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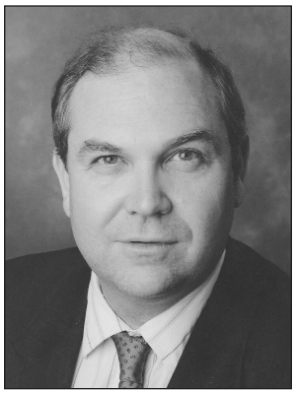
From the Editor



This column is being written in the aftermath of the incomprehensibly awful tragedy that occurred in New York and elsewhere on September 11, 2001. Though the tragedy, at this too-close remove, transcends my own ability to speak intelligently about it, nevertheless I've seen some very moving eloquence, sometimes of the simplest kind. Since I do not feel adequate to match it, I won't, but would suggest that the task is now to think long and hard about where we go from here. It doesn't devalue the heartache by starting to grapple with the pragmatic. On this note, I recommend that readers look to Michael Gerrard's *New York Law Journal* column (October 4, 2001, p. 3) for a discussion of some of the environmental aspects of the World Trade Center disaster. As always, Mike is informative and timely.

For the present issue, Peter Henner discusses the judicially crafted rule on organizational standing articulated in the landmark New York *Society of Plastics v. County of Suffolk* (77 N.Y.2d 761) ruling. Peter notes that despite the initial intent of the Court in restricting SEQRA standing when economic interests are asserted as the underpinning for organizational aggrievement, the perverse effect has been to squeeze community and other citizen groups, rather than large commercially powerful lobbying groups, out of the SEQRA arena. He suggests that corrective action is necessary, and timely, and makes suggestions in this regard. The article also includes a useful summary on the current state of the law. Randall Young submits a cautionary article addressing the potentially severe consequences that may befall major air contamination sources which violate conditions in permits that allow emissions below the major source threshold. The article provides a useful overview of relevant law, and alerts facilities that they thus may be treated as a major source. We also have an article written by Theodore Keyes, an associate at Schulte Roth & Zabel who represented the plaintiffs in *Friends of Van Cortlandt Park v. City of New York*, (95 N.Y.2d 623) a case clarifying legislative primacy regarding the use and disposition of public parkland. The Court of Appeals has spoken most recently in a 2001 ruling. The case has wound its way through federal and state courts. The article addresses the history of the case, common law precedents, and the unsuccessful attempt by New York City to restrict this application of the public trust doctrine by reliance on countervailing important public uses, in this case a water filtration plant. Marla Rubin returns with her "Minefield" ethics column, this time discussing the multijurisdictional

Inside

practice of law. She analyzes its impetus in terms of the territorial as well as geographical expansiveness of much of the modern practice of law and discusses consequences, as well as evolving judicial and administrative approaches to what historically has been a matter of local prerogative. Elizabeth Vail, the student editor at St. John's Law School, shepherded the case summaries.

I again urge authors to mind the deadlines listed on the *Journal's* last page. The entire publication process is being tightened up, as demands and products increase. I have always found the publication team in the CLE Department to be generous with their time and efforts and committed to turning out first-rate results in all of their product lines, and I feel an editorial responsibility to help make the process as smooth and responsive as possible. The submission of articles in a timely manner is, of course, critical to this effort.

On a final note, as we approach the holidays, please keep in your hearts and prayers all of those families who likely will be facing a sorrowful winter; every small bit of charity, especially the unrecompensed and unacknowledged kind, helps someone. Also, it is probably not too hyperbolic to assume that our society and our government, in which lawyers play such prominent roles, are going to have to adapt rapidly, forcefully and effectively to an entirely new paradigm of how we mesh legitimate security concerns, including new and probably realistic environmental and public health threats, civil liberties, and relations with foreign states and societies. The figurative vacation since the end of the cold war has been all too brief, and probably a bit Pollyannish. Now, we likely must belatedly face the challenge of constructing new, more realistic, and probably more empathetic, intellectual models of how we interact with international actors, and a more coherent means of ordering our society in which new balances must be found between the liberties we take for granted and the growing appreciation of our vulnerabilities to deadly expressions of nihilistic hate. That being said, a prayer or two for the wisdom and effectiveness of our national, state and local leaders would not be a misplaced effort.

Kevin Anthony Reilly

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

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

Great Future in *Plastics*? The Judicial Repeal of Standing for Environmental Organizations in SEQRA Cases

By Peter Henner

Ten years ago, in *Society of Plastics v. County of Suffolk*,[1] the Court of Appeals, by a 4-3 vote, reiterated that: (1) standing cannot be based on a claim of economic injury;[2] and (2) it is necessary to demonstrate a "special injury," different from the injury suffered by the community at large, to have standing to challenge a proposed action that was "geographically centered" or "site-specific."[3] *Plastics* has been the basis of a growing body of case law rejecting standing by individuals and organizations with clear and obvious environmental interests.

Even though the intent of the Court in *Plastics* may have been to prevent commercial entities from using SEQRA as a tool to pursue an anti-environmental agenda, the practical effect of the decision has been to provide a powerful weapon for commercial entities and agencies to insulate SEQRA determinations from judicial review in cases brought by citizens, environmental organizations, and even by affected municipalities. In this article, I will present an argument that strong corrective action is needed, either in the form of a pronouncement from the Court of Appeals, or in the form of legislation, in order to preserve standing in SEQRA cases for community and environmental groups, and for the public at large. Without such corrective action, I believe that SEQRA will cease to function as a tool to make sure that the environmental impacts of proposed governmental action are considered.

Judge Hancock's bitter dissent, joined by Judges Simons and Titone, characterized the holding in *Plastics* as "a decided change in the course of the Court's carefully developed jurisprudence in interpreting and implementing SEQRA since its enactment 15 years ago. It denotes an apparent lessening in what has been recognized as this Court's 'powerful commitment to the goal of SEQRA.'"[4] Under the majority opinion, "someone who alleges environmental damage from an action which applies generally to an entire area and indiscriminately affects everyone in the area is precluded from judicial review. . . . The rule, as it is employed here, can thus present a virtual impasse to judicial review."[5]

Judge Hancock also noted that the majority opinion "stresses the danger of allowing challenges by 'pressure groups, motivated by economic self-interests, to misuse SEQRA for [improper] purposes.'" He inquired rhetorically whether "the application of the [new special injury rule] depend[s] in some way on the identity of the objector rather than on whether the injury objected to is within the zone of interest?"[6]

The majority opinion in *Plastics*, written by Judge Kaye and joined by Chief Judge Wachtler and Judges Bellacosa and Alexander, stated that a showing of special harm had previously been required for SEQRA standing in "site-specific cases," and the Court expressly decided not to reach the question of whether special harm was required in cases of "general" harm. Therefore, incredible as it may seem today, the Court stated "no new standing requirement is fashioned by the majority." According to Judge Kaye, the only disagreement with the dissent was whether the countywide ordinance at issue in *Plastics* could be characterized as a "site-specific" action, which would require a showing of special harm to establish standing.[7]

Ten years later, it is clear that the standing requirement established in *Plastics* has radically reshaped SEQRA litigation. Although standing was routinely assumed in SEQRA cases in the 1980s, today "the standing issue is alive and well in environmental law, and one that counsel must seriously address."[8]

Judge Hancock, in his dissent, gave the example of a hypothetical local law permitting all of the residents to throw garbage into the streets. Since the same harm from this ordinance would be shared by all of the residents, it would appear that none of the residents would be able to demonstrate a special harm, and no one would have standing to challenge the enactment of the ordinance on SEQRA grounds.[9] The majority explicitly refused to consider this hypothetical.[10] However, courts, with increasing frequency, have treated such actions as "site-specific," and have rejected SEQRA challenges because of a failure to show "special harm." Furthermore, in a number of cases where actions are clearly "site-specific," such as the proposed construction of new developments, neighbors and local organizations have been held not to have standing because their environmental interests cannot be distinguished from the interests of the community at large.

This problem has now reached alarming proportions. In a recent case, a respected Supreme Court Justice, now-retired Harold Hughes, cited *Plastics* to hold that employees who would occupy a proposed new office building and neighbors of the site of the building both lacked standing because: "SEQRA does not provide universal standing due to both legislative and judicial concern over the potential for improper use of citizen suits as a delaying tactic by those whose interests are only marginally related to or inconsistent with the purposes of the statute."[11] In other words, *Plastics* is now cited for the proposition that SEQRA challenges can be

viewed as nuisances and delaying tactics, rather than as the public's opportunity to ensure that environmental concerns are fully considered by agency decision-makers.

SEQRA Standing Before *Society of Plastics*

SEQRA was initially enacted in 1975, effective in 1976.[12] It is doubtful that the Legislature expected that standing would be a major bar to potential litigants challenging determinations under SEQRA. SEQRA was modeled after the federal National Environmental Policy Act and, in 1975, it was very easy to establish standing under NEPA.[13] Furthermore, the obvious intention of the Legislature was to require agencies to consider the environmental implications of their actions and to involve the public in the review of these actions. Thus, it would appear likely that the state Legislature intended SEQRA standing requirements to be at least as liberal as the standards used by federal courts under NEPA.

The federal courts' standards for standing, as of the early 1970s, were extremely liberal. The U.S. Supreme Court had just decided the case of *United States v. SCRAP*,[14] where the plaintiff was able to establish standing on the basis of a very attenuated claim that higher rail freight charges would result in increased pollution in national parks, which would cause injury to the plaintiff organization, whose members utilized the national parks.[15]

Furthermore, the New York State Court of Appeals had indicated its willingness to establish liberal standing rules shortly before the enactment of SEQRA.[16] In *Dairylea Cooperatives v. Walkley*, the Court of Appeals held that a plaintiff must demonstrate that: (1) he has suffered an "injury in fact" from the action under consideration, and (2) the asserted interest is arguably within the zone of interest that the statute in question seeks to protect.[17]

The early cases pertaining to SEQRA standing applied a liberal standard. In *Glenhead-Glenwood Landing Civic Association Civic Council v. Town of Oyster Bay,*[18] the two-part test of *Dairylea Cooperatives* was applied to SEQRA cases.[19] In *Glenhead-Glenwood*, the court was satisfied that the requirements for standing had been met, since the individual plaintiffs lived in close proximity to the affected land, and "the asserted environmental consequences of the instant project fall within the zone of interest protected by SEQRA."[20] The court also refused to make a distinction between those plaintiffs who lived in the town and those who lived beyond the town, "since the environmental effects of the proposed development are matters of more than local consequence that will affect residents and nonresidents."[21]

Prior to the late 1980s, it was generally assumed that a petitioner under SEQRA could establish standing based upon economic interests. It was explicitly noted that a petitioner could establish standing "in light of the fact that anyone who can show an adverse environmental impact causing him or her injury as result of agency action . . . (has) standing to bring an action."[22] Concerns unrelated to environmental impact do not constitute grounds to deny standing.

In *Schenectady Chemicals v. Flacke*,[23] a chemical company was permitted to challenge the determination of DEC to grant a mining permit because of its interest in the aquifer that supplied its water needs. Even though the interest of the company was purely economic, the petitioner was assumed to have standing without discussion.

Similarly, in *Industrial Liaison Committee of Niagara Falls Chamber of Commerce v. Williams*,[24] an association of industrial wastewater dischargers was granted standing based upon their "speculative" claims that they "used the surface waters of the state."[25] The court even noted that petitioners' concerns would "appear to be too insignificant to confer standing under the federal National Environmental Policy Act. Nevertheless, the court held that petitioners had standing "in light of SEQRA's broad definition of environment."[26]

It is important to remember that SEQRA defines the environment to include "economic" considerations.[27] Therefore, it would seem logical that at least some forms of economic injury should be deemed to be environmental injury. For example, in *Chinese Staff and Workers Association v. City of New York*,[28] the Court of Appeals held that impacts associated with "long-term secondary displacement of residences and businesses" must be considered as part of the environmental analysis of a proposed high-rise apartment building in lower Manhattan. Although these impacts could properly be characterized as "economic," the Court apparently assumed that the petitioners had standing to maintain the lawsuit.

Nevertheless, in *Mobil Oil Corp. v. Syracuse Industrial Development Agency*,[29] the Court of Appeals held that "to qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature."[30] Mobil alleged that it would suffer injury as a result of the secondary and cumulative impacts of a proposed development plan because the plan would require the relocation of oil tanks, with the possible adverse impact of increased fuel costs for commercial and industrial customers. Since these injuries were characterized as purely economic, Mobil was therefore held not to have standing to maintain a SEQRA challenge to the proposed plan.

In *Mobil*, the Court also reiterated the need to demonstrate "something more than the interests of the public at large . . . to entitle a person to seek judicial review," citing *Sun-Brite Carwash v. Board of Zoning and Appeals*.[31] In *Sun-Brite*, Judge Kaye writing for a unani-

mous Court, held that "the status of neighbor does not . . . provide the entitlement, or admission ticket to judicial review" because the petitioner "may be so far from the subject property that the effect of the proposed change is no different from that suffered by the public generally."[32]

In other words, even if Mobil had been able to establish a harm that was environmental rather than "economic," that harm would still have to be different from the harm that was suffered by the public at large. The Court held that Mobil, like the petitioner in *Sun-Brite*, had failed to establish this special harm.

Therefore, as of 1990, there was authority for the proposition that a SEQRA litigant could not rely on a showing of economic damage, even though such economic damage was arguably part of the broad definition of environment. There was also authority for the proposition that a showing of special harm needed to be demonstrated to establish standing. However, it was the combination of these two doctrines in *Society of Plastics*, that has resulted in a virtual revolution in the law pertaining to standing in New York State.

Society of Plastics

The action at issue in *Plastics* was a Suffolk County ordinance that banned the use of certain plastic products in retail food establishments. This ordinance was challenged by a nationwide trade organization representing the plastics industry. In order to establish standing, the association relied upon one member in Suffolk County, about whom "few facts are known."[33] A number of environmental organizations, including the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club, appeared at the legislative hearing in support of the challenged law. The Court expressed its outrage at the use of SEQRA to challenge an environmentally beneficial ordinance, noting

> were it appropriate to consider the merits here—which it is not—the few paragraphs in the dissent regarding the adverse effects of the Plastics Law could be multiplied many times over, by the statements and submissions of the environmentalists as to the beneficial effects of the bill, viewed as a first step toward resolving the County's garbage crisis. The plastics industry brought this to a halt.[34]

The Court acknowledged that the legislative history of SEQRA was "not definitive."[35] Nevertheless, the Court inferred intent to impose "some limitation on standing to challenge administrative action" from the fact that the Legislature had failed to enact a "citizen suit bill."[36]

The Court discussed, in passing, the establishment of the "injury in fact" standard in federal environmental cases, including the *SCRAP* case discussed above, but distinguished the case under consideration because the petitioner trade association had "not demonstrated that the interest it asserts in this litigation are germane to its purposes."[37] In other words, even if the plastics industry had an environmental interest, the fact that its primary interest was economic was a sufficient basis to deny standing. The Court explained "though couched as environmental harms, plaintiff's assertions of injury by and large amount to nothing more than allegations of added expense it might have to bear if plastics products were banned and paper products substituted."[38]

Finally, the Court characterized the action under consideration as geographically centered, because the impact of the action would have a site-specific impact upon landfills in Suffolk County. This is a significant expansion in the law pertaining to the identification of a proposed action as general or site-specific. Prior to *Plastics*, site-specific projects were associated with specific developments or directly associated with specific sites, such as zoning decisions, or the construction of a new facility. *Plastics* was the first case to identify a project which, on its face, covered a large geographic area (such as an entire county) as a site-specific project that required a prospective standee to demonstrate a special harm.

In short, in order to reach the desired result that a trade organization did not have standing,[39] the Court (1) assumed that there was legislative hostility to the idea of liberalized standing for SEQRA litigants; (2) for the first time speculated as to the actual motive of a SEQRA plaintiff and permitted standing to be denied as a result of such speculation; and (3) characterized an action that obviously had impacts over a wide geographic area as site-specific, to require a showing of special harm. Despite the Court's disclaimer, the combined impact of these holdings had a tremendous synergistic impact on the law of standing for SEQRA plaintiffs.

Impact of *Society of Plastics*

A. Claims of Economic Injury in SEQRA Cases

Initially, it should be noted that there is no clear dividing line between interests that are clearly "economic" and interests that are "environmental." In *Plastics*, the Court was apparently motivated by its belief that the trade association did not actually have any environmental interest, especially since the environmental claim was asserted in opposition to a recycling law. However, many impacts, especially adverse impacts upon residential property owners, cannot be readily characterized as either environmental or economic. The owners of property affected by land use decisions may not need to demonstrate special harm and may not even have to

assert non-environmental claims.[40] However, by characterizing certain impacts as "economic," SEQRA standing has been denied to entities that may well suffer impacts that are within SEQRA's definition of "environment."

For example, in *Young v. Pirro*,[41] a case decided three months before *Plastics*, the city of Syracuse was denied standing to challenge Onondaga County's alleged failure to comply with SEQRA in connection with a redistribution of sales tax revenue. The loss of revenue would have impacted the delivery of city services, affected urban neighborhoods, and possibly forced Syracuse to raise residential property taxes, with potentially serious adverse impacts to neighborhood character. Nevertheless, these impacts were held to be economic, not environmental.

In 1998, three municipalities, the cities of Oswego, Fulton and Cohoes, The New York Conference of Mayors, as well as a Buffalo City Councilman, challenged the Public Service Commission's approval of Niagara Mohawk's Power Choice plan, by which the utility intended to divest itself of its generating assets, as part of the deregulation of the electric industry. The cities asserted that there were numerous environmental impacts associated with the determination to proceed with the divestiture of generating assets, including dramatic impacts on local property tax revenues and the city services dependent on such revenues, as well as the possibility that deregulation might result in a shortage of electric power and higher prices for all consumers.[42] The petition was dismissed on the grounds that the cities' interests were purely economic, and were therefore insufficient to confer standing.[43]

More recently, in *Benson v. City of Albany*,[44] members of the Public Employees Federation who were employed by the New York State Department of Environmental Conservation challenged the determination of the city of Albany to grant site plan approval for the new DEC building, alleging that Albany had failed to consider the environmental impacts of the shortage of parking and the absence of mass transportation in downtown Albany. The DEC employees claimed standing because of the prospective environmental harm associated with increased commuting time and the negative impacts associated with having to drive to downtown Albany. These impacts were dismissed as non-environmental. The court noted that "those PEF members . . . will be impacted by their own choices of where to live and how to commute." Concerns about the adequacy of parking, as any suburban planning board that has ever considered a new strip mall well knows, are a part of the environmental analysis of new commercial uses. Yet, the concerns of employees who will not have adequate parking and who will be exposed to urban traffic congestion are deemed "economic," and the employees are found not to have standing.[45] In this case, as noted above,[46] the court also questioned the sincerity of the environmental interest that was asserted, citing *Society of Plastics* as its authority to question the genuineness of petitioner's motivation.

B. Decline of "General" Actions in SEQRA Standing Analysis

Although *Plastics* is generally cited for the proposition that a claim of economic injury is insufficient to establish standing, the requirement to demonstrate a showing of special harm for actions which are deemed to be "site-specific" has had a far greater impact. The *Plastics* majority stated: "we explicitly do not reach the question of standing to challenge actions that apply indiscriminately to everyone" and therefore claimed to have left open the question of whether a showing of special harm would be required to challenge an action deemed to be "general." Unfortunately, in the last ten years, courts have interpreted *Plastics* to impose a requirement that virtually every action is "site-specific," and to require a showing of special harm for virtually all SEQRA challenges, with the exception of challenges brought to land use actions that directly affect an owner of real property.

For example, *Plastics* was recently cited for the proposition that "it is well-settled that unless the claimed SEQRA violation relates to a zoning enactment, a party must allege a specific environmental injury which is "in some way different from that of the public at large."[47]

In *Long Island Pine Barrens v. Town of Islip*,[48] the Second Department cited *Plastics* for the proposition that "it is well-settled that, in land use matters, 'the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large.'" Taking these two cases together, it appears to be the law that a showing of special harm is required for any environmental action, including land use matters, unless the issue is a zoning enactment.

For example, in *Schulz v. New York State Department of Environmental Conservation*,[49] the Third Department characterized the adoption of the 1989-1990 update to the state solid waste management plan as "not an instance 'where solely general harm would result from a proposed action' as a consequence of which a SEQRA challenge could possibly be based upon mere 'potential injury to the community at large'" (citing *Plastics*). If an update of a statewide plan is deemed to require a showing of special harm because it will have localized impacts, it is difficult to imagine any action that will be regarded as a "general" action not requiring a showing of special harm, inasmuch as any "action" will have some localized impacts somewhere.

Indeed, there are very few, if any, recent cases where a court has interpreted an action under review to be a "general" action, which does not require a showing of special harm by the prospective SEQRA petitioner. In another action brought by Mr. Schulz, *Schulz v. Warren County Board of Supervisors*,[50] a SEQRA determination pertaining to "sewering within the town of Hague" was found to be a site-specific action, despite alleged prospective impacts upon Lake George. In an earlier action brought by Mr. Schulz against the New York State Department of Environmental Conservation,[51] the court had treated a determination by DEC to adopt a consolidation plan requiring the closure of a separate landfill to require a showing of "*direct* harm" (emphasis in original) different from the public at large.

The Long Island Pine Barrens Society sought standing based upon its concerns that the "sole source aquifer" that supplies water to Long Island may be adversely impacted by developments. Since the aquifer encompasses a large geographic area, some developments on Long Island could, arguably, be considered to be general in scope. However, the Society's concerns with respect to impacts on the aquifer in connection with a 121 unit residential real estate project to be constructed in a designated Special Groundwater Protection Area were rejected, because the members of the society could not establish any concerns "different in kind and degree from the community generally."[52]

In *Heritage Coalition v. City of Ithaca*,[53] the Third Department held that "[a]ppreciation for historical and architectural buildings does not rise to the level of injury different from that of the public at large for standing purposes."[54] This decision effectively forecloses organizations concerned about historic buildings from challenging determinations made with respect to these buildings, under SEQRA, and, presumably, also under section 14.09 of the Parks, Recreation and Historic Preservation Law, since members of such groups will never be able to establish an interest separate from that of the public at large.

Similarly, challenges to actions taken with respect to the management of public property, including the sale or purchase of governmental assets, may also be foreclosed, because such actions will apparently be considered to be site-specific, rather than general. For example, in *Montecalvo v. City of Utica*,[55] a group of "publicly minded citizens" did not have standing to challenge "the proposed sale and transfer of the 60-year-old municipal water system to a regional authority"[56] because they could not "demonstrate some 'special injury' beyond their bare identities as voters, taxpayers, ratepayers, property owners, residents or citizens concerned about or involved in public affairs."[57]

Mindful of the above case law, the petitioners in *Benson v. City of Albany* attempted to characterize the siting of the new DEC headquarters in downtown Albany as a "general action."[58] Petitioners argued that the siting was part of the "Albany plan" which involved an intention to redevelop downtown Albany, in accordance with an overall development plan. This issue was not addressed at all in the unreported decision of Justice Hughes, nor was it addressed by the Third Department. Petitioners had argued that the lower court decision had effectively insulated the question of SEQRA compliance from public review because, under the court's decision, no one ever could have standing. During oral argument, Justice Peters asked counsel for the developer: "Who would have standing to challenge the decision of the City of Albany?" In response, counsel could not identify any individual or group which would have standing, but merely reiterated the claim that the petitioners did not have standing.

C. Standing Requirements in Site-Specific Actions

In addition to applying the "special injury" requirement to virtually all cases involving SEQRA standing, courts have also applied the standard strictly since *Plastics*. Consequently, standing has been denied to putative petitioners who had a clear environmental interest in a proposed project.

One of the most egregious examples of the denial of standing is *Buerger v. Town of Grafton*.[59] In *Buerger*, the petitioner owned lakeside property within 600 feet of the proposed access road of a new subdivision. She alleged that construction of the access road would cause flood damage, forest habitat degradation, and that previous construction activity had polluted the waters of the lake. Nevertheless, her claim of standing was denied because "while these are serious concerns, they are not specific to petitioner but are general concerns shared by all the residents of the area."

Even if the petitioner is a municipality representing the interests of its citizens, it must still demonstrate "special harm." In *Dyer v. Town of Schaghticoke*,[60] the city of Mechanicville was denied standing in a SEQRA challenge to a special use permit granted for the construction of a hot mix asphalt plant on the other side of the Hudson River from the city. The city's environmental concerns about "excessive noise caused by industrial operations, greatly increased traffic and air pollution, and a possible destruction of the ecosystem" were "insufficient to demonstrate that the City may suffer unique environmental harm."

The Third Department has also held that "the proximity of petitioner's properties to the proposed facility . . . is insufficient, without more, to confer standing; actual injury must be shown" in determining that the alleged "unsavory environmental effects petitioner claims will result from the increased light, noise and traffic generated by the facility do not afford standing,

for they are no different in kind or degree from that suffered by all in the general vicinity."[61]

In *Schulz v. Warren County Board of Supervisors*,[62] petitioners' concern with the possibility of increased development and runoff pollution into Lake George was found to be insufficient for standing purposes, because petitioners' injuries were no different from those of the public at large.

Those cases where courts have found special injury have usually based their holdings on the property rights of the petitioner. For example, in *Many v. Sharon Springs*[63] and *Long Island Pine Barrens Society v. Town of Islip*,[64] the petitioners were found to have standing based upon interference with water rights. In *Many*, a possible injury to petitioners' well was found sufficient to demonstrate a special environmental injury. Similarly, in *Pine Barrens*, the Society was able to establish standing because three of its members alleged that they had a problem with rust in their drinking water, and the parcel under consideration was a possible source of replacement water. Absent this specific concern, petitioners presumably could not have demonstrated special injury.

In *Committee to Preserve Brighton Beach v. City of New York*,[65] a homeowners' association was granted standing because a proposed project would "impact on their sight lines, the availability of light, potentially on the flow of sea air to their residences, and from the presumptive diminishment of their own property interests with the change in neighborhood character." Similarly, in *Steele v. Town of Sale*,[66] a property owner was granted standing based on a claim that his scenic view would be adversely affected by the construction of a cell tower. In both of these cases, the environmental interest is also a particular economic interest of a property owner.

These cases illustrate that a putative SEQRA plaintiff must have an interest which is: (1) in close geographic proximity to the proposed action; (2) specifically identified, rather than a general interest in preventing pollution; and (3) distinguishable from the interests of the community at large. For the most part, the standards cannot be met by environmental organizations that rely upon the interests of affected members, but can be met by individuals or commercial entities that have an economic interest with respect to a proposed action.

D. Standing for Economic Actors

Despite the expressed intention of the majority in *Plastics* to respond to "the danger of allowing special interest groups or pressure groups, motivated by economic self-interest, to misuse SEQRA,"[67] economic actors have, for the most part, been able to maintain SEQRA challenges to actions that affect their interests, while environmental and community groups have been precluded by the judicial interpretation of *Plastics*.

Obviously, a developer or an applicant for a permit or a license has the standing to challenge any environmental condition that is imposed by a municipality or by a regulatory agency, or to challenge a regulation. For example, an industrial association was assumed to have standing to challenge the adequacy of the environmental review conducted by DEC of proposed DEET regulations in *Chemical Specialties Manufacturers v. Jorling*.[68]

Economic actors are likely to own property in the immediate vicinity of proposed actions and are therefore likely to be able to assert standing under the exception for owners of affected property recognized in *HAR v. Town of Brookhaven*. For example, mining companies in *Skenesborough Stone, Inc. v. Village of Whitehall*[69] and *Patterson Materials Corp. v. Town of Pawling*,[70] as well as *Gernatt Asphalt v. Town of Sardinia*,[71] were held to have standing to challenge alleged SEQRA noncompliance of the enactment of local laws.

In *Niagara Mohawk Power Corp. v. Village of Green Island*,[72] the owner of a hydroelectric facility which was the subject of a condemnation proceeding successfully challenged the condemnation because of noncompliance with SEQRA. Although the issue of standing was raised by the village of Green Island, the court did not address the issue in its decision.[73]

Thus, economic actors who would like to use SEQRA to protect their own commercial interests have been relatively unaffected by the holding in *Plastics*. In contrast, individuals who have an environmental interest that is not related to a property interest, especially when they do not actually have an ownership interest in property, have frequently not been able to meet the requirements of a cognizable environmental injury distinguishable from that of the community at large.[74]

Current State of the Law

In his dissent, Judge Hancock rhetorically inquires whether the petitioners would have had standing to question the adequacy of the environmental review in *Industrial Liaison Committee v. Williams*[75] and *Save the Pine Bush v. City of Albany*[76] under the decision of the majority in *Plastics*.[77] Ten years later, the answer is clearly no. Furthermore, many SEQRA litigants in landmark cases would have been similarly precluded under the new standard.

Many of the important SEQRA decisions arise from cases where community residents, or organizations representing them, have challenged governmental action. For example, the well-known "hard look" test was conclusively established as the relevant standard to measure the adequacy of an environmental review in *H.O.M.E.S. v. New York State Urban Development Corp.*[78] In *H.O.M.E.S.*, urban residents challenged the determination to tear down a large sports stadium and replace it with the Carrier Dome.

The residents alleged that the UDC had failed to consider the impact of the project on traffic congestion and parking. The court identifies them only as "landowners in the City of Syracuse" who "reside in close proximity to the former Archbold Stadium on the campus of Syracuse University." In *Glen Head-Glenwood v. Town of Oyster Bay*,[79] which adopted the two-part test of *Dairylea Cooperatives* for SEQRA cases in New York, similar allegations were deemed sufficient. In the Third Department, prior to *Plastics*, prospective plaintiffs were granted standing based on allegations that they resided in the area, without a showing that they were property owners.[80] In all of these cases, there is nothing to indicate that petitioners' interests could be in any way distinguished from the interests of the community at large, there is little, if any, discussion of the particular "environmental" interest, nor is there any discussion of the motivations of petitioners.

In *Chinese Staff and Workers Association v. City of New York*[81] and *Jackson v. New York State Urban Development Corp.*,[82] which involved the impacts of major projects on New York City neighborhoods, the issue of standing was not even raised. However, it is not clear that any prospective standee lived in close enough proximity to the project, nor does it appear that anyone could make a showing of "special harm" in New York City as a result of urban displacement.

If these cases were tried today, petitioners could expect a vigorous challenge on the issue of standing. Mere ownership of property may now be necessary, but is no longer sufficient for standing. In any event, if the environmental injury cannot be distinguished from the injury to the public at large, an environmental injury may not be enough to confer standing.

Before *Plastics*, "the 'special harm' rule [was] simply an 'injury-in-fact' rule applied in situations where the objector is not directly a party to the challenged action."[83] Today, the "identifiable trifle"[84] that the supreme court once held to be sufficient for establishing an "injury in fact" no longer applies, at least for SEQRA challenges brought by petitioners whose interest is only "environmental," and cannot claim to be exempt from the "special harm" requirement under *HAR Enterprises*.

Judge Hancock, writing ten years ago, characterized the prospective impact of the holding in *Plastics* as a "new standing rule [which] will undeniably make review of a municipality's compliance with SEQRA more difficult."[85] Ten years ago, it was fashionable to discuss the need to "level the playing field." The Court's decision in *Plastics* may have been intended to level the playing field by attempting to restrict economic entities from misusing SEQRA, but it has had the effect of locking genuine environmental interests, represented by neighborhood groups, environmental organizations and municipalities out of the arena.

Endnotes

1. 77 N.Y.2d 761 (1991).
2. *Id*. (citing its then recent holding in *Mobil Oil v. City of Syracuse*, 76 N.Y.2d 428 (1990)).
3. *Id*. (citing *Sun-Brite Carwash v. Town of North Hempstead*, 69 N.Y.2d 406 (1987)).
4. *Id*. at 786, quoting Weinberg, McKinney Practice Commentaries, ECL § C8-0109:4 (1988).
5. *Id.* at 786.
6. *Id.* at 793.
7. *Id*. at 780.
8. Weinberg, McKinney Practice Commentaries, ECL § 8-0109 (1997).
9. 77 N.Y.2d at. 789.
10. 77 N.Y.2d at 781.
11. *Benson v. City of Albany* (Sup. Ct., Albany Co. Jan. 20, 1999), *aff'd on opinion below*, 266 A.D.2d 625 (3d Dep't 1999).
12. 1975 N.Y. Laws ch. 612.
13. Michael B. Gerrard, *et al.*, *Environmental Impact Review in New York*, pp. 7-67 (citing *United States v. SCRAP*, 461 U.S. 669 (1973) and *Sierra Club v. Morton*, 405 U.S. 727 (1972)).
14. 416 U.S. 669 (1973).
15. Interestingly, the majority in *Plastics* cited *SCRAP*, a federal case, with apparent approval, for this definition of "injury-in-fact." 77 N.Y.2d 776.
16. *Cf. Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1 (1974) where the Court indicated that it was "troubled by the apparent readiness of our courts in zoning litigation to dispose of disputes over land use on questions of standing without reaching the merits, an attribute which is glaringly inconsistent with the broadening rules of standing in related fields."
17. 38 N.Y.2d 6, 9 (1975).
18. 88 A.D.2d 484 (2d Dep't 1982).
19. This test is still applied in SEQRA cases, *cf. Gernatt Asphalt v. Town of Sardinia*, 87 N.Y.2d 668, 687 (1996).
20. 88 A.D.2d 490.
21. 88 A.D.2d 490.
22. *Bliek v. Town of Webster*, 104 Misc. 2d 852, 859 (Sup. Ct., Monroe Co. 1980); *New York State Builders Ass'n v. State of N.Y.*, 98 Misc. 2d 1045, 1050 (Sup. Ct., Albany Co. 1979).
23. 83 A.D.2d 460 (3d Dep't 1981).
24. 131 A.D.2d 205, 209 (3d Dep't 1987).
25. *Id.* at 209-210.
26. *Id.* at 210.
27. ECL § 8-0105(6) defines environment to include "existing patterns of population concentration, distribution or growth, and existing community or neighborhood character." *See* 6 N.Y.C.R.R. § 617.2(l). "SEQRA defines environment to include socioeconomic elements." *Industrial Liaison Comm.*, 131 A.D.2d at 209.
28. 68 N.Y.2d 359 (1986).
29. 76 A.D.2d 428 (4th Dep't 1976).
30. *Id.* at 433.
31. 69 N.Y.2d 406, 413 (1987).
32. *Id.* at 422.
33. *Society of Plastics v. County of Suffolk*, 77 N.Y.2d 761, 776 (1991).

34. *Id*. at 780.
35. *Id.* at 771.
36. *Id.* at 771.
37. *Id.* at 776.
38. *Id.* at 777.
39. Today, it is still noted that "business associations have brought SEQRA lawsuits and they have generally been successful in obtaining standing." Michael B. Gerrard, *et al*., *Environmental Impact Review,* pp. 7-78.
40. *HAR Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524 (1989) (the plaintiff did not articulate any specific environmental injury).
41. 170 A.D.2d 1033 (4th Dep't 1991).
42. The Public Service Commission maintains, of course, that deregulation will improve competition and lower electric rates. The substance of that argument is beyond the instant discussion; however, the question that petitioners sought to raise was whether the environmental analysis that the PSC performed in support of its conclusion complied with SEQRA. The Court could only consider this issue if petitioners had standing. Since they did not have standing, the PSC environmental analysis was effectively unreviewable.
43. *Oswego v. Public Service Comm'n*, Index No. 2115-98 (Sup. Ct., Albany Co. May 21, 1998).
44. *Benson v. City of Albany* (Sup. Ct., Albany Co. Jan. 20, 1999), *aff'd on opinion below*, 266 A.D.2d 625 (3d Dep't 1999).
45. A second group of PEF members, who lived in the vicinity of the proposed new headquarters, was denied standing because they failed to demonstrate "special harm" different from other Albany residents.
46. *See* note 11 and accompanying text.
47. *Boyle v. Town of Woodstock*, 257 A.D.2d 702, 704 (3d Dep't 1999).
48. 261 A.D.2d 474 (2d Dep't 1999).
49. 188 A.D.2d 854, 855-856 (3d Dep't 1992).
50. 206 A.D.2d 672 (3d Dep't 1994)
51. *Schulz v. New York State Dep't of Envtl. Conservation*, 186 A.D.2d 941 (3d Dep't 1992).
52. *Long Island Pine Barrens Soc'y v. Town of Brookhaven*, 213 A.D.2d 484, 485 (2d Dep't 1995) (citing *Sun-Brite Carwash*).
53. 228 A.D.2d 862 (3d Dep't 1996).
54. *Id.* at 864.
55. 170 Misc. 2d 107 (Sup. Ct., Oneida Co. 1996).
56. 170 Misc. 2d at 108.
57. *Id.* at 116.
58. The author represented the petitioners in *Benson.*
59. 235 A.D.2d 984 (3d Dep't), *appeal denied*, 89 N.Y.2d 816 (1997).
60. 251 A.D.2d 907, 909 (3d Dep't 1998).
61. *Many v. Sharon Springs*, 218 A.D.2d 845 (3d Dep't 1995); *see Piela v. Van Voris*, 229 A.D.2d 94 (3d Dep't 1997) (where the mere allegation of proximity to a proposed project was held insufficient).
62. 206 A.D.2d 672 (3d Dep't 1994).
63. 218 A.D.2d 845 (3d Dep't 1995).
64. 261 A.D.2d 474, 475 (3d Dep't 1999).
65. 214 A.D.2d 335, 336 (1st Dep't 1995).
66. 200 A.D.2d 870 (3d Dep't 1994).
67. 77 N.Y.2d at 774.
68. 85 N.Y.2d 382, 396 (1995).
69. 229 A.D.2d 780 (3d Dep't 1996).
70. 221 A.D.2d 608 (2d Dep't 1995).
71. 87 N.Y.2d 668, 687 (1996).
72. 265 A.D.2d 761 (3d Dep't 1999), *appeal dismissed*, 94 N.Y.2d 891 (2000).
73. In an article in this publication in Spring 2001, "Do Condemnees in EDPL Proceeding Automatically Have Standing to Challenge the Taking on the Grounds of SEQRA Noncompliance?" Joseph Durkin and Sara Potter persuasively argued that, under *Plastics*, and subsequent cases, a condemnee whose property is being seized may not have standing to challenge SEQRA noncompliance. However, Niagara Mohawk successfully raised the issue of SEQRA noncompliance in the *Green Island* case, and was also raising the issue in a challenge to a condemnation of a hydroelectric facility by the city of Oswego before the Fourth Department when Oswego discontinued its condemnation efforts after a change in city administration after an election.

    The author attended the oral argument of *Green Island* in his capacity as special counsel for the city of Oswego.
74. For a contrary example, see *McGrath v. North Greenbush*, 254 A.D.2d 614 (3d Dep't 1998). In *McGrath*, a commercial establishment was denied standing to challenge a zoning ordinance because its interests with respect to traffic congestion and decreased property values were purely economic and not different from the community at large. In contrast, a petitioner who alleged that she lived within 500 feet of the sight was permitted to assert standing based upon her claims of harm from increased noise, traffic and degradation of the neighborhood. However, the petitioner still needed to assert her interest as a property owner, and the interest still needed to be "environmental."
75. 131 A.D.2d 205 (3d Dep't 1987) (challenge to statewide water quality regulations).
76. 70 N.Y.2d 193 (1987) (challenge to zoning regulations affecting sensitive environmental area).
77. 77 N.Y.2d at 789.
78. 69 A.D.2d 222 (4th Dep't 1979).
79. 88 A.D.2d 484 (2d Dep't 1982).
80. *Friends of Woodstock v. Town of Woodstock*, 152 A.D.2d 876, 878 (3d Dep't 1989).
81. 68 N.Y.2d 359 (1986).
82. 67 N.Y.2d 400 (1986).
83. *Society of Plastics v. County of Suffolk,* 77 N.Y.2d 761, 789 (1991) (Hancock, J., dissenting).
84. *United States v. SCRAP*, 412 U.S. 669, 689 (citing Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1973)).
85. 77 N.Y.2d at 793.

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The Effect of State Facility Permit Violations on Potential to Emit

By Randall C. Young

Owners and operators of major air contamination sources may apply for permits that limit their facility's potential to emit below the major source threshold.[1] Capping their emissions in this way allows them to avoid the requirement to obtain an operating program permit under title V of the Clean Air Act and requirements of other regulatory provisions, such as requirements for reasonably available control technology, National Emission Standards for Hazardous Air Pollutants, New Source review, and/or emission modeling pursuant to Air Guide-1.[2] However, violation of the conditions in a State Facility Permit can subject these sources to regulations governing major sources.

Potential to emit is:

> the maximum capacity of a stationary source to emit any regulated air contaminant under its physical or operational design. Any physical or operational limitation on the capacity of such source to emit a regulated air contaminant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation is enforceable by the commissioner and the administrator of the United States environmental protection agency.[3]

Facilities often have a potential to emit well above the major source threshold, with minor actual emissions. For this reason, many otherwise major facilities will accept permit conditions that limit their potential to emit.

Despite the definition of PTE above, permit conditions do not always determine potential to emit. Where an owner or operator routinely and knowingly violates the terms of its permit, regulatory agencies may calculate potential to emit without considering permit conditions limiting potential to emit. Federal courts have been "unwilling to extend the rule that federally enforceable permit limitations are a component of potential to emit to a case where such limitations are repeatedly ignored or violated."[4] The rationale for this is that "[t]o hold that permit limitations which are repeatedly violated should nonetheless be considered in determining potential to emit would give better treatment to sources that knowingly violate such conditions than the treatment currently afforded sources which comply with the law."[5]

The court did not enunciate a test for what constitutes "routine" violation. But, based on the reasoning behind the court's holding, it seems likely that any knowing violations or a record of chronic violation will suffice to justify calculation of potential to emit without regard for permit conditions.

Where this determination is made, the consequences to the source owner can be severe. In *Louisiana Pacific* the issue was whether the company violated the permitting, modeling and increment analysis requirements of 40 C.F.R. § 52.21.[6] Aside from penalties for the violations, injunctive relief would include requirements for detailed modeling of the air contamination source in the area of the project, analysis of the effect of the source on air quality, and installation of Best Available Control Technology.[7] This would be a bitter pill to swallow for a business that would otherwise be completely exempt from these requirements.

To be fair, most owners and operators should not be alarmed by the holding in *Louisiana Pacific* because they don't routinely or knowingly violate their permit. It seems safe to assume that most people who take the trouble to obtain a permit intend to comply with it. Indeed, the number of facilities with knowing and routine violations seems comparatively small. Still, operating any facility can be complex and violations occur.

Neither the EPA nor the courts have gone beyond the holding in *Louisiana Pacific*. However, the definition of potential to emit, coupled with the structure of state facility permit conditions, means the effect of a violation can be determined by direct reference to the permit conditions. Even isolated violations of permit conditions that limit potential to emit, increase the facility's potential to emit.

State facility permit conditions limiting potential to emit do not generally specify a numeric amount of pollution that each emission unit may emit. Instead, the physical or operational restrictions that limit potential to emit are set forth in the permit conditions. This reflects the definition of potential to emit. A permit condition limiting potential to emit appears similar to the following: "Emission unit: Generator 2. To limit emissions from the facility to 99 tons of sulfur dioxide per year, operation of this emission unit shall not exceed 4,380 hours in any consecutive 12 months."

The permit would probably contain several similar restrictions for other emission units. Violation of one of these permit conditions would increase the facility's potential to emit. An example illustrates why.

Assume that this is the only source of SO_2 at the facility. If this generator operates 4,380 hours, it will produce 99 tons of SO_2 per year. If it operates 50 percent over the permit limit, or 6,570 hours, it would emit 50 percent more—123.74 tons of SO_2 per year. That would be actual emissions for that period.

To say that the emission unit's actual emissions exceeded its potential to emit is a contradiction. Therefore, the emission unit's potential to emit for duration of the violation must be at least equal to the actual emissions caused by the violation. This increases the facility's overall potential to emit. This is true whether this is the only emission unit, or one of several.

Suppose the facility contains two generators, each with that permit condition. Each generator operating 4,380 hours would generate 54.5 tons of SO_2 per year. One operates only 25 percent of the permitted number of hours, causing actual emissions of 13.6 tons of SO_2. The other operates for 6,570 hours, 50 percent over the permit limit, causing emissions of 81.75 tons of SO_2. Total actual emissions are 95.4 tons of SO_2.

This looks like compliance. A permit limit of 99 tons per year, actual emissions of only 94 tons per year. However, the bald number of 99 tons per year is not a restriction on potential to emit.[8] The underlying physical or operational restrictions limit the facility's potential to emit. Those restrictions authorized the owner to run both generators up to 4,380 hours, which in turn would cause emissions of 54.5 tons of SO_2. The permit does not deduct the excess hours of operation or excess emissions of one unit from the un-used hours and emissions allotted to the under-utilized emission unit.

The facility's potential to emit for the period of violation would equal the maximum permitted emissions plus the actual excess emissions caused by the violation. Maximum permitted emissions were 99 tons of SO_2. The violation caused 27.25 tons of emissions more than would have occurred if no violation took place. The result is a potential to emit of 126.25 tons.

The applicability of air pollution control regulations depending on a facility's potential to emit comes back into consideration at this point. If the source violates a permit condition increasing its potential to emit, it might fall subject to additional regulatory provisions that it sought to avoid by accepting the cap. On the other hand, it means many facilities will be able to diminish this risk by putting some thought into the limits for which they apply.

This application of the regulations creates a sliding scale with risk commensurate to the level of permitted emission. Facilities with low actual emissions would apply for permit limits far below the PSD, New Source Review, and major source thresholds. The risk of a violation causing their potential to emit to exceed the major source threshold would be low. The higher a facility's emission limit, the greater the chance of a violation causing potential to emit to exceed the major source threshold. This approach comports with the requirements of the regulations, and creates a rational system with the possible consequences of violations being in proportion to the emissions of the facility.

Endnotes

1. N.Y. Environmental Conservation Law § 19-0107(19); N.Y. Comp. Codes R. & Regs. tit. 6 § 201-7.1.
2. Major sources must obtain operating program permits under title V of the CAA through 6 N.Y.C.R.R. Part 201-6.1(a); major sources of NOX must comply with 6 N.Y.C.R.R. Part 212 or 227; major sources of VOC's must comply with 6 N.Y.C.R.R. Part 212 or 228; 40 C.F.R. § 52.21 and 6 N.Y.C.R.R. Part 231-2 apply to new sources or modification of existing sources; requirements of 40 C.F.R. §§ 63 *et seq.* generally apply to major sources of hazardous air pollutants; Air Guide-1 contains health based exposure limits facilities must meet.
3. ECL § 19-0107(21).
4. *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1161 (D. Colo. 1988)
5. *Id.*
6. *See Id*.
7. Environmental Protection Agency, *Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements*, Nov. 17, 1998.
8. *Louisiana-Pacific Corp.*, 682 F. Supp. 1141. *See also United States v. Wisconsin Elec. Power Co.*, 893 F.2d 901 (7th Cir. 1990).

The views expressed in this article are the personal opinions of the author and have not been endorsed by, nor do they necessarily reflect, the position of the Department of Environmental Conservation. This article is intended for professional consideration and is not intended to be legal advice.

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New York State Court of Appeals Reaffirms the Role of the State Legislature as the Gatekeeper of Public Parklands

By Theodore A. Keyes

On February 8, 2001, in a ruling issued in response to a certified question in *Friends of Van Cortlandt Park v. City of New York*,[1] the New York State Court of Appeals unanimously reaffirmed the public trust doctrine, an important common law doctrine that casts the state Legislature in the role of gatekeeper of public parkland. Under this long-standing doctrine, parkland cannot be used for other than park purposes without the specific approval of the state Legislature.[2] The decision, authored by Chief Judge Kaye, reinforced the importance of public parks in the community and the restrictions on municipalities' use of parkland in the absence of legislative approval.

As recently as 1984, the Appellate Division had reiterated the classic statement of the public trust doctrine as it affects parkland: "[d]edicated park areas in New York are impressed with a public trust and their use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred."[3] Despite this clear statement of the law, the scope of the doctrine came under attack when the city of New York announced that it intended to build a vast water filtration plant on a 23-acre parcel in the southeast corner of Van Cortlandt Park in the Bronx. The city argued that it could proceed with the project without legislative approval because (1) the project did not require transfer of a property interest; (2) the affected parkland would be fully restored to park use after the construction period; and (3) any permanent impact to the park would be underground or at least below finished grade. Underlying the city's position was the suggestion that the public trust doctrine should be relaxed because the proposed plant would serve an important public health purpose. None of these concepts had previously been recognized by the courts as exceptions to the public trust doctrine.

The Proposed Filtration Plant

The filtration plant was intended to be the solution to the city's decades-long search for a site to treat water from the Croton Watershed, a series of reservoirs and lakes located in Westchester, Dutchess and Putnam counties that provides between 10 and 30 percent of the city's drinking water. Initially, the city intended to site the facility at the Jerome Park Reservoir in the Bronx. After that site met with intense political opposition, the city decided to consider other alternatives, including three different sites in Van Cortlandt Park.

The city's proposal called for construction of a 473,000-square-foot water filtration plant with the capacity to treat up to 290 million gallons of water per day. In addition, the city planned to build a raw water pumping station and a finished water pumping station. The entire project would have been constructed in the area of Van Cortlandt Park which is currently the site of the Mosholu Golf Course, a nine-hole golf course and driving range.

The city's plans included blasting of bedrock and massive excavation of soil and rock beneath the park surface so that the filtration plant could be built partially below the ground. The finished project was intended to be buried below the surface between 5 and 30 feet above the existing grade of the park. According to the design plans, the driving range would have been rebuilt on the roof of the plant and the city represented that it would also construct a new clubhouse and golf course, each of which would have been demolished during the construction period that was expected to last in excess of five years. Although these plans clearly contemplated intrusion on the park for a non-park use, the city maintained that legislative approval was unnecessary.

The District Court Proceedings

The dispute over the scope of the public trust doctrine first came to a head before the U.S. District Court for the Eastern District of New York, the court supervising the consent decree between the city of New York, the state Department of Health and the United States.[4] Under the consent decree, the city was required to meet certain deadlines for construction of the plant in order to belatedly comply with the filtration requirements of the Surface Water Treatment Rule[5] issued in 1993 by the U.S. Environmental Protection Agency. After the city announced that the plant would be built in Van Cortlandt Park, several community groups brought suit contending that the plant could not be built in the park without the approval of the state Legislature. The attorney general of the state of New York joined in the position advanced by the community groups and the Eastern District heard cross-motions for summary judgment on the issue.

The district court granted the city's motion for summary judgment and held that legislative approval was unnecessary because the city would not be transferring a property interest to another entity and because there would be no diminution in the amount of available parkland after the construction of the plant was completed.[6] The attorney general and the community groups appealed the decision to the U.S. Court of Appeals for the Second Circuit and asked the Second Circuit to certify the key questions of New York State law to the state Court of Appeals. The Second Circuit granted the request to certify and the Court of Appeals accepted certification, framing the key question as "Does any aspect of the proposed [water treatment plant] require state legislative approval?"[7]

The Court of Appeals' Ruling and the Common Law Precedent

In its recent decision, the Court of Appeals answered the certified question in the affirmative and ruled that legislative approval is required "when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored."[8] The Court relied on its own existing precedent to reject the city's attempt to carve out exceptions to the public trust doctrine and confirmed that the requirement of legislative approval is not excused simply because the proposed filtration plant may serve an important public purpose.

Although the creation of the public trust doctrine dates back to at least the late 19th century,[9] the Court of Appeals published its most expansive discussion of the doctrine in 1920 in a decision authored by Judge Pound in *Williams v. Gallatin*.[10] In that case, the city of New York had proposed to lease the Arsenal Building in Central Park to the Safety Institute for America, which planned to provide free public access to exhibits on safety and sanitation. The proposed ten-year lease was cancelable by the city and upon expiration of the lease the property would have been returned to park use. The Court of Appeals ruled that because the museum was a non-park use, under the public trust doctrine, the lease was prohibited in the absence of legislative approval.[11]

In explaining the decision, Judge Pound eloquently described the role of parks in the community and in doing so explained the basis for impressing parks with a public trust:

> A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. . . . Monuments 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[12] 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. The environment must be suitable and sightly or the pleasure is abated. Art may aid or supplement nature in completing the attractions offered. The legislative will is that Central Park should be kept open as a public park ought to be and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end.[13]

In *Friends of Van Cortlandt Park*, the Court of Appeals again rejected the city's attempt to intrude upon parkland without the consent of the state Legislature. In fact, Judge Pound's opinion in *Williams v. Gallatin* squarely addressed the issue, raised again in *Friends of Van Cortlandt Park*, of whether the public trust doctrine should be relaxed in the face of projects that serve an important public purpose. Like Judge Kaye, Judge Pound rejected a public purpose exception, stating that "no objects, however worthy, . . . such as courthouses and schoolhouses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority, plainly conferred."[14] The Court of Appeals in *Friends of Van Cortlandt* also rejected the city's argument that the public trust doctrine was not applicable because the park would be restored after the construction period. Similarly, the ruling in *Williams v. Gallatin* makes clear that it matters not whether the park will ultimately be restored to park use, since the Arsenal Building would have been restored to park use after the lease period. Finally, the Court of Appeals in *Friends of Van Cortlandt Park* rejected the assertion that the public trust doctrine was not applicable in the absence of the transfer of a property interest.

Even prior to *Williams v. Gallatin*, in 1913, the New York State Legislature codified certain elements of the public trust doctrine in section 20 of the New York City General Law.[15] Section 20(2) provides that "the rights of a city in and to its waterfront, ferries, bridges, wharf 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."[16] While the statute can at least arguably be read as limited to cases where the municipality seeks to transfer a property interest, the existing common law enforces the public trust doctrine even where there is no actual transfer of a property interest. In fact, the Court of Appeals specified that it was relying on the common law and not on the statute in *Friends of Van Cortlandt Park*.

For example, the turn of the century ruling in *Bates v. Holbrook* recognized that the public trust doctrine extends to situations where parkland is being used for a non-park purpose even where there is no transfer of a property interest.[17] In *Bates*, the city Department of Parks had permitted the placement of construction sheds in Union Square Park for a three-year period in connection with an underground subway project that had been authorized pursuant to an act of the state Legislature. Because there was no specific authorization for invasion of the park surface through construction of these sheds, the Court of Appeals ruled that the construction had to be approved by the state Legislature.

More recently, *Ackerman v. Stiesel* presented another public trust doctrine dispute that did not concern a transfer of a property interest. In that case, the city Department of Transportation and the city Department of Sanitation "stored approximately 100 vehicles, including snow removal equipment, and [had] erected temporary structures," including fences, buildings and a tent for sanitation workers, in Cunningham Park in Queens.[18] The city agencies had used the park for this purpose for 25 and 14 years, respectively, although the record supported their assertion that the use was only intended to be temporary until a more suitable location could be located. The Court of Appeals affirmed the appellate division's ruling that occupation of the park in this manner, even if it was not intended to be a permanent use, was unlawful without legislative approval, even in the absence of the transfer of a property interest.[19]

The appellate division has also applied the public trust doctrine in the absence of the transfer of property interest. In *Stephenson v. County of Monroe*,[20] the county of Monroe proposed construction of a landfill in Black Creek Park for a five-year period. After the five-year period, the county intended to convert the landfill area into a ski slope. The appellate division held that the county's proposal was unlawful in the absence of legislative approval.

Unresolved Issues

The Court of Appeals did leave two issues unresolved in *Friends of Van Cortlandt Park*. First, the Court found it unnecessary to determine whether there are any exceptions to the public trust doctrine. As to this issue, the Court stated that "[w]hile 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."[21]

The Court of Appeals also left for another day the issue of whether an underground facility in a park that in no way intrudes upon park use would still be prohibited absent legislative approval. The Court deemed it unnecessary to reach this issue because construction of the proposed filtration plant would have required closure of "an appreciable area of the park" for more than five years and because "some future uses of the land will be inhibited by the presence of the underground structure." The Court rejected the city's reliance on *Wigand v. City of New York*,[22] an unreported case in which the Richmond County Supreme Court authorized the use and closure of parkland in connection with the installation of two underground water tanks. The Court of Appeals held that *Wigand* was distinguishable on "several grounds" and to the extent it was inconsistent with the *Friends of Van Cortlandt Park* it "should not be followed."

Conclusion

In sum, the recent decision in *Friends of Van Cortlandt Park* is an important victory for parkland protection because the Court of Appeals, addressing the public trust doctrine for the first time in over 15 years, reaffirmed its validity and reinforced the values set forth by Judge Pound in *Williams v. Gallatin* over 80 years ago. Had the Court allowed an exception to the public trust doctrine for construction of the water filtration plant, there may very well have been a parade of proposals to site public works projects in parkland. Instead, the Court of Appeals used the opportunity to re-establish the role of the state Legislature as the gatekeeper of parkland for public use.

Endnotes

1. *Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 623 (2001).
2. *Id.*
3. *Ackerman v. Steisel*, 104 A.D.2d 940, 941, 480 N.Y.S.2d 556, 558 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 833, 498 N.Y.S.2d 364 (1985); *see Miller v. City of New York*, 15 N.Y.2d 34, 255 N.Y.S.2d 78 (1964).
4. *Friends of Van Cortlandt Park v. City of N.Y.*, 96 F. Supp. 2d 195 (E.D.N.Y. 2000).
5. 40 C.F.R. §§ 141.70-75.
6. *Id.*
7. *Friends of Van Cortlandt Park v. City of N.Y.*, 232 F.3d 324, 327 (2d Cir. 2000); *Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 916 (2000).
8. *Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 623, 630 (2001).
9. *See Brooklyn Park Comm'r v. Armstrong*, 45 N.Y. 234, 243 (1871).
10. *Williams v. Gallatin*, 229 N.Y. 248 (1920).
11. Judge Pound explained the determination that the museum was a non-park use as follows:

    > [t]o promote the safety of mankind and to advance the knowledge of the people in methods of lessening the number of casualties and avoiding the causes of physical suffering and premature death is the purpose of the Safety Institute of America, to provide means of innocent recreation and refreshment for the weary mind and body is the purpose of the system of public parks. The relation of the two purposes is at best remote. *Williams*, 229 N.Y. at 254.

12. In fact, in *795 Fifth Avenue Corp. v. City of N.Y.*, 15 N.Y.2d 221, 257 N.Y.S.2d 921 (1965), the Court of Appeals recognized that construction of a restaurant in Central Park may be consistent with park uses.
13. *Williams*, 229 N.Y. at 253-54.
14. *Id.* at 253.
15. N.Y. Gen. City Law § 20(2).
16. *Id.*
17. *Bates v. Holbrook*, 171 N.Y. 460 (1902).
18. *Ackerman v. Steisel*, 104 A.D.2d 940, 480 N.Y.S.2d 556 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 833, 498 N.Y.S.2d 364 (1985).
19. *Id.*
20. *Stephenson v. County of Monroe*, 43 A.D.2d 897, 351 N.Y.S.2d 232 (4th Dep't 1974).
21. *Friends of Van Cortlandt Park*, 95 N.Y.2d at 631.
22. *Wigand v. City of N.Y.*, N.Y.L.J., Sept. 25, 1967, p. 21, col. 5 (Sup. Ct., Richmond Co.).

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THE MINEFIELD
Multijurisdictional Practice

By Marla B. Rubin

The term "practice of law" has not been defined clearly or consistently across the United States.[1] What historically has been clear is that the rendering of legal services or opinions, even attending negotiation sessions out of state—could be interpreted as the unauthorized practice of law in that state. The question of adverse consequences of such practice was considered in private conversations, or not at all. Both corporate counsel and outside counsel for national and multinational clients held their collective breaths as they met job requirements that sometimes took them out of their state of bar admission. Government lawyers, too, participating in or reassigned to work in states where they are not admitted face the same dilemma. Finally, this issue that no one wanted to approach is being considered publicly.

This new interest in multijurisdictional practice appears to have been spurred by the 1998 California case, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*.[2] As is often the case, it was a "foreign" law firm's pocketbook, short of compensation for services rendered in California, that led to this open approach to a thorny issue. In *Birbrower*, the California court ruled that the New York law firm suing a California client for services rendered in California could not get paid for these services. This deprivation seemed to be enough finally to spur the bar into action. (At least it wasn't due to one of us being jailed for attending a PRP meeting in New Jersey.)

Recently, a Colorado court required that a Wisconsin lawyer refund fees accepted for prelitigation work, despite the fact that the lawyer later was admitted *pro hac vice* (*Koskove*).[3] And what if the practice is not litigation? What if the practice is participation in arbitration (as was the case in *Birbrower*); negotiation of the purchase of real estate, even with a local lawyer present; arrangement of a stock transfer or purchase; or attendance at a PRP meeting? How can a lawyer avoid the risk of breaking rules when conducting an investigation, regardless of whether it is in preparation for litigation, or when conducting discovery of witnesses or documents not physically present either in the lawyer's state of admission or *pro hac vice* admission?

Some states have already addressed the issue, at least in part. Florida has a long-standing rule allowing corporate counsel not admitted in Florida to provide legal services there as long as the services are rendered to a full-time employer.[4] Kansas and Missouri have similar rules.[5] More recently, the states of Idaho, Oregon, and Washington adopted an agreement for the terms of reciprocal admission among their lawyers.[6]

By the time this column is printed, the American Bar Association's Commission on Multijurisdictional Practice will have issued its preliminary report. The report follows six public hearings held across the country and two roundtable discussions at ABA-related meetings since the Commission began its work in mid-2000. In the meantime, much of the material gathered by the Commission, including audio recordings of some of the public hearings, is available on an ABA Web site established specifically to gather and share ideas about multijurisdictional practice at <www.abanet.org/cpr/mjphome.html>.

The Commission has heard the expected arguments for and against multijurisdictional practice. There is the traditional argument that lawyers not admitted to a state's bar cannot adequately represent a client in that state—they lack the training and experience, the argument goes. Countering that argument, as always, is the accusation of turf protection.

At a hearing in New York City, Professor Gary A. Munneke of Pace University Law School testified that "the legal profession must not cling to a 'parochial' and 'protectionist' model for the delivery of legal services that ignores increasing globalization and the growing demand for consumer choice and 'autonomy.'"[7] After all, who needs a New York lawyer to participate in a real estate transaction in Massachusetts?

The new openness is refreshing. At one public hearing, on June 1, 2001, one prominent lawyer asked simply, "shall we change the rules to make legal and ethical that which all of us are doing already?"[8] A former chief justice of the Nebraska Supreme Court testified that he "didn't know of anybody in the smallest Nebraska community who limits his practice to the intrastate practice of law."[9]

New York's own Stephen Gillers, nationally respected expert on legal ethics and Assistant Dean of New York University Law School sits on the Commission. He expressed concern for "community-based law practice,"

fearing that the legal profession equivalent of the "Wal-Mart phenomenon" would drive local lawyers and law firms out of business.[10]

Both Dean Gillers and Commission Chair Wayne Positan made the point that "local" lawyers do much of the nation's pro bono and court-appointed representation. These being less lucrative than other legal work, both Commission members raised the spectre of lawyers no longer available to provide such community services.[11]

At the June 2001 hearing, it was generally acknowledged that there was consensus on some multijurisdictional practice that should not be subject to prosecution or sanction: affiliation with out-of-state lawyers; prelitigation activities (before *pro hac vic*e admission is required); activities of in-house counsel, participation in alternative dispute resolution; appearances before administrative agencies because they lack *pro hac vice* procedures; and activities of foreign legal consultants.[12]

In the meantime, the courts are taking a harder stance than some lawyers might wish. Besides *Birbrower* and *Koskove*, Rhode Island is now requiring that, in order to be paid for representation, even in administrative proceedings, out-of-state lawyers must be admitted *pro hac vice* by the Rhode Island Supreme Court.[13]

Multijurisdictional Environmental Practice

Most New York environmental law practitioners have been called upon to represent clients in proceedings outside New York State. For some firms, probably those with the most multistate or multinational corporate clients, a relaxation of the prohibition against out-of-state "practice of law" would be quite a relief. It probably would not change business as usual, but lawyers could let out their collective breaths. Equally relieved would be the in-house counsel whose jobs require their presence in and interpretation of the law of states where they are not admitted to the bar. In fact, many in-house counsel have their main offices in states where they are not admitted to the bar. In effect, just coming to work could violate the unauthorized practice of law rules of the state in which their main offices are located. The American Corporate Counsel Association (ACCA) has addressed this issue with its members at many meetings. ACCA's Web site <www.aca.com>, has this organization's take on the subject.

On the other hand, the so-called "Wal-Mart phenomenon" is no longer a phenomenon, but a fact of life for many businesses, including other large retailers. One shudders to think that Professor Munneke's prediction of the demise of small law firms could come to pass. In a jittery, uncertain economy, it is possible that even the local matters generally handled by community lawyers would be sought by large, multistate law firms. The bar does not have a duty to intervene in the "market," as Professor Munneke and others view the provision of legal services.[14] However, the bar does have a duty to protect the "core values" of our profession, which New York recognized when the rules were changed to allow limited affiliation with nonlawyers.[15] One of those core values is making legal services available to those who need them. If the bar determines that some relaxation of the rules that prohibit multijurisdictional practice would result in a dearth of lawyers available for pro bono and court-appointed representation, it must consider this effect in its recommendations and practice.

Changes in the rules and laws that prohibit lawyers from crossing state lines to represent a client under certain circumstances and conditions might remove the "don't ask, don't tell" aspect of the practice of law, yet make available the local practice and experience and trained state law expertise the original prohibitions were meant to protect.

Endnotes

1. Only the state of Washington has defined what is and what is not the practice of law. *See* ABA *Lawyers Manual on Professional Conduct*, Vol. 17, at 232 (2001) for a description of Washington Supreme Court General Rule 24.
2. 17 Cal. 4th 119, 949 P.2d 1 (1998), *cert. denied*, 525 U.S. 920 (1998).
3. *Koskove v. Bolte*, 2001 W.L. 125900 (Colo. Ct. App. 2001).
4. *See* Florida Supreme Court Rule 3-6.1.
5. *See* Kansas Supreme Court Rule 706; Missouri Supreme Court Rule 8.105.
6. ABA *Lawyers Manual on Professional Conduct,* Vol. 17, at 352 (2001).
7. *Id.* at 232.
8. *Id.* at 351.
9. *Id.*
10. *Id.*
11. *Id.* at 353.
12. *Id.* at 352.
13. *In re Ferrey*, No. 2001-172-M.P. (R.I. June 26, 2001).
14. ABA *Lawyers Manual on Professional Conduct*, Vol. 17, at 232-36 (2001).
15. *Id.* at 464-66. The new Rules took effect on Nov. 1, 2001.

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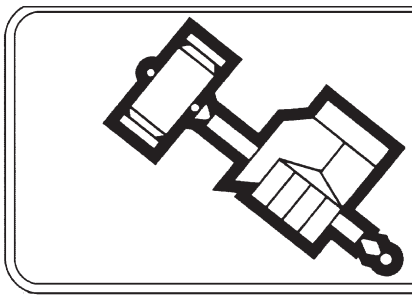

Administrative Decisions Update

Prepared by Peter M. Casper

CASE: ***In re the Application of Palumbo Block Company for a Mined Land Reclamation Permit for a Proposed Mine in the Town of Ancram, Pursuant to Article 23, Title 27 of the Environmental Conservation Law (ECL).***

AUTHORITIES: ECL Article 23 (Mineral Resources)

6 N.Y.C.R.R. § 617 (SEQR)

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

DECISION: On June 4, 2001, New York State Department of Environmental Conservation (DEC) Commissioner Erin M. Crotty issued an Order adopting the findings, conclusions and recommendations of Administrative Law Judge (ALJ) Susan DuBois holding that impacts to "community character," *inter alia*, should be an issue for adjudication. In her decision, the Commissioner notes that the issue of "community character" cannot necessarily be viewed in isolation and may include a myriad of diverse components beyond the realm of visual and noise impacts.

A. Facts

The Applicant, Palumbo Block Company, proposes to mine approximately two million cubic yards of sand and gravel from 73 acres in seven phases over 20 years from a mine located in the Town of Ancram, Columbia County.

The hearing on the project began on July 20, 1999 with a legislative hearing for unsworn comments about the application and the DEIS. Two petitions for party status were received, one from the Village of Millerton and one from a consolidated party consisting of the Town of Ancram and the Taconic Valley Preservation Alliance. On February 9, 2001, the ALJ granted party status to the Town of Ancram and the Taconic Valley Preservation Alliance (intervenors) and denied party status to the Village of Millerton.

The ALJ identified the issues for adjudication as: the Applicant's record of compliance; erosion control and drainage; freshwater wetlands impacts; visual impacts; noise impacts; and impacts on the character of the community. The administrative law judge determined that impacts on groundwater, spill prevention, air and dust impacts and traffic are not issues for adjudication.

The Applicant objected to the inclusion of impacts to "community character" in the hearing, stating that the proposed issue of community character is neither substantive nor significant because the ALJ has already determined that community character will be taken into account within the context of potential visual impacts, potential noise impacts and mitigation of those potential impacts.

B. Discussion

The ALJ held that the impacts on the "existing character of the community" will be an issue for adjudication. In determining this issue the ALJ noted that the intervenors' reasons for alleging such impacts relate largely to the issues of noise and visual impacts, and to the importance of tourism, recreational and agricultural activities in the economy and social fabric of the area surrounding the proposed mine. The ALJ also cited the town's 1972 development plan, which emphasizes open spaces and rural character and preservation of the natural environment, as a reason to adjudicate "community character."

The Commissioner noted that the intervenors propose to call local officials and members of the Harlem Valley Rail Trail Association as witnesses regarding community character. In her decision, the Commissioner states that the town's development plan can serve as evidence of a community's desires for the area and should be consulted when evaluating the issue of community character as impacted by a project. This language comes directly from *In re William E. Dailey, Inc.*, Interim Decision of the Commissioner, June 20 1995.

In making her decision, the Commissioner cites well-established case law. She states the "environment" is broadly defined under SEQRA. (*In re Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359 (1986)). She cites that community character can include neigh-

borhood gentrification (*In re Chinese Staff*, at 367), a proposed development that would quadruple a town's present population (*In re Tuxedo Conservation and Taxpayers Ass'n v. Town Board of Tuxedo*, 69 A.D.2d 320 (2d Dep't 1979)), and lower property values and less future commercial development emanating from a proposed transfer station (*In re Meschi v. New York State Department of Environmental Conservation*, 114 Misc. 2d 877 (Sup. Ct., Albany Co. 1982)). She points out that "environment" expressly includes "existing community or neighborhood character" (*see* ECL § 8-0105(6); 6 N.Y.C.R.R. 617.2(1)).

The Commissioner states that the issue of community character may intertwine and overlap with issues such as noise, aesthetics, traffic and cultural resources, and the Commissioner's final determination may "necessarily involve a judgment that integrates all of the relevant facts with respect to all of those issues. Accordingly, the issue of "community character" cannot necessarily be viewed in isolation and may include a myriad of diverse components beyond the realm of visual and noise impacts.

C. Conclusion

Based on the foregoing, the Commissioner affirmed the ALJ's Ruling to include community character as an adjudicable issue.

* * *

CASE: ***In re the Application of Pennsylvania General Energy, Inc. to Construct and Operate Natural Gas Wells in an Area Designated as the Wilson Hollow Field and an Order Establishing Field Wide Spacing Pursuant to the New York State Environmental Conservation Law (ECL).***

AUTHORITIES: ECL Article 23-0901 (Mineral Resources) (Royalty Payments)

6 N.Y.C.R.R. § 553 (Well Spacing)

DECISION: On August 8, 2001, New York State Department of Environmental Conservation Commissioner Erin M. Crotty issued an Order which affirmed the Ruling of the Administrative Law Judge Molly McBride, which denied party status for Buck Mountain Associates. Buck Mountain was unpersuasive in its argument that inclusion of the unit it occupied and leased in a spacing Order was a violation of the contract clause of the U.S. Constitution.

A. Facts

Pennsylvania General Energy, Inc. (PGE) proposed to operate producing wells for natural gas in an area designated as the Wilson Hollow Field. To date, five wells have been drilled in the field and the majority are in operation. Wilson Hollow Field is located almost entirely in Steuben County, town of Hornby. A small portion lies within Chemung County, town of Catlin.

DEC Staff and PGE entered into a written Stipulation regarding the Wilson Hollow Field providing for the creation of unit sizes and shapes and the spacing of wells to ensure that all affected interest owners receive a fair and equitable compensation upon issuance of a final well spacing Order by the Commissioner. The ECL directs that such an Order shall result only after a public hearing is held. The public hearing was held on April 10, 2001, and the issues conference was held on April 11, 2001.

Buck Mountain filed a petition for party status dated March 26, 2001. Buck Mountain owns no property within the field. It was learned during the issues conference that Buck Mountain's only relationship to this field is a lease interest for the oil and natural gas rights signed by one of five owners of a parcel that is less than one acre in size. According to DEC Staff, this interest amounts to 0.006 percent of the total field acreage.

Buck Mountain argued that it entered into a lease agreement that requires it to pay a higher royalty than it will receive if the terms of the Stipulation are incorporated into a Commissioner's Order. Buck Mountain does not challenge the Stipulation as being contrary to the law, it simply disagrees with ECL § 23-0901 and its fairness in light of the lease agreement Buck Mountain has entered into with the property owner.

The ALJ went on to examine each of the matters tendered by Buck Mountain in its petition of party status and, overall, denied Buck Mountain party status upon finding that no substantive issues were raised that warranted adjudication. Buck Mountain appeals the ALJ's Ruling.

B. Discussion

1. Position of Buck Mountain

Buck Mountain argued it was entitled to party status based on a lease agreement with the fractional mineral rights owner, Mr. James Griswold. It was alleged that the terms of the lease gave Buck Mountain the right to drill on the land owned by Griswold. By denying party status to Buck Mountain and to include the unit occupied, in part, by Griswold in a spacing Order, was argued by Buck Mountain to be in "derogation of privately negotiated existing contract rights." Buck Mountain argued that interference with its private contractual rights is in violation of the contract clause of the U.S. Constitution. Further, that the Griswold lease entitled Buck Mountain to royalties in excess of those provided by PGE and thus, by diminishing the royalty amount to Buck Mountain, was a confiscatory taking without compensation.

2. Position of PGE

PGE argued to affirm the ALJ's Ruling. PGE contended that Buck Mountain leased the Griswold property after the well was permitted, that Buck Mountain was not the operator of oil and gas wells, that Buck Mountain knew of the spacing hearing notice and knew or should have known that it would never be able to obtain an oil and gas drilling permit on the fractional interest of a 0.87 acre parcel. Further, that ECL § 23-0901 is constitutional and was constitutionally applied and, moreover, the Stipulation between PGE and DEC Staff did not interfere with contract rights or obligations nor did the Stipulation constitute a "taking" of Buck Mountain's property.

3. Position of DEC Staff

DEC Staff also argued to affirm the ALJ's Ruling. Staff contend that the ALJ properly applied the substantive and significant standard for determining party status and that Buck Mountain did not meet any of the regulatory requirements for raising an adjudicable issue. DEC Staff asserted, for example, that Buck Mountain's appeal regarding interference with private contract rights and confiscatory taking without compensation, are conclusory statements unsupported by factual and technical evidence. Further, Buck Mountain's legal arguments did not raised any matters to adjust the ALJ's Ruling.

C. Conclusion

The Commissioner denied the issue raised by Buck Mountain, referring to the fairness of ECL § 23-0901 and the Stipulation, because Buck Mountain failed to provide legal authority to allow for royalty payments different from those directed by ECL § 23-0901.

The Commissioner affirmed the ALJ's Ruling that Buck Mountain is not an "operator" as defined by 6 N.Y.C.R.R. § 550.3(a)(b). She concluded that there is no evidence to corroborate this claim, such as practical oil and gas experience, experience in development of leases for oil and gas production, or that Buck Mountain has engaged in the business of gas drilling and producing wells.

The Commissioner found that Buck Mountain's private contract rights have not been interfered with and that the DEC Staff's action is not a confiscatory taking without compensation. The Commissioner stated that Buck Mountain failed to produce the Griswold lease, which might have shed light on some of the contentions raised by Buck Mountain and that Buck Mountain simply made conclusory remarks unsupported by any factual and technical evidence. The Commissioner cites *In re Sylvania Corp. v. Kilborne*, 28 N.Y.2d 427 (1971), where the Court held, *inter alia*, that there can be no doubt as to the constitutionally of ECL § 23-0901.

Finally, the Commissioner pointed out that the record showed the Stipulation was entered into by PGE and the Department on December 27, 2000. Mr. Griswold received the Stipulation on or prior to January 8, 2001. The Department's well drilling permit was issued to PGE on January 11, 2001, and named PGE as operator. On February 24, 2001, Buck Mountain and Griswold entered into its lease. Thus, PGE was permitted by the Department to drill its well prior to the Griswold lease agreement. The Commissioner stated, "It is apparent that Griswold was thus aware of the Stipulation but choose not to participate and instead elected to join with Buck Mountain. The problems presented from which Buck Mountain complains are of its own doing."

For the above-stated reasons the Commissioner rejected the matters raised on appeal and affirmed the ALJ's Ruling.

* * *

CASE: ***In re the Application for a Freshwater Wetlands Permit Pursuant to Environmental Conservation Law (ECL) Article 24 and Part 663 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 N.Y.C.R.R.) to Construct a Single Family Dwelling, Driveway, and Septic System on the South Side of Fall Street, in Montauk, Town of East Hampton, Suffolk County, New York, in the Adjacent Area of Freshwater Wetland MP-18 in the Montauk Point Quadrangle.***

AUTHORITIES: ECL Article 24 (Freshwater Wetlands)

6 N.Y.C.R.R. § 663 (Freshwater Wetlands Permit Requirements)

DECISION: On July 25, 2001, New York State Department of Environmental Conservation Commissioner Erin M. Crotty issued an Order adopting the findings, conclusions and recommendations of ALJ Daniel O'Connell in the above-captioned matter. The Commissioner found that the Applicant did not present a *prima facie* case that was sufficient to show conformity with the regulatory criteria for issuance of a freshwater wetlands permit. The Commissioner recognizes that the Applicant did not show how the incompatible activities associated with its proposal complied with the regulatory criteria. Accordingly, the Applicant's application for a freshwater wetlands permit was denied.

A. Facts

In 1997, the Applicant, Paul Novack, bought real property on the south side of Fall Street in Montauk, New York, the Town of Easthampton. On January 28, 1998, the Applicant applied to the Department for a freshwater wetlands permit pursuant to ECL Article 24 to construct a single family residence, driveway, and septic system on the site. On February 2, 1998, the Department Staff issued a notice of incomplete applica-

tion to Mr. Novack, indicating that a wetlands survey must be performed. DEC Staff concluded that this project was a Type II action pursuant to 6 N.Y.C.R.R. § 617.5, the regulations implementing the State Environmental Quality Review Act (SEQRA; ECL Article 8), and therefore, would not require an environmental impact statement (EIS).

By letter dated July 1, 1998, DEC Staff denied Mr. Novack's permit application because the proposed activities would be incompatible with the wetland and its functions. By letter dated April 9, 1999, Mr. Novack requested a hearing.

Immediately following the legislative hearing, the Issues Conference began. No intervenors filed petitions for party status. After several adjournments and site visits the parties agreed that the issues for adjudication would be whether the Applicant's proposal would comply with the three-part compatibility tested outlined at 6 N.Y.C.R.R. § 663.5(e)(1), and the weighing standards listed at 6 N.Y.C.R.R. § 663.5(e)(2).

B. Discussion

A portion of the Applicant's property is located in Freshwater Wetland MP-18, which is identified as a Class I wetland. Class I wetlands are considered to be the most highly valued type of wetland. The standards for permit issuance include a three-part compatibility test and, when applicable, weighing standards. The three-part compatibility test is set forth in 6 N.Y.C.R.R. § 663.5(e)(1) and provides that:

> [a] permit, with or without conditions, may be issued for a proposed activity on a wetland of any class or in a wetland's adjacent area, if it is determined that the activity (i) would be compatible with preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare.

In the case of a Class I wetland, the proposed activity must also minimize degradation to, or loss of, any part of the wetland or adjacent area or the functions and benefits the wetland provides. Finally, a permit shall only be issued if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss or detriment to the benefit(s) of the Class I wetland. (6 N.Y.C.R.R. § 663.5(e)(2)).

The regulations contain a chart that list the regulated activities for the various classes of wetlands. (6 N.Y.C.R.R. § 663.4(d)). The chart assigns a level of compatibility based on the nature of the activity and whether that activity would take place in the regulated wetland or adjacent to the wetland. The Applicant proposed to construct a home and related structures and would clear, fill and grade property adjacent and within the regulated wetland. Under the regulations this is considered both "usually incompatible" for adjacent property and "incompatible" for property within the wetland.

The Applicant's direct case did not focus on the compatibility standards, rather he primarily focused on the weighing standards. The weighing standard is whether the Applicant's proposal would minimize degradation to, or the loss of, any part of the Class I wetland or its adjacent area, and that the proposal would minimize any adverse impacts on the functions and benefits that the wetland provides. Although the scale of the Applicant's proposal compared to the total area of the subject wetland suggests that the proposed project may meet this weighing standard, the Applicant has an affirmative obligation to make this demonstration. The Applicant, however, did not offer any expert testimony or other evidence to show how his proposal would minimize degradation to, or the loss of, any part of the subject wetland. It is the Applicant's burden and the Applicant must present information about the wetland's particular functions and benefits. Absent this information, the Applicant failed to show that his proposal would minimize potential impacts to the functions and benefits of the wetland.

The Applicant cannot rely on the Town Zoning Board of Appeal's determinations as sufficient evidence to demonstrate that his proposal would meet the weighing standards outlined above. The ALJ notes that the "standards for obtaining a natural resources special permit from the Town are different from the standards for obtaining a freshwater wetlands permit from the Department." Consequently, this information was given little weight by the ALJ.

The Applicant also argued that the need for affordable housing on the eastern end of Long Island satisfies a compelling economic or social need that clearly and substantially outweighs the loss or detriment to the benefits of the Class I wetland. To support this argument, Mr. Novack testified that he would move out of the area if the Commissioner denies the pending permit. He explained that he cannot afford housing in Montauk, and that the availability of housing for working people in the town of East Hampton is an issue. However, these arguments were not successful in tipping the scale in his favor.

C. Conclusion

Commissioner affirmed the ALJ Ruling that the Applicant did not show how the usually incompatible activities associated with its proposal would comply

with the applicable weighing standards. Accordingly, the Applicant's application for a freshwater wetlands permit was denied.

* * *

CASE: ***The Application of Ramapo Energy Limited Partnership for Permits Pursuant to the Requirements of ECL Article 19, and 6 N.Y.C.R.R. Part 201 and N.Y.C.R.R. Subpart 231-2, and Pursuant to ECL Article 17.***

AUTHORITIES: ECL Article 19 (Air Pollution Control)

ECL Article 17 (Water Pollution Control)

6 N.Y.C.R.R. § 201 (Permits and Registrations)

6 N.Y.C.R.R. § 231-2 (Requirements for Emission Units)

DECISION: On July 13, 2001, New York State Department of Environmental Conservation Commissioner Erin Crotty affirmed in part and reversed in part the April 17, 2001 Ruling on Issues and Party Status by ALJ Susan DuBois. The Commissioner reversed the ALJ's Ruling on several issues regarding party status because Ramapo Energy Limited Partnership (the "Applicant") conformed to the approved protocols which raised the bar for intervenors to advance an issue to adjudication.

A. Facts

The Applicant applied to the DEC for air permits for a 1,100-megawatt major electric generating facility in the town of Ramapo, Rockland County, as well as a general permit for stormwater discharges under the State Pollutant Discharge Elimination System (SPDES).

The Applicant has also applied for a Certificate of Environmental Compatibility and Public Need, pursuant to Article X of the New York State Public Service Law. The Department's public hearing was held contemporaneously and on a joint record with the Article X proceedings.

The DEC held the issues conference on February 15 and 16, 2001, and continued on February 26, 2001. Several governmental bodies and organizations requested full party status. Petitions were received from Rockland County, the village of Suffern, the Torne Valley Preservation Association (TVPA), the village of Chestnut Ridge, and the Rockland County Conservation Association and the Passaic River Coalition (initially a consolidated party (RCCA/PRC)). The Palisades Interstate Park Commission and the Town of Ramapo (PIPC/Ramapo) participated as a consolidated party, and also filed a joint petition for party status.

The events preceding the issuance of the ALJ's Ruling are complex. This is due in part to requests by various parties for more time to prepare, the nature of the process to allow responses, and because of the schedule established pursuant to the time frames in Article X. Under the Department's operating practice, the petition for party status and the issues conference are the place where offers of proof are made, and with leave of the ALJ, briefs may be filed. Here, several issues conference sessions were held given the public interest, supplemental petitions for party status were filed, responses to the supplemental petitions were allowed, a draft permit required certain changes by Staff, further supplemental petitions and further supplemental responses were filed, all culminating in the issuance of the ALJ's Ruling itself. The Commissioner states, "as a cautionary note, care needs to be taken to ensure that the issues conference not become so iterative that it defeats its very purpose."

The ALJ identified the following issues for hearing: four issues regarding the information used in modeling concentrations of air pollutants; the emission limit and technology associated with the lowest achievable emission rate (LAER) for oxides of nitrogen (NOx); identification of the source of emission reduction credits (ERCs); the adequacy of proposed dust control measures to be undertaken during construction; formaldehyde emissions; the height of the stacks as that height relates to the definition of good engineering practice stack height; certain requests by the Applicant for changes in conditions in the draft air permits; and whether the project is subject to general permits for stormwater discharges, as opposed to requiring an individual permit for these discharges.

Approximately 17 proposed issues were excluded or resolved. The issue of the record of compliance by the Applicant's parent company was limited by the ALJ to include compliance history information from Massachusetts. The issue of evaluating 6 N.Y.C.R.R. § 231-2 alternatives was limited to the technology alternatives to further reduce NOx.

B. Discussion

1. DEC Staff and Applicant's Appeal

DEC Staff and the Applicant's appealed the portions of the ALJ's Ruling that: (1) granted full party status to PIPC/Ramapo; (2) granted full party status to the county; (3) granted full party status to TVPA/RCCA and Suffern; (4) allowed testimony with respect to topographical data; (5) allowed testimony on the data used for air modeling; (6) allowed testimony on the air source inventory; (7) allowed adjudication of the Department's LAER determination and the quantity of offsets for NOx; (8) allowed adjudication of the potential impacts of formaldehyde emissions; (9) allowed

adjudication of the proposed stack height; and (10) allowed adjudication of the question of the facility's eligibility for coverage under the general stormwater permits during construction and operation.

The Applicant also appealed the ALJ's determination that proposed the dust control measures during construction was an issue for adjudication.

C. Summary of Arguments and Commissioner's Decisions

1. PIPC/Ramapo's Request for Party Status

In their joint petition, PIPC/Ramapo identified as an issue alleged discrepancies in the information used in the Applicant's computer modeling to determine terrain features in the vicinity of the proposed facility. The petition stated that inconsistencies in the information could have a significant effect on dispersion modeling results.

The ALJ concluded that the information in the hearing record sufficiently raised a substantive and significant issue and the testimony by Department Staff and the Applicant failed to successfully rebut the issue. The ALJ therefore granted party status to PIPC/Ramapo.

The Commissioner reversed the ALJ's Ruling. She stated, "In such cases where, as here, Applicant has conformed to the approved protocols and Staff's review of the data, the bar to advance an issue to adjudication is higher." PIPC/Ramapo did not show that using their information would lead to a result significantly different than that already reached by the Applicant. Therefore, they did not meet their burden of establishing a substantive and significant issue.

2. Adequacy of Complex Terrain Modeling

In seeking party status, PIPC/Ramapo and Suffern raised an issue regarding the adequacy of the Applicant's complex terrain air modeling. They asserted that the Applicant's air modeling for complex terrain failed to include any receptors between the highest stack height elevation and the 900 foot contour line. They believe this omission was contrary to modeling protocol and was significant with regard to lateral plume impaction.

The ALJ-determined that the Applicant's response to the above-mentioned allegations referred to computer files that were made available to Staff and PIPC/Ramapo, but not to the ALJ. The ALJ states that the modeling protocol, which are in dispute, require interpretation.

The Commissioner reversed the ALJ Ruling stating that intervenors did not satisfy the substantive and significant standard because their submissions did not include an offer of proof that would bolster their assertion that data from receptors in that range would be critical in establishing maximum impact from air contaminants from the facility. The Commissioner stated that intervenors failed to complete their analysis and therefor the Ruling must be reversed.

3. Adequacy of Meteorological Data Used for Modeling

PIPC/Ramapo contended that Applicant should have used meteorological data from the site and not the Newburgh weather station. Intervenors state the Newburgh station was arbitrarily selected over other stations and this raises an adjudicable issue.

The ALJ allowed the intervenors to summit additional information on modeling and left open the issue as to whether meteorological data should be adjudicated.

The Commissioner reverses the Ruling because the intervenors failed to show why their data is more appropriate than the Applicant's data. The Commissioner cites directly to the intervenor's petition, which acknowledges that the existence of a substantive and significant issue has yet to be established. The Commissioner said that such language, in a petition, runs counter to the desired decisiveness required in the issues conference process.

4. Completeness of Source Inventory

Both the county and PIPC/Ramapo argued that the Applicant's inventory of sources of pollution used in the air modeling was flawed. The intervenors argued that sources that emit less than 1,000 tons per year (TPY) were omitted from New York City inventory, and that the appropriate threshold is 100 TPY.

The Applicant argued that this issue relates only to Ramapo's Prevention of Significant Deterioration (PSD) permit, and therefore there is a jurisdictional bar to its adjudication.

The ALJ responded to Applicant's arguments by stating, "If this issue were solely related to the PSD permit review, it would not be subject to adjudication. However, there are state air quality standards as well as federal ones." The ALJ stated that the issue of source inventory remains open as a potential issue for adjudication and she will allow intervenors to submit additional information to bolster their arguments.

The Commissioner, once again, reversed the ALJ's Ruling because the ALJ determined that the source inventory issue was "potentially" an issue for adjudication. The Commissioner states that this type of Ruling gives unwarranted weight to the insubstantial and incomplete offers of proof advanced by intervenors. It is important to note that the Commissioner recognized the ALJ's interpretation that state air permit issues are adju-

dicable and not barred simply because they are linked to the PSD process.

5. LAER Analysis for NOx and Alternative Technologies

PIPC/Ramapo and the county challenge the Applicant's analysis of LAER for NOx, and questioned whether the NOx emissions limits in the draft DEC permits can be achieved. The ALJ determined that the intervenors had raised a substantive and significant issue, and that adjudication is warranted.

The Commissioner reversed the ALJ's Ruling stating that Staff and Applicant agreed to the permit limit. This agreement shifts the burden to the intervenors to make an offer of proof that would cast doubt on Staff's determination, (i.e., that a more restrictive limit should be imposed or that it cannot be achieved in practice, and therefore, is unrealistic). The intervenors' proof fell short of this standard. The Commissioner also reverses the ALJ's Ruling that alternative technologies is an issue for adjudication stating that the technologies raised by intervenors are not feasible technologies that have achieved in practice or are reasonably expected to occur in practice.

6. Other Issues Raised on Appeal

The Commissioner went on in detail and stated that: there exists an issue as to treatment of ERCs; there does not exist an issue as to the number of offsets; there does not exist an issue as to additional dust control; there exists an issue as to formaldehyde emissions; there does not exist an issue as to stack height; there exists an issue as to whether the general SPDES permit is applicable; and that there does not exist an issue as to alternative sites, sizes or production processes.

D. Conclusion

The Commissioner remanded this matter to the ALJ for further action consistent with the discussion above.

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New York Municipal Formbook

Second Edition

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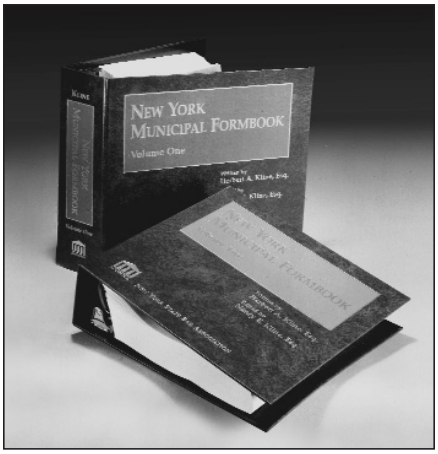

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Recent Decisions in Environmental Law

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Appalachian Power v. EPA, 249 F.3d 1032 (D.C. Cir. 2001)

Facts: In August of 1997 eight states submitted petitions to the Environmental Protection Agency (EPA) under section 126 of the Clean Air Act (CAA).[1] Under section 126 "downwind" states can petition the EPA for enforcement of section 110(a)(2)(D)(i)(I)[2] of the CAA, which provides that states must prohibit airborne emissions in amounts that will "contribute significantly to nonattainment" by other states of the National Ambient Air Quality Standards (NAAQS) for regulated pollutants.[3] In this case the "downwind states" complained that excessive release of the oxides of nitrogen (NOx) by stationary sources in "upwind states" contributed significantly to their nonattainment for the pollutant ozone, which is created by atmospheric chemical reactions involving NOx.

Instead of ruling directly on the section 126 petitions, the EPA chose to address the concerns of the upwind states through a separate rule-making process. In October of 1998 the EPA issued a ruling, *Finding of Significant Contribution and Rulemaking For Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone*[4] (NOx SIP Call), which required 22 states and the District of Columbia to revise their State Implementation Plans (SIPs) for NOx. The NOx reductions were limited to those that could be achieved at a cost of $2,000 per ton or less, and full implementation would be required by May 1, 2003. The section 126 petitions were linked to the NOx SIP Call through an "automatic trigger" mechanism. Under the automatic trigger, if a state were found to be in violation of the NOx SIP Call, a section 126 ruling will be entered automatically and the emissions sources within the state must cease operation after May 15, 2003. In a challenge to the NOx SIP Call, the D.C. Circuit Court of Appeals stayed the implementation date of the NOx SIP Call deadline, extending it to May 31, 2004.[5] As a result of this decision, the EPA abandoned the trigger mechanism and issued a section 126 ruling. The ruling imposed a NOx emissions "cap and trade" program on 12 states[6] that were found to have made significant contributions to the nonattainment of the NAAQS in New York, Connecticut, Massachusetts and Pennsylvania. Under the cap and trade program, the EPA issued NOx emission allowances on a state-by-state basis. The number of allowances issued to any given state was determined through the use of a computer model, the Integrated Planning Model (IPM), and was based on projected heat input (utilization) for electric generating units (EGUs), and projected emissions for nonelectric generating, industrial facilities (non-EGUs).

Several parties petitioned the court for review of this ruling including a group of the upwind states, electric utilities, and companies that operate nonelectric generating facilities.

Issues:

1. Whether the doctrine of "cooperative federalism" precludes the EPA from issuing a section 126 ruling while the NOx SIP Call is ongoing.
2. Whether the methodology used by the EPA in determining a "significant contribution" by the upwind states in the NOx SIP Call can be applied to a section 126 ruling.
3. Whether the method used by the EPA to calculate "growth factors" for EGUs in the NOx budget allocation process was arbitrary and capricious.
4. Whether the EPA properly reclassified cogenerators that sell electricity to the grid as EGUs.

Analysis: First, petitioners argued that under the doctrine of cooperative federalism the EPA cannot issue a final section 126 ruling while the NOx SIP Call is still pending. According to the petitioners, the doctrine embodies the principle that the preferred method of pollution control is through SIPs rather than direct federal regulation under section 126. The court rejected this argument, reasoning that since Congress provided both mechanisms without establishing a preference, the court would defer to the EPA's conclusion that the two provisions may operate independently of one another.

The court also rejected the petitioner's argument that the EPA's findings of "significant contribution" of NOx emissions in the upwind states are inadequate for a sec-

tion 126 ruling. Petitioners' argument stemmed from the language of the CAA. In finding a significant contribution under the NOx SIP Call the language of section 110 (a)(2)(D)(i) is controlling and requires the EPA to consider "any source or other type of emissions activity within the state." For a section 126 ruling the agency must consider "a major source or group of stationary sources." Therefore, it was argued that before the EPA can issue a section 126 ruling it must first determine that stationary sources within a given state were independently contributing to NAAQS nonattainment in downwind states. Again, the court deferred to the EPA finding as reasonable under the *Chevron* test.[7] The EPA argued that, since the problem was due to an accumulation of emissions, the "group of stationary emissions" language could be reconciled with a determination under a statewide emissions standard. The court deferred to this interpretation, holding that it was "reasonable for the EPA to link its stationary sources findings to the significance of a state's total NOx emissions."[8]

Petitioners also asked the court to find that the estimated growth rates used by the EPA to calculate individual state budget allocations of NOx emissions were arbitrary and capricious. Although the court generally upheld the use of the IPM to calculate growth rates, the EGU projection rates were remanded until the EPA could explain why they were reasonable. Growth rates represent the projected growth of electricity generation over time. In allocating NOx budgets the EPA used utilization baselines and then applied the growth rate projections to determine the budgets. The projections extended to the year 2007. Petitioners pointed out that the EPA's growth rate projections for the year 2007 in Michigan and West Virginia were less than the actual utilization rate of EGUs for 1998. The EPA argued that the estimates were reasonable. The court disagreed stating that "the EPA claims it made a reasonable choice, and it may be right—but simply to state such a claim does not make it so." The court noted that the EPA had other choices. The agency could have used the growth rate projections offered by the individual states. The fact that the EPA chose to use the IPM model is not in itself unreasonable, but the agency must "explain the assumptions and methodology used in preparing the model." In this case it failed to do so and the court remanded the growth factors until the EPA could "explain why the results that appear arbitrary on their face are in fact reasonable determinations."

Finally, the court addressed the issue of the EPA's classification of cogenerators that sell electricity to the grid as EGUs for the purposes of the section 126 ruling. The court vacated and remanded the classification. Under the ruling, different caps were established for EGUs and non-EGUs with the more stringent regulations applying to EGUs. In the past the EPA has classified cogeneration facilities, which produce electricity with energy that is a by-product of another industrial function, as non-EGUs if they sold less than one-third of their capacity, or less than 25 megawatts to the grid. The EPA argued that the new classification was reasonable in light of electric utility deregulation. Under deregulation cogenerators are competing with utilities and the cost of compliance is the same for both electric utilities and cogenerators. The court concluded that, while deregulation may provide a reason for lumping them together, the EPA does not support its conclusion regarding cost. Having established that the EPA used cost as a criterion for classification, the court held that the EPA "cites no record support" for its claim that the cost of implementing the reductions would be comparable for electric utilities and cogeneration facilities. The classification was therefore vacated and remanded for the EPA to either alter or properly justify its categorization of cogenerators selling to the grid as EGUs.

Brian Troy '02

Endnotes

1. 42 U.S.C. § 7426.
2. 42 U.S.C. § 7410(a)(2)(D)(i)(I).
3. *Id.*
4. 63 Fed. Reg. 57,356 (1988).
5. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000).
6. The states are: Delaware, Indiana, Kentucky, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia and West Virginia.
7. *Chevron U.S.A. Inc., v. Natural Res. Def. Counsel*, 467 U.S. 867 (1984).
8. 249 F.3d 1032, 1051.

* * *

D.E. Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)

Facts: D.E. and Karen Rice brought suit against the Harken Exploration Co. claiming that Harken contaminated both surface water and groundwater on their property in violation of the Oil Pollution Act (OPA). The Rices are trustees of the Rice Family Living Trust, which has owned the Big Creek Ranch in Hutchinson County, Texas, since 1995. They sued to obtain recovery costs for the cleanup of discharged oil on their property, asserting that the groundwater, Big Creek, and other streams on their property are protected under the OPA as "navigable waters."[1]

Harken, a Delaware corporation, owns and operates oil and gas properties on Big Creek Ranch. Although Big Creek Ranch had been used for oil operations for decades, Harken began to operate and maintain various structures for the purposes of drilling and pumping oil on Big Creek Ranch in 1996. Big Creek is a small, seasonal creek, running through the Rices' property and into the Canadian River, which is down-gradient from Harken's oil operations. Although Harken and the Rices

disputed the scope of the words "navigable waters" as pertaining to surface and groundwater, they both conceded that the Canadian River is a "navigable water" protected under the OPA.

The Rices alleged their cleanup costs to remediate the contamination of soil and groundwater on Big Creek Ranch would be $38,537,500. The Rices argued that Harken has discharged "hydrocarbons, produced brine, and other pollutants onto Big Creek Ranch and into Big Creek, unnamed tributaries of Big Creek and other independent ground and surface waters."[2] The Rices did not allege that Harken caused any major event or catastrophe resulting in pollutants directly spilling into the Big Creek Ranch property, rather they attributed the damage to their property to smaller discharges that occurred over a considerable time period. Harken conceded that there were instances where oil leaked onto the Big Creek Ranch property, however the company maintained that the discharges never threatened "navigable waters" protected by the OPA. Harken argued that the Rices misconstrued the meaning of "navigable waters" as defined under the OPA and therefore did not have a right to receive cleanup costs. Harken moved for summary judgment in U.S. District Court for the Northern District of Texas, arguing that the scope of the words "navigable waters," found in the OPA, did not cover leakage of oil into dry land that was located far away from any coastline or shoreline. The district court granted Harken summary judgment and dismissed the case. The Rices appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the District Court's dismissal of the Rices' claim.

Issues:

1. Whether the OPA's protection of "navigable waters" includes protecting oil discharges into the groundwater.

2. Whether oil discharges into the groundwater is actionable under the OPA or Clean Water Act (CWA) if those discharges result in contamination of surface water.

Analysis: The court of appeals reviewed the order granting summary judgment *de novo* and noted that considering the scope of the OPA was an issue of first impression for the court. The court first discussed the purpose of the OPA and how the OPA was spurred into legislation by the disaster of the Exxon Valdez. The Congressional intent behind enacting the OPA was to consolidate laws pertaining to oil spills and consequently provide a more efficient way to deal with the disasters. The OPA imposes strict liability on a party responsible for an oil discharge stating, "a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines . . . is liable for the removal costs and damages specified . . . that result from such incident."[3] The OPA defines "navigable waters" as "the waters of the United States, including the territorial sea."[4]

The Rices contended that the district court should have broadly construed the term "navigable waters" found within the OPA to be consistent with the Clean Water Act (CWA) because Congress used the same language in both the OPA and the CWA. The Rices asserted that with a broad construction of the OPA, the Act would protect inland waters such as Big Creek. Furthermore, the Rices argued that the district court improperly excluded groundwater from "waters of the United States" protected under the OPA.

The court looked to CWA case law to determine the scope of the OPA, since there were few cases interpreting the term "navigable waters" in the OPA and there was a substantial amount of case law interpreting the same term in the CWA. The court found that construing the CWA and the OPA consistently was a reasonable approach after considering the identical definitions used in both acts and the legislative intent that the OPA and CWA be interpreted in the same way, which was indicated in the House Conference and Senate Committee Reports.[5]

The court then addressed the issue of whether groundwater was, as the Rices claimed, protected under the OPA by examining whether groundwater was protected under the CWA. The court answered the Rices' assertion by looking to the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps. of Engineers,*[6] where the U.S. Supreme Court refused to "interpret the CWA as extending the EPA's regulatory power to the limits of the Commerce Clause, and held that application of the CWA to the petitioner's land exceeded the authority granted to the Corps under CWA."[7] The Court in *Solid Waste Agency* felt that it was beyond the CWA's power to regulate water unless the water was navigable or adjacent to an open body of navigable water.[8] Under the proposition that the CWA and the OPA can be interpreted similarly, the court of appeals in the present case drew the conclusion that although the OPA does not completely exclude all inland waters from protection it does leave only a narrow margin for inclusion of these inland waters within the meaning of the Act.

The court of appeals then addressed whether the oil discharge into the groundwater underneath Big Creek Ranch was protected as "navigable water" under the OPA. Noting that the Rices urged the court to apply the CWA, the court determined that the law is clear in stating that ground waters are not protected as "navigable waters" under the CWA. The court relied on their holding in *Exxon Corp. v. Train,*[9] where the Fifth Circuit made clear that subsurface waters were not protected from pollution under the CWA. The court indicated that the Seventh Circuit in *Village of Oconomowoc Lake v. Dayton Hudson Corp.,*[10] had also taken the stance that the Legislature

did not intend to protect groundwater under the CWA and rather intended it to be left to the jurisdiction of the states. The Rices also argued that Congress intended to exert its full power under the Commerce Clause and, consequently, if groundwater affected interstate commerce in any way, it should be protected by the OPA. However, the court of appeals responded by noting that the Rices failed to point to any portion of the OPA or the legislative history that might justify their claim that Congress intended to depart from the CWA interpretation that groundwater is not included in "navigable waters."

The court then addressed whether surface waters on Big Creek Ranch, which were threatened by Harken's discharges into the groundwater, were protected under the OPA. The Rices did not introduce any evidence at trial that there was ever a discharge of oil directly into surface water. Rather, their claim was that pollutants were discharged onto dry land, seeped into the groundwater and in doing so contaminated bodies of surface water. The court described how there were no detailed descriptions of the intermittent streams or seasonal creeks in the record, and that there was little evidence regarding the nature of Big Creek. The court stated, "there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA."[11] The court also looked to the purpose of the OPA and how it was directed at the prevention of disasters of great magnitude and held that the evidence in the present case was too attenuated to conclude the OPA had jurisdiction over surface water. The court held, "In light of Congress's decision not to regulate ground waters under CWA/OPA, we are reluctant to construe the OPA in such a way as to apply to discharges onto the land, with seepage into groundwater that have only an indirect, remote connection with an identifiable body of 'navigable waters.'"[12]

After the court determined that an indirect connection between contamination of land and consequential seepage into groundwater could not sustain a cause of action under the OPA, the court succinctly concluded, "[t]he groundwater under Big Creek Ranch is, as a matter of law, not protected by the OPA."[13] The court held that summary judgment for Harken was appropriate since the Rices failed to bear the burden of proving a direct and proximate link between Harken's oil discharge and any resulting contamination of a body of natural surface water protected by the OPA.

Lauren O'Rourke '02

Endnotes

1. 33 U.S.C. §§ 2701-2720.
2. *Rice*, 250 F.3d at 265.
3. *Id.* at 266.
4. 33 U.S.C. § 2701(21).
5. 250 F.3d at 267.
6. 531 U.S. 159 (2001).
7. 250 F.3d at 268.
8. *Id.*
9. 554 F.2d 1310, 1322 (5th Cir. 1977).
10. 24 F.3d 962, 965 (7th Cir. 1994).
11. 250 F.3d at 271.
12. *Id*.
13. *Id*.

* * *

***New York v. Green*,** 96 N.Y.2d 403 (2001)

Facts: Defendant Vanessa Green is the lessee of a trailer pad owned by defendant Village at Lakeside, Inc. On this property, Green owned and maintained a 275-gallon, above-ground kerosene tank which was serviced by defendant H. Reynolds & Sons, Inc. In January 1992, the tank fell, causing kerosene to spill on the ground. None of the defendants attempted to clean up the spill. Intervention was taken by the state of New York and the spill was cleaned up at a cost of over $15,000. In an effort to recover cleanup costs, the state took action against all three defendants under Navigation Law article 12.

Green failed to appear in court, however, Lakeside and Reynolds answered and asserted cross-claims against each other and Green for indemnification. Lakeside sought summary judgment dismissing the complaint pursuant to Navigation Law § 181(1), arguing that because it neither owned, maintained nor installed the tank, it was not liable as a discharger. The state cross-moved for summary judgment, arguing that because Lakeside is the owner of the property on which the spill occurred, it is strictly liable for the cleanup. The supreme court denied Lakeside's motion and granted the state's summary judgment motion. The court held Lakeside liable for the cleanup costs because Lakeside, as owner of the property, had control over both the property and source of the spill.

The appellate division reversed the supreme court's decision and granted Lakeside's motion dismissing the complaint against it. The court held that Navigation Law § 181(1) limits liability to "the owner of the system from which a discharge occurred, regardless of fault."[1] Since Lakeside was not the owner of the tank, the court reasoned it could not be held strictly liable for cleanup costs. The state appealed this decision to the New York Court of Appeals.

Issue: Whether Lakeside, as a faultless landowner on whose property petroleum has spilled, is a "discharger" within the meaning of the Navigation Law § 181(1), and thus liable for the cleanup costs.

Analysis: Navigation Law article 12 was enacted to ensure that petroleum spills, which threaten the environment, are swiftly and effectively cleaned up. The Legislature created the Environmental Protection and Spill Compensation Fund to finance state cleanup costs when a "discharger is unknown, unwilling or unable to pay these costs."[2]

After the cleanup has been financed, the state seeks reimbursement from a responsible party.[3] The Legislature has broadly defined a responsible party to be: "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained."[4]

Furthermore, discharge is defined as: "[a]ny intentional or unintentional action or omission resulting in the restraining, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters."[5]

The Court of Appeals construed these provisions liberally and found Lakeside to be a discharger within the meaning of Navigation Law § 181(1). According to the language of the statute, no requirement of proof of fault or knowledge is necessary. Instead, the language broadly includes landowners, like Lakeside, which could have controlled activities occurring on its property and had reason to believe that petroleum products would be used by its tenants.

Lakeside was both an owner and lessor of the trailer park, and it was able to control the possible sources of contamination on its property, such as the maintenance of Green's kerosene tank. Hence, Lakeside is strictly liable as a discharger for failing to control activities leading up to the spill for failing to institute an immediate cleanup

The Court of Appeals determined that interpreting "discharger" to include landowners like Lakeside is consistent with the statute's intent. Article 12 provides financing to the state for immediate cleanups of environmentally threatening oil spills.[6] By holding landowners, like Lakeside, strictly liable for the cleanup costs, article 12 ensures that a responsible party will reimburse the state. If liability were limited, dischargers would be discouraged from quickly cleaning up their contaminated land, and would leave it for the state to handle, thus benefiting from the state.[7] This could possibly causing future delays and depletion of the Environmental Protection and Spill Compensation Fund.

The court took judicial notice that through the Fund, a lien can be placed on the discharger's real property until the state is reimbursed, even though the state did not take advantage of this provision in the present case. To utilize this provision, the landowner must first be found liable as a discharger under section 181(1). The Court stated that the ability to place a lien on a discharger's property further illustrates the Legislature's intent of holding landowners, like Lakeside, strictly liable for cleanup costs.[8]

Finally, the Court found that Lakeside still had a remedy since under Navigation Law § 181(5), a faultless landowner, although considered a discharger under section 181(1), may seek contribution from the actual discharger.[9] The statute suggests that there may be more than one discharger under section 181(1). The Court noted that landowners would not be responsible for spills on their property over which they had no control, as in the case of a midnight dumper.

The Court reversed the decision of the appellate division, with costs, and reinstated the order of the supreme court granting the state's motion for summary judgment against Lakeside.

Holly Giordano '02

Endnotes

1. *New York v. Green*, 709 N.Y.S.2d 704, 706 (App. Div. 2000).
2. N.Y. Navigation Law § 179 (Nav. Law).
3. Nav. Law §§ 187(1), 188.
4. Nav. Law § 181(1).
5. Nav. Law § 172(8).
6. *See* Nav. Law § 171.
7. *See White v. Long*, 650 N.E.2d 836, 838 (N.Y. 1995).
8. *See* Nav. Law § 181-a.
9. *See White*, 650 N.E.2d at 838.

* * *

United States v. Robert E. Kelly, Jr., No. 99-5327, 2000 U.S. App. LEXIS 34043 (6th Cir. Dec. 28, 2001)

Facts: Robert E. Kelly owned and operated a small pest control business, Kelly's Spraying Service, out of Memphis, Tennessee. Kelly used the pesticide methyl parathion in his customer's homes and sold methyl parathion directly to his customers as a household pesticide. Methyl parathion is "an acutely toxic pesticide intended only for agricultural use in uninhabited open fields"[1] and is classified as a restricted-use pesticide under federal regulations.[2] Symptoms related to exposure to methyl parathion include nausea, vomiting, headache, muscle spasms and coma. Several of Kelly's customers testified as having experienced some of these symptoms after he had serviced their homes. As a result of the acute toxic nature of methyl parathion, only qualified applicators may purchase the chemical. Kelly obtained an applicator permit in Mississippi and was able to purchase and use the chemical. On February 12, 1998, Kelly was convicted by a jury of 20 counts of mis-

use of methyl parathion in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[3] According to the U.S. Sentencing Guidelines Manual, Kelly was subject to sentencing in the range of 41 to 51 months of imprisonment. However, he applied for and received a downward departure under Guidelines § 5k2.0 and was sentenced to 20 months imprisonment. He was also ordered to pay $250,000 in restitution. Kelly testified that he learned the methods of using methyl parathion as a pesticide in homes by working with his father at a time when it was not considered a restricted-use chemical. Furthermore, he testified that he had not known the risks associated with the chemical, had used it in his own home around his family, and never used protective gear while working with methyl parathion. The district court granted the downward departure based on the fact that Kelly did not fully appreciate the harm the chemical could cause, and that the misdemeanor nature of the crime did not warrant the sentence indicated by the Guidelines. The government appealed the district court's grant of a downward departure.

Issue: Whether the district court abused its discretion by granting Kelly a downward departure in his sentencing because of the misdemeanor nature of his offense and because he did not understand the potential harm methyl parathion could cause.

Analysis: The Court of Appeals for the Sixth Circuit held that the district court did abuse its discretion when it granted the downward departure and therefore reversed and remanded to the district court for resentencing. The court first found that any error of law in interpreting and applying the Guidelines is an abuse of discretion and noted that a court must rely on appropriate factors in granting a departure from the Guidelines. Although the sentencing court does have discretion, when considering a departure from the Guidelines, the court "should consider: (1) what aspects of the case take it outside the "heartland" of cases; (2) whether the Commission has forbidden departures based on these aspects; (3) whether the Commission has encouraged departures on these bases; or (4) whether the Commission has discouraged departures on these bases."[4] In this case, the district court based its departure on Kelly's lack of appreciation for the harm he was causing and the misdemeanor nature of the crime, which were not forbidden by the Guidelines. Therefore, the court of appeals was required to determine whether the factors indicated sufficiently distinguished this case from the "heartland" cases.[5]

When departing from the Guidelines, the district court was concerned that Kelly's FIFRA violation carried a sentence of less than one year in prison, like a misdemeanor, whereas the Guidelines set forth between 41 to 51 months of imprisonment. The government argued, and the court of appeals agreed that the Guidelines accounted for the possibility of multiple misdemeanor convictions. The court found that the Guidelines provided for sentences to run consecutively to reach the total punishment, which specifically dealt with the possibility of multiple misdemeanor convictions. The court held that Kelly's case was not "sufficiently distinguishable from those of the heartland cases; thus, the misdemeanor nature of his crimes is insufficient to sustain a downward departure."[6]

The court also determined that Kelly's lack of understanding of the serious harm methyl parathion could cause did not support a downward departure. Although knowledge of serious harm is not specifically encouraged by the Guidelines as a basis for departure, the court did not agree with Kelly's argument that they specifically suggest a departure for lack of knowledge. The Guidelines indicate that Kelly would only be allowed a downward departure if he did not know he was spraying methyl parathion. This is consistent with the FIFRA "knowing" element as well. In this case, however, Kelly did not argue that he did not know he was spraying methyl parathion, he argued that he did not know it was against the law. The court acknowledged this assertion as a variant of the argument that ignorance of the law is a defense, which the American legal system is deeply rooted against. Consequently, Kelly's argument for lack of knowledge failed. The court then considered whether his lack of knowledge of potential harm distinguished his case from the "heartland" of other cases. The court concluded that this was not an appropriate basis for a downward departure because it was contemplated by the statute and accompanying Guidelines. The district court based its departure on finding that Kelly did not understand there was a "danger of . . . imminent death or serious bodily injury," which the court of appeals noted was not required by FIFRA. The court stated that FIFRA only required a knowing violation and Kelly, having knowingly sprayed without knowingly endangering his clients, was a "typical FIFRA violator."[7] Furthermore, the court noted how the district court indicated that Kelly knew the chemical methyl parathion was somewhat harmful. For the foregoing reasons, the Court of Appeals for the Sixth Circuit reversed and remanded the case for resentencing consistent with its decision.

Elizabeth Vail '02

Endnotes

1. 2000 U.S. App. LEXIS 34043, at *2.
2. 40 C.F.R. §§ 152.170, 152.175.
3. *See* 7 U.S.C. §§ 136-136w-3 (1994).
4. 2000 U.S. App. LEXIS 34043, at *7.
5. *Id.,* at *9.
6. 2000 U.S. App. LEXIS 34043, at *11.
7. *Id.* at *15.

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