Gallatin* is not a sufficiently clear statement of park purposes and uses to direct future judicial and administrative decisions. It has, however, continued to influence later courts, as evidenced by *Friends of Van Cortlandt Park v. City of New York*.[74]

The New York Court of Appeals, relying explicitly on common law and not statutory authority,[75] reinvigorated the public trust doctrine of earlier cases[76] in the 2001 decision *Friends of Van Cortlandt Park v. City of New York*.[77] The court held that a five-year disruption of public access to a park recreational facility for construction of an underground city water treatment plant (WTP) was a non-park use requiring state legislative authorization.[78] The court noted that although no title was conveyed and the parkland would be restored,[79] legislative authorization was required both because of construction and because of future impacts of the underground facility.[80]

The history and controversy surrounding *Friends of Van Cortlandt Park* underscore that *Williams* is simply not an adequate guide in the twenty-first century to what are proper park uses, as distinct from non-park uses requiring state enabling legislation. *Williams* talks of monuments, horticulture, zoos, playgrounds and other delights of recreation and amusement.[81] While *Williams* may stand for the proposition that non-park uses should not be allowed without state authorization, it was not an adequate guide to proper park uses in 1920, and it is even less so now.

II. Common Law Public Trust Protections Are Important But Not Sufficient

A. Common Law Public Trust Requirements of State Legislative Authorization Are a Significant Barrier to Alienation[82] of Parkland

The public trust doctrine is important as a protection of parkland, but it is not sufficient. While the process of obtaining state legislative authorization for a proposal often takes a year to complete, it does hold decisionmakers accountable to community opinion in a rough way. Regulatory requirements for environmental review or zoning changes present procedural barriers that can cause delay and expense, but are not answerable to citizens of affected communities. But existing common law park protections are not sufficient because they lack clear definitions of park purposes and uses. They do not address the existing range of contractual activities in parks. They have been ignored, creating bad precedent and pre-existing conflicting uses. Finally, they do not adequately define what is and is not a park.

1. The Process of State Legislative Authorization Often Takes a Year to Complete

Great ramifications flow from a determination that a proposed activity is a non-park use, since the process of obtaining state legislative authorization often takes at least a year, and can be blocked by opposition among the local community and their legislators.[83] Other regulatory and administrative requirements may delay the project and increase the cost, but do not make a proposed activity dependent on support from the local community.

The process of introducing an alienation bill authorizing a non-park use and getting approval by both bodies of the state legislature takes six to nine months if all goes smoothly and more than a year if complications arise.[84] Based on case law and custom, authorizing bills should be as specifically drawn as possible.[85] In general, the state encourages substitution of equivalent land (based on acreage or market value) for discontinued parkland.[86] When parkland is used by a municipality for another purpose, it should specify replacement for the alienated land or set aside equivalent funds for capital park improvements.[87]

2. Local Community Opposition Can Prevent State Legislative Authorization of Non-Park Uses

Although there is no explicit requirement for local community support to authorize non-park uses, it is very difficult to obtain state legislative authorization without it: the bill must be accompanied by a "Home Rule Request" from the local legislature and a Memo of Support from the local executive;[88] the bill must be sup-

ported by the local senator and assemblyperson;[89] and the bill must be passed by both the Senate and the Assembly. Public support for extremely unpopular uses will be difficult to get.[90] The New York legislature has passed less than twenty bills each year from 1990-2000 authorizing park alienations.[91]

3. Regulatory Requirements for Alienating Park Uses Are More Procedural and Less Responsive to Public Opinion Than State Legislative Authorization

Environmental review as well as land use/zoning review will be necessary to execute a transfer of municipal parkland in most cases, even if legislative authorization is successfully obtained.[92] Environmental review by the agency responsible for sponsoring or permitting is mandated by the State Environmental Quality Review Act (SEQRA).[93] A plaintiff challenging the regulatory determination is unlikely to prevail.[94] If a plaintiff does prevail, it will likely be on procedural grounds and not because of community opposition.[95]

SEQRA requires that a proposed action be assessed for its effect on the environment.[96] The purpose is to force consideration of possible environmental effects of a proposed action early in the process.[97]A "Type II Action" is defined as having less significant environmental impact and thus not requiring intensive study.[98] "Type I Actions" are likely to require an exhaustive study of environmental impact and alternatives in an Environmental Impact Statement (EIS).[99] An Environmental Assessment Form is used to determine the significance of a Type I or Unlisted Action and whether an EIS is required.[100]

Although the process of environmental review includes public comment and a hearing, community opposition will not necessarily stop a proposed project.[101] In fact, the party proposing a project is the one that assembles the data and writes the EIS. The lead agency determination of environmental impact and written findings may incorporate public comment but is not bound by it. Agency determinations can be challenged in court as "arbitrary and capricious or an abuse of discretion,"[102] limited by a four-month statute of limitations.[103] Courts usually defer to administrative agency determinations in environmental review challenges.[104] Statutes of limitations are commonly a successful defense to challenges of environmental review by plaintiffs.[105] Traditionally, plaintiffs were environmentalists challenging a completed review in order to stop or delay a project.[106] In an interesting change, applicants or developers of proposed projects are starting to come to courts to overturn adverse agency determinations.[107]

B. Existing Common Law Public Trust Park Protections Are Not Sufficient

Public trust protections of New York parks add an essential requirement that prohibits non-park uses without state legislative approval. Not only is obtaining the state authorization an onerous process, but it is one that can be stopped by vigorous community opposition. Public trust protections are limited, however, by unclear definitions of park purposes and uses, a failure to address the full range of contractual arrangements, and the fact that the public trust requirements have at times been ignored. In addition, roads and parks together and modern changes in funding structures have acted to confuse the jurisdiction of public trust protections. Central Park illustrates the changing conceptions of park function.

1. Common Law Does Not Articulate Proper Park Purposes

Conceptions of the purposes or functions of parks have expanded over time among both those who administer and those who use parks.[108] Multiple visions of the functions of parks have competed and coexisted: rural pastoral landscape art, eclectic pleasure garden, progressive recreational park, commons for political discourse and social organizing, nature conservation and restoration, and even site of social programs for the disadvantaged.[109] Allowable park uses are a direct function of the purpose which parks are assumed to provide.[110] Unfortunately, changing conceptions of park purposes are not reflected in common law.[111]

Rural Pastoral Landscape Art

Central Park in Manhattan was created as "perfected nature" in the English tradition,[112] a place to uplift the spirit and improve the senses.[113] The park was seen as a tangible manifestation of and way to advance democracy: the government was physically supporting culture and the arts, and providing a place for all citizens of all classes.[114] Art and design of the entire landscape were calculated to achieve the function of the restful rural pastoral retreat in the city.[115] This assumption of park purpose underlies *Brooklyn Park Commissioners.*[116]

Pleasure Ground

The vision of park as eclectic pleasure ground has competed with the rural pastoral approach since the beginning of formal park design.[117] A park as pleasure garden functions to provide amusement and diversion and produce profits by attracting crowds with: ornamental gardens, grottoes, fountains, stages, circuses, carousels, concerts, theater, fireworks, and inspirational statues.[118] *Williams v. Gallatin* could not have provided a

better description of the park as pleasure ground.[119] Clearly, if a park is assumed to function as a novelty, amusement, and diversion—a pleasure ground—monuments, floral displays, zoos, playgrounds, restaurants and rest houses are in.[120] Displays of safety devices for "methods of lessening the number of casualties and avoiding the causes of physical suffering and premature death" are out.[121] Even as rentals and rides, concerts and carousels,[122] franchises and food,[123] museums,[124] zoos[125] and a casino[126] had been added to Central Park in the nineteenth century, active recreation was beginning to emerge as a function of parks.[127]

Center of Active Recreation

It was only in the 1880s that tennis, football, bicycling, baseball and other active and competitive sports were allowed in Central Park.[128] Earlier park policies had discouraged organized sports as being incompatible with the rural pastoral ideal of enjoying nature.[129] Beginning in the twentieth century, however, parks began to provide recreational opportunities.[130] The first playgrounds were built only after 1910, and by the 1920s Manhattan had almost a hundred.[131] The real expansion in active recreational facilities in New York City, however, was during Robert Moses' tenure as park commissioner from 1934 to 1960.[132] Moses was able to accomplish his massive construction and rehabilitation campaign because of huge infusions of New Deal federal money.[133] To a large extent, the infrastructure that Moses put in place constrains today's park functions.

Social and Political Commons

Although the notion that parks functioned as a common area for political discourse had been suggested earlier,[134] the 1960s forced a reassessment of park function.[135] Massive antiwar protests and civil rights demonstrations were allowed in Central Park, causing a reconsideration of park policy.[136] There was great debate as well on whether parks should function as a place for ethnic cultural festivals and mass concerts.[137] Park functions in the 1960s came to include providing a commons for social expression and experimentation, as well as the pre-existing rural pastoral landscape, pleasure garden, and center for recreation.

Other Functions

Since the 1970s, additional park functions have been added to the list. Environmental awareness of the natural resources of parks led to an important perceived function of conservation and restoration.[138] Parks are starting to be seen by administrators and citizens as a way to preserve habitat and ecological systems.[139] Rare, endangered, and threatened species of plants and animals have become important stakeholders in today's parks.[140] In addition, at least in New York City, the park system has provided social program functions, especially in education.[141] Parks agencies increasingly allow commercial activities.

By 2001, when *Friends of Van Cortlandt Park* was decided, different park functions competed for dwindling funds: the rural pastoral landscape, the pleasure garden, the center of recreation, the social and political commons, nature conservation, provider of social services, and commercial venue. The courts, however, have relied primarily on *Williams*, which briefly describes park functions and uses only from a limited 1920s approach.[142] This is an inadequate guide to the rich variety and complex possibilities of park function, especially when the assumptions of park function dictate allowable park uses.

2. Definitions of Non-Park Uses Are Not Clear

Permissible park uses by a municipal park agency are those uses compatible with proper park purposes. Park purposes have not been articulated by courts in any complete way and the only real guide to what park uses are permitted, as opposed to those which would require legislative authorization, is the common law record.

Because obtaining state legislative approval is difficult, time-consuming, and can be blocked by community opposition, the distinction between park and non-park uses is quite important. Common law furnishes some guideposts but no clear definitions.

Courts have found the following to be permissible uses, when conducted pursuant to park purposes:[143] a valid license for the operation of a park facility;[144] a valid permit for the use of park facilities;[145] buildings for park purposes;[146] dances, concerts, and theater;[147] monuments and statues;[148] restaurants and food facilities;[149] parking lots;[150] zoos and gardens;[151] and concessions.[152]

Courts have found the following to be non-park uses requiring state legislative approval: sale of parkland;[153] long-term leases for non-park purposes;[154] multi-year disruption of public access;[155] disposal of refuse by converting parkland to landfill;[156] storage of city highway and sanitation vehicles;[157] issuance of permits for private residences on public shores;[158] taking of parkland for city roads;[159] restricting a formerly open park to local residents;[160] and diversion to private use.[161]

The following uses of parks are not clearly alienations or proper park uses: easements for underground facilities;[162] "discontinuance" of park facilities developed on lands of another;[163] and failure to maintain and operate park and recreational facilities.[164]

Many contemporary uses of parks are not covered by case law. Parks, at least in New York City, have a

dizzying array of activities that take place.[165] Much of the debate centers on activities that park agencies contractually agree to.[166]

3. Common Law Does Not Address the Range of Contractual Park Uses

Early New York courts held that licenses were permissible and leases were not; later courts have looked at the terms of the agreement rather than what it's called and found that a permit which functions as a lease is beyond the park commissioner's power to issue.[167] Courts have also looked to see whether the proposed activity was a proper park use.[168] Contracts involving parks, however, are not limited to leases and licenses.[169] Case law suggests but does not answer the question whether every contract for use of parkland is subject to a *Williams* prohibition against park uses foreign to park purposes.

In early New York case law and the New York City Charter, licenses were permissible uses consistent with park purposes and leases were not. A license consistent with park uses granted authority for a specific act or acts upon the land of another and did not convey an interest or estate in the land.[170] The license had to be temporary and personal, avoiding the creation of any property interest.[171] Finally, all licenses had to contain a "terminable at will clause" stating that the commissioner of parks reserved the right to cancel the license agreement whenever it was decided in good faith to do so.[172] However, the commissioner was subject to a New York "Civil Practice Law and Rules Article 78 requirement that a revocation decision not be arbitrary or capricious, having no basis in reason and fact."[173]

In a surprising decision in 1986, the Appellate Division held that not all leases of parkland without legislative sanction were invalid.[174] The court looked to whether the proposed use served a public purpose.[175] In 1996, the Appellate Division found that a lease of parkland for private summer cottages was improper,[176] but it based the decision on the proposed use and not the lease itself.[177]

Although case law generally includes decisions involving leases and licenses, parks management agencies write various contractual agreements for all sorts of activities in parks.[178] The City of New York DPR, for example, issues very few leases, but many licenses, special events permits, memoranda of understanding, and contracts.[179] New York courts have never definitively addressed whether any and all contractual agreements must be subjected to a *Williams* analysis. Case law certainly suggests that any use of a park must be consistent with park purposes, but judicial discussion has been confined largely to leases and licenses.

4. Public Trust Common Law Has Sometimes Been Ignored

While a range of activities may have been officially acknowledged as areas of questionable park alienation, various types of unacknowledged park uses have historically taken place and not been questioned. The historical record of activities allowed in parks includes both park and non-park uses, as defined by the courts.[180] Park commissioners are appointed to their agency offices, have a great deal of discretion in directing park activities,[181] and, like other appointed officials, are subject to the political pressures of municipal government.[182] Most public trust suits are brought by citizens against the park commissioner, agency, or city.[183]

The long era of Robert Moses' domination of New York parks, roads and construction was a time of unprecedented expansion of parkland and uses of parkland, as well as unbridled discretion and power.[184] Moses built many facilities and added to parkland.[185] However, he also used parks as his personal domain to build roads,[186] let concessions,[187] build on,[188] deconstruct,[189] or restrict access to.[190] The lawsuits that do survive in the record contesting Moses' treatment of parkland do not discuss state legislative authorization.[191] The information extant concerning Robert Moses' use of parkland suggests that there were many unauthorized alienations and non-park uses, that his complete dominion over parkland was rarely challenged, and that he left a legacy of non-park uses in parkland.[192]

5. Common Law Does Not Adequately Address the Question "What Is a Park and When Do Public Trust Protections Apply?"

The question of what is a dedicated park and when should public trust protections apply has never been an easy one.[193] When courts attempt to define a park they tend to rely on *Williams v. Gallatin* or similar cases.[194] In trying to discern whether public trust restrictions apply, courts look for an intent to dedicate, either express or implied, and an acceptance by the city or public, either express or implied.[195] Questions about park jurisdiction can arise when parks occur together with roads or other public works. In a more fundamental way, the definition of a public municipal park is being thrown into question by increasing private funding and complex private-public partnerships. Common law does not address these questions explicitly.

The background restriction on non-park uses in parks has at times been trumped by legislation specifically empowering certain uses, creating a scrambled legacy of roads and parks occurring together. Roadways built with federal funds, and certain public

authorities are examples of activities that have trumped public trust protections. The Department of Transportation Act of 1966 Section 4(f) allowed a roadway funded by federal monies to be built through a park if there was "no prudent and feasible alternative" and the project was planned to minimize harm.[196] Well before the Department of Transportation Act was passed, Robert Moses had pioneered the building of highways through parks,[197] and even the concept of a restricted-access road with a linear park called a parkway.[198] Roads and parks together can create confusing jurisdictional issues.[199]

Public authorities are another legislative creation that can have statutory authority to take and use parkland. For example, New York Public Authorities Law gives the Triborough Bridge and Tunnel Authority (TBTA) wide powers to build, condemn property, raise funds, and acquire city property without compensation.[200] The powers extend to otherwise inalienable land.[201] Transactions can be effected with nothing more than a contract from the mayor.[202] Generally, one city agency would not bring suit against another, so there is no case law on point, but the statute allows parkland to be taken for use by TBTA. It should be no surprise that amendments to the statute creating and vesting almost unlimited power in the TBTA were written by Robert Moses, who was head of the authority.[203] Since each authority is created independently by the legislature, its enabling statute will determine the scope of powers and ability to take and use parkland.

The development of alternative funding sources and management structures for parks is not acknowledged in legal doctrine. Whereas the public trust approach may rest on an assumption that parks are paid for by the public's money, the reality in New York City is that increasingly parks are funded by private donations.[204] In addition, private-public partnerships are being used to manage and run parks and programs.[205] Does a privatization of park funding and management threaten some of the functions that parks have played?

Parks in New York City have a history of relying on philanthropists when the city's money was not enough.[206] In recent decades, continued cuts in public funding for parks has drastically cut budgets.[207] The result has been an unprecedented dependence on donated money from private sources: individuals and neighborhood groups,[208] private non-profit foundations,[209] and corporations.[210]

The increasing reliance on private money in parks has led to complex public-private partnerships.[211] Developers, given special development privileges, pay for new park and recreational facilities and ongoing maintenance.[212] Sometimes, a separate nonprofit organization is set up to manage the park project.[213]

Conflicts among competing interests arose when parks were administered solely through municipal agencies;[214] not surprisingly questions and conflicts arise when parks are administered through private-public partnerships.[215] Who decides what purpose the park serves and what are proper park uses? Is a park funded largely by private money still a public trust resource protected by the traditional requirements?[216] If a corporate donor is responsible for the payment of ongoing park maintenance, it is to be expected that issues of control, direction and authority to make decisions will arise.[217] A more basic concern about privatization of some aspects of parks is whether the public trust will be sacrificed altogether.[218] Are parks still democratic spaces if wealthy citizens have nice parks and poor citizens do not?[219] There are no answers in common law because these questions have not been put to courts.

III. Improving Public Trust Protections of Municipal Parkland in New York

The long history of public trust protections in New York makes outright sale of municipal parkland unlikely without legislative authorization. Although it is also improbable that any one individual will accumulate as much discretionary power to build in parks as did Robert Moses,[220] park protections are far from assured. The common law public trust doctrine as applied to New York parks is helpful but incomplete. Preserving a functional and robust heritage of public parks accessible to all will require better articulation of park purposes and uses, enforcement of existing protections, and more public funding. This can be accomplished through legislative and regulatory support, buttressing of the common law protections against agency overreaching, and inter-governmental cooperation and citizen involvement.

A. Legislative and Regulatory Support

Common law public trust applications are limited by courts to the facts of specific cases, leading to a doctrine with inconsistencies and gaps.[221] Common law public trust protections of shorelines have in some states been strengthened and supported by legislation and regulation.[222] This approach can be effective if coordinated and should be applied to park protection.[223] The legislature and agencies can provide better definitions, contracting guidelines, and special protections of natural resources.

1. Better Definitions

Park uses consistent with park purposes are already mandated by statutes funding parks.[224] Such statutes could flesh out general definitions for park, recreational, and forest preserve purposes and still leave considerable flexibility. DPR park regulations, part of the Rules of the City of New York, already list regulated,

permitted, and prohibited activities.[225] Non-park uses could easily be added, as well as definitions of park purposes. The Court of Appeals in *Friends of Van Cortlandt Park* noted public trust protections may have *de minimis* exceptions.[226] Such exceptions could be spelled out by legislation or regulations that define actions having such a small spatial or temporal impact that legislative approval would not be required. Funding bills and regulations can also effectively address the range of park contracts, general limits, and whether they are subject to the same public trust analysis. Contracting terms for park permits or concessions determine the uses of parks allowed by agencies. The terms of dedication by which a municipality takes title to a park also determines future purpose and use.[227]

2. "Forever Wild" Designation

High quality habitat and valuable natural resources in parks can be protected with special designations. The "Forever Wild" protection is used both by the state legislature and by at least one municipal agency in the state.

On the state level, perhaps the strongest form of protection the state can afford is a "Forever Wild" designation in the New York State Constitution.[228] It is written to protect designated "forest preserve" land owned by the state.[229] Any substantial encroachment on forest preserve land, including timber harvesting, requires a constitutional amendment.[230] There has been subsequent case law interpreting and applying the constitutional provision.[231] Statutes supplement the constitutional mandate.[232] Protections of park woodlands could be greatly strengthened if forest preserves were designated and constitutionally protected.[233]

In 2001, in an attempt to achieve greater protections of high-quality natural areas in New York City the DPR Natural Resources Group initiated its own "Forever Wild" program.[234] The DPR "Forever Wild" program has designated over 7,500 acres as off-limits to any development, to be protected by design review, impact assessment, negotiation, and litigation.[235]

B. Common Law Support

Common law itself can be a fertile source of doctrine to bolster public trust protections. The *ultra vires* doctrine and trust law duties for fiduciaries both are applicable and would enhance park protections against overreaching by municipalities that are entrusted with management of parks.[236] *Ultra vires* is a term meaning that an act or contract is unauthorized because the corporation or organization has gone beyond the power authorized by its charter or law.[237] Municipal corporations are held to strict compliance with delegated legislative authority.[238] When agencies act beyond their authority, they can be restrained.[239]

Private trust and charitable trust law are other sources of common law support for restrictions on actions of municipalities.[240] These arrangements involve a trustee who holds the trust asset for the benefit of another.[241] The heightened fiduciary duties of trustees include the duties of loyalty, of furnishing information, of taking and keeping control of trust property, of dealing impartially with beneficiaries, of enforcing claims, and preserving trust property.[242] The most substantial encroachments on park property are initiated, sanctioned and permitted by municipalities. Hence, it makes sense to turn to existing common law to impose restrictions on agency and trustee actions in this regard.

C. Inter-Governmental Cooperation and Citizen Involvement

Future challenges to parks will require inter-governmental cooperation and citizen involvement. Cooperation of all branches of government helps to address the most difficult challenges of park protection. Only with concerted effort by the judiciary, the executive, and the legislative branch will thorny and complicated issues of overlapping jurisdiction, pre-existing alienations, and the need for better enforcement be addressed. Although not ideal, parks and roadways already coexist and will continue to in the future. Clear guidelines are lacking about what uses are allowed in parks and roadways. Guidelines will have to address the many different types of roads and transportation agencies. Pre-existing alienations are a particularly thorny problem, but ignoring their existence weakens park protections. Park or state regulatory agencies should perhaps initiate efforts to compile guidelines for areas of overlapping park and road jurisdiction. Enforcement of already-existing park protections could be improved so that common law public trust restrictions are not ignored. In that regard, citizen involvement is crucial, since individuals or parks advocate groups are often the ones who bring challenges to agency actions.

Conclusion

Although the common law public trust doctrine has been used as a theoretical support for increased governmental protection of common natural resources, the reality for the last three decades has been decreasing government funding for parks and a resulting increase in privatization of agency functions. Public trust park protections in New York have succeeded in making sale or conveyance of municipal parkland very difficult, but they are not comprehensive enough to deal with the complexities of modern park contractual arrangements and park management partnerships. Clearer legislative and agency definitions of park locations, purposes and uses are essential. Common law doctrinal support and improved enforcement will certainly help. Intergovern-

mental cooperation will be necessary for the multi-party negotiations of the future. Citizens who organize to maintain and enhance their parks are often the ones who have filled in the gaps in what agencies can do. However, one of the best ways to allow public trust protections to work is to provide adequate public funding for public parks.

Endnotes

1. Jack Archer et al., The Public Trust Doctrine and the Management of America's Coasts ix, 179 (Univ. of Mass. Press 1994) (arguing for an incorporation of public trust principles from common law into state constitutions, statutes, and regulations).
2. Dennis Burton, Nature Walks of Central Park 138-39 (Henry Holt 1997); Richard J. Berenson and Raymond Carroll, Illustrated Map and Guidebook to Central Park 41 (Barnes and Noble 1999). Prior to 1842, New Yorkers had relied principally on shallow wells in an overburdened groundwater aquifer. *Id.*
3. Edwin G. Burrows and Mike Wallace, Gotham, A History of New York City to 1898 594-95, 625-27 (Oxford 1999).
4. A brochure at the opening of Bethesda Fountain quoted the New Testament account of an angel bestowing health-giving properties to the pool of Bethesda near Jerusalem—and the name stuck to the fountain in Central Park. *See* Berenson, *supra* note 2, at 41; Burton, *supra* note 2, at 139.
5. *See, e.g.*, Peter H. Lehner, *Avoiding the Path of Good Intentions: Protecting the Watershed Through Better Enforcement*, 12 Fordham Envtl. L.J. 523, 523-26 (2002) (listing contaminants such as road runoff, microbes, heavy metals, and synthetic organics). High levels of phosphorus and algae regularly shut down Croton reservoirs during the summer. *Id.*
6. *See, e.g.,* John Cronin & Robert F. Kennedy, Jr., The Riverkeepers, Two Activists Fight to Reclaim Our Environment as a Basic Human Right 141 (Touchstone 1999). "According to the Public Trust Doctrine, the public owns common or shared environments—air, water, dunes, tidelands, underwater lands, fisheries, shellfish beds, parks and commons, and migratory species. . . . Government trustees are obligated to maintain the value of these systems for all users—including future generations. Like other rights, public trust rights are said to derive from 'natural' or God-given law. They cannot be extinguished." *Id.*
7. The public trust doctrine, discussed *infra*, goes back at least to the Institutes of Gaius and Justinian in Roman civil law; it was incorporated into English common law after the Magna Carta, and was adopted by the original American colonies. David Slade et al., Putting the Public Trust Doctrine to Work xviii (1990). For an accessible recounting of the history of the public trust doctrine, see Cronin and Kennedy, *supra* note 6, at 141-44. *Contra* Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 Fordham Envtl. L.J. 1, 24-36 (1998) (contesting assertions that the public trust doctrine has deep historical roots and asserting that it is a relatively modern tool for advancing political agendas).
8. *See* Black's Law Dictionary 1513-14 (7th ed. 1999) (defining a public trust when property is held by a trustee for the benefit of the general public).
9. *See id*. at 1401-02 (defining a sovereign state as one with independent existence and supreme authority). The sovereignty or rule which was exercised by the crown of England, for example, passed to the people of the thirteen colonies. Archer et al, *supra* note 1, at 8-9. Other states entered the Union on an equal footing, with complete power over its public trust lands. *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).
10. *See Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 387-89, 452-53 (1892) (ruling that a state may not convey public trust property if the public's interest in remaining public trust lands is impaired); *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476-79 (1988) (holding each state entered the Union with sovereignty over all tidal and navigable waters and lands beneath them and could later expand its public trust authority).
11. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 477 (1971). *See also* Cronin & Kennedy, *supra* note 6, at 143 (reciting Supreme Court public trust cases and summarizing judicial interpretation). "The public trust resources of America are owned by the public, and no one has the right to use them in a way that will diminish their use and enjoyment by others. The state, as trustee, has no authority to enact policies that favor one public user over another." *Id.*
12. *See* Sax, *supra* note 11 at 556 (noting that extension of public trust protections beyond the traditional tidal waters and parklands applications would be an instrument for democratization); Cronin & Kennedy, *supra* note 6, at 9-10.
13. *See, e.g., Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, 571-72 (2001) (applying public trust principles to a shore owner in Oyster Bay Harbor in Nassau County).
14. The extent of public trust protection in navigable waters has long been a contentious issue. *See* Robert J. Kafin, *Ancient Principles of Navigability Prove to Have a Modern Applicability*, N.Y. Envtl. Law., vol. 19, no. 3, at 18 (N.Y. State B. Ass'n, Summer 1999) (reporting on a long conflict over passage by canoes and kayaks in small waterways). Although the N.Y. Court of Appeals granted public trust passage to recreational boaters in one case, the question of navigability appears to be fact-specific. *See id*. (discussing N.Y. Court of Appeals cases).
15. *See Phillips Petroleum,* 484 U.S. at 483.
16. *See, e.g.*, John G. Sprankling, Understanding Property Law 500 (2000) ("The public trust doctrine is one of the most far-reaching and controversial rules defining the legal relationship between private owners and the environment.").
17. *See* Cronin and Kennedy, *supra* note 6, at 145. "[C]ourts and Congress began to breathe life into the moribund Public Trust Doctrine, raising it up in a new iteration: modern environmental law. . . . The Clean Water Act, the Clean Air Act, The Endangered Species Act, and the National Environmental Policy Act are all best understood as a modern guarantee of the protection of ancient public trust rights in an industrial age." *Id.*
18. *See id*. at 9 (describing Cronin and Kennedy's belief in a fundamental right of protection from pollution and environmental abuse).
19. *See* David Gionfriddo, Comment: *Sealing Pandora's Box: Judicial Doctrines Restricting Public Trust Environmental Suits*, 13 B.C. Envtl. Aff. L. Rev. 439, 443 (1986) (describing how Professor Joseph Sax relied on the public trust doctrine as a foundation when helping to draft Michigan's environmental policy statute of 1970, and listing similar statutes in Minnesota and Connecticut).
20. *See* Philip Weinberg and Kevin A. Reilly, Understanding Environmental Law 53 (1998) (describing how California's constitution guaranteed public access to the shore); Erin Ryan, Comment: *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 Envtl. L. 477, 477-78 (Pennsylvania constitution contains public trust rights to natural resources).
21. *See* Sax, *supra* note 11, at 477, 556.
22. A symposium and volume of commentary was recently devoted to criticism of Joseph Sax's scholarship on natural resource law.

See, e.g., Richard J. Lazarus, Foreword to symposium volume on *Takings, Public Trust, Unhappy Truths, and Helpless Giants: A Review of Professor Joseph Sax's Defense of the Environment Through Academic Scholarship*, 25 Ecology L.Q. 325-26 (1998).

23. *Cf.*, Sally K. Fairfax, *The Essential Legacy of a Sustaining Civilization: Professor Sax on the National Parks*, 25 Ecology L.Q. 385, 385-88 (1998) (reviewing Sax's scholarship on park protections).

24. *See, e.g.,* Erik Swenson, Comment: *Public Trust Doctrine and Groundwater Rights*, 53 U. Miami L. Rev. 363, 363-64 (1991) (advocating public trust protections of groundwater).

25. *See, e.g.,* William C. Galloway, *Protection of Biodiversity Under the Public Trust Doctrine*, 8 Tul. Envtl. L.J. 21, 21-22, 32 (1994) (public trust protections of biodiversity).

26. *See, e.g.,* Scott B. Yates, Comment: *A Case for the Extension of the Public Trust Doctrine in Oregon*, 27 Envtl. L. 663, 663, 695 (1997) (arguing that common law and state statutes support application of public trust protections to maintenance of adequate stream flows in nonnavigable tributaries); Peter Manus, *To a Candidate In Search of an Environmental Theme: Promote the Public Trust*, 19 Stan. Envtl. L.J. 315, 315-19, 367-69 (2000) (suggesting that 2000 presidential candidate Al Gore rely on the public trust).

27. *See, e.g.*, Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 Va. Envtl. L.J. 713, 717-21 (1996) (questioning interpretations of early Supreme Court decisions by commentators like Sax who find them as supportive of public trust protections).

28. *See, e.g.*, Scott, *supra* note 7, at 24-36 (questioning the historical basis of the public trust doctrine and finding it to be a dangerous tool of political intent which undercuts judicial precedent and property interests).

29. *See id.* at 68-70 (public trust undermines property rights and expectations).

30. *See, e.g.,* James Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. Colo. L. Rev. 33, ? (1998).

31. *See, e.g.*, Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711, 711-23 (1986) (analyzing the common law basis of the public trust doctrine through a law and economics model); Carol Rose, *Joseph Sax and the Idea of the Public Trust*, 25 Ecology L.Q. 351, 351-52, 361-62 (1998) (suggesting that the success and impact of the public trust resurgence was due partly to its catchy name).

32. *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 633 ("By continuing to resist a legal system that is otherwise being abandoned, the public trust doctrine obscures analysis and renders more difficult the important process of reworking natural resources law.")

33. Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 Vand. L. Rev. 1209, 1209-14 (1991).

34. *See* Scott, *supra* note 7, at 16-23 (listing differences between and within states in what lands are covered, the time over which measurement is made, what resources are protected, underlying purposes, how government has acquired the land in question, and whether the government may transfer land).

35. *See, e.g., id* at 15-16, 23, 70 (contending that the public trust doctrine is used in its inconsistent manifestations to promote a philosophical/social agenda undercutting property interests).

36. *See, e.g.*, Bonnie J. McCay, Oyster Wars and the Public Trust: Property, Law and Ecology in New Jersey History (1998) ? (detailing the history of public trust protections of New Jersey oyster beds).

37. *Compare id.* (criticizing a "tragedy of the commons" argument for privatization with support from evidence of the "Oyster Wars") with James Rasband, *The Public Trust Doctrine: A Tragedy of the Common Law*, 77 Tex. L. Rev. 1335, 1336 (1999) (reviewing McCay, *supra* note 36, and using the same Oyster Wars to argue for stronger enforcement of constitutional protections against taking of private property).

38. *See* Black's Law Dictionary 73 (7th ed. 1999) (defining alienation as "the conveyance or transfer of property to another). Modern courts tend to use the term "alienation" to encompass any impermissible use of public parkland from sale to unauthorized use of parkland. *See, e.g., United States v. New York*, 96 F. Supp. 2d 195, 202 (2000) (discussing how courts have extended the meaning of alienation from conveyances of parkland to any non-recreational use of parkland).

39. Non-park uses are uses of a park that are inconsistent with park purposes. *See infra* discussion of *Williams v. Gallatin*, 229 N.Y. 248 (1920) in Section II.B.

40. *See, e.g,* N.Y. State Office of Parks, Recreation, and Historic Preservation, Guide to the Alienation or Conversion of Municipal Parklands Preface (revised 1990) ("Alienation applies to every municipal park in the state. . . . In order to convey parklands to another entity, or use them for another purpose, the municipality must receive the authorization of the State Legislature. The bill by which the Legislature grants its authorization is a 'parkland alienation bill.'").

41. In this article, use of the word "parkland" connotes New York municipal parkland. Conveyances of state parkland can often be governed by state statutes or the terms of dedication and may not require legislative authorization. *See id.* at 6. Conveyances of federal parkland are termed "conversions" and are governed by federal statutes and guidelines. *See id.* at 12-13.

42. *See Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, 571-73 (2001) (balancing property rights of riparian owner and the town which held tidal lands and oyster beds "in trust for the public good").

43. *See Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234, 243 (1871). *See* discussion *infra* Section I.A.

44. *See* discussion *infra* Section II.B.1,2.

45. *See, e.g.*, City of N.Y. Department of Parks and Recreation (DPR) Natural Resources Group, *Forever Wild: Preserving New York City's Natural Areas*, April 2001 (map with text available online at http://www.nycgovparks.org/sub_about/parks_divisions/nrg/nrg_forever_wild_splash.htm) Natural areas in parks face a constant threat from transportation and public works projects, and even recreational facilities. *Id. See also*, David Gionfriddo, *supra* note 19, at 443-44 (pointing out that traditional protections of parkland are often lowered for public works projects).

46. *See* discussion *infra* Section II.B(1).

47. The relevant state statute reads: "[T]he rights of a city in and to its waterfront, ferries, bridges, wharves, property, land under water, public landings, wharves, docks, streets, avenues, parks and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section." N.Y. General City Law § 20.2. Generally, subdivision seven is not viewed as reducing the inalienability of parklands. *See In re Central Parkway*, 251 N.Y.S. 577, 580-81 (Sup. Ct., Schenectady Co. 1931) (holding that subdivision seven does not give a city power to discontinue a park); *Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495, 509-510 (Sup. Ct., Nassau Co. 1972) (affirming *In re Central Parkway* and additionally finding no authority in the city charter to restrict the use of the park). Language in the New York City Charter generally follows that of General City Law and has been interpreted similarly. *See Aldrich v. City of N.Y.*, 145 N.Y.S.2d 732, 743-44 (Sup. Ct., Queens Co. 1955) (finding in New York

City Charter § 383 no express power to discontinue or close a park); New York City Charter § 383.

48. *See* Peter Harnik, Inside City Parks 1-4 (Urban Land Institute 1985) (pointing out that city parks often define urban layout, property value, traffic flow, and even whether a city is a desirable place to live that will attract new inhabitants, businesses, and jobs).

49. New York City Department of Parks and Recreation has well over 28,000 acres under its jurisdiction. See DPR Web site at www.nyc.gov/parks. If state and federal parkland is added in, as well as cemeteries and open space, the total is about 53,000 acres. *See* Harnik, *supra* note 48, at 121. In fact the total park and open space acreage in New York City, at almost 27%, is the largest of any major city in the country. *See id*. at 126. Central Park is thought by many to be the most successful city park in the world, the "standard against which all other parks are measured." *Id*. at 9.

50. *See Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 623, 631-32 (2001) [hereinafter *Friends of Van Cortlandt Park*].

51. *See Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234 (1871).

52. *See Williams v. Gallatin*, 229 N.Y. 248 (1920).

53. *See Friends of Van Cortlandt Park*, 95 N.Y.2d 623 (2001).

54. *Brooklyn Park Comm'rs*, 45 N.Y. at 243.

55. *Id.* at 243 ("It is to be observed that the act of 1861 vested the lands in the city of Brooklyn forever, but for the uses and purposes in that act mentioned. Though the city took the title to the lands by this provision, it took it for the public use as a park, and held it in trust for that purpose.").

56. *Id.* (finding that it was within the power of the legislature to relieve the city of the trust to sell the land).

57. *Id.* at 239-40.

58. Prospect Park was intended by Brooklyn to surpass the famous Central Park that its rival New York was building. *See* Graff, *supra* note 64, at 111 (describing how land for Prospect Park was purchased in 1860, while construction was delayed by the war). *See also* Harnik, *supra* note 48, at 11 (saying that 20,000 laborers worked on Central Park and that the same designers Olmsted and Vaux designed in Prospect Park a similar "tour de force").

59. *Brooklyn Park Comm'rs*, 45 N.Y. at 239-40.

60. *See generally* Witold Rybczynski, A Clearing in the Distance, Frederick Law Olmsted and America in the Nineteenth Century 184, 269-77 (Scribner, 1999) (recounting the ground-breaking approach taken in establishing Central and Prospect Parks: to create a perfected or idyllic version of a natural environment, with huge outlays of labor and capital). In 1859 Central Park was the largest public works project in the United States. *Id*. at 184.

61. *Williams v. Gallatin*, 229 N.Y. 248 (1920).

62. Judges Pound, Hiscock, Chase, Collin, Cardozo and Andrews (Pound wrote the opinion).

63. *See Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 629 (2001) (relying on *Williams v. Gallatin* as controlling precedent). *See also United States v. City of N.Y.*, 96 F. Supp. 2d 195, 202 (E.D.N.Y. 2000) ("The leading N.Y. Court of Appeals decision is *Williams v. Gallatin* [cite omitted] which held that, once land has been dedicated to use as a park, it cannot be diverted for uses other than recreation, in whole or in part, temporarily or permanently, even for another public use, without legislative approval.").

64. *Brooklyn Park Comm'rs*, 45 N.Y. 234, 234 (1871).

65. *Williams*, 229 N.Y. at 253-54.

66. *Williams v. Gallatin*, 229 N.Y. 248, 253-54 (1920).

67. *Id.*

68. *See id*. at 253 ("A park is a pleasure ground set apart for recreation of the public to promote its health and enjoyment."). *See also id*. at 254 ("[T]o provide means of innocent recreation and refreshment for the weary mind and body is the purpose of the system of public parks."). The court contrasts the purpose of the Safety Institute of America as being quite different. *Id.* ("promoting education about safety").

69. *Id.* at 253-54. Proper park uses are "[m]onuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor; floral and horticultural displays, zoological gardens, playing grounds, and even restaurants and rest houses and many other common incidents of a pleasure ground contribute to the use and enjoyment of the park. The end of all such embellishments and conveniences is substantially the same public good. They facilitate free public means of pleasure, recreation and amusement and thus provide for the welfare of the community." *Id.* Note how uses and purposes are not clearly distinguished. *Id*.

70. *Id*. at 253.

71. *Id*. at 253 (citing *Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234 (1871), but nowhere mentioning the public trust).

72. *Williams*, 229 N.Y. at 251-52.

73. Safety Institute purpose is to promote safety and education about safety and health. *Id.* at 252, 254. Park purposes are general welfare through pleasure, recreation and amusement and to promote health. *Id.* at 253-54.

74. *Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 629 (2001) (beginning analysis of the case with the statement that all parties agree that *Williams v. Gallatin* is controlling precedent).

75. *Id* at 632 ("Finally, we reach this conclusion as a matter of common law, without the need to address General City Law § 20(2).").

76. *Id*. at 630, 632 ("In the eighty years since *Williams*, our courts have time and again reaffirmed the principle that parkland is impressed with a public trust [note omitted] requiring legislative approval before it can be alienated or used for an extended period for non-park purposes [citations omitted].").

77. *Id.*

78. *Id*. at 630.

79. *Id.* at 629-30.

80. *Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 631 (2001) (noting as relevant to the decision the scale of construction, multi-year disruption of access for more than five years, and inhibition of future uses by aboveground protrusions). The court found it unnecessary to consider the questions of any *de minimis* exception, or a completely underground facility. *Id.*

81. *Williams v. Gallatin*, 229 N.Y. 248, 253-54 (1920). *See supra* notes 66-70 and accompanying text.

82. *See* definition of alienation, *supra* note 38.

83. *See* Tina Kelley, *City to Consider Two Sites for Plant to Filter Water*, N.Y. Times, Dec. 13, 2001, at D3 (reporting that the city had identified two other sites for a WTP, and suggesting that passage of approval by the state legislature for the Van Cortlandt Park site was "highly unlikely" in such a contentious battle).

84. Interview with Alison Wenger, Director of Government Relations, DPR, in The Arsenal, Central Park, New York City (July 23, 2001).

85. N.Y. State Office of Parks, Recreation, and Historic Preservation, Guide to the Alienation or Conversion of Municipal Parklands 9 (revised 1990) [hereinafter "State Guide to Alienation"].

86. *See id*. at 8 (policy of State Office of Parks, Recreation and Historic Preservation to encourage substitution of parkland; requirement cannot be waived for parkland funded by state bonds).

87. *See id. See also, e.g.*, N.Y. Ch. 497 (McKinney 1998) (authorizing discontinuance of a small portion of Verdi Park in Manhattan taken by the 72nd Street subway station expansion in exchange for replacement land and improvements); N.Y. Ch. 341 (McKinney 1994) (authorizing Waverly in Franklin County to use parklands for a sewage line easement on condition that the ground surface be restored for park use and consideration paid for park improvements).

88. Interview with Alison Wenger, *supra* note 84.

89. *Id.*

90. The proposed WTP in Van Cortlandt Park demonstrates that a controversial use of parkland can meet all the regulatory requirements but not garner the political support necessary to pass a bill through the state legislature. *See* Kelley, *supra* note 83; Rizzo, *supra* note 9.

91. *See* N.Y. Laws Index (McKinney 1990-2000) (listing under "Parks and Recreation" statutes for park discontinuance, transfer, easements, sale, deaccession, and imposition of admission fees).

92. *See* State Guide to Alienation, *supra* note 85, at 5 (noting that a legislative action only gives authorization but does not accomplish a transfer).

93. State Environmental Quality Review Act (SEQRA): N.Y. Envtl. Conserv. Law § 8-0101 *et seq*. Codified at N.Y. Comp. Codes R. & Regs., tit. 6, § 617 (N.Y.C.R.R.). *See Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency*, 646 N.Y.S.2d 741, 747-48 (4th Dep't 1996) (holding that under SEQRA environmental review must be carried out by the agency responsible for undertaking, funding, or approving an action and reciting the necessary standard that the agency take a "hard look" at areas of environmental concern).

94. *See* Michael B. Gerard, *Ten Years of SEQRA Litigation: A Statistical Analysis*, N.Y.L.J. Mar. 24, 2000 at 3 (reporting 10% to 30% of 635 SEQRA cases where plaintiffs won, 5 of 41 CEQR cases, 4 of 56 ULURP decisions, and 1 of 11 Fair Share decisions).

95. *See id.*

96. *See* 6 N.Y.C.R.R. § 617.7 (indicators of significant adverse environmental impact).

97. *See Scenic Hudson, Inc. v. Town of Fishkill Town Bd.*, 685 N.Y.S.2d 777, 780 (2d Dep't 1999) (holding that the purpose of SEQRA was to bring in evaluation of environmental impacts early in the decision and annulling a town zoning decision that did not consider environmental impacts).

98. *See* 6 N.Y.C.R.R. § 617.5(c) (Type II Actions).

99. 6 N.Y.C.R.R. § 617.4(b) (Type I Actions). *See also Scenic Hudson*, 685 N.Y.S.2d 777, 780 (finding that SEQRA requires an Environmental Impact Statement whenever authorization is given for an action that may have significant environmental impact).

100. 6 N.Y.C.R.R. § 617.6. *See also Omni Partners L.P. v. County of Nassau*, 654 N.Y.S.2d 824, 826 (2d Dep't 1997) (finding that when an Environmental Assessment for an upgrading of athletic facilities showed significant environmental impact possible that a full impact statement should be prepared and overturning the county planning commission negative determination). An EIS is required presumptively by a listed Type I action or when an EAF results in a positive determination. *Id.*

101. *See, e.g., United States v. City of N.Y.*, 96 F. Supp. 2d 195, 200 (2000) (recounting how public comments and hearings were held pursuant to SEQRA in the consideration of the Van Cortlandt Park WTP and reporting that despite numerous critical comments, approvals were granted). *Cf. Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 223, 227-28 (1980) (holding that federal environmental review did not impose substantive requirements but mandated that agencies follow the procedural steps).

102. *See, e.g., Cathedral Church of Saint John the Divine v. Dormitory Authority of the State of N.Y.*, 645 N.Y.S.2d 637, 640 (App. Div. 3d Dep't 1996). The appeals court reviewed a SEQR Declaration of Negative Impact by the respondent state agency for an expanded nursing home facility next to city land that the petitioner claimed was a park. *Id*. at 639, 642. It was a N.Y. Civil Practice Law & Rules Art. 78 (CPLR) proceeding; the standard of review was "whether the determination was arbitrary and capricious or an abuse of discretion." *Id*. at 640. The court affirmed the agency determination that no EIS was required. *Id*. Judicial review of actions of agency administrators and officers of state and local government is conducted pursuant to CPLR § 7801-06 (McKinney 2001-02) and the statute relative to the agency. *Id.*

103. *See Douglaston and Little Neck Coalition v. Sexton*, 535 N.Y.S.2d 634, 635-36 (App. Div. 2d Dep't 1988) (rejecting, because the four-month statute of limitations had expired, a CPLR Art. 78 claim that SEQRA and ULURP reviews were deficient). *See* CPLR § 217 (McKinney 2001-02).

104. *See* Michael B. Gerrard, *A Review of 2000 SEQRA Cases*, N.Y.L.J. Mar. 23, 2001 at 3 (reporting that the Court of Appeals consistently rules for government defendants in SEQRA cases).

105. *See id*. (statute of limitations often used to defeat plaintiffs' claims).

106. *See, e.g., Sierra Club v. Unites States Army Corps of Engineers*, 701 F.2d 1011, 1016, 1029-33 (2d Cir. 1983) (finding that an environmental review document was inadequate in a case brought by citizen and environmental activists). The ensuing delay ultimately meant that the proposed "Westway" high-speed road was not built along the west shore of Manhattan. *See* Robert V. Percival et al., Environmental Regulation; Law, Science, and Policy 896 (Aspen 2000) (noting that the resulting delay from the injunction of this decision led to abandonment of the Westway).

107. *See id*. (plaintiffs in year 2000 SEQRA cases included project applicants and not just environmentalists opposed to projects).

108. *See* Roy Rosenzweig and Elizabeth Blackmar, The Park and the People, A History of Central Park 493, 497, 512-13, 518-19 (Cornell Univ. Press 1992) (recounting recent history of Central Park, evolution of commissioners' concepts of park purposes and park uses allowed).

109. *See id.* at 493, 497.

110. If active recreation is the purpose, then ballfields are desirable uses. If nature conservation is the purpose for an area, then a ballfield is an encroachment.

111. *See Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 629-30 (2001) (relying almost exclusively on *Williams* in discussing park purposes and non-park uses).

112. Calvert Vaux, who handled the structure, was English and Frederic Law Olmsted, who designed the landscape, had been greatly influenced in his ideas about landscaping by a visit to England. *See* Rybczynski, *supra* note 60, at 86-87, 121, 161.

113. See Rosenzweig and Blackmar, *supra* note 108, at 5, 104, 107-08 (discussing initial conceptions of Central Park's function as landscape art that would reveal the hand of God in nature, a symbolic statement of "shared civic goals," and a rural tranquil "Eden.")

114. *See id*. at 136-39 (describing Vaux and Olmsted's slightly differing conceptions of how to manifest democracy in the public park).

115. *See* The New Encyclopedia Britannica v. 9 at 156 *Park* (1994) (describing the original park concept as a romantic green open space to escape from the industrialized city to more healthful

open air). "The primary purpose was to provide passive recreation—walking and taking the air in agreeable surroundings reminiscent of the unspoiled country." *Id.*

116. *Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234, 239-40 (1871) (describing the work and expense in altering and improving the natural processes of the landscape).

117. *See* Rosenzweig and Blackmar, *supra* note 108, at 104 (characterizing "popular eclecticism" as an early competing vision of how Central Park should function).

118. *See id.* (listing uses proposed by advocates of the park as profit-generating pleasure garden).

119. *See Williams v. Gallatin*, 229 N.Y. 248, 253-54 (1920).

120. *See id*. The Court of Appeals in *Williams* lists these park uses. *See supra* note 69 and text accompanying.

121. *See Williams*, 229 N.Y. 248, 253-543.

122. *See* Rosenzweig and Blackmar, *supra* note 108, at 309 (boat rentals, pony rides, concerts, sail boats, carousel).

123. *See id*. at 315.

124. *See id.* at 357.

125. *See id.* at 345.

126. *See id.* at 399.

127. *See id.* at 312 (relating how active sports began to be allowed in parks).

128. *See* Rosenzweig and Blackmar, *supra* note 108, at 312.

129. *See id*. at 251.

130. *See id*. at 392-93 (recounting how this view was led by progressive reformers promoting play programs for children).

131. *Id.*

132. *See* Robert Caro, The Power Broker 7 (1975) (enumerating 658 playgrounds, 288 tennis courts, and 673 baseball diamonds built during his tenure).

133. *See id*. at 368-85 (reciting the money and accomplishments during just Moses' first year as commissioner in 1934).

134. *See* Rosenzweig and Blackmar, *supra* note 108, at 314-15, 391 (political functions in parks limited to labor picnics in Central Park as well as athletic/patriotic/historical pageants).

135. *See id*. at 489.

136. *See id*. at 495-97 (describing the conflict between Mayor Lindsay's efforts to open parks for gatherings and the park commissioner's goal of providing a pleasure garden for residents).

137. *See id*.

138. *See* Kirk Johnson, *Return of the Natives: Playing God in the Fields*, N. Y. Times, Nov. 12, 2000 at 37, 42 (describing Project X, an ecological restoration effort of the city DPR to replace invasive introduced plants with native ones). *Compare Williams*, 229 N.Y. 248, 253 (listing "mere open space" as a non-park use). New York City DPR started a special unit in 1984, the Natural Resources Group (NRG), for conservation purposes. The NRG has programs to support natural resource protection of high-quality natural areas in parks. See www.nyc.gov/parks/nrg.

139. Henry J. Stern, Commissioner, City of N.Y. Dep't of Parks and Recreation, *The Politics and Science of Managing New York City's Emerald Empire: Sustaining Our City's Ecosystem in Blue Skies and Gray Clouds: Environment, Health and Economic Development in the New York Metropolitan Region*, Science in Society Policy Report SIS #D4 at 13-17 (1999) (describing DPR habitat restoration goals and accomplishments).

140. *See* City of N.Y. Parks and Recreation, Natural Resources Group, *The Rare Plant Propagation Project* 3 (2001) (describing efforts since 1984 for "protection, acquisition and restoration of the city's diverse natural resources").

141. *See* DPR, Biennial Report 35-40 (2000-2001) (listing afterschool programs, computer resource centers, and many education programs); Dep't of Citywide Administrative Services (DCAS), Green Book, Official Directory of the City of N.Y. 274 (2001-2002) (listing DPR special programs for seniors, teenagers, pre-schoolers, the disabled, and homeless).

142. *See supra* notes 68-70 and accompanying text.

143. *See generally* 81 N.Y. Jurisprudence 2d §§ 37-44, 60-69 *Parks, Etc*. (2001).

144. The license would have to be for a permissible park use. *See* State Guide to Alienation, *supra* note 85, at 2.

145. *See* State Guide to Alienation, *supra* note 85, at 2. *See also* DPR Rules and Regulations, 56 Rules of the City of N.Y. § 1 *et seq.* (listing regulated uses and permitted activities) (also available online at www.nyc.gov/parks.

146. *See Davis v. New York*, 270 N.Y.S.2d 265, 269-70 (Sup. Ct., N.Y. Co. 1966) (citing *Williams v. Gallatin* and *795 Fifth Ave Corp*. in finding an indoor recreational facility a valid park use).

147. *See Campbell v. Hamburg*, 281 N.Y.S. 753 (1935) (dances); *Terrell v. Moses*, 163 N.Y.S.2d 770, 771 (App. Div. 1st Dep't 1957) (observing that the park commissioner can issue permits or licenses for a musical production but not a lease and dismissing a suit for lack of standing); *Shakespeare Workshop v. Moses*, 187 N.Y.S.2d 683, 684-87 (App. Div. 1st Dep't 1959) (finding that theater productions are a proper park use consistent with park purposes and reversing an order of the park commissioner that an unreasonably high admission be charged).

148. *See Williams v. Gallatin*, 229 N.Y. 248, 253 (1920).

149. *See Gushee v. City of N.Y.*, 42 A.D. 37, 41 (1st Dep't 1899); *795 Fifth Avenue Corp. v. City of N.Y.*, 15 N.Y.2d 221, 224-26 (1965) (holding that restaurants and cafes are established park uses and finding it reasonable for the park agency to decide on location and type).

150. *Cf. Freidberg v. New York*, 151 N.Y.S.2d 258 (1956) *aff'd* 153 N.Y.S.2d 541 (App. Div. 1st Dep't) (noting that some parking lots may be permissible in parks, while issuing an injunction to stop construction of one at Tavern on the Green in Central Park to allow a full trial).

151. *See Williams*, 229 N.Y. at 253-54.

152. *See Gushee*, 42 A.D. at 41, 48 (restaurant license).

153. *See Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234, 243 (1871). *See also supra* Section II.A.

154. *See Williams v. Gallatin*, 229 N.Y. 248, 250-51 (1920). *See also supra* discussion Section II.B.

155. *See Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 630-31 (2001). *See also supra* Section II.C.

156. *See Stephenson v. County of Monroe*, 351 N.Y.S.2d 232, 233-34 (4th Dep't 1974) ("mere speculation that one day people might ski down a mountain of garbage does not make it so"); *Village of Croton-on-Hudson v. County of Westchester*, 331 N.Y.S.2d 883, 884-85 (2d Dep't 1972) (disallowing diversion of twenty acres of public park as a waste disposal site).

157. *See Ackerman v. Steisel*, 480 N.Y.S.2d 556, 557-58 (2d Dep't 1985) *aff'd* 66 N.Y.2d 883 (ruling that storage of non-park vehicles for 25 and 14 years was not a temporary park use).

158. *See Tobin v. Hennessy*, 223 N.Y.S. 618, 620, 622 (Sup. Ct., Bronx Co. 1927) (finding that the reissuance yearly of the same permits was not temporary). "Pelham Bay Park is one of the beauty spots of our city, made so by God without the use of city money, and should be kept free and open for the unrestricted use of all people." *Id.*

159. *See In re Central Parkway*, 251 N.Y.S. 577, 579-80 (Sup. Ct., Schenectady Co. 1931) (observing that parks are held by a municipality in trust for the public by delegation and may not be used for non-park purposes).

160. *See Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495, 511-14 (Sup. Ct., Nassau Co. 1972) (public trust prevents restrictions to local inhabitants without legislative authority).

161. *See Lake George Steam Boat Co. v. Blais*, 30 N.Y.2d 48, 50-52 (1972) (disallowing a lease of village dock facilities to a private corporation, even though public facilities and function would be provided).

162. *See* State Guide to Alienation, *supra* note 85, at 2 (examples are sewer or water pipelines).

163. *See id.*

164. *See id*. at 3.

165. City of N.Y. Parks and Recreation, Biennial Report 2000-2001 at 5-53 [hereinafter "DPR Biennial Report"] (listing DPR activities providing: work experience for welfare recipients, environmental restoration, Greenstreets program, maintenance of parks, raising funds, education programs, development of Greenway paths, preservation of historic structures, planting and maintenance of street trees, contracting for food concessions, recreational activities, providing computer centers, partnering for summer concerts and sports events, hosting art exhibitions, and many special events such as an easter egg hunt and cultural festivals). See also DPR Web site at http://nycparks.completeinet.net.

166. Sporting events, educational programs, product launches and publicity, fund-raising events, concessions, historic house museums, restaurants, gas stations, art exhibits, theater, active and passive recreation, as well as "First Amendment activities" such as religious talks and political petitioning.

167. *See generally Miller v. City of N.Y.*, 15 N.Y.2d 34, 36-38 (1968) (finding a license document functionally to be a lease alienating park property because it conferred exclusive right to use park land for twenty years with the rental fee).

168. *See, e.g.*, *Tompkins v. Pallas*, 47 Misc. 309, 309-12 (Sup. Ct., N.Y. Co. 1905) (analyzing whether a license granted in Bryant Park for advertising was a park use consistent with park purposes). The court in *Tompkins* seemed to find the messages rather than the signs themselves objectionable to park purposes, describing them as advertisements for "cheap cigars and Russian teas, of Irish whiskey and Geneva gin, of a hair restorative and a complexion balm, of horses and automobiles, of shore dinners and pawnshops, of wall papers and hose supporters, of rye whiskey and headache powders, of chiropodists and chemists, and of various other trades and commodities." *Id*. at 310.

169. DPR Biennial Report 15-20, 25-29 (2000-2001) (describing various contracts entered into by the agency: capital project renovations, requirements contracts, privatizing of parks vehicles, multi-year food service concessions, special events permits, and partnership agreements).

170. *See In re Ford*, 369 N.Y.S.2d 855, 857-58 (App. Div. 3d Dept 1975) *aff'd* 39 N.Y.2d 1000 (finding a license and not an easement of passage after the City of N.Y. had purchased watershed riparian rights through eminent domain). "This right, being a mere personal privilege giving authority to do acts on the lands of another, did not create any interest in the land itself, and thus constituted a license. . . ."

171. *See Tobin v. Hennessy*, 223 N.Y.S. 618 (Sup. Ct., Bronx Co. 1927).

172. *See Miller v. City of N.Y.*, 15 N.Y.2d at 38 (finding that a clause reserving the right to revoke for paramount park purposes was not an adequate "terminable at will clause," and the agreement was more properly an impermissible lease alienating parkland); *Gushee v. City of N.Y.*, 42 A.D. 37, 37-39, 48-49 (1st Dep't 1899) (finding that the Parks Dep't had discretion to grant and terminate licenses, but that the Parks Dep't had acted arbitrarily, capriciously and not in good faith in prematurely ending the restaurant license).

173. *See Theater Festival, Inc. v. Moses*, 181 N.Y.S.2d 364, 366 (Sup. Ct., N.Y. Co. 1958) (noting that "in the absence of clear and convincing proof that a public official has acted arbitrarily, unreasonably, or capriciously, his action will be sustained" in upholding Commissioner Moses' decision to stop summer theater productions on an off-season ice rink); *Shakespeare Workshop v. Moses*, 187 N.Y.S.2d 683, 684-87 (App. Div. 1st Dep't 1959) (refusing to allow the Commissioner's imposition of an unnecessarily high fee on free theater performances as being arbitrary and capricious and serving no useful park purpose).

174. *See Port Chester Yacht Club v. Village of Port Chester*, 507 N.Y.S.2d 465, 467 (App. Div. 2d Dep't 1986) (overturning the lower court's summary judgment finding invalid a lease of village parkland to a nonprofit membership corporation).

175. *See id.* (asking whether the lease for a dock served a public purpose).

176. *See Johnson v. Town of Brookhaven*, 646 N.Y.S.2d 180, 181 (App. Div. 2d Dep't).

177. *See id*.

178. Interview with Laura LaVelle, Assistant Counsel, City of N.Y. Dep't of Parks and Recreation (DPR), in The Arsenal, Central Park, New York City (Oct. 30, 2001). *See also* Harnik, *supra* note 48, at 10, 13 (various park contractual arrangements brought $36 million to the city in one year).

179. Interview with Laura LaVelle, *supra* note 178.

180. *See, e.g., Resolution of the Board of Estimate of the City of N.Y., Consolidated Edison Co. of N.Y.*, J. Proc. Board Estimate vol. V Cal. No. 192 (May 23, 1964) (granting consent to the Consolidated Edison Co. of N.Y., Inc. to construct, maintain and use a fuel oil pipeline near promenade in East River Park in Manhattan). *See also* Barbara Stewart, *Park Emerging From a Nightmare*, N.Y. Times, Aug. 1, 2001 at B1, 7 (describing how, in 1968, Columbia University started to construct a gymnasium in a leased area of Morningside Park and was stopped by protests of nearby residents).

181. *See 795 Fifth Avenue Corp. v. City of N.Y.*, 15 N.Y.2d 221, 225 (1965) ("The Park Commission is vested by law with broad power for the maintenance and improvement of the city's parks . . .").

182. *See United States v. City of N.Y.*, 96 F. Supp. 2d 195, 200 (E.D.N.Y. 2000) (city agencies all supported park location as not requiring legislative approval, despite state attorney general's opinion that parkland would be alienated).

183. *See, e.g., Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234, 234 (1871) (suit by citizen against park commissioners); *Williams v. Gallatin*, 229 N.Y. 248, 248 (1920) (suit by citizen against commissioner); *Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 623 (2001) (suit by citizen individuals, citizen groups, state and federal government against the city, city agencies, the mayor, and commissioners).

184. *See* Caro, *supra* note 132, at 1-21 (contending that Moses' effective control lasted from 1924 to 1968). *See also* Harnik, *supra* note 48, at 12-13 (detailing the expansion of the park system under Moses).

185. *See* Barbara Stewart, *Hunger for Parkland of All Kinds*, N.Y. Times, Sept. 11, 2001 at B1 (noting that Robert Moses added the most park acres to New York City and built the modern park system).

186. *See, e.g.*, Caro, *supra* note 132, at 534-38 (describing West Side Highway placement in parks).

187. *See, e.g.*, *id.* at 374, 399, 614, 825 (describing how Moses created a restaurant concession in Central Park and let it to "cronies for favors").

188. *See, e.g.*, *Resolution of the Board of Estimate of the City of N.Y., Dep't of Parks, Approval . . . of $28,836,640 . . . for Construction of Shea Stadium*, J. Proc. Board Estimate, Cal. No. 258 (Apr. 23, 1964).

189. *See, e.g.*, Caro *supra* note 132, at 338, 678-83 (describing Moses' demolition of the Central Park Casino and attempted destruction of Fort Clinton in Battery Park).

190. *See, e.g.*, *id.* at 318 (describing some of the many ways that Moses discriminated against African Americans in parks).

191. *See, e.g., Wetter v. Moses*, 86 N.Y.S. 2d 110 (Sup. Ct., N.Y. Co. 1941) (finding that Moses had authority to close the Battery Park Aquarium for construction of the Brooklyn-Battery Tunnel).

192. *See* Barbara Stewart, *A Reclaimed Park is Due in Fall 2002*, N.Y. Times, Nov. 25, 2001 at A41 (recounting how a park that had been illegally paved over by Robert Moses for construction without approval of the State Legislature was reclaimed through a suit by neighbors decades later). *Cf.* Harnik, *supra* note 48, at 13 (telling how Moses tried to run a highway through Washington Square Park).

193. The New York City Charter and Rules of the City, for example, define a park as a facility under the jurisdiction of the DPR. New York City Charter § 533 (2001); 56 RCNY § 1-02 (2001). Community gardens are an example of a situation where the existence of dedicated parkland has been contested. *See, e.g.*, Stephen C. Kass and Jean M. McCarroll, *Environmental Justice and Community Gardens*, N.Y.L.J. Aug. 27, 1999 at 3; Seth Kugel, *Young Protestors Think Globally and Act Locally to Save a Garden*, N.Y. Times, Feb. 10. 2002, Section 14 at 7 (reporting on a city conflict over a garden, which some community members and supporters claim is a protected park "Greenthumb" property, while a local nonprofit plans to use the lot for urban renewal housing). *See also* Harnik, *supra* note 48, at 15 (recounting the conflicts over community gardens in New York City).

194. *See* 81 N.Y. Jur. 2d *Parks, Etc*. § 1 (citing *Williams* and others: "[A] park is a pleasure ground set apart for the recreation of the public to promote its health and enjoyment.").

195. *See, e.g.*, *Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495, 504-07 (Sup. Ct., Nassau Co. 1972) (laying out the necessary elements for a park dedication); *Angiolillo v. Town of Greenburgh*, 735 N.Y.S.2d 66 (A.D. 2d Dep't 2001) (finding no dedication, express or implicit, of parkway land).

196. 49 U.S.C. § 303 (1994). The section in question is still called "Section 4(f)," although it was codified as 49 U.S.C. § 303 "Policy on lands, wildlife and waterfowl refuges, and historic sites."

197. *See, e.g.*, Caro, *supr*a note 132, at 534-35 (describing how Moses ran the Henry Hudson Parkway through Riverside Park, Fort Tryon, Inwood Hill, and Van Cortlandt Parks in 1934 to save money and get "free labor").

198. Although Olmstead and Vaux had begun the use of parkway design in America in Brooklyn in 1858, and 38 miles of parkway were built in the city from 1860 to 1910, Robert Moses built 416 miles of parkways around New York City after 1920. *See* Rybczysnski, *supra* note 60, at 281-83; Caro, *supra* note 132, at 8.

199. *See, e.g.*, Greg Wilson, *Happy Trails for the Bronx*, Daily News April 23, 2001 1CN (describing a nature trail built in Van Cortlandt Park that must traverse three highway roads).

200. N.Y. 24 A Public Authorities Law §§ 553-57 (Consolidated).

201. *Id*. § 557-a(3).

202. *Id*. § 557-a(5).

203. *See* Caro, *supra* note 132, at 625-31 (describing how Moses, "the best bill drafter in Albany," wrote amendments granting himself as head of TBTA almost unlimited funding and power).

204. *See* DPR Web site at http://nycparks.completeinet.net (listing parks partners); Harnik, *supra* note 48, at 11-12.

205. *See, e.g.*, City of N.Y. Parks and Recreation, Biennial Report (1998-1999) (listing partnerships with: City Parks Foundation, Central Park SummerStage, Partnerships for Parks, foundation grants, Randall's Island Sports Foundation (with support of Michael Bloomberg), Historic House Trust, historical sign volunteers, various park conservancies). *See also* Lynda Richardson, *From a Room With a View, Going to Bat for Parks*, N.Y. Times, Nov. 8, 2001 at D2 (interviewing the new executive director of the City Parks Foundation, a "non-profit group that raises money to restore neighborhood parks." The non-profit group's offices are in the Arsenal, headquarters of the City Parks Dep't and site of the 1920 *Williams* case.)

206. *See* Roy Rosenzweig and Elizabeth Blackmar, The Park and the People, A History of Central Park 330, 484-86, 508 (1992) (describing three different eras where private donations were relied on in Central Park); Harnik, *supra* note 48, at 11-12 (giving a brief history of New York City park philanthropy).

207. *See* Ira Milstein, *City Can't Afford to be Stingy With Parks*, Daily News, April 22 2001 at 45 (reporting that the DPR budget has been cut by almost 70% in 25 years and arguing for an increase). The parks budget used to represent 1% of the city budget and now represents four-tenths of a percent. *Id. See also* Harnik, *supra* note 48, at 14 (inflation-adjusted public spending on city parks fell by 31% from 1987 to 1996).

208. *See, e.g.,* Seth Kugel, *In Washington Heights, Residents Wake Up, Smell the Roses and Save a Garden*, N.Y. Times, Dec. 2, 2001, Section 14 at 8 (Fort Tryon neighborhood residents raised $60,000 to help city get a grant).

209. *See* DPR, Biennial Report 26-31 (2001-2002) (describing partnerships).

210. *See* Jennifer Steinhauer, *Bloomberg Passes Hat, Aiming at Corporate Help*, N.Y. Times, Feb. 6, 2002 at A1, B6 (reporting that Mayor Bloomberg is asking corporations to help with the city's $4 billion deficit). DPR is used as an example of a city agency that works with corporations. *Id.*

211. *See* Harnik, *supra* note 48, at 16 (listing park partnerships involving Donald Trump, Riverbank State Park above a Harlem sewage treatment plant, Prospect Park-private foundation, and Bronx River-state department of transportation).

212. *See, e.g.,* David W. Dunlap, *Going Downtown, Downstream*, N.Y. Times, Dec. 10, 2001 at F1, F6 (describing how Riverside Park South was paid for by a development consortium including Donald Trump); Rosenzweig and Blackmar, *supra* note 206, at 208-09 (describing how developers are given additional height authorization in return for terraces and plazas around high-rise buildings in Manhattan).

213. See Dunlap, *supra* note 212, at F1, F6 (describing the Riverside South Planning Corporation).

214. *See, e.g.,* Rosenzweig and Blackmar, *supra* note 206, at 263-66 (describing political factions in the governing body of the 1880s city parks department).

215. *See* Harnik, *supra* note 48, at 15 (describing how Hudson River Park is not owned by DPR but by a state-chartered authority which must juggle interests of developers, citizens, and commercial ventures in the park.)

216. *See id.* at 523 (asking who decides for Central Park).

217. *See, e.g.*, Terry Pristin, *Bryant Park Agency Replaces Kiosk Operators*, N.Y. Times, Feb. 22, 2002 at B3 (reporting on an abrupt decision by the business group that oversees Bryant Park to replace concession operators). Bryant Park in mid-town Manhattan is an interesting example of the dilemma. Although it is a city park, it is funded largely through the Bryant Park Restoration Corporation and run by the Bryant Park Management Corporation. Bryant Park Restoration Corporation, *Garden Notes* (Summer 2001). 500 Fifth Ave., Suite 1120; New York, NY 10110, online at www.bryantpark.org. Uses of Bryant Park include movies, concerts, fashion shows, several food concessions, passive recreation, a traveling circus, and cultural festivals. *Id.* The Restoration Corporation raised funds to rehabilitate the dilapidated park from abutting property owners, the city, private donations, a bank loan, and park concessions. *See* Harnik, *supra* note 48, at 12. Ongoing management of the park is funded by rental fees, assessments from abutters, and in-kind entertainment contributions. *Id.*

218. *See* Rosenzweig and Blackmar, *supra* note 206, at 529-30 (arguing that in Central Park the "sovereign public" has "surrendered its commitment to provide free, well-maintained public spaces and has lost a measure of control over its most important public space").

219. *See* Denny Lee, *Washington Sq.: First in Their Hearts*, N.Y. Times, Feb. 3, 2002 at Section 14, p. 3 (suggesting that private conservancies may not be successful in poor areas).

220. *See id.* at 498 (describing 1960s parks commissioner regretting that making decisions had become so slow and cumbersome).

221. *See* David Slade et al., Putting the Public Trust Doctrine to Work 345 (1990) (describing how limiting public trust shore enforcement to the courts results in inconsistent results and gaps in the doctrine's application). *Cf.* Gionfriddo, *supra* note 19 (describing how the judiciary has, in some cases, stifled citizen public trust suits).

222. *See* Slade, *supra* note 221, at Appendix I (describing the evolution of Massachusetts public trust doctrine protections of shorelines, from the courts, to a one-page statutory codification, to a "sixty-page comprehensive regulatory program"). Other states have implemented broader environmental statutes modeled on the public trust. *See supra* notes 18-19 and accompanying text.

223. *See* Jack H. Archer et al., The Public Trust Doctrine and the Management of America's Coasts 165 (1994). "In Massachusetts, the judiciary, the legislature, and various administrative bodies have alternated over the last three centuries in taking the lead to develop and apply the public trust doctrine, but with limited overall coordination. . . . [I]t is only in the last twelve years that this solid but fragmented legal base for the public trust doctrine has been codified and coherently restructured so that the doctrine can be effectively and consistently implemented. . . ." *Id.*

224. *See, e.g.*, 36-B N.Y. Parks Rec. & Hist. Preserv. Law § 15.09 (McKinney 1972) ("Lands acquired by a municipality with the aid of funds . . . [shall not be] used for other than public park and related purposes without the express authority of an act of the legislature.").

    36-B N.Y. Parks Rec. & Hist. Preserv. Law § 17.09 (McKinney 1972) ("Real property acquired or developed by a municipality with the aid of funds made available pursuant to this article shall not be sold or disposed of or used for purposes other than public park, marine, historic site or forest recreation purposes without the express authority of an act of the legislature.").

    54 N.Y. Envtl. Conserv. § 0909 (1993) (restriction on alienation).

225. Parks Rules and Regulations, 56 Rules of the City of N.Y. (2000).

226. *Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 631 (2001) ("While there may be *de minimis* exceptions from the public trust doctrine, the magnitude of the proposed project does not call upon us to draw such lines in this case.").

227. *See* Kevin A. Bowman, Comment: *The Short Term Versus the Dead Hand: Litigating Our Dedicated Public Parks*, 65 U. Cin. L. Rev. 595, 616-17, 642 (1997) (emphasizing that the nature of estate and terms of dedication control future park uses and stressing the need for a coherent law of public dedication).

228. N.Y. Const. Art. 14 § 1 (formerly Art. 7 § 7).

229. *Id.* "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild lands."

230. *Id.* See subsequent amendments.

231. *See id.* McKinney's "Notes of Decisions."

232. *See* N.Y. Env. Conserv. Law §§ 9-0301 *et seq.*, 71-0701 *et seq.*

233. Some observers, however, maintain that the state "Forever Wild" protections in the Adirondack Park were too heavy-handed and caused a backlash. *See* Patricia E. Salkin, *The Politics of Land Use Reform in New York: Challenges and Opportunities*, 73 St. John's L. Rev. 1041, 1044, 1050 (1999).

234. *See* DPR Natural Resources Group map: *Forever Wild: Preserving New York City's Natural Areas* (available at DPR Web site at http://www.nycgovparks.org/sub_about/parks_divisions/nrg/nrg_forever_wild_splash.htm). *See also*, Maura E. Lout, *Forever Wild in New York City: What's With the New Signs?*, The Urban Audubon (New York City Audubon Society, New York, N.Y.) Mar. 2002 at 4 (describing the new city Forever Wild program and contrasting it to the state program).

235. *Id.*

236. *See* Jack Archer et al., The Public Trust Doctrine and the Management of America's Coasts 35-50 (discussing analogies of the public trust doctrine to trust law and legislative delegation of public trust responsibilities).

237. *See* Black's Law Dictionary at 1525 (7th ed. 1999) (definition of *ultra vires*); N.Y. Jur. 2d Counties, etc. § 175 (2001) (City Charters). *See also* William F. Fox, Jr., Understanding Administrative Law 42 (4th ed. 2000) ("*Ultra vires* asks whether an agency is functioning within its statutory powers.").

238. *See* Fox, *supra* note 237, at 42 (explaining that an agency enabling act should set scope of authorization).

239. *See id.* (reporting that *ultra vires* challenges to agency actions are more common than non-delegation challenges, and that occasionally the *ultra vires* cases succeed); Archer, *supra* note 236, at 46.

240. *See* Archer, *supra* note 236 at 35. "Given the consensus that states hold public lands in trust for the benefit of the public, and the dearth of cases which have addressed the obligations and responsibilities of the state as trustee, it is both reasonable and instructive for states and coastal managers to look to private and charitable trust law for guidance in determining their rights and obligations as trustees." *Id.*

241. *See* Black's Law Dictionary at 1519 (7th ed. 1999) (definition of trustee).

242. *See* David Slade et al, Putting the Public Trust Doctrine to Work 325-30 (1990).

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THE MINEFIELD
The Sarbanes-Oxley Act and Multijurisdictional Practice: Two New Concepts in Lawyer Regulation and Their Implications for Environmental Lawyers

Part I

By Marla B. Rubin

With the Sarbanes-Oxley Act of 2002[1] and the consensus for the need for rules allowing and governing multijurisdictional practice, the states' virtual monopoly on lawyer regulation will come to an end. This column addresses the Sarbanes-Oxley Act. The next column will address new rules governing multijurisdictional practice, as well as attorney regulation rules that will be promulgated soon under the Sarbanes-Oxley Act.

"Like most legislation enacted in haste (anyone remember CERCLA?), Sarbanes-Oxley is fraught with unclear terms and conditions most likely to be resolved in court."

The impetus for the Sarbanes-Oxley Act was the proliferation of business scandals that resulted in major losses for stockholders of a number of large companies and for the various pension funds that had invested in those companies. It was passed in almost-record time, and almost unanimously by both the Senate and the House. It was signed into law on July 30, 2002. It applies to publicly traded companies. Section 307 of the Act requires the Securities and Exchange Commission (SEC) to promulgate (1) rules setting forth minimum standards for attorneys practicing before the SEC, and (2) a rule requiring attorneys to disclose to a company's chief legal officer or chief executive officer evidence of a "material violation of the securities laws, a breach of fiduciary duty, or other similar SEC violations." If there is no "appropriate response" to the attorney's report, the attorney is required to report the evidence to an audit or similar committee of a company's Board of Directors, which committee is mandated by Sarbanes-Oxley, or to the Board of Directors itself. The rules are due out by January 23, 2003. There are criminal sanctions for violation of these rules.

Obviously, SEC rules for attorney professional conduct do not directly apply to environmental practitioners. However, the impact of these rules on in-house counsel and outside business counsel will affect the relationships with, and demands made on, environmental counsel. Skeptical as it may sound, those criminal penalties may spur general counsel and in-house attorneys to examine environmental reporting with extreme scrutiny.

Like most legislation enacted in haste (anyone remember CERCLA?), Sarbanes-Oxley is fraught with unclear terms and conditions most likely to be resolved in court. Unfortunately, while attorneys are guessing how to interpret their duties under the statute, the price of an incorrect guess could be imprisonment and/or major fines. For example, attorneys must make the "up-the-ladder" disclosure if they are in possession of "evidence" of a "material" violation of securities laws. If they do not receive an "appropriate" response on the first rung, they must elevate the reporting.

The statute does not define "evidence," "material," or "appropriate." Even more confusing is the duty to report breaches of fiduciary duty. Which duty? Does the breach have to be material? Why is disclosure required for "material" breaches of SEC rules, and, seemingly, any breach of fiduciary duty? What standards or definitions should an attorney apply—the federal standards or definitions, or those of the attorney's state of admission?

What is evident is that in-house counsel are under tremendous pressure to tell not just the truth, but the whole truth. To the extent that environmental matters are considered in public reports like 10-Ks and annual reports, the work of environmental counsel will be reviewed not only for truthfulness, but for potential violations of the Sarbanes-Oxley Act. This puts environmental counsel in an interesting juxtaposition. While we know that our "client" is the organization, our dealings with client personnel can be intensely personal,

particularly after a lengthy professional relationship. We may not have lost sight of the identity of our "client" in preparing our input into securities filings, but we have been responsive to the objectives of the people we actually work with. Short of apparent fraud, we will work with an eye toward accomplishing the objectives they give us. Generally, we do not stop to consider objectively the impact of our work, in tandem with corporate personnel, on the corporation. It is not an incorrect or unethical assumption that corporate personnel are working in the corporation's best interests. It may, however, be a dangerous assumption. If a stated public report would be a breach of either securities law or a corporation's fiduciary duty to its stockholders, and one source of the report is you, the environmental attorney, you may be in violation of Sarbanes-Oxley. As one commentator bluntly stated: "Lawyers cannot escape their role in giving assistance to corporate wrongdoers by hiding behind their ability to craft a clever phrase to circumvent what they know to be the right answer."[2]

Scholars and others are debating whether the Sarbanes-Oxley duty to report violates the rules on client confidentiality.[3] Since the reporting requirement is "up-the-ladder" within a corporation, and not to the SEC itself, the attorney representing a corporation is not breaching any confidences by reporting wrongdoing to those in corporate governance. It is interesting to note that this reporting requirement resembles that in Model Rule 1.113, adopted in New York as DR- . However, these rules are not as specific; and they are not federal law with criminal sanctions.

This introduction to Sarbanes-Oxley, a major federal incursion into regulation of attorney conduct, merely sets the stage for the next discussion. The attorney conduct rules that will be promulgated under Sarbanes-Oxley and the states' handling of multijurisdictional practice rules will be the subject of the next column, examining fundamental changes in attorney governance and the practice of law.

Endnotes

1. Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong.
2. Pitt on Attorney Accountability, *N.J.L.J.*, Sept. 2, 2002.
3. *See, e.g.*, Michael Prounis, "The Impact of the Sarbanes-Oxley Act: If You Can't Teach An Old Dog New Tricks, You May Have to Visit Him At The Pound," *The Metropolitan Corporate Counsel, Northeast Edition*, Sept. 2002; Simon Lorne, "Sarbanes-Oxley: The Pernicious Beginnings of Usurpation?," *Wall St. Lawyer*, Sept. 2002, vol. 6, p. 1.

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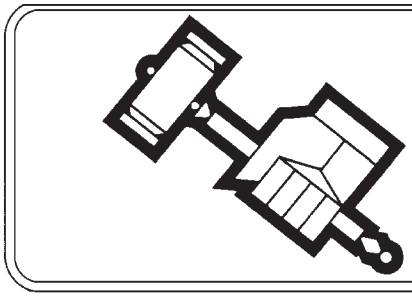

Administrative Decisions Update

Prepared by Peter M. Casper

CASE: ***In the Matter of Application for a Mined Land Reclamation Permit (MLRP) pursuant to Article 23 of the Environmental Conservation Law (ECL), for a proposed mine in the Town of Erwin, Steuben County by Dalrymple Gravel & Contracting Company, Inc. ("Applicant").***

AUTHORITIES: ECL, Article 23 (Mined Land Reclamation Permit) (MLRP)

ECL, Article 8 (SEQRA)

N.Y. Comp. Codes R. & Regs. tit. 6, § 617 (N.Y.C.R.R.)
(SEQRA Regulations)

DECISION: On September 24, 2002, New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty ("Commissioner") issued an interim decision with respect to appeals from the Issues Ruling ("Ruling") of Administrative Law Judge (ALJ) Richard R. Wissler on, among other things, inadequate noise and alternative site studies for the above referenced permit application. As discussed in greater detail below, the Commissioner determined that the Applicant's placement of noise receptors may have misrepresented the noise impacts from the mine on the nearby hamlet of Coopers Plains, and as such the issue must be adjudicated. The Commissioner also determined that the Draft Environmental Impact Statement (DEIS) failed to adequately evaluate alternative sites, specifically a 220-acre parcel of property in which the Applicant had an option to purchase during the DEIS process.

A. Facts

The Applicant proposed to mine unconsolidated sand and gravel from an approximately 94-acre area within a portion of its 212-acre parcel in the Town of Erwin, Steuben County. The Applicant proposed to excavate over a 20-year period in four phases removing an anticipated three million cubic yards of sand and gravel.

In connection with its proposal the Applicant applied for an MLRP from the DEC, which is the only permit required for the proposed project. On July 28, 2000, the DEC, as lead agency under the State Environmental Quality Review Act (SEQRA), determined that the project may have a significant environmental impact and issued a Positive Declaration requiring the preparation of a DEIS. On December 19, 2000, the DEC accepted the DEIS and issued a Notice of Complete Application.

The DEC held legislative hearings on March 27, 2001 and an issues conference on July 25, 2001. A voluntary association of residents known as the CPLA Against Gravel Mines (CPLA or "Intervenor") sought and was granted intervenor status. The ALJ advanced two issues for adjudication: (1) the noise generated by the proposed project; and (2) the sufficiency of the site alternatives analysis provided by the Applicant in the SEQRA process.

B. Discussion

Insufficient Noise Study

The ALJ determined that CPLA raised substantive and significant issues with respect to the noise impacts associated with the proposed mining activity. Specifically, CPLA argued that the Applicant placed noise monitoring receptors in locations away from the mine site, thus masking the anticipated noise level associated with the mining operations. CPLA also argued that the placement of the noise monitoring receptors was in clear violation of the DEC Policy and Guidance Memorandum entitled, "Assessing and Mitigating Noise Impacts" ("Noise Memorandum"). According to the Noise Memorandum, DEC protocols call for the placement of the receptors at the boundary of the Applicant's property or of contiguous property owners, neither of which the Applicant adhered to.

The ALJ determined, and the Commissioner agreed, that the placement of the monitoring receptors could misrepresent the ambient noise levels which provide the baseline for judging whether the mine's maximum noise levels exceed DEC standards. The Commissioner added that inappropriate placement of receptors could impact the ambient noise levels and, with that, put into question the sufficiency of the Applicant's mitigation of noise impacts. As such, the Commissioner determined that the validity of the noise data is a proper issue for

adjudication, given the requirements for minimizing noise impacts in the mining laws, regulations, DEC noise policy and SEQRA. The Commissioner also determined that noise issues associated with the topography of the site, as well as truck traffic, should be adjudicated as part of the proper ambient noise level issue discussed above.

Insufficient Alternative Site Analysis

Section 617.9(b)(5)(v) of the SEQRA regulations requires the Applicant to provide in the DEIS a description and evaluation of the range of reasonable alternatives to the mining action and limits the comparative assessment to sites owned by, or under purchase option by, the Applicant. The Applicant maintained a purchase option for a potential mining site in the Town of Campbell during the SEQRA review process for the Erwin site.

According to the ALJ, the DEIS contained only "cursory" and "inadequate" references to the Campbell site. The ALJ ruled that the references to the Campbell site in the DEIS were "speculative" and lacked the necessary "description" and "evaluation" to permit a comparative assessment of the alternatives discussed and therefore the Applicant failed to meet the requirements of section 617.9(b)(5)(v).

The Applicant also attempted to argue that the Campbell site is not an "alternative" site because the Applicant proposes to develop the two mines concurrently. The ALJ concluded that 6 N.Y.C.R.R. § 617.9(b)(5) does not excuse the requirement of the comparative assessment of two or more sites because a project sponsor is considering projects at both sites, and as such, the Applicant was required to evaluate the Campbell site as an alternative to the Erwin mine.

In affirming the ALJ's ruling, the Commissioner commented that SEQRA mandates that an EIS "evaluate all reasonable alternatives," and the Campbell site, which is located within two miles of the project site, is a reasonable alternative. The Commissioner clarified that the Applicant, like any other project sponsor, is charged with the responsibility under SEQRA of describing and evaluating the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the Applicant. In making her decision, the Commissioner determined that under normal circumstances the Applicant would have to consider other alternatives, such as technology, scale or magnitude; however, since the Intervenor has only put into issue the lack of analysis of an alternative site, the adjudication shall be limited to that issue.

Other Issues

The Commissioner also affirmed the ALJ's ruling that the Intervenor failed to adequately raise the issues of wetlands, endangered and threatened species and impermissible SEQRA segmentation. As such, these issues were not properly preserved for adjudication.

C. Conclusion

Based on the foregoing conclusions the Commissioner remanded the matter to the ALJ for further proceedings consistent with her decision.

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Recent Decisions in Environmental Law

Student Editor: Jason P. Capizzi

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

***Clean Air Mkt. Group v. Pataki*,** 194 F. Supp. 2d 147 (N.D.N.Y. 2002)

Facts: Acid deposition (acid rain) is an environmental problem caused when atmospheric sulfates and nitrates are deposited on the earth's surface. Sulfur dioxide and nitrogen oxides, which are emitted as byproducts from the combustion of fossil and industrial fuels, motor vehicles and electric utilities, *inter alia*, form the sulfates and nitrates. New York's status as a high source state (states in the Midwest and East with the highest emissions of sulfates and nitrates) coupled with the effect of atmospheric sulfates and nitrates that travel hundreds of miles from upwind states (states from which emissions travel and contribute to acid deposition in New York State) has caused several areas of New York, including the Adirondacks, to be highly susceptible to acid deposition.

Federal and State legislation have been passed in an effort to combat acid deposition. Title IV of the 1990 Amendments to the Federal Clean Air Act (CAA) created a "cap and trade" system, which set an annually decreasing cap on the sulfur dioxide emissions of electric generating units (EGUs).[1] Under the system, each EGU has a base allocation of allowances, the number of tons authorized for emission, set for each year. Allowances are freely tradable, or could be banked for use in subsequent years. An emission rate for nitrogen oxide was set for each source, but unlike sulfur dioxide, trading of allowances is not permitted. Title IV also reserved authority for the states to further regulate pollutant emissions and utility rates and charges. The Public Service Commission (PSC) regulates utility rates and service in New York.

In the Adirondacks the recovery from acidification under the Title IV scheme was lagging behind that of other parts of New York. The New York State Legislature in turn enacted the Air Pollution Mitigation Law[2] (APML) in May 2000 to "encourage New York utilities to protect sensitive areas from acid deposition and to 'make prudent revenue decisions regarding their participation in the federal allowance credit trading programs established' by Title IV."[3] The APML requires a written report of all sulfur dioxide allowance transfers to be made to the PSC. Additionally, an air pollution mitigation offset was to be assessed, equal to the amount received, to transfers made directly to, or which later became available for trade with, EGUs in upwind states. To avoid the offset, covenants restricting the transfer of allowances to EGUs in upwind states had to be attached. The restrictive covenants in turn reduced the value of the allowances in New York as compared to those in other states.

Plaintiff Clean Air Markets Group challenged the facial constitutionality of the APML as preempted by Title IV of the CAA, and as violative of the Interstate Commerce Clause of the United States Constitution. Defendants, Governor George E. Pataki, et al., moved for summary judgment, and plaintiff cross-moved for the same before the United States District Court for the Northern District of New York.

Issues:

1. Whether Title IV of the Federal Clean Air Act preempts the New York State Air Pollution Mitigation Law.
2. Whether the New York State Air Pollution Mitigation Law violates the Interstate Commerce Clause of the United States Constitution.

Analysis: Defendants argued that the APML was a permissible use of the state's police powers while plaintiff (an association which had standing because one of its members, NRG Energy, Inc., "suffered a diminution in value of its SO_2 [sulfur dioxide] allowances" as a result of the APML[4]) argued that the law went beyond police powers and created a conflict with the CAA. The court found that although the APML did not create a complete obstacle to compliance with the CAA, the imposed trading restriction hindered the execution of Congress' intended objectives. Geographic trading restrictions discouraging trades to upwind states were considered by Congress, but rejected for conflicting with Congress' intent to create a nationwide allowance market. Finding the APML to be in conflict with the CAA by interfering with its goal of air pollution control

via a "cap and trade" system, the court held that the APML was preempted as a matter of law.

Defendants also argued that the APML was not protectionist because it only affected intrastate trade, and under the *Pike* balancing test,[5] the state's interest in protecting the environment substantially outweighed the burden on interstate commerce. Plaintiff claimed that the APML was protectionist because it created a barrier to the interstate movement of a commodity—sulfur dioxide allowances. Alternatively, plaintiff argued that the APML failed the *Pike* balancing test because it did not accomplish its goal of reducing acid deposition.

The court found that the APML was protectionist because: it isolated New York from the national economy by blocking the flow of interstate commerce, and because it gave preferred treatment to allowances traded within the state. The court rejected defendants' argument that the APML also restricted intrastate commerce by lowering the value of allowances.

The court also noted that even if the APML was not a protectionist statute, it still would have failed the *Pike* balancing test. The goal of the APML was to reduce acid deposition in sensitive areas of New York State in order to protect both the environment and public health. The APML proposed to accomplish this goal by restructuring the sulfur dioxide allowance trading system. The court recognized that while the reduction of acid deposition to address concerns about the environment and public health is a legitimate goal, there was no connection between such and the proposed means to accomplish it. The APML did not guarantee that emissions would be reduced in the upwind states, which would continue to have high emissions by trading allowances with states other than New York. Furthermore, the court recognized the burden imposed on interstate commerce by the APML not to be inconsequential, and the local benefits of the APML to be tenuous at best.

The court found the APML to be unconstitutional for two reasons: because it was preempted by the CAA pursuant to the Supremacy Clause, and because it was in violation of the Interstate Commerce Clause. The court ultimately denied defendants' motion for summary judgment and granted plaintiff's cross motion for summary judgment.

Laura Del Vecchio '03

1. 42 U.S.C. § 7651o (2002).
2. N.Y. Pub. Serv. Law § 66-k (2002).
3. *Clean Air Mkt. Group v. Pataki*, 194 F. Supp. 2d 147, 154 (N.D.N.Y. 2002).
4. *Id.* at 156.
5. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

* * *

***Farmers Against Irresponsible Remediation v. United States Envtl. Prot. Agency*,** 165 F. Supp. 2d 253 (N.D.N.Y. 2001)

Facts: Two capacitor power plants, owned and operated by General Electric Co., located on the Hudson River (the "River") in Fort Edward and Hudson Falls, discharged between 209,000 and 1,330,000 pounds of polychlorinated biphenyls (PCBs) into the River from 1940 until 1977. The fear of widespread fish contamination was a primary concern stemming from the pollution, which resulted in several policies banning fishing and eventually the consumption of fish caught. The defendant, United States Environmental Protection Agency (EPA), placed a 230-mile stretch of the River on the National Priorities List for the Federal Superfund Program under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1984. A three-phase Reassessment Feasibility Study (RFS) by the EPA spanning eleven years concluded in December 2000 with the decision to remove the PCB-contaminated sediment at the bottom of the River.

Pursuant to 42 U.S.C. § 9617(a), the EPA sought public commentary regarding the conclusions derived from the RFS. A period of 120 days with forty public meetings was allotted for the public commentary. The plaintiff, Farmers Against Irresponsible Remediation (FAIR), submitted approximately 50 single-spaced pages of commentary in addition to oral comments offered at some of the meetings.

In July 2001, FAIR commenced this action, alleging that the EPA failed to disclose information regarding the locations of hazardous waste treatment plants, mines used to provide backfill material, and any highway and rail routes that might be used to implement its dredging decision. FAIR argued that the EPA's non-disclosure was in violation of their First Amendment rights, CERCLA provisions, the National Contingency Plan, and the National Environmental Policy Act (NEPA). FAIR sought both a declaratory judgment and a preliminary injunction preventing the EPA from issuing a final Record of Decision that memorializes the conclusions made in the RFS. The EPA filed a motion to dismiss based on a lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and that FAIR was not entitled to the specific relief they sought.

Issue: Whether the EPA's failure to provide information regarding the locations of hazardous waste treatment plants, mines used to provide backfill material, and any highway and rail routes that might be used to implement its dredging decision during a notice and commentary period violated the First Amendment to the United States Constitution, CERCLA or NEPA.

Analysis: The United States District Court for the Northern District of New York adopted a distinction between constitutional challenges to CERCLA itself and to particular removal or remedial actions.[1] The court reasoned that significant legislative history existed indicating that 42 U.S.C. § 9613(h)(4), passed as a part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), was created in order to prevent cleanup delays and to decrease response costs.[2] The jurisdiction of federal courts to hear certain CERCLA issues is limited under 42 U.S.C. § 9613(h):

> No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial actions selected . . . in any action except: (4) an action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken . . . was in violation of any requirements of this chapter. Such action may not be brought with regard to a removal where a remedial action is to be undertaken at that site.[3]

Therefore, the court reasoned that constitutional challenges to CERCLA itself were valid, but not pre-enforcement challenges to removal or remedial actions. As such, CERCLA claims would be valid only after the removal/remedial action was complete. In this way 42 U.S.C. § 9613 served as a catalyst for reaching the goals of CERCLA.

In their first cause of action, FAIR contended that their First Amendment rights were violated because the EPA refused to provide certain information during the notice and commentary period, and because FAIR felt that they were deprived a "public forum" to comment. The court reasoned that the quality of the RFS was a variable, and that the EPA issued a voluminous detailed report that satisfied 42 U.S.C. § 9617. Additionally, FAIR argued that they may never have an opportunity to comment in a public forum because 42 U.S.C. § 9617 does not extend into the "design" phase of the remedial action. Although the court agreed with this contention, it countered that Congress provided that "the forum must close . . . once the EPA issues its final remedial action plan,"[4] and that the court does not have the authority to change legislation. As such, the court concluded that FAIR's claims were not constitutional challenges to CERCLA itself, but rather to the EPA's administration of 42 U.S.C. § 9617. Therefore, these claims were actually challenges to a removal action, and are barred by 42 U.S.C. § 9613(h)(4). For this reason, the court dismissed FAIR's first cause of action based on a lack of subject matter jurisdiction.

In their second and third causes of action, FAIR challenged the sufficiency of the notice and analysis provided by the EPA. They claimed that the failure to provide information regarding the locations of hazardous waste treatment plants, mines used to provide backfill material, and any highway and rail routes violated 42 U.S.C. §§ 9617 and 9621(b)(1)(G). FAIR argued that this omission failed to satisfy 42 U.S.C. § 9617(a), which requires "that any notice and analysis published . . . must 'include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternate proposals considered.'"[5] However, the court followed the reasoning that 42 U.S.C. § 9613(h)(4) precludes any judicial review of these claims until the EPA commences dredging. As such, the court dismissed the second and third causes of action as well in light of the plain language and relevant case law.

FAIR argued in their fourth cause of action that NEPA was violated when the EPA failed to perform an Environmental Impact Study (EIS) in conjunction with the RFS. The court reasoned that since the main purpose of 42 U.S.C. § 9613(h) was to prevent interference with the cleanup process, it precludes any and all challenges to a removal/remedial action, and "not simply those brought under the provisions of CERCLA itself."[6] Therefore, the court concluded that the fourth cause of action was dismissed pursuant to 42 U.S.C. § 9613(h) because of its probable burdensome and counterproductive impact on the dredging project.[7] FAIR's fifth cause of action, which was based on alleged CERCLA violations by the EPA, was dismissed without prejudice to refile because neither party addressed the merits of the claim. Finally, FAIR requested in its sixth cause of action that it be granted declaratory relief based on the first five causes of action. Since the fifth cause of action was not sufficiently addressed in the motions, and the court had no jurisdiction to decide the first four causes of action, it dismissed the sixth cause of action as well.

William Deveau '04

Endnotes

1. *Farmers Against Irresponsible Remediation (FAIR) v. United States Envtl. Prot. Agency*, 165 F. Supp. 2d 253, 262 (N.D.N.Y. 2000); *see Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991).
2. *FAIR,* 165 F.Supp 2d at 258.
3. *Id*.
4. *Id*. at 264.
5. *Id*. at 259.
6. *Id*. at 260 (quoting *Costner v. URS Consultants, Inc*., 153 F.3d 667, 674 (8th Cir. 1998)).
7. *Id*. at 261.

* * *

***Smith v. Potter*,** 187 F. Supp. 2d 93 (S.D.N.Y. 2001)

Facts: Plaintiffs, the New York Metro Area Postal Union, APWU, AFL-CIO and Dennis O'Neil, sought injunctive relief under the Resource Conservation and Recovery Act[1] (RCRA) to force the United States Postal Service (USPS) to shut down and decontaminate the Morgan Processing and Distribution Center ("Morgan"), and to test the James A. Farley postal facility in addition to all others serviced by Morgan. This cause of action was in response to the discovery of anthrax spores at Morgan, which likely came from anthrax-laced letters sent to Tom Brokaw and The New York Post.[2]

Morgan is a building complex located on the west side of Manhattan between 28th and 30th Streets and 9th and 10th Avenues; it has six work floors in addition to office space located on the top floors. Several pieces of mail-sorting equipment on the third floor in the southern building of Morgan tested positive to anthrax exposure in October 2001. At the time the anthrax spores were discovered, Morgan also was infested with mice.

The USPS sought direction on how to best combat the possibility of employee exposure to anthrax at Morgan from the Centers for Disease Control and Prevention (CDC). The CDC concluded that it was unnecessary to close Morgan and instructed the USPS to have its employees wear gloves and masks as a precautionary measure to protect themselves. Anthrax testing was performed on the employees and equipment that could have come into contact with the contaminated letters, and a 120,000 square foot area on the third floor of Morgan was shut down and decontaminated by environmental specialists. Furthermore, after consulting with the CDC, the USPS provided over 7,000 employees in New York City with antibiotics that would prevent them from contracting anthrax while Morgan was cleaned.

Issue: Whether an injunction to close a mail processing facility exposed to anthrax should be granted even though the USPS implemented all recommendations of the CDC to diminish any safety risk.

Analysis: RCRA was designed to prevent the improper disposal of solid and hazardous wastes in ways that harm the public health or environment.[3] Congress waived the government's sovereign immunity by allowing citizens to bring suits against any RCRA offender whose solid waste handling practices may pose "an imminent and substantial endangerment to health or to the environment."[4]

The United States District Court for the Southern District of New York acknowledged the responsibilities of the CDC as the federal agency that protects the country's public health by providing leadership and direction in the prevention and control of diseases.[5] Since any existing danger would have dissipated by mid-October, and no USPS employees in New York had gotten sick from anthrax exposure, the CDC concluded that it was not necessary to close Morgan. Having found that the CDC deliberated and scrutinized the state of affairs and status of the anthrax contamination at Morgan, the court concluded that the CDC fulfilled its duties in making an informed decision regarding any potential safety risks. The court declined to interfere with the CDC's reasoned opinion, and concluded that since the USPS followed all recommendations, their response to the anthrax contamination produced no imminent or substantial danger to the public or community.[6]

The USPS argued that sovereign immunity barred plaintiffs' public nuisance claim, which focused on contentions that "actions and omissions of the USPS with respect to the handling of anthrax have created a public nuisance because of the potential exposure of the general public to a deadly bacteria."[7] The court recognized that Congress waived the USPS's sovereign immunity with respect to tort claims, which are subject to the Federal Tort Claims Act (FTCA). Since monetary relief was only permitted under the FTCA, the court held that Congress did not waive the USPS's sovereign immunity against tort claims, like plaintiffs' public nuisance claim, which sought injunctive relief. To obtain a preliminary injunction, the moving party must establish irreparable harm should the injunction not be granted, and either a likelihood of success on the merits, or a sufficiently serious question going to the merits and a balance of the hardships decidedly in their favor.[8]

The United States District Court for the Southern District of New York denied plaintiffs' application for a preliminary injunction and directed that the Morgan facility be exterminated on November 22, 2001 to eradicate the infestation of mice. The court also ordered that on November 26, 2001, the government supply the court and plaintiffs' counsel a detailed report on the current status of the anthrax contamination and clean-up at Morgan.

Silvia M. Metrena '03

Endnotes

1. Res. Conservation and Recovery Act, 42 U.S.C. § 6972 (2002).
2. *Smith v. Potter*, 187 F. Supp. 2d 93, 95 (S.D.N.Y. 2001).
3. *Id.* at 97.
4. *Id.* at 98.
5. *Id.* at 97.
6. *Id.* at 97-98.
7. *Id.* at 98.
8. *Id.* at 95.

* * *

***Town of Oyster Bay v. Commander Oil Corp.*,** 96 N.Y.2d 566 (2001)

Facts: Defendant, Commander Oil Corporation ("Commander"), owns and operates a petroleum storage facility on land adjacent to Oyster Bay Harbor in Nassau County. Plaintiff, the Town of Oyster Bay (the "Town"), owns the underwater land in the harbor. In 1952, Commander built a pier into the harbor in order for barges to dock and pump oil into the facility's storage tanks. Adjoining the pier are two basins, which require periodic dredging as silt deposits from various sources, including the Town's storm runoff system, accumulate.

To maintain an adequate depth for barges to dock, Commander permissibly dredged both basins in 1966 pursuant to a lease with the Town, in addition to a letter and permits issued by the United States Army Corps of Engineers (USACE). Neither the letter nor permits conveyed, nor authorized the interference with, any property rights. The lease and permits expired in 1985, and in 1995, Commander only sought federal and state permission to re-dredge the basins.

The New York Department of Environmental Conservation (NYDEC) issued a permit which authorized Commander to "maintenance dredge," and did not "authorize the impairment of any rights, title or interest in real or personal property held or vested in a person not a party to the permit."[1] The New York Department of State (NYDOS) issued a Consistency Certification Concurrence, which contained a condition that Commander "receive permission from the owner of the underwater lands . . . to occupy and use the underwater lands,"[2] concurring in Commander's certification that maintenance dredging was consistent with the Long Island Sound Coastal Management program. The USACE did not rule on Commander's permit application.

In 1995, the Town challenged the NYDEC and NYDOS permits in two CPLR article 78 proceedings in the Nassau County Supreme Court. The court dismissed both proceedings, holding that the NYDOS did not abuse its discretion and that the suit against the NYDEC was time-barred; no appeal was taken. In September 1996, the Town sought a preliminary injunction against Commander in the Nassau County Supreme Court. Denying the injunction, the court held, *inter alia*, that the Town was not authorized to interfere with the rights of an upland owner to reasonably dredge as may be necessary to access navigable water upon which a pier or dock exists.

The Town appealed and the New York Supreme Court Appellate Division in the Second Department reversed, holding that Commander's right of access to navigable water may not interfere with the Town's ownership of underwater land, and that Commander failed to prove that the dredging was necessary to maintain access. The court remitted the case back to the Supreme Court to determine whether the Town was entitled to temporary injunctive relief. Finding that the dredging was necessary to restore the basins to their natural condition and maintain access for barges to dock at the pier, the Supreme Court denied the Town's request for a permanent injunction. On appeal, the Appellate Division again reversed and granted the Town a permanent injunction, holding that an upland owner "has no riparian right to dredge public underwater lands in the absence of the public owner's permission."[3] The New York Court of Appeals granted Commander's application for leave to appeal.

Issue: Whether a riparian owner has the right to dredge public underwater lands in order to maintain access to navigable water.

Analysis: Noting the distinction as vestigial, the Court of Appeals afforded Commander the rights of a riparian owner (one who owns land along a river), although it is actually a littoral owner (one whose land is bounded by the seashore). Riparian owners have the right to reasonably access navigable water, and may exercise such by wharfing out (building a pier).[4] The Town owns and holds in public trust the underwater land by virtue of a colonial patent, and is afforded general rights not yet accurately defined beyond the regulation of oyster beds, general aid to commerce, navigation, fishing, or bathing.[5] Neither Commander nor the Town may exercise their rights in a "manner unreasonably intrusive upon the other's rights."[6]

The Town contended that under *Hedges*,[7] the right to dredge is separate from the riparian right of access to navigable water. The Court of Appeals disagreed, and found that injunctive relief is available under *Hedges* only when dredging is performed in a manner that would "destroy or seriously impair" an underwater landowner's rights.[8] Commander contended, and the Court agreed, that dredging to preserve reasonable access is permissible under *Hedges* since the Town's water runoff system contributed to the accumulation of silt and thereby altered the foreshore's natural condition. The Court held that a riparian owner "may dredge if dredging is necessary to preserve reasonable access to navigable water and does not unreasonably interfere with the rights of the underwater [land] owner."[9]

The Court of Appeals noted that a riparian owner does not have the right to maintain the foreshore in the precise condition as it was when acquired, or attained by wharfing out, and stressed that an underwater landowner's rights are to be balanced against the riparian owner's right of reasonable access, rather than against the level of access that existed at any purported

point of time.[10] Accordingly, dredging is permissible should a court find it necessary to preserve a riparian owner's right of reasonable access, and not to unreasonably interfere with the rights of the underwater landowner. The Court reversed the order of the Appellate Division granting a permanent injunction and remitted the matter to the Supreme Court to strike the appropriate balance since the foregoing standard was not applied.

Jason P. Capizzi '03

Endnotes

1. *Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, 569 (2001).
2. *Id.*
3. *Id.* at 571.
4. *Id.*
5. *Id.* at 571-72.
6. *Id.* at 572.
7. *Hedges v. W. Shore R.R. Co.*, 150 N.Y. 150 (1896).
8. *Commander Oil Corp.*, 96 N.Y.2d at 573.
9. *Id.* at 568.
10. *Id.* at 574.

* * *

***Trout Unlimited, Inc., v. City of New York*,** 273 F.3d 481 (2d Cir. 2001)

Facts: Defendants, the City of New York, et al., own and operate the Schoharie Dam and Reservoir (the "Reservoir") in the Catskill Mountains. The Reservoir supplies drinking water to the residents of New York City, and is connected to the Esopus Creek (the "Creek") by the Shandaken Tunnel (the "Tunnel"). Water flows from the Reservoir, through the Tunnel, and then into the Creek. Plaintiffs, Catskill Mountains Chapter of Trout Unlimited, Inc., et al., use the Creek for recreation and claim it is "one of the premier trout fishing streams in the Catskill Region."[1]

Pursuant to the citizen suit provision[2] of the Clean Water Act[3] (CWA), plaintiffs sent a notice-of-intent-to-sue letter (NOI) to defendants, et al., on November 20, 1998. The NOI stated that defendants discharged "pollutants in the form of Total Suspended Solids and Settleable Solids into [the Creek]."[4] The complaint, which was later filed in the United States District Court for the Northern District of New York on March 31, 2000, alleged unpermitted discharges[5] of pollutants into the Creek in the form of "'suspended solids,' 'turbidity,' and heat."[6]

Defendants moved for a dismissal pursuant to Federal Rules of Civil Procedure 12(b)(1) ("Fed. R. Civ. P."), claiming that plaintiffs' NOI failed to provide notice of the claims of turbidity and thermal discharges, and under Fed. R. Civ. P. 12(b)(6), asserting that the water flowing from the Reservoir to the Creek was not a "discharge" within the meaning of the CWA. The District Court denied defendants' Fed. R. Civ. P. 12(b)(1) motion, but granted their Fed. R. Civ. P. 12(b)(6) motion. Plaintiffs appealed this judgment before the United States Court of Appeals for the Second Circuit.

Issues:

1. Whether a notice of intent must identify with reasonable specificity each pollutant alleged to have been discharged unlawfully.
2. Whether the water flowing from the Reservoir, through the Tunnel and into the Creek constitutes an "addition" as it applies to "the discharge of any pollutant" under the CWA.

Analysis: Since the relationship between turbidity and suspended solids is one of identity, the Circuit Court of Appeals found that sufficient notice had been given regarding plaintiffs' turbidity claims. However, since the relationship between suspended solids and temperature is one of association, the Court held that plaintiffs' claims of unpermitted thermal discharges were not reasonably specified in the NOI, and properly dismissed. Plaintiffs would have had to specifically state that the suspended solids were directly related to an increase in temperature in order for the NOI to have sufficiently provided notice of the thermal discharge claims. The Court remanded the thermal discharge claims with direction that they be dismissed without prejudice to refiling.

Recognizing that each discharge of a pollutant represents a distinct violation of the CWA, the Circuit Court of Appeals held that a NOI must identify with reasonable specificity each pollutant alleged to be unlawfully discharged, and that the failure to do so will justify the dismissal of any claim based on pollutants not properly noticed. The court recognized the rationale for differentiating individual pollutants from nonpollutants in an NOI to be most apparent in situations where a violator may be discharging multiple pollutants lawfully, and others unlawfully. The court also noted that such specificity in an NOI would grant the alleged violator the opportunity to identify, and voluntarily cure, what he/she may be doing wrong, without litigation.

Undefined in the CWA, the Circuit Court of Appeals next addressed the meaning of the term "addition" as it relates to the "discharge of a pollutant." The CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."[7] Relying upon the position of the United States Environmental Protection Agency (USEPA) that "dam releases should not be considered 'discharges'

under the CWA,"[8] defendants argued that the water flowing from the Reservoir and into the Creek was not a "discharge" within the meaning of the CWA. Since the USEPA's position was only stated in informal policy statements and lacked the force of law, the court, supported by recent United States Supreme Court decisions[9] which have leaned away from giving broad deference to agency policy statements, regarded the USEPA's position as persuasive and not binding.

Defendants argued that the flow of water through the Tunnel and into the Creek was not an "addition" under the CWA. The Circuit Court of Appeals disagreed, and recognized that when water is pumped from one body to another in which it does not naturally flow, the displaced water constitutes an addition.[10] Since both the Reservoir and the Creek are distinct bodies of water, the court held that the discharge of any material would be an "addition."

Claiming that the meaning of "addition" was related to its association with the phrase, "from any point source," defendants also argued that the Reservoir was the point source and not the Tunnel. Therefore, defendants concluded that there was an "addition" to the Tunnel, and not to the Creek. The Circuit Court of Appeals looked to the definition of "point source" in the CWA and concluded that the Tunnel was clearly a point source within the plain meaning of the statute. The Court explained that a "point source" does not have to be the origin of the pollutants, and can be the means by which a pollutant is distributed. Determining the Tunnel to be a "point source," and the water flowing from it an "addition" into the Creek, the Second Circuit Court of Appeals concluded that the water flowing from the Reservoir, through the Tunnel and into the Creek was a "discharge of a pollutant" under the CWA.

Daniel A. McFaul, Jr., '03

Endnotes

1. *Trout Unlimited, Inc., v. City of New York*, 273 F.3d 481, 485 (2d Cir. 2001).
2. 33 U.S.C. § 1365(a)(1) (2002).
3. 33 U.S.C. § 1251 (2002).
4. 273 F.3d at 486.
5. 33 U.S.C. § 1311(a) (2002).
6. 273 F.3d at 485.
7. 33 U.S.C. § 1362(12) (2002).
8. 273 F.3d at 489.
9. *Id.* at 490. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000).
10. *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996).

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