NYSBA FALL 2004 | VOL. 24 | NO. 3

The New York Environmental Lawyer

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

Message from the Chair

Opportunities for Mercury Emission Reductions

I recently heard a radio report about a young, pregnant woman who lives on Florida's Gulf Coast. She and her husband fish, and have always eaten lots of their catch because it was considered healthy. That is, before her doctor advised her not to eat any more fish because of the potentially harmful neurological effects of the mercury contained in fish on her developing baby. The woman had not really focused on the power plant located across from where she fished. It appears that emissions of mercury from that plant, as well as other man-made sources, had resulted in unsafe mercury levels in the local fish.

Reducing mercury emissions from coal- and oil-fired power plants (which are the largest domestic source of mercury emissions), thereby preventing mercury from contaminating the food chain and threatening our most vulnerable citizens, would contribute enormously to our public health. And unlike other threats to our nation, the human health risks associated with exposure to mercury have been identified and are well understood.

Are New Yorkers at risk? According to the New York State Department of Environmental Conservation, approximately 158 tons of mercury are emitted from man-made sources every year in the United States. Over 85% of these emissions are from combustion sources, including fossil fuel and waste combustion. The global input to the atmosphere of all sources of mercury is about 5,500 tons. New Yorkers get more than their fair share of the load because of the prevailing west-to-east wind patterns and mercury emissions within the region.

How does mercury find its way into our food chain? Gaseous elemental mercury comprises most of the mercury in the atmosphere. It can travel long distances over a period of months. Some of this mercury gets converted to a more soluble form or it binds with particulate matter to form particulate mercury. Precipitation removes both of these forms of mercury from the atmosphere and deposits them onto land and into water. In water and sediments, bacteria can convert the mercury into an organic form, methylmercury. Acidic conditions and elevated ozone may contribute to the

Inside

conversion. Methylmercury can bioaccumulate up the food chain when contaminated aquatic organisms are ingested. This is why the largest fish and aquatic mammals often contain dangerously high levels of methylmercury. Fish consumption is the principal pathway for humans and wildlife.

Unsurprisingly, an embryo/fetus and young children are more affected by mercury exposures than adults. Methylmercury can accumulate in the fetal brain and then inhibit normal development of the nervous system. Even low levels can affect motor and verbal skill development. In adults, methylmercury concentrates in the kidneys, liver and brain and can cause nephritis, and neurological and cardiovascular effects.

You are most exposed if on a regular basis you consume large amounts of fish, either marine or freshwater. The U.S. Environmental Protection Agency ("USEPA"), Food and Drug Administration and many states have issued fish consumption advisories to inform the public, in particular women of child-bearing years, of protective consumption levels. According to the USEPA, 76% of all fish advisories have been issued in part because of mercury contamination. In 2003, states issued 222 new advisories relating to mercury. Vast geographic areas are affected by these advisories: approximately 13 million lake acres and 766,872 river miles. At this time, 21 states have issued statewide advisories for mercury in freshwater lakes and/or rivers. These include New York, New Jersey, Pennsylvania, Vermont, Massachusetts, and New Hampshire. Information regarding fish advisories in New York can be found on the web site of the New York State Department of Health.

Based on a study conducted in accordance with the requirements of the Clean Air Act, in December 2000, USEPA issued a regulatory finding that it was "appropriate and necessary" to regulate hazardous air pollutant ("HAP") emissions, which include mercury, from coal- and oil-fired electric utility steam generating units under section 112(d) of the Clean Air Act because imposition of other requirements under the Clean Air Act would not adequately address the public health and environmental hazards posed by the HAP emissions. As a result of that finding, USEPA was required to regulate mercury as a toxic substance and impose maximum achievable control technology ("MACT"), a very stringent type of control requirement, on emissions from these units. That is, until December 2003, when USEPA proposed a revision to that initial regulatory finding.

While still concluding that it was "appropriate" to regulate emissions from these utility units, USEPA determined that it was not "necessary" to regulate them under section 112(d) and impose MACT for two reasons: first, the record supported a finding that mercury warranted regulation based on serious public health hazards, but not all HAP emissions from coal-fired plants; and second, the record regarding any serious environmental hazards was limited to mercury. Thus, USEPA determined that although it might be appropriate to regulate utility units, it was not compelled to do so under section 112(d) of the Clean Air Act. It then proposed to regulate mercury emissions from these units under section 111(b) of the Act using an alternative cap-and-trade system to achieve reductions. But the alternative program would result in significant delays in reductions. The MACT standard would require strict controls by 2007; the alternative program gives the industry until 2018 to significantly reduce mercury levels. And now it appears that the 2018 goal may not be a sure bet, because soon after it proposed the revision, USEPA ordered more studies after it became concerned that the proposal might fall short of meeting its reduction goals by 2018.

USEPA has received almost 600,000 comments on this proposal, an indication of the level of concern regarding the proposal. In the view of some citizen groups, the proposal to revise USEPA's December 2000 finding changes the legal status of mercury under the Clean Air Act in ways that previous administrations could not justify legally or scientifically. These groups also worry that a cap-and-trade approach ignores the potential for some facilities to continue to emit mercury at high levels, creating mercury "hot spots" for local populations. The cap-and-trade approach may also result in elevated mercury levels in areas of the country that do not currently have this problem. USEPA is reviewing the comments and expects to issue a final rule in December.

What does this all mean? It means that the regulatory process is being used to make changes that would be difficult to achieve if presented to Congress as statutory amendments. Also, the general public is unlikely aware of these initiatives because regulatory proposals in the Federal Register are not usually first-page news. But in the case of the utility mercury reductions rule, if the cap-and-trade alternative is selected in the final rule, a legal challenge by various state attorneys general is likely. Such a challenge was brought in response to a recent rule that revised the new source review requirements. In that case, the U.S. Court of Appeals for the District of Columbia Circuit temporarily blocked a relaxation of the new source review requirements, indicating that it doubted the administration had authority to modify the Clean Air Act by regulation.

At the state level, the New York State Department of Environmental Conservation regulates emissions of mercury from specific sources. In 2002, the Subpart 219-1, 219-2 and 219-7 regulations became effective and lowered the mercury emission limit for incinerators and large municipal waste combustors. Also, mercury emis-

sions are considered an air toxic and their impacts are scrutinized in the air quality permitting process under DEC guidance, known as Air Guide-1.

On July 12, 2004, Governor Pataki signed into law legislation banning the sale or the giving away of mercury-added toys and novelty products in New York State and requiring new labeling and recycling of other mercury-added consumer products, such as thermostats, thermometers, and switches. One impetus for this legislation was the Spiderman 2 toy placed by Kellogg's in some of its cereal boxes, including Frosted Flakes. The toy uses a mercury-powered battery to create a web-shaped light. Although labeled for its contents and for proper disposal, the battery was not easy to remove, and so could not be replaced.

When Kellogg's was asked to voluntarily recall all products containing this toy in New York, it reportedly refused to do so, despite its having done so in Connecticut and New Hampshire. Why? Because New York did not have a law requiring Kellogg's to act. Now it does.

This new legislation also established an Advisory Committee on Mercury Pollution, appointed by the Governor and the state legislature. The committee will be asked to report on the extent and health effects of mercury contamination, methods and costs associated with reducing risks from mercury contamination and other issues.

There is significant activity on both the federal and state levels for us to monitor regarding the impacts of mercury emissions and the opportunities for reductions. The reports of the state's Advisory Committee will be welcome and will undoubtedly provide new information concerning mercury that will inform future policy and legislation. I invite the involvement of Section members in monitoring these developments and reporting on them to our membership.

Virginia C. Robbins

Request for Articles

Special Issue "Rivers and Harbors"

The *New York Environmental Lawyer* is actively seeking articles and other submissions in connection with a Special Issue, "Rivers and Harbors." This symposium issue will focus on the Hudson River and its tributaries, the Hudson River Valley, and the wider New York Harbor watershed.

The Hudson and other rivers that feed into New York Harbor have historically been the arteries that connected this strategically and commercially critical region throughout American history. If one wants to understand the regional environment, one must be knowledgeable about historic uses. If one wants to gauge the success of future uses, one must take into account environmental regulations and policies. With the inarguable benefits of modern environmental law, this riverine network and its maritime destination are enjoying an unsurpassed ecological recovery that deserves special attention.

The Hudson River Valley also, in particular, has occupied an unsurpassed but often too-little-appreciated niche in regional history. As suburbia sprawls north from New York City and south from the Capital Region, the unique and colorful character that has defined its culture for centuries is threatened with homogenization.

Hence, in further celebration of the 40 years since Scenic Hudson and the resurgent regional ecology, in recognition of the dramatic growth of "Gotham" history and the growing appreciation of the interconnectedness of the City, the river and the region, but also in an awareness of the fragility of the unique human cultural ecologies of the Hudson River Valley, the *New York Environmental Lawyer* invites the participation of authors who can deepen our environmental and historical awareness of the Hudson and its environs.

From the Editor

This column is being written upon my return from the Section's Fall Weekend at West Point. It was wonderful. Those of us who attended the game were treated to old-fashioned college football, and almost saw Army win. Judging by remarks in the crowd, that, in itself, was a worthy event. The Friday evening speaker was Col. James Johnson, Ph.D., who provided a wide-ranging discussion of the history of the Hudson River Valley and, of course, West Point. The Hudson River theme was continued in Saturday's legal program, and, after the game, in the entertaining presentation by Saturday's speaker, J. Winthrop Aldridge. Judging by his many interconnecting stories about the colorful personalities that people the region's history, Mr. Aldridge seemed to be kin to his many subjects, adding an anecdotal immediacy to a regional narrative that seemed more a family history writ large. The Section, again, thoughtfully provided for a children's dinner on Saturday that greatly eased their parents' responsibilities and facilitated our own social enjoyment of the evening. The Executive Committee meeting was, as always, productive and satisfying. Ginny Robbins, as Section Chair, and Joan Leary Matthews, George Rodenhausen and Kevin Ryan as Program Co-chairs, deserve a hearty applause. Kevin, in particular, gave an excellent presentation notwithstanding the professional distraction of having to leave immediately thereafter in order to prepare and file a memorandum of law.

In the present issue, the Chair provides a column so informative that it actually suffices as a short article. I was tempted to use it as an article and ask for another column, but, in view of Ginny's undoubted attention to the upcoming West Point Weekend, somehow I thought that my compliment might be less than fully appreciated. So, we are benefited with a discussion of New York's recent legislation regarding mercury poisoning, and an invitation for Section members to stay current on the subject. I'll never look at my Frosted Flakes the same way again.

Over the years, I've encouraged the submission of articles that help members, and especially newer or younger members, develop practical and technical skills. In this sense, our mission is a hybrid one: to engage readers intellectually in substantive areas of environmental law, but also to help in their lawyering as environmental practitioners. Dan Riesel and Elizabeth Read continue this latter tradition by providing invaluable advice on how to litigate an administrative law case. In view of the significant agency component of so much environmental law, many of our members participate in administrative proceedings on a regular basis, but many do not. This article walks such readers through an administrative proceeding, emphasizes the importance of the administrative record, explains the subsequent interplay with judicial review, and, throughout, offers invaluable tips from seasoned litigators.

Janice Dean submits a thoughtful article in the general area of environmental justice. She emphasizes the utility and efficacy of community-based supplemental environmental projects as part of settlement agreements and as a beneficial alternative to judicial proceedings. Janice, of Pace Law School, was the first-place finalist in the Section's Environmental Law Essay Competition. Marla Rubin provides another article in her long-running feature that alerts readers to the many nuances of legal ethics as they pertain to environmental lawyers. James Deniston, of St. John's Law School, is the new Student Editor; James shepherded the case summaries, an endeavor that always begins with Phil Weinberg's own shepherding of the student writers.

To all of our readers, have a pleasant autumn.

Kevin Anthony Reilly

Litigating the Administrative Law Case

By Daniel Riesel and Elizabeth Read

Environmental litigation frequently involves litigation with the Environmental Protection Agency and other federal regulatory agencies and their state counterparts. This form of litigation is seldom "plenary," and because it most often involves agency decision making, discovery, the device that can level the playing field, is normally unavailable.

Theoretically, the reviewing court will examine the record of proceedings before the agency, which should objectively reflect all the proceedings before the administrative decision maker, and apply the relevant law. However, the environmental litigator is often faced with a less-than-objective process.

I. Agency Decision Making

Environmental regulation increasingly turns on an agency's often informal promulgation of rules, interpretations and "guidance." These "actions," often taken without public input, can dictate the initiation or even the outcome of enforcement proceedings. Government agencies have been quick to assert that many of these pronouncements are not subject to judicial scrutiny because they are internal guidance and therefore not final agency action reviewable by a court. When agency actions are subject to judicial review, the agency often demands and receives "substantial deference" from the reviewing court. In addition, agency action is reviewed "on the record," that is, on the papers before the agency at the time it made its decision.

Examples of agency efforts to avoid review or to cloak their decisions in "deferential" armor abound.[1] Indeed, one reviewing court noted that this attempt at insulation from scrutiny has led to a "let them eat cake" attitude among some regulators.[2] However, courts have recently attempted to place limitations on administrative agencies' attempts to frustrate meaningful judicial review.

II. Circumventing the Administrative Procedure Act

The Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and its state counterparts provide that legislative or substantive rules must be preceded by public notice and an opportunity for public comment. Hence, an agency's "legislative" or "substantive" actions tend to have both an opportunity for the public to shape the ultimate agency decision and a fairly identifiable record for judicial review. Substantive rule making occurs when the agency is carrying out the statutory mandate to make rules to implement the statute.[3] A familiar example of such rule making is the congressional directive to the U.S. Environmental Protection Agency ("EPA") to promulgate rules implementing the broad mandates of the flagship environmental statutes enacted in the 1970s.[4]

However, administrative agencies, particularly the EPA, have recently been prone to publish "guidance" and "interpretative" decisions which are not preceded by an opportunity for public comment. Agencies will attempt to avert substantive review of such decisions on two fronts: by arguing that they are not "rules" requiring compliance with APA procedures, and by arguing that they do not constitute "final agency action" subject to judicial review under section 706 of the APA.

However, with regard to the latter line of defense, a series of federal decisions have made it clear that where the agency promulgates a decision that changes the legal regime affecting the plaintiff or establishes a new public standard, it has engaged in final agency action. In *Bennett v. Spear*,[5] the Fish and Wildlife Service had issued a Biological Opinion letter to the Bureau of Reclamation, asserting that particular minimum water levels should be maintained in reservoirs relied upon by the petitioners, in order to avoid endangerment to a particular species of fish. The Supreme Court held that the Opinion was a reviewable final agency action because it had direct and immediate legal consequences, as it altered the legal regime controlling the Bureau of Reclamation's decision making (the Bureau would be subject to legal penalties if the reservoir levels were not enforced). In *Appalachian Power Co. v. Environmental Protection Agency*,[6] EPA released a so-called "guidance" regarding state implementation of the Clean Air Act that required states to enforce periodic monitoring by state permit holders. The court held that the guidance in and of itself constituted final agency action with direct legal consequences in the form of the obligations it imposed on states to implement the requirements. In *Barrick Goldstrike Mines, Inc. v. Browner*,[7] EPA issued a guidance stating that chemicals in waste rock were ineligible for the regulatory *de minimis* exception to reporting requirements of the Emergency Planning and Community Right-to-Know Act. The court held that the guidance, in concert with a regulatory preamble applying the reporting requirements to the mining industry, served to "crystallize an agency position into final agency action."[8]

However, in the *Flue-Cured Tobacco* case,[9] the Fourth Circuit held that an EPA report classifying secondhand smoke as a known human carcinogen was not a reviewable final agency action because the report (at least theoretically) carried no legally binding authority and imposed no rights or obligations.

The federal courts have also shown a willingness to reject agencies' arguments that APA procedural rulemaking requirements, such as opportunities for public notice and comment, do not apply to determinations simply because they are denominated "guidance" or "policy statements." As the Second Circuit noted thirty years ago in *Lewis-Mota v. Secretary of Labor*,[10] "the label that the particular agency puts upon its given exercise of administrative power is not . . . conclusive, rather it is what the agency does in fact."

For example, the D.C. Circuit held in *Community Nutrition Institute v. Young*[11] that the Food and Drug Administration's establishment of an "action level" for a contaminant in corn required notice and comment although the agency characterized it as an interim standard used prior to the establishment of formal tolerances. The court was persuaded by "the fact that FDA considers it necessary for food producers to secure *exceptions* to the action levels. . . . If, as the agency would have it, action levels did 'not bind courts, food producers or FDA,' it would scarcely be necessary to require that 'exceptions' be obtained."[12] And also importantly, the language FDA used in establishing action levels indicated that they were presently effective rather than "musings about what the FDA might do in the future."[13] Recently, the D.C. Circuit took a similar view of an EPA "PCB Risk Assessment Review Guidance Document" holding that the guidance document was a "legislative rule" within the meaning of the APA.[14]

The temptation of agencies to promulgate standards as "guidance" in an attempt to avoid the delay and public scrutiny inherent in the APA's "Notice and Comment" provisions is illustrated in a recent Southern District of New York litigation involving an agreement between the EPA and the Army Corps of Engineers ("ACOE") to set new standards for PCB levels in dredged material to be disposed in designated dumping grounds.[15] In that case, plaintiff needed a permit from the Army Corps of Engineers to dredge sediment from a channel adjoining one of its plants and place it in a designated ocean disposal site. The sediment was contaminated with PCBs, but below the 400 parts per billion (ppb) bioaccumulation level that had been deemed the maximum acceptable by both the ACOE and the EPA. A few days before the permit was to be granted, however, the ACOE entered into a Memorandum of Agreement ("MOA") with the EPA which lowered the level to 113 ppb. Neither agency had subjected the new ocean disposal standard to the rigors of APA public notice and comment. The MOA provided for the immediate adoption of an "interim" standard. With that, it became apparent that the ACOE would deny the permit, and the plaintiff sued EPA and the ACOE.

The federal agencies moved to dismiss on the grounds that the new PCB standard was merely "guidance" and therefore did not amount to "final agency action." The government also relied on the terms of the MOA, which declared that it was "intended exclusively for the internal management of the Executive Branch, and does not establish or create any enforceable rights, legal or equitable, on behalf of any person not a signatory to this agreement." The District Court for the Southern District of New York denied this motion, finding that "as a practical matter, the new PCB standard . . . was binding and resulted in tangible legal consequences for plaintiff." The District Court also declared that "such boilerplate cannot render an otherwise final and binding agency action non-final and nonbinding." Similarly, the District Court disregarded the MOA's recitation that the new PCB number would be subject to revision, noting that all standards are subject to revision.

The plaintiff then moved for summary judgment. This time the government developed a new dodge to the effect that the MOA's interim standard was not a legislative rule requiring prior notice and an opportunity for comment but an "interpretive rule," which is subject to judicial review but does not require prior notice and comment.[16] Interpretive rules are decisions that do not have controlling effect on parties not before the agency in the particular proceedings.[17]

In July 2002, the District Court again ruled for the plaintiff, finding that the new standard, "being binding and outcome determinative, was a 'rule' subject to the notice and comment requirements of the Administrative Procedure Act."

Accordingly, private litigants are not bound by the now typical agency boilerplate characterizing its pronouncement as merely guidance; courts apply a functional test. Moreover, the agency's action should be reviewed carefully to ascertain if it essentially promulgates a legislative or interpretive rule because the former requires an opportunity for public comment.[18]

III. The Administrative Record and Discovery

Given the limitations on judicial review, members of the regulated community must attempt to shape administrative decisions during the administrative process. Absent that ability, there are a few basic concepts that can be used to make judicial review more meaningful.

A readily identifiable record can be developed in Notice and Comment rule making or in trial-type administrative adjudications. Unfortunately, more and more agency decisions are made pursuant to an informal process. Upon judicial review, the agency should file with the reviewing court what it believes to be the administrative record, which should consist of all the relevant papers that were directly or indirectly before the decision-maker.[19] Unfortunately, this is a subjective process often involving the agency's lawyers whose decisions or work product is under attack in the judicial process. Not surprisingly, critical documents may be left out of the submitted record, or documents justifying the agency's decisions which were not actually considered, added to the record. Omitted documents can be particularly important to a successful challenge because they might well reveal criticism of the agency's decision by independent experts.

A barrier to ensuring the development of an accurate record in these circumstances is the general rule that judicial review of agency action does not involve pre-trial discovery. However, in appropriate instances, limited discovery to establish the record will be allowed, and courts have permitted discovery of an administrative agency to determine the adequacy of the record submitted by the agency.[20] Indeed, there appears to be a fairly low threshold to allow discovery for the limited purpose of ascertaining the adequacy of the record.[21] This standard would seem consistent with Rule 56(f), Fed. R. Civ. P., or where there is a material disputed fact such as the completeness of the record.[22]

A useful technique is to keep track of the agency's documents prior to the commencement of litigation through the use of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 551. In response to FOIA requests, the agency must file a "Vaughn Index" listing the documents withheld under claims of privilege.[23] The government's liberal interpretation of the work product and attorney-client privileges as a basis for withholding documents has received critical scrutiny from the courts.[24]

IV. Contents of the Record

The "record" has been defined by the courts as "all the documents and materials that were directly or indirectly considered by the decision-makers at the time the decisions were rendered."[25] The scope of the complete administrative record, as described in the case law, is necessarily highly inclusive. "[T]o the extent the agency's final decision was in fact based on a compendium of materials, documents, submissions and initial staff decisions and opinions, these constitute the whole record."[26] Courts will presume that agency decision makers referred to a "variety of internal memoranda" in reaching their conclusions, which materials should therefore be included in the record before a reviewing court."[27] The complete record may also include "notes, personal logs, and working papers" which document the collection of information by agency personnel involved in the decision making process.[28] Necessary elements of the administrative record are not limited to those materials supporting the conclusion that the agency ultimately adopted.[29] Moreover, the record must include materials relevant to all levels of decision making leading up to the final agency action; "[a] document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record."[30] Upon a showing that the defendant agency considered materials not included in the record submitted to the court, the record should be completed by order of the court.[31]

A complication may arise when the agency seeks to preclude review of documents that were before the agency under the "deliberative process privilege" doctrine. To establish the deliberative process privilege, a federal agency must demonstrate that the deliberations the agency wishes to withhold satisfy two requirements. First, the communication must be predecisional.[32] Second, the communication must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.[33] Under the deliberative process privilege, discovery cannot be had of "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.[34] In addition, the privilege applies to factual materials that would reveal the deliberative process.[35]

Fortunately, unlike certain other privileges (e.g., attorney-client), the deliberative process privilege is not absolute.[36] After concluding that the privilege is properly invoked, the court must balance the public interest in nondisclosure with the individual need for the information as evidence. The factors to be weighed include: (1) the degree to which the proffered evidence is relevant; (2) the extent to which it may be cumulative; and (3) the opportunity of the party seeking disclosure to prove the particular facts by other means. To compel disclosure, the claimant must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender."[37]

V. Judicial Deference to Agency Action

Members of the regulated community face two additional hurdles in obtaining relief through judicial review. Judicial review seldom involves plenary litigation, and the standard of review normally involves some formulation of the now familiar doctrine that agency decisions will not be overturned unless procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute.[38] In addition, agencies lay claim to judicial "deference" to their actions.

Indeed, the incantations of deference would make the Lord High Executioner blush. Historically, deference appears as a recognition of the agency's primary role in administering a legislative mandate; the reviewing court must accept a reasonable agency interpretation even if it would reach a different one if not acting as a reviewing court under what has been called the *Hearst* doctrine.[39] In addition, the courts have developed the *Skidmore*[40] deference doctrine, wherein a reviewing court will give respectful consideration to the agency's views in light of the agency's experience and informed judgment. However, the decision that has recently dominated judicial review of agency action has been *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("*Chevron*").[41] The *Chevron* doctrine provides for a two-step judicial analysis:

> First, always, is the question whether the U.S. Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[42]

Thus, the first step is to determine whether the statute is clear and unambiguous; if it is, then deference to an agency interpretation is not appropriate. Where the statute is silent or "ambiguous" then the second step of the *Chevron* deference doctrine mandates that the court must accept the agency's interpretation of the statute so long as it is reasonable.

Since 1984, *Chevron* deference has been in the forefront of agencies' defenses of their actions and pronouncements. While *Chevron* arose in the context of rule making, agencies have tended to invoke it in a wide variety of circumstances.[43] The Supreme Court has placed those attempts in perspective in several recent decisions. In *Christensen, et al. v. Harris County, et al. ("Christensen")*,[44] the Court noted that the unsuccessful plaintiffs had argued that the Department of Labor opinion letter should be granted deference under *Chevron*. The Court then held:

> Here, however, we confront an Interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication, or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.[45]

In the following year, the Court decided *United States v. Mead Corporation*.[46] Here, the Court attempted to sort through the various claims of deference. Justice Souter wrote for the Court: "[t]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[47] Justice Souter noted that agencies that are filling legislative "gaps" at the express direction of Congress are entitled to "substantial deference" in their promulgation of rules pursuant to the *Chevron* doctrine, but that in other circumstances, agency actions have received judicial responses of "near indifference."[48]

> To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires, id., at 140. See generally *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inapplicable); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (according "some deference" to an interpretive rule that "does not require notice and comment"); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) ("some weight" is due to informal interpretations though not "the same deference as norms that

> derive from the exercise of . . . delegated lawmaking powers").
>
> * * *
>
> A classification ruling in this situation may therefore at least seek a respect proportional to its "power to persuade," *Skidmore*, *supra*, at 140; see also *Christensen*, 529 U.S. at 587; id., at 595 (STEVENS, J., dissenting); id., at 596-597 (BREYER, J., dissenting). Such a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.[49]

Subsequent to *Mead*, the Supreme Court discussed judicial deference to agency interpretation in three cases. In *Edelman v. Lynchburg College*[50] ("*Edelman*"), the issue was the correctness of the Equal Employment Opportunity Commission ("EEOC") acceptance of a letter from a claimant's attorney as a sufficient "charge" under 42 U.S.C. § 2000e-5(e)(1) (1994), even though the official form was not filed until after the statutory 300-day time period. The Court sustained the EEOC's position; however, the Court sidestepped the deference issue, noting, "there is no need to resolve any question of deference here. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference or how much."[51] Shortly thereafter in *Barnhart v. Walton*[52] ("*Barnhart*"), *Chevron* deference to formal regulations was applied, despite petitioner's argument that the regulation shouldn't be considered given its recent enactment. The Court dismissed this argument, noting the Agency's interpretation was one of long standing, "[a]nd the fact that the Agency previously reached its interpretation through [less formal means] does not automatically deprive that interpretation of the judicial deference otherwise its due."[53]

However, in *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*[54] ("*Keffeler*"), a similar outcome was reached but by different means. The Court accepted an informal Social Security Administration definition interpreting a statute, and therefore excluded respondent's claim, because, "[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of . . . abstract breadth."[55] Although *Chevron* deference was not warranted because the definition appeared in an Administration operating manual, some deference was afforded because the interpretation was reasonable and adhered to general principles of statutory construction.[56]

Edelman, *Barnhart* and *Keffeler* may simply stand for the propositions that reasonable agency interpretations, vetted by some process that vouches for their reasonableness, will likely be sustained.[57]

Nevertheless, members of the regulated community should try to conduct their judicial fight along lines that do not invoke the maximum deference of *Chevron* or similar administrative doctrines. Justice Souter's list of varying degrees of deference is a useful tool for the private litigant. For example, internal guidelines and other pronouncements not subject to prior public scrutiny, or positions advanced for the first time in the course of the litigation, are only entitled to some or little deference, as opposed to substantial deference under *Chevron*.[58]

The advantages to this approach are illustrated by the case *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,[59] in which the plaintiff alleged that the City had violated the Clean Water Act with an unpermitted discharge from a dam. The City argued that no permit was required, relying on an EPA policy, articulated in opinion letters, reports to Congress, and litigation positions over the years, that the Act's discharge permit requirement did not apply to discharges from dams. The Second Circuit, following *Mead* and *Christensen*, held that because the EPA policy was never formalized in a notice-and-comment rulemaking or formal adjudication under the APA, it was not due *Chevron* deference, and need not be adopted by the court unless it was "persuasive."[60] Thus, the court engaged in its own interpretation of the statute and rejected the EPA position as applied to discharges from a more polluted body of water into a less polluted one.[61]

VI. Conclusion

All of the foregoing leads to the ineluctable conclusion that the real fight should be before the agency as opposed to a reviewing court. However, when the dispute has progressed to the courts, careful attention should be paid to whether the rule requires an opportunity for public comment and whether the record docketed by the agency's lawyers reflects what the agency actually considered, and the issues should be framed in a manner that avoids an application of the broad discretion of the agency. Claims of deference should be reviewed to ascertain their entitlement under the Supreme Court's teaching in *United States v. Mead* and similar earlier cases.

Endnotes

1. *Compare Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000) with *Flue-Cured Tobacco Cooperative Stabilization Corp., et al., v. EPA*, __ F.3d __ No. 98-2407 (4th Cir. Dec. 11, 2002).
2. *Chemical Manufacturers Association v. Environmental Protection Agency*, 28 F.3d 1259, 1266 (D.C. Cir. 1994): "And, we may add, it bespeaks a 'let them eat cake' attitude that ill-becomes an

administrative agency whose obligation to the public it serves is discharged if only it avoids being arbitrary and capricious."

3. *Professionals and Patients For Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995); *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993).

4. The scope of judicial review of an agency rulemaking under section 706 of the APA depends upon whether the challenged rule was promulgated "formally," in which case the standard of review is substantial evidence, or "informally," in which case the reviewing court applies the less rigorous arbitrary and capricious standard. *Phillips Petroleum Co. v. Federal Energy Regulatory Commission*, 786 F.2d 370, 374 (10th Cir. 1986); 5 U.S.C. § 706(2)(A) and (E). Formal rulemaking occurs according to the procedural requirements set forth at 5 U.S.C. §§ 556 and 557, providing for public trial-type hearings, and is necessitated only when specifically directed by an agency's organic statute. *See United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1972). An "informal rule" is promulgated pursuant to the notice and comment provisions of section 553 of the APA. *See AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 429–30 (4th Cir. 1998); *Phillips Petroleum Co., supra*, 786 F.2d at 374.

5. 520 U.S. 154 (1997).

6. 208 F.3d 1015 (D.C. Cir. 2000).

7. 215 F.3d 45 (D.C. Cir. 2000).

8. *Id.* at 49.

9. __F.3d __, No. 98–2407 (4th Cir. 2002).

10. 469 F.2d 478, 481–82 (2d Cir. 1972).

11. 818 F.2d 943 (D.C. Cir. 1987).

12. 818 F.2d at 947 (citation omitted).

13. *Id.* at 948.

14. 5 U.S.C. § 551(4). Another rubric used by an agency to circumvent the APA's notice and comment provision is to argue that notice is not required because the promulgation is merely an "interpretive rule." *See, e.g., General Electric Co. v. EPA, supra; Community Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987).

15. *United States Gypsum Co. v. Muszynski, etc., et al.*, 161 F. Supp. 2d 29 (S.D.N.Y. 2001), later proceedings, 209 F. Supp. 2d 308 (S.D.N.Y. 2002).

16. Prior notice and comment are only required for legislative rules within the meaning of the APA, 5 U.S.A. § 551(4); *see General Electric Co. v. EPA*, ___F.3d ___ (D.C. Cir. May 17, 2002); *Community Nutrition Inst. v. Youn*g, 818 F.2d 943 (D.C. Cir. 1987).

17. *General Electric, supra*.

18. *See* note 2, *supra*.

19. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

20. The seminal authority is *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), as modified by *Camp v. Pitts*, 411 U.S. 138 (1973). These cases and their progeny establish that a reviewing court may go beyond the administrative record provided by the agency when (i) the record is not complete; (ii) there is a strong showing of bad faith or impropriety; or (iii) the reviewing court is not able to understand the basis for the agency's decision from the record certified to it by the agency.

21. *Dopico v. Goldschmidt* ("*Dopico*"), 687 F.2d 644, 654 (2d Cir. 1982) ("a strong suggestion that the record before the court was not complete"); *Pension Benefit Guaranty Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 342 ("there are compelling reasons to allow limited discovery to proceed at this stage . . . the absence of both a formal agency proceeding and formal administrative findings suggest that some limited discovery will be useful to ensure that all matters considered by the [agency] are brought before the court.") *See also Public Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982) ("a showing that need for discovery was not 'insubstantial or frivolous'").

22. *Dopico,* 687 F.2d at 654.

23. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

24. *See, e.g., Mead Data Cent. Inc. v. Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977). In *State of Maine v. U.S. Dep't of Interior, et al.*, 285 F.3d 126 (1st Cir. 2002), the Court held that such claims made for documents generated during periods when both rule making and litigation are ongoing must have Vaughn Index documentation that the work product privilege is claimed with respect to a specific litigation and establish that the document was prepared "primarily" for litigation purposes. Similarly, the attorney-client privilege must support the critical proposition that the attorney-generated document would reveal a confidential client communication.

25. *Miami Nation of Indians of Indiana v. Babbitt* ("*Miami Nation*"), 979 F. Supp. 771, (N.D. Ind. 1996); *Lloyd v. Illinois Regional Transp. Authority* ("*Lloyd*"), 548 F. Supp. 575, 590–591 (N.D. Ill. 1982); *Tenneco Oil Co. v. Dep't of Energy* ("*Tenneco*"), 475 F. Supp. 299 (D. Del. 1979).

26. *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, (N.D. Tex. 1981).

27. *Tenneco*, 475 F. Supp. at 317. *See also Lloyd*, 548 F. Supp. at 590; *Ammex, Inc. v. United States*, 62 F. Supp. 2d 1148, 1156 (Ct. Int. Trade 1999).

28. *Miami Nation*, 979 F. Supp. at 777. The delineation of materials to be included in the administrative record before the reviewing court can be complicated by agency invocation of the "deliberative process privilege." *See, e.g., id*. at 777–79. However, the application of the privilege from which the agency seeking its protection has the burden of making specific showings, involves an inquiry separate from that of establishing the scope of the complete administrative record. *See id*. Materials which are properly included in the administrative record may turn out to fit within the privilege, but only if it has not been waived and the agency invoking the privilege has made the necessary affirmative showings.

29. *Woodhill Corp. v. Federal Emergency Mgmt. Agency* ("*Woodhill Corp.*"), 1997 U.S. Dist. LEXIS 13311, *5 (N.D. Ill. 1997) (ordering the inclusion in the administrative record of notes of a meeting where the unsuccessful applicant advocated its position to the defendant agency).

30. *Miami Nation*, 979 F. Supp. at 777.

31. *Woodhill Corp.*, 1997 U.S. Dist. LEXIS 13311, *3 (N.D. Ill 1997); *see Miami Nation*, 979 F. Supp. at 778.

32. *Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*).

33. *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975).

34. *Carl Zeiss Stiftung v. V.E.B., Carl Zeiss Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 348 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992).

35. *National Wildlife Federation v. U.S Forest Service*, 861 F.2d 1114, 1116–18 (9th Cir. 1988).

36. *Carl Zeiss*, 40 F.R.D. at 328–29; *Gomez v. City of Nashua, N.H.*, 126 F.R.D. 432 (D.N.H. 1989).

37. *Id.*

38. *United States v. Morton*, 467 U.S. 822 (1984); 5 U.S.C. § 706.

39. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

40. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
41. 467 U.S. 837 (1984).
42. *Id.* at 842–43.
43. *See, e.g., National Association of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir 1998) (distribution of royalties collected from cable television systems); *Bamidele v. Immigration and Naturalization Service*, 99 F.3d 557 (3d Cir. 1996) (Board of Immigration Appeals determination to deport the plaintiff); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990) (Navy practices of leasing acreage and contiguous water rights to local farmers).
44. 529 U.S. 576 (2000).
45. *Id.* at 587.
46. 533 U.S. 218, 121 S. Ct. 2164 (2001).
47. *Id.*, 121 S. Ct. at 2171–2172, *citing Chevron* (internal quotes and other citations removed).
48. *Id.*
49. *Id.* at 2175–76.
50. 122 S. Ct. 1145 (2002).
51. *Id.* at 1150.
52. 122 S. Ct. 1265 (2002).
53. *Id.* at 1271 (citations omitted).
54. 123 S. Ct. 1017 (2003).
55. *Id.* at 1026.
56. *Id.* at 1025.
57. *See also Heimmermann v. First Union Mortgage Corporation*, 305 F.3d 1257 (2002) (holding that *Chevron* deference applied to a HUD statement of policy because Congress expressly delegated authority to make and interpret rules, and thereby gave the statement the full force of law); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2002) (holding that *Skidmore* deference is appropriate where the Secretary of Labor's position on citation pardons was only expressed in a litigation document); *Teambank, N.A. v. McClure*, 279 F.3d 614 (2002) (holding that an Office of the Comptroller of the Currency ("OCC") opinion letter was entitled to *Chevron* deference because, under *Mead*, OCC decisions are deferred to even in the absence of formality); *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126 (2001) (holding that Customs classification rulings are not given *Chevron* deference under *Mead*, however this particular case did merit *Skidmore* deference due to its persuasiveness).
58. 533 U.S. 218, 121 S. Ct. at 2175–76.
59. 273 F.3d 481 (2d Cir. 2001).
60. *Id.* at 489–91.
61. *Id.* at 491–94.

Daniel Riesel and Elizabeth Read are litigation attorneys with Sive, Paget & Riesel, P.C.

Remembering the Forgotten Community: Community-Based Supplemental Environmental Projects and Environmental Justice

By Janice A. Dean

In Chicago in 1997, the United States Environmental Protection Agency ("EPA") and Sherwin-Williams Company negotiated a $5.8 million settlement after three-and-a-half years of litigation for numerous violations of environmental laws at Sherwin-Williams' paint and resin plant.[1] *The settlement agreement designated over a million dollars for supplemental environmental projects, designed to offset the detrimental ecological impact of the facility's violations and to benefit the surrounding community. However, the local community was not involved in the negotiations, and did not directly benefit from the settlement agreement. Instead, the Chicago Department of the Environment received $950,000, and $150,000 went to wetlands restoration in nearby creeks. Neighbors of the facility who had been fighting to get the land cleaned up for years were dismayed when EPA and Sherwin-Williams reached an agreement without community input.*[2] *Sherwin-Williams's vice president of corporate planning and development said his company wanted the money to go to the community, but was unaware of what the community's needs were.*[3] *"We don't object to those other projects," said Tom Zarris, President of the Pullman Civic Organization, "but take care of us, too. It seems like we're the forgotten community, and we're right across the street."*[4]

I. Introduction

State and federal environmental agencies often settle enforcement actions for violations of environmental laws, including the Clean Water Act,[5] Clean Air Act,[6] and Resource Conservation and Recovery Act,[7] instead of pursuing judicial resolution, and have the discretion to approve supplemental environmental projects ("SEPs") as part of settlement agreements.[8] The Environmental Protection Agency ("EPA") and the Department of Justice agree to settlements involving millions of dollars in enforcement penalties every year under various environmental statutes, but these funds are deposited directly into the United States Treasury under the Miscellaneous Receipts Act ("MRA"), and are not returned to either EPA's budget or the communities surrounding the violations.[9] SEPs evolved at the federal level over the last thirty years, amid discussion regarding constitutionality and consistency with the MRA, as a way to return much-needed environmental benefits to areas impacted by environmental violations (similar to the "restorative justice" theory of criminal law, discussed in more detail below),[10] and some states adopted the practice as well.[11] When it became clear that penalties were successful as deterrents, but unsuccessful as environmental remediation measures, EPA enforcement staff explored alternative ways to fund environmentally beneficial projects.[12] SEPs, known in some states as environmentally beneficial projects or "EBPs," are projects that a violator "voluntarily agrees to perform, in addition to actions required to correct the violation(s), as part of an enforcement settlement."[13] SEPs take one of two forms: internal SEPs, which typically involve technological upgrades to reduce or prevent pollution above and beyond the requirements of law, or community-based SEPs designed to directly benefit the environment and the community surrounding the violation.[14] SEPs may arise through citizen suit settlements as well as through federal or state enforcement negotiations.[15]

SEPs offer environmentally impacted communities benefits that traditional litigation outcomes do not. This article will explore the application of community-based SEPs in low-income and minority communities. It will provide examples and analysis of the need for environmentally beneficial projects in these communities and the legal framework behind SEPs. It will look at state and federal policies guiding settlement negotiations, the differences between their treatment of environmental justice, and the community participation factors necessary for effective collaboration at any level of government. It will illustrate when and where community participation in the settlement process has been and can be most effective, and will, through analogy to the restorative justice model of criminal law, suggest that SEPs can provide a vehicle for remedial actions to be taken in areas surrounding environmental violations. It will assess the benefits to industries and regulators of successful SEP negotiations, and the potential for SEPs to offer impacted communities and industries real environmental and social justice improvements.

II. Environmental Justice

The importance of directing remedial funds to environmentally impacted neighborhoods is underscored by recent health statistics. The Institute of Medicine estimates that 25 percent of preventable illnesses worldwide are attributable to poor environmental quality,[16] and the United States Department of Health and Human Services ("HHS") estimates that in the United States alone, air pollution causes 50,000 premature

deaths and results in $40 billion to $50 billion in health-related costs.[17] Low-income and minority communities[18] bear disproportionately heavy environmental burdens. The Government Accountability Office ("GAO," formerly the General Accounting Office), the EPA, the National Academy of Public Administration, the United Church of Christ, and other organizations have documented these disproportionate risks in numerous studies throughout the last twenty years.[19] For example, HHS statistics show that in 1996, a disproportionate number of Hispanics and Asian and Pacific Islanders lived in areas that failed to meet air quality standards, compared with whites, African Americans, and American Indians or Alaska Natives.[20] A 1995 study performed by the Virginia Assembly's Legislative Audit and Review Commission found that four out of every ten solid waste facilities sited in Virginia between 1988 and 1995 were located in disproportionately minority communities.[21] According to an EPA official, "[t]hose who commit environmental crimes in disadvantaged neighborhoods often felt that they could do so with impunity."[22] Perhaps this was because of a history of less effective enforcement in these neighborhoods; a landmark 1992 study found that EPA enforcement in low income and minority communities was less frequent and less effective than in non-minority communities.[23] The study found, *inter alia,* that penalties were lower in minority communities, and hazardous waste facilities took an average of 20 percent longer to be placed on the National Priority List for cleanup through the Superfund program than facilities elsewhere.[24] The Virginia Assembly's study also found that facilities in minority neighborhoods were inspected less frequently than facilities elsewhere in the state.[25] Numerous studies have documented the health impacts of hazardous facilities on communities like these,[26] which have become known as "environmental justice communities."[27]

Environmental justice is "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[28] Following President Clinton's Executive Order 12898 on Environmental Justice in 1994,[29] the EPA created a series of working groups to address environmental justice issues. Throughout the last ten years, the National Environmental Justice Advisory Council ("NEJAC") and the Interagency Working Group have made a series of recommendations aimed at addressing charges of environmental racism[30] at the federal level, and increasing community involvement in EPA's decision-making processes.[31] While the awareness of environmental justice issues at the federal level may be higher now than ever before, community involvement in community-based SEP negotiations has not kept pace. In the mid-1990s, NEJAC recognized that SEPs could offer environmental justice communities tangible improvements, and began to explore SEPs in their annual meetings.[32]

III. Supplemental Environmental Projects

A. Legal Framework: Consent Decrees and the Miscellaneous Receipts Act

SEPs arise through the settlement process. The United States Attorney General has "plenary authority to settle civil cases on terms that are consistent with the underlying statute."[33] Under 28 U.S.C.S. § 516, "the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."[34] The power to authorize SEPs in settlement negotiations is therefore implicit in this grant of authority, because SEPs arise out of these settlement proceedings.

SEPs can be critical parts of successful settlement negotiations as measures of good faith for community, industry, and governmental stakeholders. Nevertheless, their validity in light of controlling constitutional and statutory law continues to be questioned. While no constitutional provision or statute directly addresses SEPs, one provision and multiple statutes are implicated. EPA may not agree to a settlement that requires a defendant/respondent to perform an activity that EPA is mandated to perform, because "such a project would augment appropriations made by Congress to the Agency, thereby violating the separation of powers doctrine."[35] For example, a SEP requiring payment of money to EPA for inspections or other services would therefore fail.[36] Perhaps the most important legal issue surrounding SEPs is the relationship between SEPs and the Miscellaneous Receipts Act ("MRA"), which requires all penalties collected by the government to be deposited directly into the U.S. Treasury.[37] The MRA was enacted to prohibit agencies from using penalty money for their own purposes.[38]

Although at first blush it may appear that dollars directed at community or facility improvement projects are penalties diverted away from the Treasury, judges approve consent decrees containing SEPs by the dozen every year with no challenges on MRA grounds.[39] However, that was not always the case. In December 1991, perhaps reacting to the Department of Justice's history of opposition to SEPs, Representative John Dingell (D-Mich), then Chairman of the House Energy And Commerce Committee, "called for study by the general accounting office to investigate whether the EPA had the authority to reduce the mobile source penalty under the Clean Air Act for the violator to agree to fund a public awareness program to reduce automobile pollution."[40] The Department of Justice was concerned that the diversion of funds from the Treasury violated the

Miscellaneous Receipts Act, and its concern was well-founded; the GAO concluded that EPA had acted beyond its statutory authority and that "the project was not acceptable on two bases: (1) the beneficiary of the penalty payment had no relationship to and had suffered no injury from the violation; and (2) the Miscellaneous Receipts Act requires penalty payments to the U.S. Treasury."[41]

Since then, EPA has formulated its "nexus" requirement (discussed in more detail below) to address the MRA concern[42] and the issue remained largely dormant for more than ten years. A Colorado district judge recently reopened the issue, questioning the United States' authority to include SEPs in a proposed consent decree with Rocky Mountain Steel Mills for Clean Air Act violations.[43] The government persuaded the court that SEPs were constitutional and appropriate when in line with the underlying statute and the MRA[44] by explaining that monies spent on SEPs are not civil penalties withheld from the Treasury (indeed, they accompany penalties), but are instead agreements made before the determination of penalties that merely act as penalty mitigation factors.[45] The government successfully argued that "no amount of money is due to the government until the complaint is resolved"[46] and that "EPA is not giving up the collection of funds that are clearly due to the government; rather, EPA has decided to settle on terms that, in consideration of all the statutory factors and the best use of its own resources, it has determined achieve the goals of the statute."[47] Although the issue may continue to show up from time to time, to date no court has invalidated SEPs on MRA grounds.

B. EPA's SEP Policy

EPA's SEP Policy ("SEP Policy")[48] guides all SEP negotiations between EPA, a defendant/respondent,[49] and any involved community groups in both administrative and judicial proceedings.[50] Parties who have an ongoing relationship with EPA enforcement staff may be familiar with these projects from past negotiations, and may bring their ideas to the discussion. Defendant/respondents may seek to include SEPs in settlement agreements to repair damaged community or regulator relationships. Otherwise, EPA can make the defendant/respondent aware of the availability of SEPs as factors to be taken into account in determining penalty mitigation and may offer them a copy of the EPA's SEP Policy, but EPA staff cannot require SEPs in settlement negotiations.[51] If a defendant/respondent chooses to perform a SEP as part of their penalty, EPA will determine the value of a SEP using a mathematical computer model, and determine the penalty by taking into account mitigation factors including SEP factors like environmental justice and community input.[52] A penalty will therefore not be mitigated dollar-for-dollar by a SEP's value.[53]

1. Nexus

Proposed SEPs considered by EPA must meet a nexus requirement, defined as "the relationship between the violation and the proposed project."[54] The relationship exists only if at least one of the following can be said of the proposed SEP: (1) that it is not inconsistent with any provision of the underlying statute; (2) that it is designed to reduce the likelihood of other similar violations in the future; or (3) that it will reduce the adverse impact to public health or the environment caused by the violation and reduce the overall risk to public health or the environment.[55] Nexus can be established by a project at the site of an alleged violation, at a different site within the same ecosystem, or within the general geographic area (generally within a fifty-mile radius of the site).[56] A nexus requirement is crucial to a SEP's consistency with the MRA; it is only because of the link between the violation's impact and the SEP's remedial function that the EPA has the discretion to include the SEP in settlements at all.[57] Fear of violating the MRA remains a strong incentive for careful analysis of the nexus between a violation and a SEP, as individual staff members may be removed from office or held personally liable for the amount of money misappropriated if found to be in violation of the act.[58]

SEPs need not address the same pollutant or the same medium as the alleged violation,[59] although EPA and communities are likely to push for a same-medium SEP to address the impacts on their community and to meet the policy's nexus requirement. For example, a facility violating the Clean Air Act would be likely to gain community support by proposing a SEP that addresses the health impacts of air pollution, and not a wetlands mitigation project. Community groups, even if they are located in the neighborhood directly surrounding the violating facility, are not usually made aware of the pending settlement agreements.[60] Many recent SEP negotiations have included community members, likely as a result of actions EPA has taken in recent years to include community groups in this process by publishing notices on community bulletin boards and in local newspapers.[61] Public hearings are rarely held during enforcement settlement agreements, but have been held in environmental justice communities to adequately address local concerns.[62] Following receipt of all comments and any public hearings, and the integration of ideas from submitted comments into the agreement, a judge or administrative law judge will agree to the settlement terms and sign the settlement agreement. Performance of the SEP will then follow the agreed-upon timetable.

2. SEP Categories

EPA has seven specific categories of acceptable SEPs: (1) pollution prevention; (2) pollution reduction; (3) public health; (4) environmental restoration and protection; (5) assessments and audits; (6) environmental compliance promotion; and (7) emergency planning and preparedness; it will consider "other" projects as long as they meet the requirements of the SEP Policy.[63] SEPs may not include facility improvements, projects that EPA would be entitled to get as injunctive relief,[64] or any procedure that the facility is otherwise legally required to perform.[65] The creativity with which defendant/respondents propose and perform SEPs continues to improve; SEPs range from entirely internal, non-public projects to community-based projects that involve community organizations as integral partners. It is important to note that internal SEPs, as well as community-based SEPs, can greatly benefit surrounding communities, albeit in a less public way. Transferring existing pollution reduction equipment from one part of a facility to another can result in significant indirect environmental, public health, and economic benefits.[66] Similarly, internal organizational practices may lead to improved environmental performance.[67] A less quantifiable but important benefit to a defendant/respondent may be the improved community and agency relations that come out of a successful SEP performance.[68]

While donations to charitable organizations are not allowed under EPA's policy,[69] community-based or other organizations may become "contractors" to administer SEPs. For example, The Nature Conservancy contracted with United Technologies Corporation in 2001 to restore a tideland along the Connecticut River.[70] EPA has taken the position that it may make a list of such organizations available to a defendant/respondent without expressing a preference among them, and may not enter into any agreement with such an organization at either the Regional or Headquarters level, but that defendant/respondents are free to.[71]

3. Environmental Justice in the SEP Policy

The SEP Policy acknowledges that "certain segments of the nation's population . . . are disproportionately burdened by pollutant exposure."[72] In stating that SEPs involving pollution prevention are preferred over other types of reduction or control strategies, the policy states that "[e]mphasizing SEPs in communities where environmental justice concerns are present helps ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near, where the violations occur would be protected."[73] Environmental justice is not a specific factor to be considered in penalty mitigation, but rather an "overarching goal" that EPA encourages.[74] However, EPA considers the extent to which the proposed SEP "mitigate[s] damage or reduce[s] risk to minority or low-income populations which may have been disproportionately exposed to pollution or are at environmental risk"[75] in determining penalty mitigation, essentially giving more consideration to projects aimed at lessening environmental burdens in these communities.

Public health, restoration and protection projects lend themselves effectively to community-based SEPs. In Baltimore, Maryland, S.C. Johnson & Son was charged with violations of the Federal Insecticide, Fungicide, and Rodenticide Act related to the marketing of an unregistered pesticide, following a marketing campaign targeting a benzene-laden allergy spray toward asthma sufferers who experienced adverse reactions.[76] On top of a $200,000 civil penalty, the company financed the creation of a mobile asthma unit called the "Breathmobile," funding staff to monitor children's asthma and recommend treatment for one year, at a cost of over $700,000.[77] Asthma treatment programs make excellent public health SEPs because areas of high air pollution are often accompanied by high asthma rates, especially in children, and these are often in low-income communities of color like Harlem.[78] Crozer Chester Medical Center in Chester, Pennsylvania, implemented an asthma detection program at local schools as part of a Clean Air Act violation settlement.[79] Through this project, students in the Chester-Upland Public Schools, who experience asthma rates at almost twice the national average, receive screening, diagnosis, and placement in an appropriate asthma management program.[80]

Funding for certain supplemental environmental projects is not limitless, however. For example, S.C. Johnson & Son committed to funding the Breathmobile asthma clinic for one year only.[81] The SEP contemplated that the University of Maryland would continue the mobile asthma clinic,[82] but agreements like these are not certainties. Agencies and defendant/violators alike would benefit from the publication and analysis of ongoing SEPs, and the success or weakness of particular projects. A future defendant/respondent might be able to continue funding a project like the Breathmobile, for example, when the original SEP obligation has been fulfilled. EPA has published a report summarizing recent SEPs, but the report is not a critical one, and would be of little use to a facility seeking anything more than broad ideas.[83] EPA publication of a report offering a critical look at successes and weaknesses of SEPs over time, as well as the negotiating process itself, would be of great benefit to EPA staff, violating facilities, and communities alike.

EPA may not suggest a SEP to a violating company as part of a settlement agreement; the process is voluntary and controlled almost entirely by the company from its inception to implementation and conclusion.[84] However, EPA enforcement staff have established rela-

tionships with members of the regulated community and are likely to have a sense of each entity's ability or propensity to undertake a SEP (indeed, many EPA enforcement settlements may succeed because of the negotiating savvy of the agency's enforcement staff). Similarly, some enforcement staff in EPA Region offices have developed ongoing relationships with community members, and are often in good positions to advise other enforcement staff about the needs of, and current problems in, environmental justice communities.[85] As discussed below in greater detail, EPA's role as a liaison can likely be improved through increased communication without violating the SEP Policy.

IV. SEPs and the States

Many federal enforcement responsibilities are delegated to the states through environmental statutes.[86] Many states have therefore developed their own SEP policies to guide their own settlement negotiations. Although these policies in most instances mirror EPA's policy, states may have more flexibility depending on their statutory or administrative provisions. For example, a state without the equivalent of the Miscellaneous Receipts Act may not be as tightly bound to a nexus requirement as the federal government is.[87] This can be of particular value in joint federal and state settlement agreements for enforcement officials looking for ways to fund community projects that might not qualify as a SEP under EPA's rigid policy. For example, Colorado's policy does not have a nexus requirement, so joint enforcement negotiations with EPA's Region 8 can defer environmental justice-oriented SEPs to the state's policy if they fall outside of EPA's requirements.[88] As long as a project falls under one of the state's categories, which are almost identical to EPA's seven categories, the SEP can go forward.[89]

However, the nexus requirement can be a crucial element to the success of a community-based SEP, especially in an environmental justice community. Without it, a community in the area of a violation may be slighted when an environmentally beneficial project relating to that violation is performed elsewhere. For example, New York State commenced an enforcement action against the New York Power Authority ("NYPA") in 2002 for multiple violations of state air permits at their Jamaica Bay facility in Queens County.[90] The State Department of Environmental Conservation ("DEC") and NYPA reached a settlement in which NYPA agreed to restore wetlands in an entirely different part of the county.[91] Despite the presence of a very active community organization in the facility's neighborhood, neither the community groups nor the state's environmental justice coordinator were made aware of the settlement until the DEC issued a press release following the consent decree.[92] The community was outraged because the EBP did not return any funding or projects to the community surrounding the violation.[93] The incident did result in a positive outcome, as the DEC pledged to do a better job returning projects to the communities experiencing the violations.[94] Nevertheless, the process further alienated an already disenfranchised community that had taken great strides toward becoming an effective political unit.

On the other hand, the nature of a community's environmental burdens may make cross-media SEPs appropriate. Typically, environmentally burdened communities suffer from the "synergistic" effect of multiple pollutants,[95] and so alleviating air pollution with a SEP, even if the project's stemmed from a water violation, may directly benefit the community.

States address SEPs through both legislation and administrative policies. Codification of a policy may make it enforceable by parties outside of the environmental agency administering it,[96] which could benefit watchdog community groups, but few states have chosen to turn their SEP policies into legislation. Virginia has codified their policy, which requires state enforcement staff to consider the project's impact on minority or low-income communities, among other things.[97] New York State has pending legislation codifying the DEC's "Environmentally Beneficial Projects" ("EBP") policy.[98]

Most states have followed EPA's seven-pronged approach to designating projects as SEPs.[99] Their treatment of environmental justice is similar as well; many, including Massachusetts,[100] Oregon,[101] and Connecticut[102] treat environmental justice as an overarching goal as EPA does. However, these states do not consider environmental justice as a penalty assessment consideration.[103] Colorado's policy,[104] like Florida's policy[105] and Virginia's statute,[106] consider environmental justice as a factor in determining the appropriate penalty mitigation. California's SEP Policy[107] does not explicitly address environmental justice, but controlling environmental justice legislation and affiliated policies may allow for the consideration of environmental justice priorities in SEP negotiations nevertheless.[108]

V. Citizen Suits and SEPs

While the issue of SEPs in EPA enforcement actions has not often been the subject of litigation, citizen suits, and specifically citizen suit settlements including SEPs, have received their fair share of judicial attention.[109] Almost every environmental statute contains a citizen suit provision, a clause authorizing "any person" to commence an action to compel compliance with an environmental statute.[110] Although these cases are brought outside of the federal or state enforcement arena, environmental statutes require citizen plaintiffs to notify the Administrator and the Attorney General when commencing a suit, and before entering a consent

decree.[111] Citizen suits represent a vehicle for the broadest SEP potential, as they are not limited by statutory constraints or EPA's nexus requirement.[112] In its earliest treatment of the issue, the Ninth Circuit found in 1990 that EPA's penalty policy (which predates the SEP policy) was not binding on the court, and that the prohibition against ordering a defendant to make payments to an organization other than the U.S. Treasury did not extend to out-of-court settlements.[113] The court allowed the defendant in a Clean Water Act settlement to make payments to the Sierra Club instead of to the U.S. Treasury, deeming the payments part of an out-of-court settlement reached without a finding of liability.[114] Of course, citizen suits that result in judicial decisions, and not settlements, are constrained by the MRA just as EPA enforcements suits are.[115]

The non-binding nature of the SEP Policy and precursor penalty policies leaves district courts free to approve consent decrees without following EPA's strict nexus analysis. In 1991, the Atlantic States Legal Foundation brought a citizen suit under the Clean Water Act against Simco Leather for alleged violations of Simco's pre-treatment requirements.[116] The parties agreed to settle the case, and sent a copy of their proposed consent decree to the Attorney General and EPA Administrator as required under the Clean Water Act.[117] The proposed decree included a payment of $2,120 to the U.S. Treasury and a payment of $8,480 to the State University of New York at Oswego for water quality examinations throughout the Mohawk River.[118] The government objected on grounds that the proposed decree violated the nexus requirement of the Clean Water Act Penalty Policy for Civil Settlement Negotiations[119] (a precursor to the SEP Policy). The court found that the policy was intended "solely for the guidance of government personnel," and was not binding on the court; the policy did not apply to cases in which the government was not a party and did not limit relief available to citizen plaintiffs.[120]

Perhaps for these reasons, citizen suit settlements often include SEPs. The Department of Justice reports that between 1999 and 2001, citizen suits resulted in SEPs valued at over $9 million.[121] To date, no comprehensive analysis has been done regarding SEPs and citizen suits in low-income and minority neighborhoods, so the proportion of SEP dollars resulting from challenges in these communities is impossible to determine. Most environmental citizen suits are brought by large environmental organizations and not small environmental or community-based organizations.[122] Typically, these small, grassroots "organizations" begin as nothing more than a gathering of concerned citizens, with no funds, no hierarchical organizational structure, and little to no knowledge of government decision making processes. Often, members of these community organizations include recent immigrants and other non-English speaking citizens, further complicating their attempts to understand or affect the decisions made in their neighborhoods. Traditionally, mainstream environmental organizations and public interest legal organizations did not address issues of environmental justice, instead focusing on conservation and traditional public interest fields like poverty law and disability rights, respectively.[123] Citizen suits involve complex constitutional doctrines like standing, mootness, separation of powers, and sovereign immunity, [124] and can take years to litigate. Community organizations seeking redress for environmental harms may not have the resources to litigate, eliminating the possibility for SEPs in the absence of an EPA enforcement action. Professor May posits that a recent decline in EPA's civil penalty, SEP, injunctive relief, and administrative penalty values suggests a decline in EPA enforcement, making citizen suits ever more important.[125]

VI. Restorative Justice and Beyond

A. Restorative Justice: Polluter as Criminal

The importance of community involvement in the settlement of environmental actions is correlated with an increasing social awareness of the importance of community involvement in the administration of justice in general. The concept of "restorative justice" exists in juxtaposition with the traditional retributive model of American justice, focusing on repayment for harms done and restoration of peace in the community following a crime.[126] Restorative justice is "a philosophical framework . . . [which] emphasizes the ways in which crime harms relationships in the context of communities,"[127] viewing crime as against individuals, not against the state.[128] The Department of Justice has acknowledged and worked with restorative justice ideas since 1996.[129] Criminal sentences including community service as punishment exemplify the idea of restorative justice in a criminal law setting.[130] SEPs exemplify this idea in an environmental and civil context; the presence of affected community members at the negotiating table shows corporate violators that their regulatory infractions have real, personal consequences.

Viewing an environmental violation as community harm, and not simply a faceless statutory or regulatory violation, changes the theory of punishment most appropriate to remedy the harm done. Under this view, a penalty that is not only kept out of the community, but not even returned to the environmental agency for increased enforcement or prosecution, falls far short of remedying a violation's harm to community health. Applying a restorative justice model to an environmental violation, therefore, becomes appropriate in any harmed community, but especially in low-income and minority communities that are repeatedly harmed by environmental violations and inadequate enforcement.

It is perhaps the community members themselves who know what remedy is most appropriate, where public health resources in their community may be falling short, or which relationships should be fostered within the environmental dialogue between regulators and members of the regulated and impacted communities. SEPs provide a platform to bring restorative justice principles into an environmental context.[131]

VII. Including Communities in Negotiations

EPA has committed to making "special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations," noting that this process can "better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility."[132] Tellingly, however, EPA's Draft Guidance for Community Involvement in Supplemental Environmental Projects received only five comments.[133] Certainly this number does not reflect the number of interested community groups around the country; it is likely more reflective of the inadequacy of publishing such notice only in the Federal Register. This matter is one that EPA should remedy through more effective community outreach.

Industry representatives often cite confidentiality concerns as reasons to refrain from including community participation in SEP negotiations.[134] Such concerns can be well-founded, but can certainly be honored and accommodated throughout the community participation process. EPA notes that several categories of documents and information must always be kept confidential, including the parties' settlement offers; EPA's penalty positions (which could compromise the government's case if settlement fails); documents covered by attorney-client privilege, and information subject to the privacy requirements of the Freedom of Information Act.[135] However, many stages of a settlement negotiation need not be so carefully guarded. The types of information that are not necessarily confidential include notices of violation, complaints and other documents filed with a judge or court, the facility's monitoring report, and inspection reports.[136] The defendant/respondent is free to share additional information with community members as it sees fit, and may wish to do so as an offering of good faith, or to give a community a realistic sense of what SEP options may be.

The level of community participation undertaken during settlement negotiations, or the kind of community-based SEP discussed, may depend on the level of connection between the EPA enforcement attorney and the impacted community. Not all EPA enforcement staff members are familiar with environmental justice, even if they often work in low-income and minority communities, which can make inclusion of community members in settlement agreements a challenge. Although environmental justice continues to be a priority of the EPA administration,[137] most Region offices have an environmental justice staff of five or fewer.[138] The agency recently initiated an environmental justice training program, which has trained approximately 2,500 staff members since 2002, and EPA plans to provide all enforcement staff and managers with environmental justice training.[139] A well-versed enforcement official would recognize a settlement agreement taking place in a highly impacted neighborhood, would likely know the active community leaders and organizations in the area, and would be able to initiate conversations at the appropriate time and in an appropriate manner to ensure maximum community participation among parties with a full understanding of the SEP's possibilities and limitations.

EPA may use both informal and formal methods of contacting communities, including notice in the Federal Register[140] as well as telephone calls to local organizations, posted notices in churches and community centers, and notices in local newspapers.[141] However, because of the fast pace of some settlement negotiations,[142] it may be more effective for community groups to suggest projects to EPA in advance, either through a contribution to EPA's "SEP Library" or through informal communications with EPA enforcement staff. Effective communication regarding a specific settlement may only be an option if a community group is aware of a pending settlement, as few groups are.

In 2002, EPA commenced an enforcement action against Atofina Chemicals for multiple violations of air, water, and reporting requirements.[143] The LeMoyne Community Advisory Panel ("LCAP"), an Alabama community group alleging to have been affected by Atofina's air and water pollution violations, challenged the proposed consent decree between EPA and Atofina on grounds that their proposed SEP (remediation and beautification of Mobile's Montlimar Canal) lacked adequate nexus, and that the government failed to notify the community of pending settlement negotiations.[144] The court found an adequate nexus, but found that the government did violate their community participation guidelines by delegating to Atofina the task of locating and designing an appropriate SEP absent community notification.[145] Atofina collected SEP ideas from the Alabama State Department of Environmental Management, which recommended the Montlimar Canal project.[146] The court nevertheless approved the consent decree in order to serve the public interest, avoid protracted litigation, and because "[e]ven if the court had the clear authority to enforce the terms of the EPA policy, it lacks the power to modify the consent decree by striking the SEP and leaving the rest of the agreement intact."[147] The court opined that by not requiring Atofina to comply with the community notification policy,

EPA might have allowed Atofina to "give priority to irrelevant political considerations while ignoring local groups who should have been at least consulted in the SEP's design."

One example of effective community participation strategies involved a joint federal and state enforcement action in Colorado instituted as part of EPA's Petroleum Refinery Initiative.[148] Conoco, EPA, and four states (Colorado, Louisiana, Oklahoma, and Montana) agreed to a settlement involving a $1.5 million monetary penalty and $5.1 million in supplemental environmental projects including the purchase of air quality monitoring equipment for local officials, retrofitting local buses and trucks to meet particle matter and nitrogen oxide requirements, and watershed improvement projects.[149] Colorado accepted its entire penalty in SEPs, and together with Conoco and EPA held two public meetings in which they asked the communities surrounding the violations for guidance and proposals.[150] The meetings were extremely successful, gathering forty different proposals from non-governmental organizations.[151] Twenty community-based projects were ultimately selected and funded in Colorado.[152] Colorado administered some of these programs through a not-for-profit foundation set up exclusively to administer SEPs related to energy efficiency.[153]

To expedite the often lengthy settlement process, and likely to deflect criticism that including community groups in settlement negotiations may slow the process, EPA recently established a SEP Library. The Library, a repository of SEP ideas, will eventually be made public in a searchable format.[154] Region staff, community members, and industry stakeholders can contribute ideas from hypothetical or past SEP projects to the Library for others to use as models. Interestingly, a micro-industry is growing around the use of SEPs; nonprofit organizations that wish to be tasked with administering SEPs, as well as industries providing pollution abatement equipment for internal SEPs, have contributed ideas to the SEP Library.[155]

SEP negotiations, and the violating facility's decision of whether or not to perform a SEP, can be complex and ridden with political intricacies. In May of 2003, environmental and tribal organizations in the Cook Inlet region of Alaska became aware of an EPA enforcement proceeding against Unocal for Clean Water Act violations surrounding Unocal's oil and gas platforms in the Inlet.[156] The local tribes, along with Cook Inlet Keeper, an environmental watchdog organization which had itself been formed with the proceeds from a 1995 SEP between Unocal and EPA, found out about the negotiations only after EPA published a press release that was publicized in the Anchorage Daily News.[157] EPA and Unocal had agreed to a fine of $370,000 for dozens of violations over a five-year period, and community members were given a chance to comment during the forty-day public comment period.[158] The Port Graham Village Council (the "Tribal Council"), a coalition of five local tribes in the Cook Inlet region, submitted a formal comment to EPA requesting meaningful consultation under the SEP Policy and Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments.[159] The Tribal Council requested a SEP that would direct funds to local organizations to "build tribal capacity on oil and gas issues . . . [and] conduct research on subsistence resources."[160] EPA contacted the Tribal Council and told them that Unocal was not interested in a SEP, and that EPA was not able to pursue the matter further.[161] Unocal, however, told the Tribal Council that the SEP was under EPA's discretion.[162] Unocal and EPA also received comments from other conservation and tribal organizations in support of a SEP, leading Unocal to claim that it would be unfair to choose one local organization over another.[163] However, Unocal had a history of violations in this region and may have avoided the inclusion of a SEP simply to avoid ongoing interactions with adversarial, and well organized, community opposition. Unocal's settlement with EPA was finalized without a SEP component despite organized community efforts.[164]

However, many community-based SEPs do indeed include meaningful community participation, and result in successful collaborations. This depends to a large degree on the willingness and creativity of the violating facility, but may also depend upon the community's ability to make their priorities known in an organized fashion. Community participation, often complicated and adversarial, need not hinder a SEP's success. A settlement might result in the formation of a SEP advisory committee, like that included in an agreement between the city of Atlanta and EPA to address the impact of combined sewage overflows ("CSOs") on Atlanta's minority and low-income communities.[165] Atlanta's SEP advisory committee included minority representatives from neighborhoods affected by the CSOs, community leaders, neighborhood planning units, business community leaders, and others.[166] The consent decree required the SEP advisory committees to "provide advice and recommendations to the City in the development, management, and implementation of the Greenway Acquisition Project and the stream cleaning project."[167]

VIII. Recommendations and Conclusion

The number of supplemental environmental projects applied to environmental problems in low-income and minority communities should increase as successful SEPs gain public attention; nevertheless, these projects remain largely unknown to industry and community members alike. Increasing public awareness and cross-party communication about SEPs will assist all stake-

holders in the formation of creative and effective community-based projects.

Public participation requires three-way communication; communities must offer information and comments, industry must seek out and be open to community perspectives, and EPA must diligently disseminate information and responses.[168] The public participation requirements in SEPs must include the depth required by statutes like the National Environmental Policy Act ("NEPA").[169] NEPA regulations presume that a public hearing will take place whenever notice of intent to prepare an environmental impact statement has been published, for example.[170] Community participation in beneficial projects should be at least as inclusive as in potentially harmful projects. The community must be notified of proposed settlements in a timely manner, through a medium easily accessible by all community members, and in the appropriate languages for the geographical area affected. Inclusion of a person familiar with the environmental justice concerns in settlement negotiations is crucial; this could be an EPA enforcement official familiar with environmental justice concerns or a community leader or representative. Federal agencies continue to have problems implementing their public participation policies promulgated under the Executive Order on Environmental Justice.[171] EPA has taken the lead in environmental justice community outreach efforts at the federal level, but the nature of EPA's mission demands the highest attention to these communities.[172] EPA should mirror its environmental justice/public participation guidelines under the National Environmental Policy Act in its SEP negotiations, as they are the most detailed of any promulgated by the agency or NEJAC.[173] In areas with high numbers of violations, EPA might hold a series of community meetings to educate both industry counsel and communities about the SEP process, and to collect ideas from both groups. Typically, settlement negotiations do not require public meetings, but Colorado and EPA Region 8's Conoco settlement provided a model for how successful public meetings can be in the settlement context. Outside of a specific settlement negotiation, these meetings could provide a non-adversarial forum in which to establish support for future projects. Additionally, under NEPA, the lead agency must make copies of the Record of Decision available to every party who commented on a draft or final environmental impact statement.[174] A similar requirement in SEP negotiations would ensure that community members who had been active during the process were made aware of the ultimate settlement terms.

Intra-agency coordination is critical to the success of any community outreach effort. A 2002 study by the National Academy of Public Administration found that "despite the commitment of senior EPA leadership, environmental justice has not yet been integrated fully into the agency's core mission or its staff functions."[175] Similarly, many states have established no principles to guide decision making in communities of concern, and those with environmental justice policies may not have addressed the issue in relation to enforcement settlements. EPA enforcement personnel negotiating settlements in low-income and minority communities may not realize that their colleagues have engaged in dialogue with community groups in the area; brief meetings or "heads up" about pending negotiations will alert Region staff members to these negotiations. Similarly, EPA Region staff working with environmental justice communities should make themselves, and the areas of concern in that Region, known to all Region enforcement staff. At the federal level, communication between Headquarters and Region staff already takes place regarding certain aspects of SEP negotiations and implementation, and this communication should be extended to include both the environmental justice coordinator at Headquarters and the environmental justice staff in each Region. A simple carbon-copied letter or electronic mail message will open lines of communication, and a more formal SEP notification procedure for environmental justice projects should be implemented over time. At the state level, similar coordination efforts between enforcement and environmental justice staff will be equally as effective.

Stakeholders identify many areas of weakness in the current SEP policy landscape. Community groups are often criticized as not presenting a "united front,"[176] a problem that can doom a SEP negotiation despite a violator's willingness. Community members and organizations have different priorities, and can compete for limited SEP funds.[177] Community members may have unrealistic expectations, or may lack education about their role in the process.[178] Similarly, defendant corporations may not realize that the SEP process can result in a "win win"[179] situation, or may be deterred by either lack of interest in community affairs or disinterest in working with adversarial community groups. Both groups are frustrated with EPA's failure to be more involved in the process.[180] EPA should examine the reasoning underlying its inability to advocate for SEPs, and its role in the negotiating process, and use its institutional memory to the best advantage of all interested parties. Not every defendant/respondent will be well-suited to administer a community-based SEP, despite the availability of workable ideas. Community-based SEPs require a large degree of oversight, resource allocation, and time. Small and mid-sized manufacturers with limited resources and expertise, for example, may require particular assistance from EPA.[181]

A settlement process involving SEPs is not without its problems, and represents only one of a number of necessary measures regulators can take to alleviate environmental justice concerns. However, SEPs provide

substantial, creative, and effective mitigation for environmentally impacted communities. Of course, the crucial element to the restoration of any environmentally impacted community is vigilant enforcement. Without enforcement, environmental violations in low-income and minority communities will go unnoticed. The direction of enforcement resources, and subsequently SEP resources, toward environmental justice communities will begin to balance the inequity scarring our enforcement history. With increased participation between EPA, communities, and defendant/respondents, SEPs can offer real solutions to environmental justice problems.

Endnotes

1. James Hill, *Pullman Residents Fight for Theirs; All Parties Are Pleased With A $5.8 Million Settlement Against Sherwin-Williams . . . Except Neighbors Of The Toxic Site In Dispute*, Chi. Trib. (Oct. 3, 1997), at 1.
2. *Id.*
3. *Id.*
4. *Id.*
5. Clean Water Act, 33 U.S.C. § 1251 (1977).
6. Clean Air Act, 42 U.S.C. § 7401 (1970).
7. Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1976).
8. *See* Final EPA Supplemental Projects Policy, 63 Fed. Reg. 24,796, 24,798 (May 5, 1998) (hereinafter "EPA SEP Policy").
9. *See* Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (1982).
10. Interview with Jeffrey Miller, Professor of Law, Pace University of Law (former head of enforcement, EPA) in White Plains, New York (Dec. 18, 2003).
11. *See* Michele N. Gagnon, *Creative Settlements: A Comparison of Federal and State SEP Policies*, Nat'l Envtl. Enforcement J. (Feb. 2002) (hereinafter "*Creative Settlements*").
12. Interview with Jeffrey Miller, *supra* note 10.
13. *See* EPA, *Beyond Compliance: Supplemental Environmental Projects,* at 4 (Jan. 2001), *available at* http://www.epa.gov/oeca/sep) (hereinafter "*Beyond Compliance*").
14. For example, pollution prevention assessments or audits may qualify as SEPs but are entirely internal reviews of processes and operations designed to identify ways to reduce the use, production, and generation of toxic and hazardous waste. *See* EPA SEP Policy, *supra* note 8, at 24,800.
15. Interestingly, EPA also collects penalties and supplemental environmental project proposals from federal agencies that have violated environmental statutes. Government Accountability Office, *Federal Facilities: EPA's Penalties for Hazardous Waste Violations* (Feb. 1997) at 4-5, *available at* http://www.gao.gov (last accessed Feb. 7, 2004). From November 1989 to October 1996, EPA assessed penalties totaling $16.4 million against 16 federal agencies for violations of hazardous waste laws (including violations of interagency agreements). *Id.* In five of the 61 settled Comprehensive Environmental Response Compensation and Liability Act (Superfund) cases, supplemental environmental projects amounted to $4.5 million. *Id.* Penalties in these cases totaled $6.3 million. *Id.* One has to wonder how effective this fund-shifting truly is; EPA expends its agency resources enforcing penalties against other agencies, yet these penalty dollars both come from, and ultimately go to, the same place: the U.S. Treasury.
16. Institute of Medicine, *Toward Environmental Justice: Research, Education, and Health Policy Needs* (1999) at 14 (quoted in National Academy of Public Administration Report for the Environmental Protection Agency, *Models for Change: Efforts by Four States to Address Environmental Justice* (June 2002)).
17. U. S. Department of Health and Human Services, *Healthy People 2010,* 2d ed. (Nov. 2000), at 40, *available at* http://www.healthypeople.gov/Document/html/uih/uih_4.htm#environqual (last accessed Nov. 26, 2003).
18. The Council on Environmental Quality uses statistical poverty thresholds from the Bureau of Census' Current Population Report to define "low-income communities." Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act* (Dec. 1997), Appendix A, "Guidance for Federal Agencies on Key Terms in Executive Order 12898." *Available at* http://ceq.eh.doe.gov/nepa/regs/EJ/justice.pdf (last accessed Feb. 7, 2004). "Minority" is defined as "individual(s) who are . . . American Indian or Alaska Native; Asian or Pacific Islander; black of non-Hispanic origin; or Hispanic." *Id.* "Minority populations should be identified where either (a) minority population of the affected area exceeds 50 percent, or (b) the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population." *Id.*
19. See United States Commission on Civil Rights, *Not In My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, Draft Report for Commissioners' Review (Sept. 4, 2003) (*available at* http://www.usccr.gov/pubs/envjust/ej0104.pdf (last accessed Feb. 7, 2004) (hereinafter "USCCR Report")). The Commissioners adopted the Commission on Civil Rights' report in October 2003, concluding that "EPA, HUD, DOT, and DOI have failed to fully implement the Executive Order signed in 1994 by President Clinton mandating that federal agencies incorporate environmental justice into their work and programs." Press Release, U.S. Commission On Civil Rights Advances Environmental Justice With Approval Of *Not In My Backyard* Report (Oct. 22 2003). *Available at* http://www.usccr.gov/ (last accessed Feb. 7, 2004).
20. USCCR Report, *supra* note 19.
21. Joint Legislative Audit and Review Commission of Virginia General Assembly, *Solid Waste Facility Management in Virginia: Impact on Minority Communities* (1995) (hereinafter "Virginia Study"). *Available at* http://jlarc.state.va.us/Reports/Rpt166.pdf (last accessed Feb. 12, 2004).
22. Memorandum from EPA Assistant Administrator John Peter Suarez (Sept. 6, 2002).
23. Marianne Lavelle & Marcia Coyle, *Unequal Protection; The Racial Divide in Environmental Law*, The Nat'l L. J. (Sept. 21, 1992). To be sure, EPA has taken great strides to respond to studies like this, as discussed in greater detail below.
24. *Id.*
25. *See* Virginia Study, *supra* note 21.
26. The origin and history of the environmental justice movement is beyond the scope of this article and has been well documented. For an extensive list of studies documenting environmental impacts on low-income and minority communities, see Luke W. Cole & Sheila Foster, From the Ground Up: The Transformative Politics of the Environmental Justice Movement (New York University Press 1999) (Appendix).
27. The difficulty of defining boundaries of environmental justice communities continues to plague environmental agencies. For the purposes of this article, the term refers to an "intuitive" idea

(*see id.* at 10), and not any formal agency designations, as these designations are still very much works in progress.

28. *See* Executive Order 12,898, 59 Fed. Reg. 7,629 (1994).

29. *See id*. The Order directed all federal agencies to evaluate their programs and policies for disproportionate impacts on low-income and minority populations. *Id.*

30. *See* Richard Lazarus, *Environmental Racism! That's What It Is*, 2000 U. Ill. L. Rev. 255, 257 (2000).

31. *See, e.g.*, NEJAC reports on public meetings, including *Environmental Justice in the Permitting Process* (Dec. 1999); *Environmental Justice and Community-Based Health Model Discussion* (May 2000); *NEJAC Report on Integration of Environmental Justice in Federal Programs* (Dec. 2000); *Fish Consumption and Environmental Justice* (Dec. 2001); and *Advancing Environmental Justice Through Pollution Prevention* (Dec. 2002) (hereinafter "*Advancing Environmental Justice*," all available at http://www.epa.gov/compliance/environmentaljustice/nejac/.

32. Report of the Environmental Justice Enforcement and Compliance Assurance Roundtable, sponsored by the National Environmental Justice Advisory Council in conjunction with the United States Environmental Protection Agency (Oct. 1996), at 10.

33. *United States v. Hercules, Inc.*, 961 F.2d 796, 798–99 (8th Cir. 1992) (authority exists even without a clear directive from Congress).

34. *See* 28 U.S.C.S. § 516 (1966).

35. United States Supplemental Memorandum of Points and Authorities in Support of Entry of Consent Decree, *United States v. CF&I Steel*, (D. Colo.) (L.P., No. 03-M-0608) (hereinafter "United States Memorandum, Rocky Mountain Steel), at 15 (on file with author).

36. *Id.* at 15.

37. 31 U.S.C. § 3302(b).

38. United States Memorandum, Rocky Mountain Steel, *supra* note 35, at 16. The MRA was enacted to curb unlimited discretion of tax collectors to withhold payment from the Treasury for a period of time for their own use before turning it over to the Treasury." *Id.*, citing *United States v. Forsythe*, 25 F. Cas. 1152 (C.C. N.D. Ohio 1855).

39. Between 1999 and 2001, of the 5,328 cases with SEP potential, 554 of EPA's cases included SEPs (approximately 10%). EPA Supplemental Environmental Project—FY 1999–FY 2001, *available at* http://www.epa.gov. For a list of all approved consent decrees, see EPA's "Consent Decrees and Settlement Agreements" web page at http://cfpub.epa.gov/compliance/resources/decrees/civil/ (last accessed Feb. 12, 2004).

40. Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 Pace Envtl. L. Rev. 789 (1995), at 811 (hereinafter "*Bargain for the Environment*").

41. *Id.*

42. EPA SEP Policy, *supra* note 8, at 24,799.

43. United States Memorandum, Rocky Mountain Steel, *supra* note 35, at 1.

44. Notice of Lodging of Consent Decree Under the Clean Air Act, 68 Fed. Reg. 20,174 (Apr. 24, 2003). As part of this settlement, Rocky Mountain Steel Mills agreed to pay a civil penalty of $450,000, to undertake facility improvements valued at $25,000, and to perform SEPs valued at over $750,000. *Id.*

45. United States Memorandum, Rocky Mountain Steel, *supra* note 35, at 16.

46. *Id.*

47. *Id.*

48. EPA SEP Policy, *supra* note 8. For an analysis of EPA's SEP Policy in general, *see Creative Settlements*, *supra* note 11; Kathleen Boergers, *Federal Statutory Law Hazardous Waste Law: The EPA's Supplemental Environmental Projects Policy*, 26 Ecology L.Q. 777 (1999); *Bargain for the Environment*, *supra* note 40.

49. The violating party in an EPA administrative action is known as a respondent, while a violator in a judicial action is known as a defendant. Telephone interview with Beth Cavalier, Program Analyst, EPA Office of Regulatory Enforcement, Special Litigation and Projects Division (Nov. 12, 2003).

50. EPA SEP Policy, *supra* note 8, at 24,797.

51. Telephone Interview with Beth Cavalier, *supra* note 49.

52. *See* EPA SEP Policy, *supra* note 8, at 24,797. Other penalty mitigation factors can be found in the underlying environmental statute itself (for example, the Clean Water Act sets maximum penalty amounts but allows for consideration of the economic benefit (if any) resulting from the violation, a history of such violations, good-faith efforts to comply, the economic impact of the penalty on the violator, and "other such matters as justice may require," which constitutes a broad grant of discretion to the judge). 33 U.S.C. § 1319(d) (1972).

53. EPA Policy, *supra* note 8, at 24,801. For a more detailed explanation of the penalty determination process, see the EPA Policy at 24,801-02.

54. See EPA SEP Policy, *supra* note 8, at 24,798.

55. *Id.*

56. *Id.*

57. EPA Memorandum from Walker B. Smith (Director, Office of Regulatory Enforcement) to Regional Counsel, Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy (Oct. 31, 2002) (hereinafter "Walker Smith Memorandum"), *available at* http://www/epa.gov/compliance/resources/policies.civil/seps/sepnexus-m_m.pdf (last accessed Jan. 15, 2004).

58. *Id.*; 31 U.S.C. § 3302(d).

59. Walker Smith Memorandum, *supra* note 57.

60. Telephone Interview with Karen Kellen, EPA Senior Enforcement Counsel, Region 8, (Nov. 19, 2003).

61. *Id.*

62. *Id.*

63. SEP Policy, *supra* note 8, at 24,799.

64. Environmental statutes often provide a court with the ability to order cessation of a violation, actions that will prevent future violations, and remediation of harm. *Id.* If the activity is likely to be achieved as injunctive relief, it will not qualify as a SEP. *Id.*

65. EPA SEP Policy, *supra* note 8, at 24,798.

66. EPA Office of Enforcement, Compliance, and Assurance, Final Report, Recent Experience in Encouraging the Use of Pollution Prevention in Enforcement Settlements (May 1995), at 3, *available at* http://www.epa.gov/cgi-bin/claritgw (last accessed Nov. 28, 2003) (hereinafter "Encouraging Pollution Prevention").

67. *Id.*

68. *Id.; see also* Meredith L. Flax & Benjamin F. Wilson, *Use of Supplemental Projects to Address Environmental Justice* (2002), *available at* http://www.beveragediamond.com/media/news/news.281.pdf (last accessed Feb. 29, 2004).

69. *See* EPA SEP Policy, *supra* note 8, at 24,801.

70. *See Beyond Compliance, supra* note 13, at 12.

71. Memorandum from John Peter Suarez, EPA Assistant Administrator, to Regional Counsels, "Guidance Concerning the Use of

Third Parties in the Performance of Supplemental Environmental Projects and the Aggregation of SEP Funds" (Dec. 15, 2003) (hereinafter "Guidance Memorandum"), *available at* http://www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf (last accessed Jan. 25, 2004).

72. *See* EPA SEP Policy, *supra* note 8, at 24,796.
73. *Id.* For a detailed analysis of the benefits of pollution-prevention SEPs, see Encouraging Pollution Prevention, *supra* note 66.
74. *See* EPA SEP Policy, *supra* note 8, at 24,797.
75. *See* EPA SEP Policy, *supra* note 8; *see also* Advancing Environmental Justice, *supra* note 31.
76. EPA Headquarters Press Release, Allercare Products to be Recalled Due to Asthma and Respiratory Problems, (Jan. 14, 2000), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/626ac02c8e90400085256866005f027e?OpenDocument (last accessed Jan. 25, 2004).
77. *See Beyond Compliance, supra* note 13, at 23.
78. *See, e.g.,* Richard Perez-Pena, *Study Finds Asthma In 25% of Children In Central Harlem,* N.Y. Times (Apr. 19, 2003), at A1.
79. *See Beyond Compliance*, *supra* note 13, at 11.
80. *Id.*
81. *Id.*
82. *Id.*
83. *See generally Beyond Compliance*, *supra* note 13.
84. Telephone interview with Karen Kellen, *supra* note 60; *see also* EPA SEP Policy, *supra* note 8, at 24,803. EPA continues to oversee SEP implementation because the violating facility will be subject to additional fines if they do not complete the project. *See* EPA SEP Policy, *supra* note 8, at 24,803.
85. Telephone interview with Karen Kellen, *supra* note 60.
86. *See, e.g.,* Clean Water Act § 402(b), 33 U.S.C. 1342.
87. *See generally Creative Settlements, supra* note 11.
88. See Colorado Final Agency-wide Supplemental Environmental Projects Policy (June 2002), *available at* http://www.cdphe.state.co.us/sep/sep.html (last accessed Feb. 12, 2004) (hereinafter "Colorado SEP Policy"); telephone interview with Karen Kellen, *supra* note 60.
89. Colorado SEP Policy, *supra* note 88, at 3.
90. New York State Department of Environmental Conservation press release, *State Announces $350,000 for Park Projects in Queens* (May 8, 2003), *available at* http://www.dec.state.ny.us/website/press/pressrel/2003/200376.html.
91. *Id.*
92. Telephone interview with Monica Abreu, New York State Department of Environmental Conservation, Environmental Justice Coordinator (Nov 25, 2003).
93. *Id.*
94. *Id.*
95. *See generally* Environmental Law Institute, *Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice* (2002), *available at* http://www.epa.gov/Compliance/resources/publications/ej/citizen_guide_ej.pdf (last accessed Nov. 28, 2003).
96. Telephone interview with Monica Abreu, *supra* note 92.
97. Va. Code Ann. § 10.1-1186.2 (2003).
98. New York State Assembly Bill 3731, 226th Legislative Session (Englebright). The term "environmentally beneficial project" is generally used interchangeably with "supplemental environmental project." Before EPA adopted a formal SEP Policy, its settlements included "environmentally beneficial projects." Telephone interview with Beth Cavalier, *supra* note 49.
99. For a general comparison of state SEP policies, see *Creative Settlements*, *supra* note 11.
100. *See* Massachusetts Interim Policy on Supplemental Environmental Projects, *available at* http://www.state.ma.us/dep/enf/enf97005.pdf (hereinafter "Massachusetts SEP Policy") (last accessed Feb. 12, 2004).
101. *See* Selket Cottle, *State Supplemental Environmental Project Laws and Policies that Address Environmental Justice*, ABA Section of Individual Rights and Responsibilities (Dec. 2003), *available at* http://www.abanet.org/irr/committees/environmental/newsletter/dec03/StateSEPS.html (last accessed Feb. 12, 2004).
102. *See* Connecticut Policy on Supplemental Environmental Projects (1996), *available at* http://dep.state.ct.us/enf/policies/sep.pdf (hereinafter "Connecticut SEP Policy") (last accessed Feb. 12, 2004).
103. *See* Massachusetts SEP Policy, *supra* note 100; Selket Cottle, *supra* note 101; Connecticut SEP Policy, *supra* note 102.
104. *See* Colorado SEP Policy, *supra* note 88, at 3.
105. *See* Selket Cottle, *supra* note 101.
106. Va. Code Ann. § 10.1-1186.2 (2003).
107. *See* California's SEP Policy, *available at* http://www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf (last accessed Feb. 29, 2004).
108. For example, see the California Environmental Protection Agency's Commitment to Environmental Justice Statement, *available at* http://www.calepa.ca.gov/EnvJustice/Documents/commitment.pdf (last accessed Feb. 12, 2004).
109. For an analysis of "why citizen suits matter" in environmental law, see James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 Wid. L. Symp. J. 1 (2003) (hereinafter "*Now More Than Ever*"); *see also* Jeffrey Miller, Citizens Suits: Private Enforcement of Federal Pollution Laws (1987).
110. Professor May provides the following chronological list of citizen suit provisions: "Clean Air Act (CAA), 42 U.S.C. § 7604 (2000); Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1270(a) (2000); Clean Water Act (CWA), 33 U.S.C. § 1365(a) (2000); Endangered Species Act (ESA), 16 U.S.C. § 1540(g) (2000); Deep Seabed Hard Mineral Resources Act (DSHMRA), 30 U.S.C. § 1427(a) (2000); Marine Protection Research and Sanctuaries Act (MPRSA), 33 U.S.C. § 1415(g)(1) (2000); Deepwater Port Act (DPA), 33 U.S.C. § 1515(a) (2000); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a) (2000); Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6305(a) (2000); Powerplant and Industrial Fuel Use Act (PIFUA) 42 U.S.C. § 8435(a) (2000); Ocean Thermal Conservation Act, 42 U.S.C. § 9124(a) (2000); Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1349(a)(1) (2000); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659(a) (2000); Toxic Substances Control Act (TSCA),15 U.S.C. § 2619(a) (2000); Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-8(a) (2000); Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. § 11046(a) (2000). Notable exceptions include the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (2000); the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361–1421h (2000); and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347 (2000)." *See* Now More Than Ever, *supra* note 109, at 2, n.3.
111. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(c)(3).

112. *See Sierra Club, Inc., v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990).

113. *Id.* at 1355. "While it is clear that a court cannot order a defendant in a citizens' suit to make payments to an organization other than the U.S. treasury [sic], this prohibition does not extend to a settlement agreement whereby the defendant does not admit liability and the court is not ordering non-consensual monetary relief." *Id.*

114. *Id.* at 1354.

115. *See generally* 31 U.S.C. § 3302(b).

116. *Atlantic States Legal Found., Inc. v. Simco Leather Corp.*, 755 F. Supp. 59 (N.D.N.Y. 1991).

117. *Id.* at 60. The Department of Justice had a history of objecting to SEPs, not only on MRA grounds; the Department feared that SEPs would undermine the deterrent effect of penalties on violators; that violators would reap public relations benefits from performing the projects; that frequent use of SEPs would compromise enforcement consistency and predictability, and that EPA would not be able to adequately monitor SEPs. *See* Quan B. Nghiem, Comment: *Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act*, 24 B.C. Envtl. Aff. L. Rev. 561 (1997).

118. *Id.*

119. *Id.* at 61.

120. *Id.*

121. *See Now More Than Ever*, *supra* note 109, at 28, *citing* DOJ 2001 and 2002 Citizen Suit Reports.

122. Telephone interview with James Payne, Department of Justice Policy, Legislation, and Special Litigation Division (Feb. 11, 2004). Of course, small organizations with sufficient resources or pro bono counsel certainly bring these cases as well. *See, e.g., Uprose v. Power Authority*, 285 A.D.2d 603 (N.Y. App. Div., 2001), in which the New York State Board on Electric Generation Siting and the Environment allowed the New York Power Authority to issue a negative declaration, indicating less than significant environmental impacts, instead of requiring the Power Authority to perform a full environmental review for their proposal for eleven natural gas-powered turbine electric generator units. The United Puerto Rican Organization of Sunset Park (UPROSE) challenged the negative declaration on grounds that it failed to adequately evaluate the impact of fine particulate matter on neighboring communities. *Id.* at 606. The Supreme Court of New York's Appellate Division found that the analysis on the environmental impact of particulate matter was inadequate, and that the lower court had erred in failing to annul the negative declaration. *Id.* at 606. The New York Power Authority was ordered to complete a full environmental impact statement in compliance with the New York State Environmental Quality Review Act. *Id.* at 608. UPROSE was represented in this action by New York Lawyers for the Public Interest, a small not-for-profit legal services organization with an environmental staff of two attorneys. *See* http://www.nylpi.org.

123. However, this is changing. The Natural Resources Defense Council now addresses environmental justice (see http://www.nrdc.org/cities/justice/default.asp), and groups like New York Lawyers for the Public Interest, a not-for-profit legal services organization in New York City, address the needs of low-income New York City residents related to environmental justice as well as disability rights and access to health care. *See* http://www.nylpi.org.

124. *See Now More Than Ever*, *supra* note 109, at 4.

125. *See id.* at 42.

126. Office of Justice Programs, U.S. Department of Justice, *An Interview with Former Visiting Fellow of NIJ, Thomas Quinn,* The Nat'l Inst. of Justice J., (Mar. 1998), *available at* http://www.ojp.usdoj.gov/nij/rest-just/tq_interview.htm (hereinafter "Thomas Quinn").

127. National Institute of Justice Restorative Justice On-Line Notebook, Working Definitions of Restorative Justice, *available at* http://www.ojp.usdoj.gov/nij/rest-just/ch1/cjdef3.htm.

128. *See* Thomas Quinn, *supra* note 126.

129. In 1996, then-Attorney General Janet Reno reacted to community discontent with, and alienation from, the criminal justice system by charging the Department of Justice's Office of Justice Programs to host a national conference on restorative justice and the role of community members in the criminal justice process. National Institute of Justice Restorative Justice On-Line Notebook, Background, *available at* http://www.ojp.usdoj.gov/nij/rest-just/backgnd.htm.

130. *Id.*

131. Perhaps, however, the needs of certain communities should not have to wait for an enforcement action in their neighborhood; perhaps a restorative justice philosophy will not allow SEPs to reach their full potential in relation to environmental justice communities. Just as the Red Cross collects donations of blood to allocate to areas most in need, the EPA may be able to "bank" SEP proposals and apply them to the most impacted neighborhoods. To date EPA has rejected this idea because of concerns related to the Miscellaneous Receipts Act (by holding on to funds for later allocation, EPA violates the MRA). *See* Guidance Memorandum, *supra* note 71. Moreover, EPA's discretionary management of funds would amount to an augmentation of appropriations in violation of the Constitution. *Id*. EPA could avoid these limitations by having a list of high-priority neighborhoods and corresponding SEP proposals on hand; such a "bank" would not delay appropriation of funds, it would simply direct them outside of the violator's location. A nexus requirement, still vital for the legitimacy of the SEP, would be met under this proposal, but under a broadened characterization of the term. Environmental pollution, like air and water, knows no sociopolitical boundary. Defendant/respondents responsible for polluting "the commons" should be able to perform projects that better the environment in the areas that need it most. *See* Garrett Hardin, *Tragedy of the Commons,* Science, 162 91968): 1243–1248, *available at* http://www.constitution.org/cmt/tragcomm.htm) for the origin of the idea of the environment as a public commons. Using the pasture as an environmental allegory, he notes, "[t]herein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." *Id.*

132. *See* EPA SEP Policy, *supra* note 8 at 24,803. In addition, the "meaningful participation" statement that EPA has created in relation to communication with these communities should bind SEP negotiations in environmental justice communities. The EPA defines "meaningful involvement" to mean "that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected." EPA Environmental Justice website, *available at* http://www.epa.gov/compliance/environmentaljustice/ (last accessed Feb. 12, 2004).

133. Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003), *available at* http://www.epa.gov/compliance/resources/policies/civil/seps/sepcomm2003-intrm.pdf.

134. Telephone interview with Benjamin Wilson, Partner, Beveridge & Diamond P.C. (Dec. 5, 2003); *see also* Flax & Wilson, *supra* note 68.

135. Draft EPA Guidance for Community Involvement in Supplemental Environmental Projects, 65 Fed. Reg. 40,639, 40,641 (June 20, 2000).

136. *Id.*

137. EPA's Commitment to Environmental Justice, May 2003, *available at* http://www.epa.gov/compliance/resources/publications/ej/ej_fact_sheet_commitment.pdf (last accessed Jan. 15, 2004).

138. E-mail from Nicholas Targ, Legal Counsel to the EPA Office of Environmental Justice, to Janice Dean (Dec. 1, 2003) (on file with author).

139. *Id.*

140. The Department of Justice seeks public comment on lodged consent decrees through a Federal Register notice. EPA SEP Policy, *supra* note 8, at 24,803; *see also* 40 C.F.R. 50.7 (1971). Other enforcement actions may require public notice as well. EPA SEP Policy, *supra* note 8, at 24,803.

141. *See* EPA SEP Policy, *supra* note 8, at 24,803.

142. Indeed, some settlements may be reached in only one day. It is common for the government to file a complaint and a joint motion to enter a consent decree on the same day, indicating that the parties negotiated a settlement before the government filed its complaint. E-mail from Jeffrey Miller, Professor of Law, Pace University School of Law, to Janice Dean (Jan. 15, 2003) (on file with author).

143. *See United States v. Atofina Chems., Inc.,* 2002 U.S. Dist. LEXIS 15137 (2002).

144. *Id.* at *9.

145. *Id.* at *18–19.

146. *Id.*

147. *Id.* at *18. The court noted that in light of the SEP Policy's declaration that it does not create any rights and is not for use at trial, it is unclear if violations of the Policy allow a court to reject a consent decree. *Id.*

148. Telephone interview with Karen Kellen, *supra* note 60.

149. *See* Conoco Consent Decree, *available at* http://www.epa.gov/Compliance/resources/decrees/civil/caa/conococd.pdf. (Last accessed Nov. 29, 2003).

150. Telephone interview with Karen Kellen, *supra* note 60.

151. *Id*.

152. *Id*.

153. *Id*. The STEPP Foundation provides funding for organizations working with projects related to energy efficiency. *See* STEPP Foundation website, http://www.steppfoundation.org/default.htm.

154. Information on EPA's SEP Library can be found at http://www.epa.gov/compliance/resources/publications/civil/programs/call-sepsprojects.pdf (last accessed Feb. 12, 2004).

155. Telephone interview with Beth Cavalier, *supra* note 49.

156. Telephone interview with Bob Shavelson, Cook Inlet Keeper (Nov. 26, 2003).

157. *Id*.; telephone interview with Violet Yeaton, Port Graham Tribal Council (Nov. 24, 2003).

158. *See* Wesley Loy, *Unocal Reports Inlet Discharge Violations, Pays,* Anchorage Daily News (May 10, 2003).

159. Comment letter, Port Graham Village Council to EPA Region 10 Director John Iani (Aug. 5, 2003) (on file with author).

160. *Id.*

161. *Id.*

162. Telephone interview with Violet Yeaton, *supra* note 157.

163. *Id.*

164. Telephone interview with Bob Shavelson, *supra* note 156.

165. *See Beyond Compliance, supra* note 13, at 20.

166. *Id.*

167. *Id.*

168. *See* EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses (Apr. 1998), *available at* http://www.epa.gov/Compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf (last accessed Jan. 25, 2004) (hereinafter "NEPA EJ Guidance").

169. 42 U.S.C. 4321 (1969); *see also id*.

170. 40 C.F.R. 6.400(c) (1979).

171. The U.S. Department of Housing and Urban Development, for example, admits that it is still not been entirely successful in translating its notices to different languages in an adequate manner. *See* USCCR Report, *supra* note 19.

172. "EPA's mission is to protect human health and to safeguard the natural environment—air, water, and land—upon which life depends." EPA's website, *available at* http://www.epa.gov/epahome/aboutepa.htm (last accessed Nov. 29, 2003).

173. *See* NEPA EJ Guidance, *supra* note 168.

174. 40 C.F.R. 6.400(e).

175. National Academy of Public Administration, for the United States Environmental Protection Agency, *Environmental Justice in EPA Permitting: Reducing Pollution is Integral to the Agency's Mission* (Dec. 2001) at 2. "Expectations for specific outcomes have not accompanied these commitments, nor has the agency adopted methods for measuring progress in achieving them or accountability to ensure that EPA managers and staff work toward implementing environmental justice policies." *Id.*

176. *See* Flax & Wilson, *supra* note 68.

177. E-mail from Keith Cohon, Counsel, EPA Region 10, to Janice Dean (Nov. 26, 2003) (on file with author).

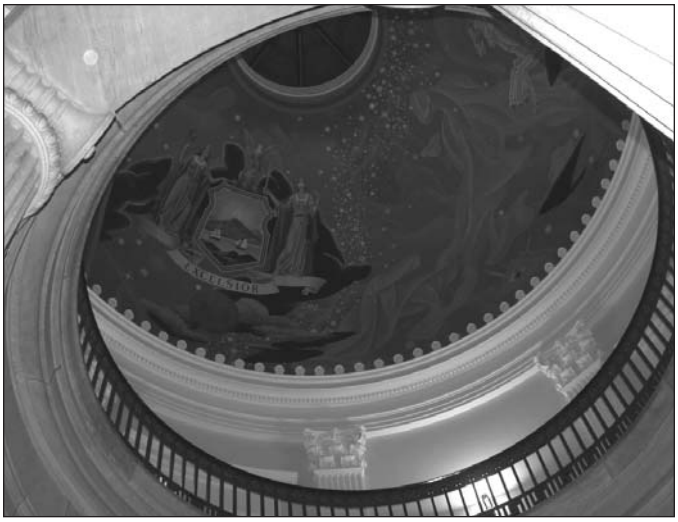
178. *See* Flax & Wilson, *supra* note 68.

179. *Id.*

180. *See* Flax & Wilson, *supra* note 68; telephone interview with Luke Cole (Nov. 25, 2004), and Violet Yeaton, *supra* note 157.

181. *See* Advancing Environmental Justice, *supra* note 31.

Janice Dean is a J.D. Candidate 2005, Pace University School of Law. **The author would like to thank Nicholas Targ, Karen Kellen, Beth Cavalier, Benjamin Wilson, James Payne, Monica Abreu, E. Gail Suchman, Violet Yeaton, and Bob Shavelson for their willingness to field my inquiries and to contribute to this article.**



During the recent tour of the Court of Appeals building in Albany, Section members viewed the rotunda domed ceiling.

Scenes from the

Environmental Law Section

Tour of the Court of Appeals

October 27, 2004

Court of Appeals Judge Susan Phillips Read leads a tour of the Court Building in Albany. Here she stands before a September 11th quilt bearing the names of court officers who lost their lives on September 11th, on display in the lobby of the Courthouse.

Judge Susan Phillips Read gives some history of the Court and building renovations during the recent tour.

On October 27th, 2004, members of the Environmental Law Section were treated to a tour of the newly refurbished Court of Appeals in Albany. Here the group poses for a picture on the Bench. Judge Susan Phillips Read is seated. Virginia Robbins, Section Chair is to the left.

A marble fireplace inside the Courtroom in the Court of Appeals building.

Section members enjoy the opportunity to see the Court of Appeals building renovations.

THE MINEFIELD
The Changing Ethical Scene: Part I

By Marla Rubin

Revisiting ethical rules and rulings in light of changes in the practice of law may be a very prudent use of time. This is the first of several columns examining changes in the "ethical scene" over the past year. Useful and important rulings and ethics opinions have been rendered in New York that impact the practice here. Noteworthy material from other jurisdictions that might provide useful precedent in New York is also reviewed. Where applicable, particular relevance for environmental attorneys is noted.

Deprivation of Honest Services

A corporate attorney in Illinois has been indicted for violation of an obscure criminal statute, 18 U.S.C. § 1346, that prohibits conduct in which someone misuses a position of trust "to deprive another of the intangible right of honest services."[1] The indictment alleged that this attorney misused his position of trust with a corporation for his personal gain. In this case, the only actual gain was the attorney's regular legal fees that he was paid, allegedly, for assisting corporate personnel in casting corporate earnings to make the company appear more profitable. The indictment alleged that the attorney conducted these services in the hope that his work would lead to increased business from the company or a general counsel position there. This hope was enough to uphold the indictment. The case is pending. A conviction under this statute might provide prosecutors with another criminal catch-all hammer of justice like 18 U.S.C. § 1001, which makes it a crime to lie to the government.

Conflicts

In the 1990s, perhaps the heyday of environmental litigation practice, it was not unknown for developers, ostensibly shopping for environmental counsel, to create pre-retention relationships substantial enough to disqualify counsel from retention by a project's opponents. This also has been a common occurrence in matrimonial litigation, particularly in smaller cities and towns where a limited number of attorneys are available to litigants. It appears that this conduct on the part of litigants continues.

For example, the Virginia Bar's ethics committee recently addressed an inquiry about the effects of an artificially created conflict.[2] The inquiry concerned a matrimonial matter in a small community with a small number of lawyers. The husband in the matter interviewed almost every family law attorney in the community with the specific purpose of preventing his wife from finding counsel without a conflict. The committee opined that no duty of confidentiality was owed to the husband by the attorneys he did not hire, as his purpose was not to establish an attorney-client relationship; he had no "'reasonable expectation of confidentiality.'"[3]

The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York (the "City Bar Ethics Committee") has issued some guidance on multiple representation, an issue frequently raised to this columnist. Formal Opinion 2004-02, June 2004, addressed the simultaneous representation of a corporation and a "constituent" of the corporation during a government investigation. The opinion is lengthy, but well-organized and informative. The Committee's focus for this opinion was, in its own words:

> . . . the circumstances under which a lawyer for the corporation may ethically undertake simultaneous representation of one or more employees of the corporation; the disclosures that must be made and the consents that must be obtained in order to render such multiple representation ethically permissible; and the steps that can or should be considered to minimize potential harm to the corporate and employee clients if conflicts between their interests arise.

The opinion relies on the "disinterested lawyer" standard of DR 5-105 and common sense. It provides a checklist of the pros and cons of such representation and a checklist of issues to cover in a written informed consent for both the corporate and individual clients to sign. While there is an unusual amount of "black and white" matters involved in such representation, the Committee strongly recommends that the lawyer assess the risks of potential conflict between the clients, not only at initial retention, but in the future as well. It suggests a periodic renewal of the written consent to waive

conflicts, forcing the lawyer to be diligent in continually applying the "disinterested lawyer" standard.

This opinion clearly applies to almost all multiple representation scenarios, as the Committee pointed out. It is an excellent guide for Superfund cases in particular, in which the issue of multiple representation arises frequently.

Finally, for the record, the City Bar Ethics Committee has also recently offered guidance on compliance with DR 5-105(E), the conflicts-checking rule.[4] Formal Opinion 2003-03 provides analysis of what constitutes a law firm, what constitutes a record and how and when to create one, and what constitutes a conflict-checking system. The Committee lent its attention to solo practitioners as well as multinational firms. This is very useful material and recommended reading.

Fees

Beware of clients uttering the phrase "do whatever it takes." Some clients seem to need no excuse to argue about their bills, but the blank check could end up as no check, or a much delayed check. In *Paul, Weiss, Rifkind, Wharton & Garrison v. Koons*,[5] the court directed the defendant client to pay the more than $1.5 million fees because the client acknowledged responsibility for payment for legal services, did not object to the ongoing bills received, and had instructed the attorneys to "leave no stone unturned"[6] in his case. Defendant's total bill was almost $4 million, making it unlikely he would ever again issue such instructions to a law firm.

Law Firm Discipline

Those of us involved in drafting the rule changes making law firms liable for the conduct of their individual lawyers[7] were pleased with the concept, but puzzled about the practical effect of the rules. After all, we wondered, how can a law firm be disbarred? While disciplinary authorities have not reached that question, the First Department, for the first time, has sanctioned a law firm with public censure.[8] It may be difficult to ascertain the impact of the sanction on the law firm, not being privy to its financial particulars, the court's action indicated that the rules are not entirely without teeth. It's a start.

Unauthorized Practice of Law

Many lawyers worry that we may be pricing ourselves out of business—that the proliferation of advertising, among other services, for the preparation of legal documents, without a lawyer may divert people from seeking our help, thinking they have a cheap way around attorney fees. Add to that concern the policy behind the prohibition against the unauthorized practice of law—the protection of clients—and the danger these nonlawyer service providers pose increases. While there are no recent New York cases addressing the issue, courts around the country are taking notice, and setting precedent that may appear in future New York rulings.

We the People, a "legal form preparation company" (that heavily advertises in New York) was found by the Florida Supreme Court to be engaged in the unauthorized practice of law.[9] The Florida court upheld a referee's finding that the company was "helping customers prepare legal documents; correcting errors on those documents; corresponding with customers' opponents in legal matters; advertising company services in a way that led the public to believe the company could provide legal advice; and hiring a lawyer to actually provide legal advice to its customers."[10] The complaint was brought by the Florida Bar.

In another case involving the preparation of legal forms,[11] the U.S. Circuit Court of Appeals for the Ninth Circuit held that a nonlawyer bankruptcy petition preparer had engaged in the unauthorized practice of law by interpreting legal terms for his clients in their bankruptcy filings. The case was decided on Oregon state law, which does not define the "practice of law" but does prohibit its practice by nonlawyers. The court found that the defendant's interpretation of terms and exercise of judgment about their applicability to individual cases constituted the exercise of professional judgment—a lawyer's professional judgment.

Multijurisdictional Practice

At this writing, eight states have specifically authorized some measure of multijurisdictional practice: California, Colorado, Delaware, Nevada, New Jersey, North Carolina, Pennsylvania, and South Dakota. Proposals to allow similar practice are pending here in New York, as well as in Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Louisiana, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oregon, and South Carolina. Interestingly, one jurisdiction—Connecticut—has refused to authorize multijurisdictional practice.[12]

Legal Malpractice—A Major Change in the Standard

The First Department has overruled the long-standing requirement that a legal malpractice plaintiff must prove not only that he or she would have been successful in the action underlying the malpractice claim, that the lawyer handling the case was negligent, and that the lawyer's negligence was the proximate cause of the plaintiff's loss, but that a collectible judgment would have resulted. In *Lindenman v. Kreitzer*,[13] the court removed the burden of proving a collectible judgment

from the malpractice plaintiff and put it on the defendant lawyers.[14] The court stated that "the issue of non-collectibility should be treated as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice . . . and the erring attorney should bear the inherent risks and uncertainties of proving it."[15]

It's Easier in D.C.

A previous column related the D.C. case in which a court refused to discipline an attorney for padding legal bills after finding that the client in question expected such conduct. Recently, the D.C. Bar's ethics committee opined that it is ethically proper for federal attorneys to engage in fraud, deceit, or misrepresentation if they have a reasonable belief that their official duties require such conduct and that the conduct is authorized by law.[16] Obviously, this is a more controversial—and openly discussed—issue than bill-padding. In fact, this is a long-standing issue for government attorneys across the country, some of whom have been disciplined for their participation in "sting" operations. Readers might remember the controversy over the Thornburgh Rules, which purported to set a few ethical standards for Department of Justice attorneys that were different than those that applied to other attorneys in the same states of admission. However, just as state courts made it publicly clear that they would not enforce the Thornburgh Rules over their own states' ethical codes, it remains to be seen whether the D.C. Bar's blessing on otherwise prohibited conduct offers any protection to plotting prosecutors.

The Buck Stops Here

The latest publicly aired ethical issue regarding the use of per diem lawyers concerned the liability of the lawyer using the per diem lawyer for the per diem lawyer's conduct. When neither counsel of record nor his per diem lawyer showed up at two scheduled court conferences in *George Constant Inc. v. Berman*,[17] Justice Charles E. Ramos had enough. He sanctioned both the attorney of record and the per diem lawyer for the following reasons:

> (p)er diem lawyers have responsibility to the court and to the client; counsel of record cannot absolve themselves of responsibility for a per diem attorney's violations; and that, despite not being counsel of record, any "agreement, action or appearance" by the per diem lawyer with respect to the representation makes the per diem lawyer "responsible" for the client's interests in the matter.[18]

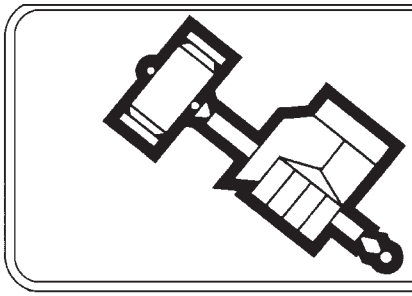
Advisory

The next column or two will relate additional changes and highlights, as well as the status of pending cases. An entire entry will be devoted to corporate counsel, both in-house and outside counsel, whose professional lives may have been the most affected by recent changes in the ethical scene.

Endnotes

1. *U.S. v. Munson*, 2004 U.S. Dist. LEXIS 15465, (N.D. Ill. 2004).
2. Virginia State Bar Standing Comm. on Legal Ethics, Op. 1794, June 30, 2004, as reported in *Lawyer's Manual on Professional Conduct, Current Reports, ("Current Reports")*, July 28, 2004, p. 384.
3. *Id.*
4. "A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements. . . ."
5. 780 N.Y.S.2d 710 (N.Y. Co. 2004), 2004 N.Y. Misc. LEXIS 667.
6. *Paul, Weiss, Rifkiknd, Wharton & Garrison v. Koons*, N.Y. Misc. LEXIS at 2.
7. By amendments to DR 1-102 and DR 1-104.
8. *In re Law Firm of Wilens and Baker*.
9. *Florida Bar v. We the People Forms and Service Center of Sarasota, Inc.*, Fla. No. SC02-1675, Apr. 29, 2004.
10. *Current Reports*, June 2, 2004, p. 275.
11. *Taub v. Weber*, Ninth Circuit Court of Appeals, No 02-36018, May 5, 2004
12. Data collected from http://www.crossingthebar.com.
13. 7 A.D.3d 30 (1st Dep't 2004).
14. This holding overrules *Larson v. Crucet*, 105 A.D.2d 651.
15. 7 A.D.3d at 36.
16. District of Columbia Bar Legal Ethics Committee, Opinion 323, Mar. 30, 2004, as reported in *Current Reports*, April 7, 2004.
17. N.Y. Sup. Ct. No. 604507-2001, Nov. 21, 2003.
18. As reported in *Current Reports*, Nov. 21, 2003, p. 698.

Marla B. Rubin is a sole practitioner in Westchester County. She co-chairs the New York State Bar Association Environmental Law Section's Task Force on Legal Ethics. She writes and lectures extensively on environmental law and legal ethics issues.



Administrative Decisions Update

Prepared by Jeffrey L. Zimring

In the Matter of the Application for a State Facility Permit for Air Pollution Control pursuant to Article 19 of the Environmental Conservation Law ("ECL") and Title 6 of the New York Compilation of Codes, Rules and Regulations ("6 NYCRR") Parts 201, et seq.; a State Pollution Discharge Elimination System ("SPDES") Permit, pursuant to ECL Article 17 and 6 NYCRR Parts 750-758; an ECL Article 15 Protection of Waters Permit; a Section 401 Water Quality Certification pursuant to 6 NYCRR Part 608; a Mined Land Reclamation Law Permit Modification pursuant to ECL Article 23 and 6 NYCRR Parts 420 to 426; and a Freshwater Wetlands Permit pursuant to ECL Article 24 and 6 NYCRR Part 663

By

ST. LAWRENCE CEMENT COMPANY, LLC

SECOND INTERIM DECISION OF THE COMMISSIONER

September 8, 2004

I. Introduction

The St. Lawrence Cement Company, LLC ("SLC") proposes to construct and operate a cement manufacturing plant capable of producing 2.6 million tons of cement per year in the Town of Greenport and the City of Hudson, both in Columbia County. The proposed plant will be located on property currently owned by SLC that is the current site of a 1,222-acre limestone mine. The plant is to be constructed in the mine. The proposed project will also result in the closure of a cement kiln SLC currently operates in the Town of Catskill and the removal of several components of a defunct plant sitting on a dock on the Hudson River.

SLC must obtain, and has applied for, a state facility permit for air pollution, a SPDES permit, an ECL article 15 protection of waters permit and Section 401 water quality certification, a mined land reclamation permit modification, and a freshwater wetlands permit. The New York Department of Environmental Conservation ("DEC") is the lead agency for purposes of complying with the New York State Environmental Quality Review Act ("SEQRA"). SLC's Draft Environmental Impact Statement ("DEIS") was accepted by DEC in May, 2001. The issues conference began in June, 2001, and addressed petitions for party status filed by Friends of Hudson ("FOH"), the Hudson Valley Preservation Coalition ("HVPC"), the Olana Partnership ("TOP"), the Town of Greenport, the City of Hudson, the Massachusetts Department of Environmental Protection ("MDEP"), the Berkshire Regional Planning Commission, Columbia Hudson Partnership, the Village of Athens, the County of Columbia, the Preservation League of New York State, the National Trust for Historic Preservation, and the Natural Resources Defense Council ("NRDC").

The issues conference was conducted before Administrative Law Judges Helene G. Goldberger and Maria E. Villa (the "ALJs"). The ALJs issued a ruling identifying issues for adjudication and designating party status in December, 2001. Appeals were taken by SLC and various petitioners to the ruling. On December 5, 2002, the Commissioner issued her First Interim Decision and identified "grandfathering" SLC's Greenport mine, noise, air impacts to Olana, and a proposed traffic contingency plan as issues for adjudication. The issues remaining from SLC's and the petitioners' appeals are addressed in this Second Interim Decision.

II. Air Issues

A. SLC's LAER Analysis for NO_x and VOC

1. Background

SLC's proposed plant will be located in the Northeast Ozone Transport Region. The project must meet, therefore, the lowest achievable emission rate ("LAER") under federal New Source Review guidelines for nitrogen oxides ("NO_x") and volatile organic compounds ("VOCs"). In order to minimize NO_x and VOC emissions, SLC proposes the use of various technological methods of controlling the creation of emissions during the cement production process.

SLC claims that the plant will meet recently promulgated maximum achievable control technology ("MACT") standards for VOC emissions. SLC maintains that its emissions, which are predicted to be well

within the most stringent federal or state limits for portland cement manufacturing plants, meet the LAER standard. Accordingly, SLC rejects the need for additional technological controls, specifically the use of a regenerative thermal oxidizer.

2. Discussion

DEC's Division of Air Resources concluded that the proposed plant would meet LAER requirements for NO_x and VOC emissions. A draft Air Permit was issued with LAER standards based on the agreed upon technology for NO_x and VOC emissions limitations. The ruling on issues and party status of the ALJ included four issues concerning SLC's NO_x LAER analysis. Two issues associated with VOCs were also identified for adjudication. All six rulings were appealed by DEC staff and SLC.

i. NO_x LAER Analysis

SLC and DEC staff argued that NO_x limits in the draft air permit were arrived at after an exhaustive and thorough analysis by DEC staff and that DEC staff's determinations should be given deference. SLC also contended that a phasing-in of the emissions limits is appropriate because the technology involved in achieving the emissions limits, selective non-catalytic reduction ("SNCR"), is innovative and has not been used in the manner proposed by SLC. Phasing-in of the limits will allow the technology to be optimized as the plant gains operating experience. SLC and DEC staff challenged the offering of a letter written by EPA that contains comparisons to facilities in Europe and Texas, arguing that the letter was written without the benefit of a comprehensive review of SLC's entire air permit and that the European and Texas facilities do not provide appropriate comparison because of the uniqueness of the Greenport facility and the raw materials that will be used.

FOH argued, in response to SLC and DEC staff, that the alleged uniqueness of a facility cannot limit the scope of LAER review. Further FOH asserted that it had met the "significant and substantive" standard required during the issues conference with its offers of proof and the letter from the EPA. Requiring a more significant showing, it maintained, would improperly change the issues conference into an adjudicatory hearing.

The Commissioner found that FOH had met its issues conference burden with respect to the phasing-in of the NO_x emissions limits. The Draft permit provides for a lower emissions limit in the third year of operation. The facility will operate in a non-attainment area. The ALJ's conclusion, therefore, that the question of whether lower NO_x limits would be appropriate at an earlier point of the facility's operation is adjudicable is correct. The Commissioner also agreed with the ALJ's holding that the short-term NO_x limits were adjudicable because of the facility's location in a non-attainment area.

The proposed facility would allow 30% of the air stream from the kiln to bypass the SNCR technology. Agreeing with FOH, the ALJs held that the amount of technical justification supplied by SLC for this design was adjudicable. The Commissioner, however, reversed the ALJs on that point. She noted that the issue was explained in SLC's permit application and that FOH had made only vague assertions concerning the alleged inadequacy of the submitted data.

ii. VOC LAER Analysis

The Commissioner agreed with the ALJs concerning the adjudicability of the adequacy of VOC emission limits. SLC's arguments that the EPA letter concerning emission limits should not be considered merely raised evidentiary weight-of-evidence issues and did not negate the finding that FOH had identified a significant and substantive issue. FOH offered additional proof that the addition of a regenerative thermal oxidizer ("RTO") was a feasible method for reducing VOC emissions. SLC argued that the addition of RTO was not necessary because of the low organic content of its raw materials and that the Commissioner's ruling in *Matter of Keyspan* supported a finding that the addition of RTO is not significant and substantive. The Commissioner disagreed and held the application of RTO technology adjudicable because the significant offer of proof by FOH's chemical engineer distinguished this application from the one discussed in *Keyspan* and raised a significant and substantive issue regarding the use of the technology.

B. Fine Particulate Matter ($PM_{2.5}$)

SLC and DEC staff raised several issues regarding the ALJs' rulings regarding emissions of fine particulate matter smaller that 2.5 micrometers in diameter ($PM_{2.5}$). SLC proposes to use a bag house to maintain fine particulate emissions at acceptable levels. SLC claims that bag house technology represents the best available control technology ("BACT") for controlling fine particulate matter emissions.

1. SLC's $PM_{2.5}$ Assessment

SLC notes in the DEIS that $PM_{2.5}$ standards issued by the EPA in 1997 have been invalidated by the U.S. Court of Appeals for the District of Columbia Circuit. Nevertheless, SLC provided an assessment of $PM_{2.5}$ emissions and their impacts in the DEIS. In preparing the DEIS, SLC, following EPA guidance memoranda, used a PM_{10} analysis as a surrogate for a $PM_{2.5}$ analysis in meeting the Clean Air Act ("CAA") requirements. The DEIS did, however, include a rough estimate of

$PM_{2.5}$ emissions that was calculated by using assumptions and data derived from literature to estimate $PM_{2.5}$ emissions as a percentage of PM_{10} emissions. Based on its $PM_{2.5}$ and PM_{10} analysis, SLC concluded that the project would result in small increases of ambient particulate concentrations in the vicinity of the Greenport facility, but the use of pollution controls would result in an overall decrease in the pollutant emissions that produced secondary particulate matter throughout the region. It expects, therefore, that the proposed project would contribute to a reduction in airborne particulate matter, especially $PM_{2.5}$.

2. Intervenors' Offers of Proof

Notwithstanding the analysis of PM_{10} in the DEIS, FOH asserted that the DEIS was deficient in several respects: 1) it failed to discuss in any meaningful way the potential impact of particulate matter emissions on public health; 2) the analysis of background concentrations of $PM_{2.5}$ ignored the impact of all other local sources of $PM_{2.5}$; 3) SLC's reliance on the regional offset of secondary $PM_{2.5}$ reductions ignored local impacts near the Greenport facility; and 4) SLC's own data shows a substantial increase in particulate matter in residential areas near the facility and that the air modeling was flawed due to its reliance on Albany National Weather Service data. Intervenor HVPC also challenged SLC's claims concerning the toxicology of $PM_{2.5}$ in concentrations below the net EPA standards and the impact of those concentrations on public health.

3. ALJ's Issues Ruling

The ALJs held that the question of the suitability of the data used in SLC's $PM_{2.5}$ analysis is adjudicable. Although there are no regulations governing $PM_{2.5}$ emissions, the ALJs reasoned that the public health impacts associated with $PM_{2.5}$ emissions warrant analysis under SEQRA. Specifically, the ALJs held that questions exist regarding: 1) SLC's air modeling, which relied on Albany National Weather Service data; 2) the failure to consider local emissions sources and the use of Cementon data to establish ambient levels in Greenport; and 3) SLC's conclusion concerning the direction the plume will drift from the stack. The ALJs noted that the intervenors will have the burden of demonstrating that SLC underestimated the amount of $PM_{2.5}$ that will be emitted to the atmosphere and that the emissions will likely affect public health.

4. Discussion

Citing *Matter of Marine Rail* (Comm. Dec. Feb. 14, 2001), SLC argues that $PM_{2.5}$ is not adjudicable because there are no established $PM_{2.5}$ standards under the CAA. The Commissioner, however, disagreed with SLC's assertion. In *UPROSE v. Power Auth. of New York*, 285 A.D.2d 603 (2d Dep't 2001), the Court held that the Power Authority failed to comply with SEQRA when it issued a negative declaration without consideration of, among other things, the individual and cumulative impact of $PM_{2.5}$. Further, in *Spitzer v. Farrell*, 294 A.D.2d 257 (1st Dep't 2002), the Appellate Division, First Department, held that the lack of legally enforceable $PM_{2.5}$ standards under the CAA did not relieve the New York City Department of Sanitation from its obligation to consider potential $PM_{2.5}$ impacts under SEQRA. Although *Farrell* was reversed by the Court of Appeals, that Court did not disagree with the general proposition that effects from $PM_{2.5}$ are relevant under SEQRA. Subsequent Commissioner's decisions also affirm an applicant's need to consider $PM_{2.5}$ in its SEQRA analysis.

The Commissioner noted that in the cases in which $PM_{2.5}$ issues have been found not to be adjudicable, the decisions were supported by the intervenors' inability to raise a significant and substantive issue in the offers of proof. The Commissioner states that none of the cases cited contain a ruling that $PM_{2.5}$ issues are not adjudicable. SLC argued that, even if $PM_{2.5}$ issues are adjudicable, the intervenors have attempted to use the SEQRA process to impose stricter emissions limits than are already applicable under NAAQS. The intervenors, however, argue that they have identified concerns with the methodology employed by SLC to predict the impacts of $PM_{2.5}$ emissions. The ALJs held that the intervenors should be given, in an adjudicatory hearing, the opportunity to prove that the $PM_{2.5}$ analysis in the DEIS underestimated the effects of the project's $PM_{2.5}$ emissions. The Commissioner agreed and held that adjudication was appropriate to further refine the $PM_{2.5}$ analysis in the DEIS.

C. Part 231 Alternatives Analysis

The ALJs held that consideration of alternatives involving certain pollution control technologies is adjudicable, but that the selection of coal rather than natural gas is not. FOH raised three objections to the ALJs' ruling. FOH argued that the ALJs improperly placed too heavy of a burden on the intervenors to establish the adjudicability of an alternatives issue under Part 231. It also argued that SEQRA standards should apply to Part 231 issues. Finally, FOH argued that the natural gas as an alternative to coal for use as the fuel for the facility should be adjudicated.

The Commissioner clarified that the burden for intervenors challenging a Part 231 analysis is to produce an offer of proof that raises a substantive and significant issue. In this case, though, the Commissioner noted that the intervenors were put to no higher of a burden. With respect to the standards applied to issues within the Part 231 analysis, the Commissioner noted that previous decisions establish that the Part 231 alter-

natives analysis is not as broad in scope as the alternatives analysis required under SEQRA. Under a Part 231 alternatives analysis, the focus is whether the project furthers the goal of minimizing emissions of any non-attainment contaminants or if there are alternatives that better serve that goal.

Regarding the fuel for the facility's kilns, FOH argued that it had set forth a sufficient offer of proof, in the form of expert testimony, of a substantive and significant issue related to the selection of coal as a fuel rather than natural gas. SLC argued, though, that it had thoroughly evaluated the use of natural gas and reasonably concluded that any reductions in specific emissions would be offset by increases in other emissions. Additionally, SLC asserted that switching to natural gas would entail an increase in the amount of raw materials needed which, in turn, would increase emissions of particulate matter. DEC staff agreed that SLC had engaged in an adequate analysis and that the choice of coal was appropriate. Noting that the ALJs had obtained an acknowledgment from FOH that the use of natural gas was a "wash" in terms of emissions, the Commissioner held that the issue was not adjudicable.

D. PSD Limits for PM_{10} and CO

FOH contended that SLC failed to properly apply BACT to PM_{10} and CO emissions and, as a result, the permit limits for the two pollutants may not be adequate. Similarly, intervenor Massachusetts Department of Environmental Protection ("MDEP") challenged SLC's failure to use a "top-down" BACT analysis for particulate matter. MDEP also appealed the ALJ's determination that issues concerning federal PSD limits are not adjudicable in Part 624 permit hearing proceedings. The Commissioner cites, however, several decisions consistently holding that federal PSD issues are not adjudicable in such proceedings and notes that there is no compelling reason to revisit the issue.

FOH argued that state air permit provisions are adjudicable regardless of the existence of a similar provision in a PSD permit. Accordingly, FOH maintained that the acceptability of the PM_{10} and CO emission limits in the state permit may be challenged in a Part 624 hearing. FOH was unable, though, to point to any state statutory or regulatory provision requiring a BACT analysis to establish PM_{10} or CO limits. Further, there was no argument that SLC is unable to meet 6 NYCRR Part 257-4 limits for those pollutants. Therefore, the issues raised by the intervenors regarding SLC's BACT analysis for PM_{10} and CO are not adjudicable.

E. PM_{10} Air Modeling

In a supplemental appeal, FOH argued that SLC's PM_{10} modeling analysis is adjudicable. It took the position that SLC's modeling used an artificially low emission factor from the sources of PM_{10}. SLC contended, though, that its analysis accounts for the worst case scenario for PM_{10} emissions. Acknowledging that an independent basis for adjudication of particulate matter issues exists under 6 NYCRR Parts 201, 200, and 257-3, the ALJs nonetheless determined that the record regarding PM_{10} modeling issue was open and would be settled upon further submission by SLC and analysis by DEC staff. DEC staff further contended that the issue was resolved after receiving further submissions by SLC.

Noting that a PM_{10} analysis is a surrogate for a $PM_{2.5}$ analysis which is an issue to be adjudicated, the Commissioner stated that the accuracy of SLC's PM_{10} modeling is relevant to state regulations that are independent of the federal PSD program and is appropriate for adjudication. Although FOH raised a substantive and significant issue regarding the effectiveness of the bag house technology, DEC staff suggested that the bag house issue could be resolved with further submission by SLC. The Commissioner, however, had ruled in an earlier decision that review of such additional submissions are procedurally precluded. Therefore, FOH has raised an adjudicable issue regarding the accuracy of SLC's PM_{10} modeling.

F. SO_2 Limits as State Law Issue

In its petition for party status, MDEP took issue with SLC's BACT analysis for SO_2 emissions, suggested that SLC's SO_2 scrubber be designed to meet a more stringent removal efficiency, urged that a condition be included in the air permit specifying a short-term SO_2 emission limit, and urged DEC to ensure that the lowest emission level are imposed in order to minimize PSD increment consumption. The ALJs rejected MDEP's challenge to SLC's BACT analysis, but did adopt MDEP's recommendation that the use of a visolite monitoring system be made a part of the permit. MDEP also urged that because there is at least one coal-fired plant operating in New York with an SO_2 removal efficiency between 95 and 98 percent, a question of state law is raised regarding SLC's projected removal efficiency of 85 percent. The other facility is distinguishable, though, because it is an electrical generating plant rather than a cement plant and uses very different resources. Finally, MDEP requested that it be notified when the DEC reissues a draft air permit and any related status reports. The Commissioner granted MDEP's request and directed the DEC to keep MDEP informed of changes to SLC's air permit.

G. Lack of SO_2 Analysis for Coal

FOH raised a concern at the issues conference regarding the lack of a proper analysis of coal composition and SLC's ability to meet Part 225 limits for sulfur compounds. Recognizing the deficiency, the ALJs

directed SLC and DEC staff to provide additional clarification and information concerning SLC's plans for complying with the limits. SLC's further submissions included draft permit language setting limits below those required by Parts 220 and 225. Because FOH did not present any proof of SLC's inability to meet the specified limits, the issue will not be adjudicated.

H. Fugitive Dust Management Plan

SLC's draft air permit requires a comprehensive fugitive dust management plan be provided no less than 60 days prior to construction. FOH maintained that SLC needed to provide greater detail concerning such a plan than had been presented. Agreeing with FOH, the ALJs required the submission of a plan with greater detail, but did not submit the issue for an adjudicatory hearing. SLC complied with the ALJs' supplementation requirement, but FOH continued to maintain that the issue was adjudicable. Citing the scope and sensitivity of the project, the Commissioner agreed with FOH and certified the issue for adjudication.

I. Adequacy of Revised Draft Air Permit

FOH maintained that the March 2002 revised draft air permit did not contain all of the stipulated information and additions identified as necessary by the ALJs. It argued, therefore, that the Commissioner should either hold the continued deficiencies adjudicable or, in the alternative, remand the draft permits for further consideration. DEC staff and SLC argue, however, that the Commissioner should simply decide that the stipulations and agreements have been incorporated in the revised draft permit. With the exception of the issues resolved in this decision, the Commissioner found that FOH failed to present any specific challenge to issues resolved by stipulation. Nevertheless, the Commissioner directed the ALJs to determine whether the revised draft permit contains the required supplementation and to take any action necessary to resolve the issues regarding the stipulated issues.

III. Part 608 Permit Issues

A. Background

The proposed facility will operate a 14-acre dock on the Hudson River between a railway right-of-way and the River's shoreline. SLC will refurbish an existing dock facility and dredge the river bottom during the construction and operational phases of the facility to accommodate the vessels that will deliver raw production materials and coal to the plant 16 to 22 times per year. For the maintenance dredging of the dock area, SLC possesses an ECL article 15 permit and water quality certification, as well as an Army Corp of Engineers permit. Further permits will be required for planned expansion of the dock.

Additionally, SLC has submitted various measures for mitigating damage to, and restoration of, the existing riverine habitat. The mitigation and restoration measures evolved significantly as the facility's permit process progressed. The ALJs agreed with intervenors FOH and Riverkeeper, though, that there were serious deficiencies in the analysis provided by SLC regarding the manner in which impacts to aquatic wildlife and wetlands are addressed. The disagreements between SLC and the intervenors regarding the impacts of the dock facility and the mitigation measures, the ALJs held, must be resolved through adjudication before it will be possible to determine whether the requirements of ECL Art. 15 have been met.

B. Discussion

SLC contends, with agreement from DEC staff, that the standards for issuance of an Article 15 permit, as described in 6 NYCRR § 608.7(b), will be met and that nothing proposed by the intervenors will assist the Commissioner in making such a decision. Additionally, SLC maintains that it has proposed positive restoration and mitigation measures that more than compensate for the modest project-related impacts. Noting that the DEC staff improperly attempted to justify its approval of the mitigation measures for the first time on appeal, the Commissioner agreed with the ALJs and held that a substantive and significant issue had been presented with respect to the issue. Further, the Commissioner identified several flaws and information deficits in the analysis provided by SLC to justify its mitigation measures.

IV. SEQRA Issues

A. Visual Impacts

1. Background

The facility proposed by SLC will consist of a 1,222-acre cement plant and mine located in the Town of Greenport. The project will include both new construction as well as refurbishing and expanding existing structures. To offset the visual impacts of the new facility, SLC proposes to remove decommissioned existing structures on both the Greenport site and at SLC's site of current operation in the Town of Catskill (including the kiln and its associated steam vapor plume). SLC maintains that the project's visual impacts have been analyzed and mitigated in accordance with the DEC guidance document *Assessing and Mitigating Visual Impacts*.

The visual impact assessment identified a number of locations from which portions of the project will be visible. Noting the agricultural character and the cultural importance of the region, the study concluded that intervening topography and vegetation would substantially screen the project from all but a small number of

sites considered resources of high cultural or scenic importance. Notwithstanding the topographical characteristics of the region, though, the DEIS conceded that the size of the facility will be disproportionate to other elements of the regional landscape and that the taller facility components will be commonly visible. Additionally, under favorable meteorological conditions, a steam vapor plume will be visible for significant time periods. Other elements of the project will only be visible to motorists passing under or near the facility's structures.

The DEIS proposes a number of measures designed to mitigate the visual impacts of the project. The mitigation measures include location of elements to take advantage of local topography, the construction of various types of screens, low-visibility construction and other camouflage techniques. SLC also agreed to decommission the facility at the end of its useful life and remove the decommissioned structures. The intervenors provided examples of various locations in the region from which the facility will be visible. Additionally, the intervenors provided an offer of proof in the form of expert testimony designed to establish that the visual impacts of the facility will be greater than predicted in the DEIS and the mitigation measures will be less effective than predicted.

The ALJs held that an adjudicable issue was raised concerning whether SLC mitigated the visual impacts to a degree that would support a decision to issue a permit. Specifically, the ALJs cited the intervenors' concerns about the project's impacts on Olana and SLC's planned elimination of Becraft Mountain Ridge.

2. Discussion

i. Becraft Mountain

SLC agreed to a condition in its permit that would prevent the elimination of Becraft Mountain. The intervenors agree with the inclusion of such a condition. The Commissioner, therefore, removed consideration of the impacts of the removal of Becraft Mountain from adjudication.

ii. Applicable Standard of Review

SLC argues that the ALJs failed to consider the visual impacts of the project as a whole. The ALJs should have considered all project components as well as mitigation and offset measures. The Commissioner, however, disagreed with the characterization of the ALJs ruling by SLC. The purpose of the issues conference is to identify and evaluate issues for adjudication. The ALJs correctly inquired whether intervenors carried their burden of raising adjudicable issues concerning the adequacy and accuracy of SLC's visual impact analysis. Further the ALJs correctly declined to engage in a balancing of the impacts and the mitigation measures as urged by SLC. That type of analysis is not appropriate until the post-adjudication stage of the proceedings.

iii. ALJs' Determination of Adjudicability

SLC asserted that the intervenors failed to offer additional mitigation measures. Additionally, the mitigation measures that had been agreed upon were enforceable through permit conditions. Therefore, SLC argued, there were no factual issues to be decided. HVPC, however, offered expert testimony and additional photo-simulations showing that the DEIS did not adequately evaluate the visual impacts of the project. TOP also argued that there are significant differences of expert opinion and those differences are sufficient to raise an adjudicable issue.

The ALJs correctly ruled that issues concerning the project's visual impacts and mitigation measures are adjudicable. The expert testimony disagreeing with the analysis of SLC's experts is sufficient to raise the issue. The Commissioner points out, though, that not all offers of expert testimony that are contrary to the opinions of the applicant's experts raise an issue for adjudication. Rather, the proposed expert testimony must raise the reasonable likelihood that adjudication would result in amended permit conditions or project denial. In this case, the intervenors' expert, in an opinion grounded in data available from the DEIS, offers to show that the project will have a greater visual impact than is predicted in the DEIS and that the impact can form the basis for additional permit conditions or project denial. Therefore, an adjudicable issue regarding the visual impacts of the project has been raised.

B. Impacts Upon Coastal Zone Policy, Community Character and Historic Resources

1. Background

The DEIS concluded that the proposed cement plant would be disproportionate in scale to other elements in the regional landscape and would be a highly dominant visual element. Additionally, the vapor plume would be visible from multiple sites including scenic areas of statewide significance ("SASS"). The DEIS also concluded that the project would result in intensification and modification of an existing land use rather that working as a change in land use. Further, past and present uses of the SLC property would be consistent with its future use and environment, and the area's character is unlikely to change with the proposed project. The project will be visible from many historic sites and would, in some cases, introduce a major new industrial facility into a setting of rural historic resources, including at least one view from historic Olana. With the use of the proposed pollution control technology, though, the emissions from the facility

should not adversely impact historic structural or decorative materials.

HVPC argued that the facility would dominate the landscape from a number of locations in the region and would undermine the values sought to be protected by designation of the Hudson River as a National Heritage Area and an American Heritage River. It also asserted that the visual impacts are inconsistent with certain Coastal Management Programs ("CMP") and that SLC failed to assess air pollution impacts on historic structures. HVPC experts also contended that the DEIS did not consider a proper area when assessing the project's impacts on community character. TOP and the Village of Athens also joined in the argument concerning the effect of the facility on community character and waterfront revitalization efforts.

The ALJs identified several issues for adjudication with respect to CMP policies and other waterfront concerns. They held, however, that the issues would be adjudicated within the visual impact context rather than in a separate hearing. Also, the ALJs held that any effects from the project on historic resources will be adjudicated in the context of air pollution and visual impacts, and the impacts on community character would, as well, be adjudicated with other issues already identified for adjudication. The ALJs also limited the inquiry into community character to the Town of Greenport, the City of Hudson and the Village of Athens.

2. Coastal Zone

i. Standards

SLC contended that the ALJs failed to apply the proper standard for adjudication for coastal zone issues. New York Executive Law article 42 requires consistency with coastal area policies including local waterfront revitalization plans ("LWRPs"). The EIS must contain a statement concerning the project's consistency with such plans. The SEQRA findings for a project must also include a statement concerning the consistency with CMP policies. The Commissioner held that the ALJs properly applied the legal standards for determining the adjudicability of issues related to the project's consistency with the CMP policies.

ii. Balancing of 44 Coastal Policies

SLC argued that the ALJs should have considered all 44 CMP policies rather than the four identified by the intervenors. The regulations mandating consistency with CMP policies, however, state that the project should not hinder the objectives of *any* CMP policy. Therefore, in the issues conference stage of identifying issues, it is appropriate to consider only the CMP policies that the project allegedly hinders.

iii. Interpretation of CMP Policies 23 & 24

SLC contended that the ALJs misconstrued and misapplied 2 of the 4 CMP policies identified by the intervenors. SLC argues that CMP policy 23 is not concerned with views from historic sites and, thus, should not be considered in the context of an adjudication of visual issues. CMP policy 23 appears to be concerned with the alteration, demolition or removal of historic structures, with actions within 500 feet of an historic structure, and with actions within an historic district. SLC's argument raises an open question concerning the proper interpretation of CMP policy 23 in the context of the visual impact of a project on an historic structure. The Commissioner decided to reserve on the question because the proper interpretation lies within another agency's expertise and because visual impacts of the project have already been identified as an issue for adjudication.

SLC also argues that CMP policy 24, which is concerned with preventing impairment of scenic resources of statewide significance, does not apply to this project because the project is not located within an SASS, the policy only applies to views of an SASS, and the mere visibility of a project does not automatically show inconsistency with the policy. Department of State guidance indicates that an action's impact on a SASS must be evaluated "whether within or outside of a [SASS]." Therefore, the policy is not limited to projects solely within a SASS. The guidance for policy 24 also indicates that one of the goals is "to retain views to and from the shore." The policy is not restricted, then, to views of an SASS. Finally, the Commissioner ruled that the intervenors have made a sufficient offer of proof that the project's visual impacts are greater than predicted in the DEIS and an adjudicable issue with regard to the project's consistency with CMP policy 24 has been raised.

iv. Consistency with Village of Athens LWRP

Finally, SLC argued that the Village's LWRP did not need to be considered. The Athens LWRP was approved by the Department of State after the DEIS was prepared, but before he ALJs ruled on issues and party status. The ALJs left the record open regarding the LWRP at the time of the issues ruling. SLC raised an open question regarding the applicability of the LWRP approved by the Department of State during the DEC permitting process. Further, SLC argues that the LWRP is not applicable because no part of the project is located within the boundaries of the LWRP. The Commissioner decided to reserve on resolution of the issues pending further development of the factual record.

3. Community Character

SLC agrees with the ALJs' conclusion that community character is not a stand-alone issue for adjudication. It argued, however, that the ALJs erred by reject-

ing local land use enactments and policies as the standard for what constitutes community character, by failing to apply any standard against which the offers of proof on the community character issue could be assessed, and contravened SEQRA's jurisdictional non-interference provision. HVPC asserted that the ALJs improperly excluded cumulative and indirect, secondary community character impacts of the project from adjudication.

The DEC largely depends on local land use plans as the standard for community character. The local land use plans are not, however, the only evidence of community character. There are other cultural, historic and scenic factors that contribute to the community character analysis. Additionally, community character issues are often intertwined with other environmental concerns. The Commissioner affirmed the ALJs' ruling that the community character issues for the Greenport facility will be adequately addressed in the context of other issues to be adjudicated.

HVPC challenged various representations concerning the character of the communities surrounding the project and seeks to develop the record concerning the region's trend away from industrial land uses. The DEIS, however, contains a discussion of the trends in land use and home ownership within the area. The DEIS and the public comments provide sufficient basis upon which a decision maker can decide upon the trends and values that deserve protection. Moreover, reduction of property values and other economic-related matters, standing alone, are not considered environmental impacts. Therefore, HVPC has failed to raise an adjudicable issue because further factual development of the record would not materially aid the SEQRA decision making process.

HVPC persuasively argued that the ALJs defined the community character geographic too narrowly. The geographic scope of the inquiry depends on the nature of the impact. The entire geographical extent of the impacts must be considered. The Commissioner rejected, however, HVPC's suggestion that the entire Hudson valley must be considered.

4. Historic Resources

The ALJs rejected the project's effect on historic resources as an independent issue for adjudication and held that it would be considered along with other environmental concerns. SLC argued that the project's effect on historic resources should not be adjudicated in the context of other issues such as visual impacts and air pollution impacts because doing so allows the issue to be brought in to the adjudicatory setting through the "back door." Because an historical resource is within the definition of "environment," the extent of the visual impact of a project on the resource must be considered along with any mitigation. Therefore, the adjudication of the project's visual impacts will include consideration of the project on historic resources.

V. Miscellaneous Issues

A. Burden of Proof at Hearing

The intervenors argue that the ALJs improperly shifted the burden of proof in an adjudicatory hearing to the intervenors with respect to two issues, $PM_{2.5}$ and visual impacts. The Commissioner disagreed with the intervenors as to whether the burden had been shifted at all, but elaborated on the burden of proof in an adjudicatory hearing. The applicant bears the burden of proof for all issues. Once the applicant sets forth a prima facie case, however, then the intervenors must put on an affirmative case to rebut the applicant's presentation. The Commissioner expressed no opinion regarding SLC's ability to set out a prima facie case with respect to either issue identified by the intervenors.

B. Production of SLC's Test Blast Results

At a preliminary conference, the ALJs rejected a request by the intervenors for the production by SLC of certain blasting data. The intervenors did not retain their own experts regarding blasting and did not produce sufficient proof that SLC would exceed guidelines established for blasting or that the guidelines were not adequately protective. When the ALJs rejected blasting as an issue for adjudication, the intervenors renewed their request that SLC produce its blasting data, or, in the alternative, requested that the ALJs draw a "negative inference" because of SLC's failure to produce the data. The ALJs again declined the intervenors' request. On appeal, the intervenors argued that the rejection of their request violated SEQRA's requirement for public notice and participation. The Commissioner rejected the intervenors' argument, stating that the intervenors had the burden of producing proof that SLC's blasting would be harmful and that the intervenors had no right to the data from a test that SLC voluntarily performed.

In the Matter of the Application for a State Facility Permit for Air Pollution Control pursuant to Article 19 of the Environmental Conservation Law ("ECL") and Title 6 of the New York Compilation of Codes, Rules and Regulations ("6 NYCRR") Parts 201, et seq.; a State Pollutant Discharge Elimination System ("SPDES") Permit pursuant to ECL Article 17 and 6 NYCRR Parts 750-758; an ECL Article 15 Protection of Waters Permit; a Section 401 Water Quality Certification pursuant to 6 NYCRR Part 608; a Mined Land Reclamation Law Permit Modification pursuant to ECL Article 23 and 6 NYCRR Parts 420 to 426; and a Freshwater Wetlands Permit pursuant to ECL Article 24 and 6 NYCRR Part 663,

By

ST. LAWRENCE CEMENT COMPANY, LLC,
Applicant.

COMMISSIONER'S DETERMINATION

REGARDING AN EXCLUDED ACTION UNDER
ARTICLE 8 OF THE
ENVIRONMENTAL CONSERVATION LAW

September 8, 2004

Background

St. Lawrence Cement Company, LLC ("SLC") owns and operates a mine in the Town of Greenport, Columbia County (the "Greenport Mine"). SLC is proposing to construct a new cement manufacturing facility at the location of the Greenport Mine. The Greenport mine is currently operated pursuant to a Mined Land Reclamation Law permit (the "Mining Permit"). The draft permit for the proposed facility would modify the Mining Permit to allow an increase in mine output and a revised sequence of mining phases. Current operations under the Mining Permit were "grandfathered" under New York's Environmental Quality Review Act ("SEQRA") because the Mining Permit was granted prior to the passage of SEQRA.

In her First Interim Decision in SLC's permit application proceedings, DEC Commissioner Erin Crotty (the "Commissioner") reserved on a determination as to whether to "ungrandfather" the mine and require review under SEQRA prior to any modification to the Mining Permit. Administrative Law Judges Helene Goldberger and Maria Villa (the "ALJs") held hearings on the grandfathering issue and, in a recommended decision and hearing report, recommended that the Commissioner exercise the discretion granted pursuant to ECL § 8-0111(5)(a) to ungrandfather the Greenport Mine and require review of the proposed modification under SEQRA.

In making their recommendation, the ALJs reasoned that the mining operation is inextricably intertwined with the proposed cement manufacturing facility and that the proposed mining operation would be qualitatively and quantitatively different that the existing mining operation. While DEC staff agreed with the factual findings of the ALJ, it maintained a position in favor of allowing the mine to remain grandfathered. SLC disagreed with the ALJs' recommendation and argued that the pre-SEQRA mining permit, mining activities and submissions to the DEC supported the proposition that the mine's operations are grandfathered with respect to SEQRA. Further, SLC contends, a 1990 DEC consent order confirmed the mine's grandfathered status. Although, the intervenors in SLC's permit proceedings agreed with the ALJs, they raised an objection to any limitation that would preclude them from raising issues related to the effects of any portion of the mine that is determined to be grandfathered on undisturbed areas.

Discussion

Enacted in 1975, SEQRA generally excludes from SEQRA review actions undertaken or approved prior to the enactment of SEQRA. Grandfathered actions, however, do not enjoy complete immunity from further SEQRA review. ECL § 8-0111(5) grants the Commissioner discretion to "ungrandfather" a pre-SEQRA action "where it is still practicable either to modify the action in such a way to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative." Further, the New York Court of Appeals has stated that changing circumstances at a grandfathered facility can be so substantial that removal of the activity from a grandfathered status is appropriate.

Historical Background of the Greenport Mine

As part of the analysis regarding the ungrandfathering of the Greenport Mine, the ALJs developed a list of activities that have been approved through the Greenport Mine's Mining Permit and distinguished it from the list of activities that have been undertaken at the mine. The Greenport mine has been owned and mined by several entities since the early 1900s. SLC came into possession of the mine in 1977 by the purchase of the mine by a subsidiary of SLC. A mining permit was issued to SLC in December 1978. By presenting evidence of communications between SLC and DEC starting when SLC obtained the mine, SLC argues that there has been no lapse of mining authority at the Greenport Mine during the period of SLC's ownership. The Commissioner notes, though, that there was no mining permit in effect on November 1, 1978 (the date that the final phase of SEQRA's enactment became effective).

The available history of the mining operations at the Greenport Mine begins in 1938. Between 1938 and

1942, approximately 400,000 to 500,000 tons per year were taken from the mine. That number increased to approximately 1,000,000 tons per year in the 1960s. Mining operations at the mine stopped between 1977 and 1980, although the quarry was used for storage of dynamite and to stockpile materials, as well as for other purposes during the time period.

DEC initially took the position that the mine had become subject to SEQRA in the late 1980s. By the late 1980s, though, DEC staff agreed to, and did, treat the mine as grandfathered (although certain actions related to the mine have been reviewed under SEQRA). The Commissioner, without deciding or holding that the DEC staff determination to treat the mine as grandfathered was correct, assumed that the Greenport Mine was grandfathered for the purpose of deciding whether it should be ungrandfathered. She noted, however, that the scope of operations proposed in the current SLC application is significantly larger than any activity undertaken at the site prior to the enactment of SEQRA.

Commissioner's Ungrandfathering Authority

As previously noted, the Commissioner has discretion to ungrandfather actions that have been previously excluded from SEQRA review. Historically, the discretion has been exercised on three occasions by former DEC Commissioners Berle and Flacke. In exercising their discretion, the former Commissioners, in their decisions, indicated that ungrandfathering is appropriate "only when special overriding environmental concerns are present and it is still practical to mitigate the actions." Commissioner Crotty states that both circumstances are present in the instant action. Therefore, ungrandfathering the Greenport Mine, thereby subjecting the modification to its mining permit and operations to SEQRA review, is appropriate.

Factors Supporting Ungrandfathering of the Greenport Mine

The Commissioner provided a list of the factors that support her decision to ungrandfather the Greenport Mine. SLC argued that the mine is a separate facility and should not be considered as part of its larger cement manufacturing facility construction project. The Commissioner, however, disagreed and stated that she considers the mine a key and integral part of the Greenport facility project that must be considered as a part of the whole Greenport project. Additionally, if the grandfathered status of the Greenport Mine were to continue, then its environmental impacts would be out of the scope of SEQRA review. Therefore, ungrandfathering of the Greenport Mine is necessary to ensure that potentially significant adverse environmental impacts are analyzed and mitigated to the fullest extent possible commensurate with the relevant economic, social and environmental factors.

Finally, the sheer magnitude of the anticipated increase to the output of the mine leads to the inescapable conclusion that the modification of the mining operation must be reviewed pursuant to SEQRA. Current DEC policy generally limits the extraction rate for grandfathered mines at 2,000,000 tons per year. The Greenport Mine extraction rates ranged from 481,000 to 773,000 tons per year between 1995 and 2000. The proposed Greenport facility predicts an extraction rate of 6,700,000 tons per year. Such an increase in mine output simply cannot be allowed without a comprehensive environmental review of the project's short-term and long-term impacts.

Scope of Ungrandfathering of Greenport Mine

The intervenors argued that the ungrandfathering of the mine must result in the necessity of a new environmental review of the proposed project. The Commissioner, however, disagreed with the intervenors, noting that the DEIS prepared by SLC addresses a range of environmental issues that includes those related to the mining operation. Because the intervenors have not been limited in any way as to the issues that could have been raised to this point, the Commissioner states that the ungrandfathering of the Greenport Mine does not provide the intervenors with an additional opportunity to raise new issues for adjudication.

To the extent that issues identified for adjudication involve the mining operation, the potential impacts of the mining operation may be adjudicated. The adjudicatory hearings for traffic and noise, however, had been completed as of the date of this determination. Any increase in noise arising from the project was to be evaluated to determine the potential for a substantial adverse change. Existing conditions of the roadway system, traffic volumes, and levels of service were used in evaluating potential impacts from the proposed project. Therefore, the Commissioner asserts, the impacts of the current mining operation are under consideration and there is no need to reopen the adjudicatory hearings for noise of traffic.

Conclusion

Based on the record, the Commissioner concluded that the Greenport Mine should be and, pursuant to ECL § 800111(5)(a), is ungrandfathered and subject to SEQRA review. This will allow the opportunity to fully analyze the environmental impacts of the mining operation and mitigate them as much as feasible while the project is still at a stage where such mitigation remains practicable.

Jeffrey L. Zimring is a first-year associate with Whiteman Osterman & Hanna LLP in Albany, New York.

Recent Decisions in Environmental Law

Student Editor: James Deniston

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

Weiler v. Chatham Forest Prods., Inc., 370 F.3d 339 (2d Cir. 2004).

Facts: Plaintiff-appellants are private citizens who live and work in the vicinity of Lisbon, New York. Defendant-appellee, Chatham Forest Products Inc., is a manufacturer proposing to build and operate an "oriented strand board"[1] manufacturing factory in Lisbon.

Defendant obtained a "synthetic minor"[2] source permit prior to construction of the proposed factory. This permit was issued by the New York State Department of Environmental Conservation ("NYDEC") under authority of the New York state implementation plan ("SIP") permit scheme.[3] The NYDEC issued this permit after concluding that the mechanisms in place in the factory to limit the pollution output would be effective and enforceable.

Plaintiffs alleged that the factory must be considered a "major emitting facility"[4] because the mechanisms in the factory to limit pollution were neither practically effective nor enforceable. Plaintiffs further alleged that because the factory must be considered a major emitting facility, a synthetic minor source permit was not sufficient, and defendant must obtain a "major source" permit[5] under the requirements of Part D[6] of the Clean Air Act ("the Act").

The United States District Court for the Northern District of New York dismissed the case for failure to state a cause of action. The District Court held that section 304(a)(3) of the Act[7] did not allow private litigants to sue in federal court to challenge the NYDEC's determination that no major source permit was necessary. Plaintiffs appealed to the United States Court of Appeals for the Second Circuit.

Issue: The issue on appeal in this court was whether section 304(a)(3) allows a private litigant to sue in federal court to challenge a determination by the NYDEC that no major source permit was necessary for the construction of a factory. This court reviewed the judgment of the district court *de novo*.[8]

Reasoning: In determining that the appellants did state a cause of action, the court looked first to the text of section 304(a)(3), which provides that any person may sue a "person who proposes to construct . . . any . . . major emitting facility without a permit required under part C . . . or part D."[9] This court determined that since appellants alleged that the proposed factory would be a major emitting facility, and since appellee did not obtain the permits required for major emitting facilities, then appellants did in fact state a cause of action under section 304(a)(3).

The court next looked to the congressional intent behind section 304(a)(3). The court noted that "Congress has frequently demonstrated its ability to explicitly provide that . . . an administrative proceeding or court action will preclude citizen suits."[10] The fact that Congress did nothing to preclude citizen suits under section 304(a)(3), combined with the fact that citizen suits play an important role in enforcement of the Act, led this court to conclude that Congress had no intent to preclude citizen suits brought pursuant to section 304(a)(3).

The court went on to reject appellee's arguments that (1) Congress provided other avenues of enforcement under the Act, rendering section 304(a)(3) suits necessary, (2) Congress intended to give states a major role in implementing the Act, and permitting judicial oversight of state permit decisions would undermine that role, and (3) the EPA's approval of New York's SIP insulated defendant from a claim that the enforcement mechanisms imposed by the NYDEC pursuant to the SIP were insufficient.[11]

Considering the first argument, the court stated that although other mechanisms of enforcement exist to challenge NYDEC's determination, these mechanisms do not evince congressional intent to prohibit citizen suits under section 304(a)(3). Each mechanism of enforcement serves a different purpose, and the existence of one does not preclude the use of another.

With respect to appellee's second argument, the court found that "judicial oversight would not under-

mine the exercise by the state agency of its nondiscretionary duty to implement the Act."[12] It found that because Congress requires both state agencies and private entities to meet the demands of the Act, there is no reason why the private entity should be immune from suit in the face of an allegation that both had not met their demands.

The court finally rejected appellee's third argument that the EPA's decision that an SIP comports with the requirements of the Act cannot be attacked in a section 304(a)(3) suit. The court stated that this argument, at best, suggests a policy rationale that Congress should preclude these types of citizen suits. It offers no indication that Congress actually chose to preclude citizen suits pursuant to section 304(a)(3).[13]

Conclusion: This court found that appellants did state a cause of action and that a state determination that a prospective source of air pollution is not a major emitting facility does not prevent a private plaintiff from bringing a suit to enjoin the construction of the facility pursuant to section 304(a)(3) of the Act.[14] Accordingly, the judgment of the District Court was vacated and the matter remanded for further proceedings consistent with this opinion. Since the judge below dismissed for failure to state a cause of action, alternative grounds for dismissing the case were not considered. On remand, the judge may address those issues. In addition, the EPA and the NYDEC may participate in the proceedings on remand as appropriate.[15]

Anna Livia Mott

Endnotes

1. "Oriented strand board is an engineered, mat-formed panel product made of strands, flakes or wafers sliced from small diameter, round wood logs and bonded with an exterior-type binder under heat and pressure." Structural Board Association, Oriented Strand Board Guide (2002–2004), *available at* http://www.osbguide.com/osb.html (last visited Sept. 28, 2004). "The manufacture of strand board produces pollutants that may be emitted into the atmosphere." *Weiler v. Chatham Forest Prods., Inc*., 370 F.3d 339, 340 (2d Cir. 2004).
2. "Under the New York state implementation plan ("SIP") permit scheme, a factory that has the capacity to emit major levels of particular pollutants may avoid the stringent permit requirements of Part C and Part D [of the Act] and proceed as a 'minor emitting facility' if it agrees to 'cap' its pollution output. If it does, it may receive a 'synthetic minor' source permit." *See Weiler*, 370 F.3d at 342; N.Y. Comp. Codes R. & Regs. tit. 6, §§ 201-7.1–201-7.2.
3. The Clean Air Act ("the Act"), 42 U.S.C. §§ 7401–7671q, places the primary responsibility for enforcement on state and local governments. Each state submits an SIP to the Environmental Protection Agency ("EPA") for approval. The SIP is a plan to implement and promote the policies and goals of the Act. The SIP must designate a state agency or its delegates to review applications for major source construction permits and to monitor compliance with the permit once a facility has begun operation. *See Weiler*, 370 F.3d at 341–42; 42 U.S.C. §§ 7410(a), 7502(b) & (c), 7503.
4. The Act defines a "major emitting facility" as "any stationary facility . . . which directly emits, or has the potential to emit" the relevant quantity of pollutant as established by the EPA. 42 U.S.C. § 7602(j).
5. Any entity proposing to construct a major emitting source of pollutants must obtain a permit prior to construction. *See* 42 U.S.C. §§ 7475(a), 7502(c)(5).
6. 42 U.S.C. §§ 7501–7515.
7. "[A]ny person may commence a civil action on his own behalf . . . (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter . . . or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit." 42 U.S.C. § 7064(a)(3).
8. *Weiler*, 370 F.3d at 342 (citing *Phillip v. University of Rochester*, 316 F.3d 291, 293 (2d Cir. 2003)).
9. 42 U.S.C. § 7064(a)(3).
10. *Weiler*, 370 F.3d at 343.
11. *Id*.
12. *Id*. at 345.
13. *Id*.
14. *Id*. at 346.
15. *Id*.

* * *

Bower Associates, Appellant, v. Town of Pleasant Valley, et al., Respondents; Home Depot, U.S.A., Inc. Appellant, v. Edward B. Dunn, Individually and as Mayor of the City of Rye, et al., Respondents, 2 N.Y.3d 617

Facts: Appeals in two separate actions, both alleging civil rights violations and damages under 42 U.S.C. § 1983, are from orders of the Appellate Division, Second Department.

In the first, Appellant, Bower Associates, is a housing developer which applied to the Pleasant Valley Planning Board for a permit to subdivide a three-acre portion of land attached to a much larger subdivision located within the adjacent Town of Poughkeepsie. The Board denied the application citing numerous environmental concerns. Bower prevailed in Article 78 proceedings, which found that the Planning Board's actions were arbitrary regarding its environmental determinations. Bower then brought suit under 42 U.S.C. § 1983. The Town of Pleasant Valley moved to dismiss and was denied. The Appellate Division reversed, finding that there was no cognizable property interest entitling Bower to substantive due process protection, no unlawful taking, and a failure to demonstrate unequal treatment.

In the second, Appellant, Home Depot, U.S.A., is a home improvement retail company which obtained site plan approval from the Village of Port Chester for the

development of a retail establishment located on the border of Port Chester and the City of Rye. During the environmental review process, the City of Rye demanded certain traffic-mitigating measures of which Port Chester made a prerequisite of its own approval. One measure required the direct approval of the City of Rye because Westchester County property located in Rye was involved. After threats of suit and serious considerations of settlement, the City of Rye refused consent to the permit. Home Depot filed Article 78 proceedings and separate suit under 42 U.S.C. § 1983 against the Mayor and City Council members of the City of Rye. Home Depot prevailed in the Article 78 proceeding with the Supreme Court, finding that the City's insistence on mitigation measures and refusal to approve the permit were arbitrary and capricious. The Supreme Court then granted summary judgment to Home Depot based on their substantive due process claim. The Appellate Division reversed and dismissed the complaint, finding that Home Depot did not raise a triable issue of fact as to a due process claim and that defendants were entitled qualified immunity, rendering the remaining contentions academic.

Issues: The first issue, addressed by the Court of Appeals in this combined decision, is to ask what more is required for an Article 78 finding, that a municipality was arbitrary in its actions, to constitute a violation of due process under 42 U.S.C. § 1983. Whether either Respondent had gone so far as to violate Appellants' due process rights is decided according to a two-part test outlined in *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).

The second issue, raised by Home Depot in particular, is whether Appellant's equal protection rights were violated under a regime of selective enforcement. A determination of a violation of equal protection rights, *inter alia*, arises in the instant case from whether malevolent intent to injure was present.[1]

Reasoning: Within *Town of Orangetown v. Magee*, 88 N.Y.2d. 41 (1996), the Court set up a two-part test for substantive due process violations. First, claimants must establish a cognizable property interest; that right had vested under state or local law. Second, claimants must show that the governmental action was wholly without legal justification, where "only the most egregious official conduct can be said to be arbitrary in the constitutional sense."[2]

In the *Bower* case, where Bower owned the subject land, the Town of Pleasant Valley was found to be arbitrary in Article 78 proceedings. Such a defeat, however, does not establish a constitutionally protected property interest. The Court found that "while the existence of discretion in a municipal actor does not alone defeat the existence of a property interest in a permit applicant, that discretion must be so narrowly circumscribed that approval is virtually assured." The Court found the Town's discretion to be not so bounded for the approval of Bower's permit. Similarly in *Home Depot*, where the Appellant did not own the subject land, the Court found the City of Rye's actions, though found arbitrary in the Article 78 proceeding as well, to also be discretionary and not so narrowly circumscribed to assure approval. For both cases, the Court found that although the lower courts had concluded each to be "arbitrary, capricious and without rational basis in an Article 78 sense," each lacked the "egregious conduct that implicates federal constitutional law."

The Court prefaced that equal protection requires that all persons similarly situated must be treated alike. In the case of Home Depot, the Court assessed their equal protection claim as resting on selective enforcement where such treatment is based upon race, religion, punishment for the exercise of a constitutional right, or malicious intent. Without alleging a basis for such selective enforcement, the Court reasoned that Home Depot must demonstrate that the City of Rye withheld consent in bad faith. What matters is not selective enforcement alone, rather discrimination with the impermissible motive.

The Court found Home Depot's allegation, that evidence of permit approval situations where the City of Rye expedited similar permit approvals was indicative of Rye's selective treatment, to be without merit because they were not shown to be comparable to a permit allowing the widening of a County road. Moreover, the Court reasoned that evidence of the City of Rye's treatment of the permit review falls short of the malicious motivation necessary for a constitutional claim and rather "addresses the merits of the City's decision."

Conclusion: According to the Court, neither appellant stated a cause of action for a violation of due process. Further, the Home Depot Appellant failed to state a cause of action for an equal protection violation. The Orders of the Appellate Division, dismissing each suit, are affirmed.

Brian P. Mitchell 2007

Endnotes

1. *Harlen Assoc. v. Incorporated Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001).
2. *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found.*, 538 U.S. 188,198 (2003).

* * *

Metropolitan Museum Historic District Coalition et al. v. Philippe De Montebello, Director, et al., 2004 N.Y. Slip Op. 50527U

Facts: Defendant, the Metropolitan Museum of Art, drafted a plan to renovate the museum starting in 1970, and again in 2000. The plan was approved by the Parks Department and included adding five new wings and nearly doubling the square footage of the Museum's existing space, intruding upon previously undeveloped parkland. Most of the plan was completed in 1990 except for the Greek and Roman Galleries. Not until the fall of 2000 did the final leg of the plan, approved by the Landmarks Preservation Commission ("LPC"), address the Museum's final renovations.

Plaintiffs allege ten causes of action, but only two adverse environmental impacts that the defendants' plan either did not address or failed to comply with. The plaintiffs contend that the defendants violated the State Environmental Quality Review Act ("SEQRA") by not conducting an environmental review. The plaintiffs state that the increased traffic, noise, and fumes, as well as the magnitude of the square footage added to the interior of the Museum will have adverse environmental effects. The defendants contend that the plaintiffs lack standing under SEQRA and the statute of limitations has already run. The defendants counter that the 2000 plan, now under construction, has been significantly scaled back from an increase of 200,000 sq. feet to 40,000 sq. feet.

Issues: The first environmental issue is whether the defendants violated SEQRA by failing to conduct an environmental review. The court discusses three other issues before reaching this one: plaintiff's standing, statute of limitations running, and mootness.

The second environmental issue is whether the defendants complied with the Uniform Land Use Review Procedure ("ULURP").

Reasoning: First, the court rejected the defendant's argument that the plaintiff lacked standing. The court stated that the plaintiff established all three tests for standing.[1] The court then dismisses plaintiff's SEQRA claim because both the statute of limitations of four months has run and the argument is moot.

The court extensively discusses the factual background and documents surrounding the statute of limitations question. The court reiterates that the statute of limitations begins "when the decisionmaker arrives at a 'definitive position on the issue that inflicts an actual, concrete injury.'"[2] The court must decide whether there was a "definitive position" for the 2000 renovations four months from April 2001, when Commissioner Stern signed the approval by the LPC as the defendants claim, or whether it has yet to run because the 2000 application is not a final approval because the application was signed by Mr. Stern prior to the LPC's issuance of a report on the plan, contrary to the Administrative Code of the City of New York § 25-318 requirements.

Plaintiffs argue that the application was made in violation of the express terms of subdivision (a) of the Administrative Code § 25-318 because the approval was given prior to referral of the plan to the LPC, and the court agrees. Nevertheless, the court declares this error a minor procedural problem, insufficient to render the approval ineffective. The court continues, stating the more important question: whether the Parks Department's 2000 application was a final agency action, which would begin the statute of limitations. The court sidesteps this question and instead declares the ruling law is that the agency's failure to consider a SEQRA review constitutes the final determination from which the statute of limitations begins to run, not when the plaintiff demands SEQRA review.[3] Thus, the court declares that the Parks Department failed to consider SEQRA review in April 2001, and the statute of limitations has already run.

In considering whether the LPC should have considered SEQRA review for the interior work, the court declares the SEQRA review was unnecessary because the LPC is more concerned with architecture and aesthetic review, not environmental. Plaintiffs also failed to submit any authority on whether the interior work required SEQRA review.

The final issue of mootness is quickly dismissed in favor of the defendants because they had substantially completed the work and abandoned some of the work in contention, namely the demolition of outside fountains.

In discussing the issues of whether the statute of limitations has run for ULURP, the court states that is has run, for the reasons behind SEQRA. The court also declares that even if the statute of limitations has not run, the Parks Department approval was not subject to ULURP because it did not involve a "site selection for a capital project."

Conclusion: Plaintiff's motion to enjoin the museum's renovation under failure to complete a SEQRA and ULURP review is dismissed because the statute of limitations had run when the plaintiff failed to request such a review by the time the Parks Department failed to mention a SEQRA review was necessary in April 2001 when it approved of the renovations.

Christian Sterling 2006

Endnotes

1. *Aeneas McDonald Police Benevolent Ass'n v. City of Geneva*, 92 N.Y.2d 326, 331 (1998).
2. *Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998).
3. *Young v. Board of Trustees of Village of Blasdell*, 89 N.Y.2d 846 (1996).

Section Committees and Chairs

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

Adirondacks, Catskills, Forest Preserve and Natural Resource Management Committee
Carl R. Howard (Co-Chair)
290 Broadway
New York, NY 10007
(212) 637-3216
E-Mail:howard.carl@epa.gov

Thomas A. Ulasewicz (Co-Chair)
358 Broadway, Suite 307
Saratoga Springs, NY 12866
(518) 581-9797
E-Mail:phu@global2000.net

Agriculture and Rural Issues Committee
David L. Cook (Co-Chair)
1300 Clinton Square
Rochester, NY 14603
(585) 263-1381
E-mail: dcook@nixonpeabody.com

Peter G. Ruppar (Co-Chair)
1800 Main Place Tower
Buffalo, NY 14202
(716) 855-1111
E-Mail:pruppar@dhyplaw.com

Air Quality Committee
Inger K. Hultgren (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-2242
E-Mail:hultgreni@rspab.com

Robert R. Tyson (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 218-8221
E-Mail:rtyson@bsk.com

Biotechnology and the Environment Committee
David W. Quist (Co-Chair)
P.O. Box 2272
Albany, NY 12220
(518) 473-4632
E-Mail:davidquist@earthlink.net

Vernon G. Rail (Co-Chair)
70 Suffolk Lane
East Islip, NY 11730
(631) 444-0265

Coastal and Wetland Resources Committee
Terresa M. Bakner (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7615
E-Mail:tmb@woh.com

Drayton Grant (Co-Chair)
149 Wurtemburg Road
Rhinebeck, NY 12572
(845) 876-2800
E-Mail:grantlyons@aol.com

Continuing Legal Education Committee
Robert H. Feller (Co-Chair)
111 Washington Avenue
Albany, NY 12210
(518) 533-3222
E-Mail:rfeller@bsk.com

Maureen F. Leary (Co-Chair)
The Capital
Albany, NY 12224
(518) 474-7154
E-Mail:maureen.leary@
oag.state.ny.us

Kimberlee S. Parker (Co-Chair)
111 Washington Avenue
Albany, NY 12210
(518) 462-7421
E-Mail:kparker@bsk.com

James P. Rigano (Co-Chair)
1393 Veterans Memorial Highway
Suite 301S
Hauppauge, NY 11788
(631) 979-3000
E-Mail:jrigano@certilmanbalin.com

Corporate Counsel Committee
George A. Rusk (Chair)
368 Pleasantview Drive
Lancaster, NY 14086
(716) 684-8060
E-Mail:grusk@ene.com

Energy Committee
Kevin M. Bernstein (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 422-0121
E-Mail:kbernstein@bsk.com

William S. Helmer (Co-Chair)
30 S. Pearl Street, 10th Floor
Albany, NY 12207
(518) 433-6723
E-Mail:helmer.b@nypa.gov

Enforcement and Compliance Committee
George F. Bradlau (Co-Chair)
P.O. Box 541
18 Washington Street, 2nd Floor
Morristown, NJ 07963
(973) 656-1800
E-Mail:gbradlau@
thebradlaugroup.com

Dean S. Sommer (Co-Chair)
Executive Woods
5 Palisades Drive
Albany, NY 12205
(518) 438-9907
E-Mail:dsommer@youngsommer.com

Environmental Business Transactions Committee
Louis A. Evans (Co-Chair)
900 Third Avenue
New York, NY 10022
(212) 508-6736
E-Mail:evans@tanhelp.com

Joshua M. Fine (Co-Chair)
59-17 Junction Boulevard, 19th Floor
Flushing, NY 11373
(718) 595-5650
E-Mail:jfine@dep.nyc.gov

Jeffrey B. Gracer (Co-Chair)
237 Park Avenue
New York, NY 10017
(212) 880-6262
E-Mail:jgracer@torys.com

Environmental Impact Assessment Committee
Mark A. Chertok (Co-Chair)
460 Park Avenue, 10th Floor
New York, NY 10022
(212) 421-2150
E-Mail:mchertok@sprlaw.com

Kevin G. Ryan (Co-Chair)
10 Circle Avenue
Larchmont, NY 10538
(914) 833-8378
E-Mail:kevingryan@cs.com

Environmental Insurance Committee
Gerard P. Cavaluzzi (Co-Chair)
104 Corporate Park Drive
P.O. Box 751
White Plains, NY 10602
(914) 641-2950
E-Mail:gcavaluzzi@pirnie.com

Daniel W. Morrison, III (Co-Chair)
One North Lexington Avenue
White Plains, NY 10601
(914) 287-6177
E-Mail:dwm@bpslaw.com

Environmental Justice Committee
Peter M. Casper (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7600
E-Mail:pcasper@woh.com

Eileen D. Millett (Co-Chair)
311 West 43rd Street, Suite 201
New York, NY 10036
(212) 582-0380
E-Mail:emillett@iec-nynjct.org

***Journal* Committee**
Kevin Anthony Reilly (Chair)
Appellate Division, 1st Dept.
27 Madison Avenue
New York, NY 10010
(212) 340-0404

Global Climate Change Committee
Antonia Levine Bryson (Co-Chair)
475 Park Avenue South, 16th Floor
New York, NY 10016
(212) 483-9120
E-Mail:abryson@worldnet.att.net

J. Kevin Healy (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-1078
E-Mail:jkhealy@bryancave.com

Hazardous Waste/Site Remediation Committee

David J. Freeman (Co-Chair)
75 East 55th Street
New York, NY 10022
(212) 318-6555
E-Mail:davidfreeman@paulhastings.com

Lawrence P. Schnapf (Co-Chair)
55 East 87th Street, Suite 8B
New York, NY 10128
(212) 756-2205
E-Mail:lschnapf@aol.com

Historic Preservation, Parks and Recreation Committee
Jeffrey S. Baker (Co-Chair)
5 Palisades Drive
Albany, NY 12205
(518) 438-9907, x227
E-Mail:jbaker@youngsommer.com

Dorothy M. Miner (Co-Chair)
400 Riverside Drive
New York, NY 10025
(212) 866-4912

International Environmental Law Committee
John French, III (Co-Chair)
33 East 70th Street, Suite 6-E
New York, NY 10021
(212) 585-3123
E-Mail:tudorassoc@aol.com

Daniel Riesel (Co-Chair)
460 Park Avenue, 10th Floor
New York, NY 10022
(212) 421-2150
E-mail:driesel@sprlaw.com

Constantine Sidamon-Eristoff (Co-Chair)
750 Lexington Avenue, 4th Floor
New York, NY 10022
(212) 872-1500
E-Mail:cseristoff@lltlaw.com

Internet Coordinating Committee
Alan J. Knauf (Co-Chair)
975 Crossroads Building
2 State Street
Rochester, NY 14614
(585) 546-8430
E-Mail:aknauf@nyenvlaw.com

Robert S. McLaughlin (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 218-8179
E-Mail:mclaugr@bsk.com

Land Use Committee
Rosemary Nichols (Co-Chair)
240 Clifton Corporate Parkway
Clifton Park, NY 12065
(518) 383-0059, x130
E-Mail:rosemary_nichols@dcgdevelopment.com

Michael D. Zarin (Co-Chair)
81 Main Street, Suite 415
White Plains, NY 10601
(914) 682-7800
E-Mail:mzarin@zarin-steinmetz.net

Legislation Committee
Philip H. Dixon (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7726
E-Mail:pdixon@woh.com

Prof. Joan Leary Matthews (Co-Chair)
80 New Scotland Avenue
Albany, NY 12208
(518) 472-5840
E-Mail:jmatt@mail.als.edu

Membership Committee
David R. Everett (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7600
E-Mail:dre@woh.com

Eric D. Most (Co-Chair)
120 Wall Street
New York, NY 10005
(212) 361-2400
E-Mail:most@informinc.org

Pesticides Committee
Telisport W. Putsavage (Chair)
1990 Old Bridge Road, Suite 202
Lake Ridge, VA 22192
(703) 492-0738
E-Mail:putsavage@chemlaw.com

Pollution Prevention Committee
Dominic R. Cordisco (Co-Chair)
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550

(845) 569-4329
E-Mail:dcordisco@yahoo.com

Shannon Martin LaFrance (Co-Chair)
1 Civic Center Plaza, Suite 501
Poughkeepsie, NY 12601
(845) 473-7766
E-Mail:slafrance@
rapportmeyers.com

Public Participation, Intervention and Alternative Dispute Resolution Committee
Jan S. Kublick (Co-Chair)
500 South Salina Street, Suite 816
Syracuse, NY 13202
(315) 424-1105
E-Mail:jsk@mkms.com

Terrence O. McDonald (Co-Chair)
18 Washington Street, 2nd Floor
Morristown, NJ 07963
(973) 656-1800
E-Mail:
tmcdonald@thebradlaugroup.com

Solid Waste Committee
John Francis Lyons (Co-Chair)
149 Wurtemburg Road
Rhinebeck, NY 12572
(845) 876-2800
E-Mail:grantlyons@aol.com

Michael G. Sterthous (Co-Chair)
One Commerce Plaza, Suite 1900
Albany, NY 12260
(518) 487-7620
E-Mail:mgs@woh.com

Toxic Torts Committee
Stanley Norman Alpert (Co-Chair)
180 Maiden Lane
New York, NY 10038
(212) 558-5802
E-Mail:salpert@weitzlux.com

Cheryl P. Vollweiler (Co-Chair)
150 East 42nd Street, 23rd Floor
New York, NY 10017
(212) 490-3000, x2674
E-Mail:vollweilerc@wemed.com

Transportation Committee
William C. Fahey (Co-Chair)
3 Gannett Drive, Suite 400
White Plains, NY 10604
(914) 323-7000, x4183
E-Mail:faheyw@wemed.com

Prof. Philip Weinberg (Co-Chair)
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6628
E-Mail:weinberp@stjohns.edu

Water Quality Committee
Robert M. Hallman (Co-Chair)
80 Pine Street
New York, NY 10005
(212) 701-3680
E-Mail:rhallman@cahill.com

George A. Rodenhausen (Co-Chair)
1 Civic Center Plaza, Suite 501
Poughkeepsie, NY 12601
(845) 473-7766
E-Mail:grodenhausen@
rapportmeyers.com

Task Force on Legal Ethics
Roger Raimond (Co-Chair)
1345 Avenue of the Americas
31st Floor
New York, NY 10105
(212) 586-4050
E-Mail:rar@robinsonbrog.com

Marla B. Rubin (Co-Chair)
P.O. Box 71
Mohegan Lake, NY 10547
(914) 736-0541
E-Mail:mbrbold@mindspring.com

Task Force on Mining and Oil and Gas Exploration
Dominic R. Cordisco (Co-Chair)
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550
(845) 569-4329
E-Mail:dcordisco@yahoo.com

Laura Zeisel (Co-Chair)
One Corwin Court
Newburgh, NY 12550
(845) 565-1100
E-Mail:lzeisel@dsltc.com

Task Force on Navigation, Petroleum and Related Issues
Christopher J. Dow (Co-Chair)
300 Linden Oaks, Suite 220
Rochester, NY 14625
(585) 899-6030
E-Mail:cjd@devorsetzlaw.com

Alan J. Knauf (Co-Chair)
975 Crossroads Building
2 State Street
Rochester, NY 14614
(585) 546-8430
E-Mail:aknauf@nyenvlaw.com

Publication—Editorial Policy—Subscriptions

Persons interested in writing for this *Journal* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Journal* are appreciated.

Publication Policy: All articles should be submitted to me and must include a cover letter giving permission for publication in this *Journal*. We will assume your submission is for the exclusive use of this *Journal* unless you advise to the contrary in your letter. If an article has been printed elsewhere, please ensure that the *Journal* has the appropriate permission to reprint the article. Authors will be notified only if articles are rejected. Authors are encouraged to include a brief biography.

For ease of publication, articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced. Please spell-check and grammar-check submissions.

Editorial Policy: The articles in this *Journal* represent the author's viewpoint and research and not that of the *Journal* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscriptions: *The New York Environmental Lawyer* is available by subscription to law libraries. The subscription rate for 2005 is $100.00. For further information contact the Newsletter Dept. at the Bar Center, (518) 463-3200.

Publication Submission Deadlines: On or before the 1st of March, June, September and December each year.

Kevin Anthony Reilly

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

Editor: James Deniston

Contributors:
Brian P. Mitchell
Anna Livia Mott
Christian Sterling

THE NEW YORK ENVIRONMENTAL LAWYER

This publication is published for members of the Environmental Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. The views expressed in articles in this publication represent only the authors' viewpoints and not necessarily the views of the Editor or the Environmental Law Section.

ISSN 1088-9752

Environmental Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

Printed on Recycled Paper