NYSBA FALL 2000 | VOL. 20 | NO. 3

The New York Environmental Lawyer

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

NYSBA Environmental Law Section
1980 - 2000
20 YEARS
Of Protecting New York's Environment

A Message from the Section Chair

Singing for Our Environment

I had just barely seen my first Chair's column in print when Kevin Reilly (the Editor-in-Chief) called to tell me that my next column was due. Panic set in—what could I write about? I then remembered a pledge I had made five years ago to my good friend Alice Kryzan (former Section Chair) when I learned that I was to become an officer of the Section and, eventually, the Chair. I had proclaimed to Alice that I would happily serve as the Section's Chair, but I was going to dispense with the Chair's column for the Section journal because I did not believe I had the ability of Michael Gerrard (former Section Chair) to whip out a three-volume treatise on a moment's notice, nor did I have Larry Schnapf's stockpile of articles on virtually any environmental topic one can imagine. Moreover, at the time, I was convinced that in the year 2000 no one would be particularly interested in my philosophical musings on the state of environmental law. (Indeed, Mike Lesser recently admitted to me that he had only gotten through the first couple of paragraphs of my last column; although, he did promise to go back and read the whole thing.) And, unlike former Section Chair Dan Riesel, I simply did not feel competent to write about sex and the environment (or was it "romance" and the practice of environmental law about which Dan had written his column?).

Five years later and one column down, I have decided that the Chair's column is too important a part of the Section's tradition to dispense with it so lightly. For inspiration, I called Kevin Reilly and asked him how he came up with topics for his column when he got writer's block. Kevin confided in me that he generally waited for the Chair to finish his or her column and then he plucked out the highlights and turned it into his Editor's column. Thanks for the help, Kevin.

That was my state of affairs until last night when, on my way to the subway, I noticed that Avenue of the Americas (from 48th Street to 52nd Street) was lit up like a Christmas tree and was totally abuzz with activity. The sidewalk was teaming with people dressed in all sorts of curious outfits (mostly black) and sporting day-glow colored hair; stretch limousines were plentiful, police barricades lined the street and music was in the air! The 2000 MTV Video Music Awards were being

Inside

NYSBA

broadcast live from Radio City Music Hall, just down the block from the entrance to the subway station. As I began to skip down the sidewalk to the rhythm of a catchy Jennifer Lopez tune, it came to me in a flash: if Lou Alexander could write an article on "environmental" movies for this publication (Fall 1999, Vol. 19, No. 4), why couldn't my column be on "popular" music with environmental themes. Okay, now I had a topic, but somewhere in my euphoria I had forgotten that I really haven't followed "popular" music since my college days and, even as to the music of the 60s and 70s, I could only guess the correct performer of a recognizable song I heard on the radio about 50% of the time. So, I did what I always do when I need help—I turned to one of my associates, Eric Most (a big music buff and the Section's co-chair of Membership) and asked for assistance.

Here are the songs we came up with:

1. ***Big Yellow Taxi***, Joni Mitchell—"They paved paradise, and they put up a parking lot." A song about open space, land use and the need for an adequate environmental impact statement with appropriate mitigation measures.
2. ***Where Have All the Flowers Gone***, Pete Seeger—A song about the loss of biodiversity and the importance of our critical environmental areas and ecosystems.
3. ***Downeaster "Alexa,"*** Billy Joel—"I know there's fish out there but where God only knows. They say these waters aren't what they used to be." A song about ocean dumping. Or maybe it is about the depletion of the ocean's fisheries.
4. ***It's the End of the World as We Know It***, R.E.M.—A song about the effects of global climate change.
5. ***To the Last Whale/Critical Mass***, David Crosby and Graham Nash—"Over the years you have been hunted by the men who threw harpoons . . . Over the years you swam the ocean, following feelings of your own, now you are washed up on the shoreline, I can see your body lie. It's a shame you have to die." A song about potentially endangered species and depletion of the ocean's fisheries.
6. ***Saturday in the Park***, Chicago—Another song about open space and land use.
7. ***Here Comes the Sun***, The Beatles and ***Sunshine on My Shoulders***, John Denver—Two songs about the environmental benefits of solar energy.
8. ***Teach Your Children***, Crosby, Stills, Nash & Young—A song promoting the need for environmental education at an early age. That's where it all starts!
9. ***Summer Breeze***, Seals & Crofts—Another song about the benefits of alternative energy sources such wind and solar power.
10. ***Apeman***, The Kinks—"I look out my window, but I can't see the sky, 'cause the air pollution is fogging up my eyes. I want to get out of this city alive, and make like an ape man." A song about air quality and, again, the effects of global climate change.
11. ***Rocky Mountain High***, John Denver—Another song about open space, land use and air quality.
12. ***Octopus's Garden***, The Beatles—"I'd like to be under the sea in an Octopus's garden . . ." A song about our marine ecosystems and biodiversity.
13. ***Every Grain of Sand***, Bob Dylan—Is this a song about desertification or is about the clean-up standards for contaminated soils that should apply in New York State?
14. ***Shock the Monkey***, Peter Gabriel—A song about biodiversity or, maybe, animal rights?
15. ***This Land is Your Land***, Woody Guthrie—Another song about open space and land use, this time with a community activism spin. Woody Guthrie was one of the first popular artists to include "green" themes in his songs.
16. ***Leaves that are Green***, Paul Simon—Could this possibly be a song about what environmental consultants should look for during a Phase I environmental site assessment? Or is this about pesticide abuse? How about natural resource damages?
17. ***Sea and Sand***, The Who—A song about tidal wetlands and marine ecosystems.
18. ***Traffic Jam***, James Taylor—"Well I left my job about 5 o'clock [obviously not about lawyers!], it took fifteen minutes to go three blocks . . . I used to think that I was cool, running around on fossil fuel, until I saw what I was doing was driving down the road to ruin." A song about air quality or the need for an adequate traffic study in the environmental impact statement and alternative transportation modes as mitigation measures.
19. ***Everlasting Moon***, Jimmy Buffett—In Jimmy Buffett's words, "this is a song about what some people did to try to preserve the environment. . . . The sky revealed the rumor, in a misty gray

(Continued on page 4)

From the Editor

This column is being written as Labor Day fades along with another summer. Having been beset with a recent case of writer's block at the close of a productive stretch at my day job (it happens, it happens), I've anxiously awaited Gail Port's column so that I could pluck from it highlights to incorporate into my own column. However, once Gail, in her present column, let our readership in on my strategic plagiarism, I thought that it might be overly transparent if I took to quoting Gail quoting me. I also recognized, humbly, that I could never best either Gail on pop tunes or Lou Alexander on movie reviews, so my column this time will simply be devoted to telling readers about some of the useful and interesting information in this Fall's issue. That being said, though, I join Gail in her apt compliments of many of our contributors.

This issue will demonstrate the benefits of follow-up information. First, Cheryl Cundall provides an update on certificates of authorization for engineering firms. This is one of the many hybrid professional areas that permeate environmental consulting and the practice of law. Notably, many non-New York firms have sought authorization to practice engineering in New York, many of which are not registered in the state, or otherwise are not in compliance with state law. In view of the dire consequences of practicing without appropriate licensing, engineers, but also the attorneys or clients who retain them, should ensure that all documentation is in order.

Last Spring, the Section was presented with a well-attended and certainly timely Legislative Forum on pesticides, at which balanced and sophisticated information was provided by participants well-qualified to speak on the subject. That was Lou Alexander's last service as Forum organizer, although, as noted in the last issue, Lou continues his contributions to the Section elsewhere, especially as Co-chair of the Environmental Justice Committee and, indirectly, as an appointed member of DEC's Environmental Justice Advisory Group. We've now had another summer, wet and mild, and more mosquito-borne illnesses. Even if, in view of the greater information presently available on West Nile Encephalitis, the urgency seems less than last summer, the new bug is still here along with myriad other illnesses caused by insect vectors. Hence, the use, and abuse, of pesticides still has significant regional importance. Among the several excellent speakers at last Spring's Legislative Forum were Assemblyman Steven Englebright, who submitted his remarks in the last issue of the *New York Environmental Lawyer*, and Audrey Thier of Environmental Advocates, who, as another follow-up, submits her remarks for this issue.

Speaking of Lou, he thoughtfully informed us of the death of Philip Rayhill, a Section member long active in Oneida County environmental matters. Lou also drafted the obituary. Obituaries tend to be rare in our journal, either a fortunate circumstance or perhaps maybe through oversight. In my conversation with Lou, though, we discussed the need to consider providing appropriate and thoughtful notice to readers when a Section member passes, especially in view of the passage of time—a factor brought home as we celebrate 20 years of time passing with this year's Fall Meeting. This is never an easy subject, but it's a proper one. I thank Lou, not only for the present notice of Philip Rayhill's passing, but also for his prescience in discussing the more general topic.

The Section's Environmental Essay Competition has produced four winners this year—with two entries tied for third place. I believe that these winners, though, also, collectively, are a first in an unusual manner. All are from the same law school—in this case, Albany. Congratulations go to the finalists, but also, obviously, to Albany Law School for its manifest success in turning out environmental law scholars. The winners are: First Place: Galen Wilcox, "Jet Skis in the Adirondack Park"; Second Place: David Green, "Medical Monitoring: The Need For One Standard"; Third Place (tie): Robert Panasci, "The Amended Article X and New York's Competitive Market: an Overview," and Jacalyn Fleming, "Diminished Market Value of Real Property Caused by the Wrongful Acts of Another: Recovering Stigma Damages in Environmental and Toxic Tort Litigation." David Green's article appears in this issue and the others will be published in future issues of the *New York Environmental Lawyer*.

Speaking of Albany Law School, Dave Markell has returned from an interesting sojourn abroad (well, OK, to Canada), about which he published an article in the *Georgetown International Environmental Law Review*. After a longer paper chase than I realized, that law review has graciously given us permission to reprint Dave's article, which is included also in this issue. So, for those who wondered why Dave was falling behind in his "People in the News/People on the Move" feature, this article will provide an answer.

(Continued on page 4)

A Message from the Section Chair

(Continued from page 2)

cocoon. Some angry baby-boomers, stole the everlasting moon. They found a new location, clear and poison free." Need any more be said?

20. ***Hard Rain's A-Gonna Fall***, Bob Dylan—A song about nuclear weapon proliferation and the adverse environmental effects of war. (Or maybe it is foreshadowing the effects of global climate change.)

21. ***Mercy Mercy Me (The Ecology)***, Marvin Gaye—"Things ain't what they used to be. Oil wasted on the ocean and upon our seas, fish full of mercury . . . radiation under ground and in the sky. Animals and birds who live nearby are dying . . . what about this overcrowded land? How much more abuse from man can she stand?" This one certainly speaks for itself.

On a more serious note, as I write this column, planning is well underway for our Annual Meeting to be held on January 26, 2001. The co-chairs for that meeting are: Alan Knauf, David Freeman and Kevin Reilly. I am also delighted to report that Congressman Sherwood L. Boehlert, one of New York's leaders on environmental issues in the U.S. House of Representatives, has already accepted my invitation to deliver the annual luncheon keynote address to the Section on January 26th. Since that will be shortly after the election of a new President and a new Senator from New York, it will be interesting to hear Congressman Boehlert's views on what he thinks the federal environmental legislative agenda should be and how it is likely to affect New York.

See you at the Marriott Marquis in New York City on January 26th.

Gail S. Port

From the Editor

(Continued from page 3)

Jennifer Rosa from St. John's, our student editor, again shepherded the case summaries, and David R. Everett and Melissa E. Osborne provided the administrative update, a regular contribution of Whiteman, Osterman & Hanna.

Kevin Anthony Reilly

Update:
Certificates of Authorization for Engineering Firms

By Thomas W. King, Jr. and Cheryl L. Cundall

In the Winter 1999 issue of this journal, we reported on new legislation which required, effective January 1, 2000, all firms that provide engineering services to obtain a Certificate of Authorization from the State Education Department.

As of August 2000, the Office of the Professions, State Education Department, had received over 1,300 applications for a Certificate of Authorization to provide engineering services in New York State, and had issued approximately 900 certificates. The Office also reported that approximately 500 applications have been received from companies that have no business entity currently registered and authorized to provide professional engineering services in New York. These companies are being advised that they are not authorized to practice in New York and that if they are practicing, they are doing so illegally, and committing a class E felony, a crime. Most of these applications are from businesses located outside of the state. An additional 100 applications have been received from businesses that are registered to practice in New York but are not otherwise in compliance with the law for various reasons. These businesses will be advised to come into compliance or risk being prosecuted for professional misconduct.

Thomas W. King, Jr., P.E. is the Executive Secretary of the New York State Board for Engineering and Land Surveying (SBELS). He can be reached at (518) 474-3846, or at tking@mail.nysed.gov. Cheryl Cundall, P.E., Esq., is a SBELS Board Member. Ms. Cundall is also a member of the New York State Bar Association, and practices with the law firm of Bond, Schoeneck & King. She can be reached at (315) 422-0121, or ccundall@bsk.com.

REQUEST FOR ARTICLES

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

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

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

Summary of New York State Voluntary Cleanup Agreements

By Larry Schnapf

In the wake of the failure by the state legislature to once again enact comprehensive brownfield legislation, the New York Department of Environmental Conservation (DEC) is considering making administrative changes to the state VCP, which are intended to increase the number of sites that go through the program.

The DEC is considering changing the form VCP agreement to one that does not undergo negotiation. The DEC hopes that the new form of agreement will operate much like the contract used in the Environmental Restoration Project Fund program authorized by the 1996 Clean Water/Clean Air Bond Act. Except for some minor definitional changes to reflect site-specific information, the DEC does not intend to negotiate these agreements. Once DEC finalizes the new form of VCP agreement, it will be published in the Environmental Notice Bulletin (ENB)

In addition, the agency is also preparing an informal guidance document that will set forth the requirements of the VCP. Previously, the regulated community has had to rely on speeches for guidance on the scope of the program which we have termed in the past to be "rulemaking by speechmaking." It is unclear if the new guidance will change the eligibility requirements for the program. One issue that will hopefully be addressed will be the eligibility of sites subject to RCRA. EPA has announced a RCRA Brownfield Prevention Initiative and has selected a site in New York as one of four national pilots to participate in this program. EPA has established the RCRA Brownfield Prevention Initiative and RCRA Cleanup Reforms to help the agency achieve its ambitious goals under the Government Performance and Results Act (GPRA). EPA wants to stabilize releases at 1712 RCRA facilities by 2005 but to achieve this goal, many RCRA sites will have to be remediated under state voluntary cleanup programs. In other states, EPA Region offices have worked with states to allow RCRA sites to be remediated under the state VCPs. There is considerable uncertainty if RCRA sites may participate in the New York VCP. Initially, sites that were subject to corrective actions or closure were not eligible for the VCP. Interim status facilities and permitted facilities that had not yet commenced corrective action or closure were presumably eligible to participate in the VCP. However, some at the agency now believe that the EPA Region 2 Office will withdraw DEC's delegation of the RCRA program if the DEC allows RCRA facilities to participate in the VCP. This would seem to be contrary to the national goals established by the EPA office. We will continue to monitor this situation.

The DEC is also considering issuing a new informal technical guidance document which would be designed to expedite the investigation and remediation process. The guidance would not change the cleanup criteria but clarify for characterizing sites. Some environmental consultants maintain 50% of the costs of site characterization can be associated with negotiating the procedures to be used to investigate and remediate a site. By establishing a roadmap for site characterization, it is hoped that this process can be streamlined and become less time-consuming. In states where this approach has been adopted, less staff resources have to be used for each site thereby allowing case managers to handle more site cleanups. It is unclear at the time of this writing if this technical guidance will become a separate TAGM document for the VCP or if the guidance would set forth the requirements for all remediation programs. Both guidance documents will be published in the ENB.

By the time this column is published, it is likely that the DEC will be using its new form VCP agreement. As a result, we will no longer be reviewing prior VCP agreements. Instead, we have included below a draft of the proposed VCP agreement that is currently under internal review by the DEC. It is possible that the form may undergo additional changes prior to its finalization. We will review the new form in a future issue.

Larry Schnapf is a New York City-based environmental attorney and is also the founder of the Schnapf Environmental Law Center which has a Web site at http://www.environmental-law.net. He is also an adjunct professor of Environmental Law at New York Law School.

Draft of New Form of VCP Agreement

WHEREAS, the Department is responsible for enforcement of the ECL and the NL and such laws provide the Department authority to enter into this Agreement;

WHEREAS, the Department has established a Voluntary Cleanup Program to address the environmental, legal and financial barriers that hinder the redevelopment and reuse of contaminated properties;

WHEREAS, Volunteer represents, and the Department relied upon such representations in entering into this Agreement, that Volunteer's involvement with the Site is limited to the following:

WHEREAS, the parties are entering into this Agreement in order to set forth a process through which the Department will approve and the Volunteer will implement activities designed to address environmental contamination at the Site; and

WHEREAS, the Department has determined that it is in the public interest to enter into this Agreement as a means to address environmental issues at this Site with private funds while ensuring the protection of human health and the environment;

NOW, THEREFORE, IN CONSIDERATION OF AND IN EXCHANGE FOR THE MUTUAL COVENANTS AND PROMISES, THE PARTIES AGREE TO THE FOLLOWING:

I. Site Specific Definitions

For purposes of this Agreement, the terms set forth in the Glossary attached to, and made a part of, this Agreement shall have the meanings ascribed to them in that Glossary. In addition, for purposes of this Agreement, the following terms shall have the following meanings:

A. "Contemplated Use": continued use as a commercial shopping center.

B. The Site's "Existing Contamination": [includes on-site contamination known at the time of the agreement and contamination encountered during the course of this Agreement's implementation, the nature and extent of which were unknown or inadequately characterized as of the effective date of this Agreement, but which shall have been fully characterized to the Department's satisfaction.]

C. "Site": that property Exhibit "A" of this Agreement is a map of the Site showing its general location.

D. "Volunteer":

II. Development, Performance and Reporting of Work Plans

A. Work Plan Labels

The work plans ("Work Plan" or "Work Plans") under this Agreement shall be captioned as follows:

1. "Investigation Work Plan" if the Work Plan provides for the investigation of the nature and extent of contamination at the Site;

2. "Remediation Work Plan" if the Work Plan provides for the Site's remediation to cleanup levels sufficient to allow the Contemplated Use of the Site to proceed;

3. "IRM Work Plan" if the Work Plan provides for an interim remedial measure; or

4. "O&M Work Plan" if the Work Plan provides for post-remedial construction operation and maintenance.

B. Submission/Implementation of Work Plans

1. Within 30 days after the effective date of this Agreement, Volunteer shall commence implementation of the Work Plan that is attached to this Agreement as Exhibit "B," unless it is a Remediation Work Plan, in which event Volunteer shall implement the Remediation Work Plan within 30 days after approval of the Work Plan pursuant to Subparagraph II.G and, if necessary, II.C.

2. A Work Plan, other than the Work Plan described in Subparagraph I.B.1, if any, shall be submitted for the Department's review and approval and shall include, at a minimum, a chronological description of the anticipated activities, a schedule for performance of those activities, and sufficient detail to allow the Department to evaluate that Work Plan. Upon the Department's approval of such Work Plan, the Work Plan shall be incorporated into and become an enforceable part of this Agreement and shall be implemented in accordance with the schedule contained therein. If a proposed Work Plan is rejected by the Department, Volunteer shall elect in writing within ten days to: (i) modify or expand it; (ii) complete any other Department-approved Work Plan(s); (iii) invoke the dispute resolution provisions of this Agreement pursuant to Paragraph XIII; or (iv) terminate this Agreement pursuant to the provisions set forth in Subparagraph XII.

3. During all field activities, Volunteer shall have on-Site a representative who is qualified to supervise the activities undertaken.

C. Revisions to Work Plans

If revisions to a Work Plan are required to satisfy the objectives of such Work Plan, the parties will negotiate revisions which shall be attached to and incorporated into the relevant Work Plan and enforceable under this Agreement. If the parties cannot agree upon revisions to the relevant Work Plan, then either party may terminate this Agreement pursuant to Paragraph XII.

D. Submission of Final Reports

In accordance with the schedule contained in a Work Plan, Volunteer shall submit a final report containing on the cover page the caption of that Work Plan as set forth in Subparagraph II.A of this Agreement. The final report pertaining to that Work Plan's implementation shall include but not be limited to: all data generated and all other information obtained during the implementation of the subject Work Plan; all of the assessments and evaluations required by the subject Work Plan; a statement of any additional data that must be collected; "as-built" drawings, to the extent necessary, showing all changes made during construction. Additionally, the final report relative to the Investigation Work Plan shall contain a certification by the person with primary responsibility for the day-to-day performance of the activities under this Agreement that those activities were performed in full accordance with the Investigation Work Plan and all other final reports must contain such certification made by a professional engineer with primary responsibility for the day-to-day performance of the activities under this Agreement.

An O&M Plan, if necessary, shall be submitted with the final report relative to an IRM Work Plan or the Remediation Work Plan.

E . Review of Submittals

1. The Department shall notify Volunteer in writing of its approval or disapproval of each submittal. In the event the submittal is a final report relative to the implementation of a Work Plan, the Department shall state whether the submittal was prepared and whether the activities performed under this Agreement were in accordance with this Agreement and generally accepted technical and scientific principles. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. If the Department disapproves a submittal, it shall specify the reasons for its disapproval and may request Volunteer to modify or expand the submittal. Within 30 days after receiving written notice that Volunteer's submittal has been disapproved, Volunteer shall make a revised submittal that corrects the stated deficiencies. If the Department disapproves the revised submittal, the Department and Volunteer may pursue whatever remedies may be available, including dispute resolution pursuant to Paragraph XIII.

3. Within 30 days of the Department's approval of a final report, such report must be submitted to the Department in an electronic format acceptable to the Department.

F . Department's Determination of Need for Remediation

In addition to the Department's approval of the final report, the Department will determine upon its approval of each final report dealing with the investigation of the Site whether remediation, or additional remediation as the case may be, is needed to allow the Site to be used for the Contemplated Use.

1. If the Department determines that remediation, or additional remediation, is not needed to allow the Site to be used for the Contemplated Use, the Department shall provide Volunteer with the Release described in Subparagraph II.H.

2. If the Department determines that remediation, or additional remediation, is needed to allow the Site to be used for the Contemplated Use, Volunteer may, at its sole discretion, submit for review and approval a proposed Work Plan (or a revision to an existing Remediation Work Plan for the Site) which addresses the remediation of Existing Contamination. Such proposed Work Plan shall include, among other requirements, an evaluation of the proposed remedy considering the factors set forth in 6 N.Y.C.R.R. 375-1.10(c). At a minimum, the remedial activities contemplated by the proposed Work Plan must eliminate or mitigate all significant threats to the public health or environment determined to result from Existing Contamination and must be sufficient to provide for safe implementation of the Site's Contemplated Use. The Department will notice a proposed Work Plan addressing the Site's remediation for public comment in accordance with Subparagraph II.G of this Agreement. If Volunteer elects not to develop a Work Plan under this Subparagraph or either party concludes that a mutually acceptable Work Plan under this Subparagraph cannot be negotiated, then this Agreement shall terminate in accordance with Paragraph XII.

G. Notice of Proposed Work Plan for the Site's Remediation

Whenever a Work Plan for the Site's remediation (other than an IRM Work Plan) is proposed, the Department will publish a notice in the Environmental Notice Bulletin to inform the public of the opportunity to submit comments on the proposed Work Plan within 30 days after the date of the issue in which the notice appears. The Department shall mail an equivalent notice to **[identify municipalities to be notified]**. The Department will notify Volunteer following the close of the public comment period whether the proposed Work Plan needs to be revised. If the Department determines that revisions are necessary to protect human health or the environment for the Contemplated Use, Volunteer agrees to negotiate revisions to the proposed Work Plan in accordance with Paragraph II.D. If the Department determines that no revisions are required, then the Work Plan shall be attached hereto as Exhibit "B."

H. Release and Covenant Not to Sue

Upon the Department's determination that it is satisfied with the implementation of the Agreement, and further satisfied that no remedial activities other than those previously conducted at the Site, if any, are necessary for the Contemplated Use to proceed with protection of human health and the environment after receipt of a final report relating to the investigation of the Site, the Department shall, upon proof of Volunteer's compliance with Paragraph X, provide Volunteer with a Release and Covenant Not to Sue which is substantially similar to the one attached hereto as Exhibit "C," subject to the terms and conditions stated therein.

III. Progress Reports

Volunteer shall submit written monthly progress reports to the parties identified in Subparagraph XI.A.1 by the tenth day of each month until the Termination Date. Such reports shall, at a minimum, include: all actions taken pursuant to this Agreement during the previous month and those anticipated for the next month; all results of sampling and tests and all other data received or generated by Volunteer or Volunteer's contractors or agents in the previous month, including quality assurance/quality control information; and information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule, and efforts made to mitigate such delays.

IV. Enforcement

This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York. Volunteer shall not suffer any penalty or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement as a result of a Force Majeure Event provided it notifies the Department in writing within ten business days of when it obtains knowledge of any such event. Volunteer shall include in such notice the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteer shall have the burden of proving by a preponderance of the evidence that an event qualifies as a defense to compliance pursuant to this Paragraph.

V. Entry upon Site

Volunteer hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer, by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to the matters addressed in a Department-approved Work Plan, and any agent, consultant, contractor or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site. Upon request, Volunteer shall permit the Department full access to all non-privileged records relating to matters addressed by this Agreement and to job meetings. Raw data is not considered privileged and that portion of any privileged document containing raw data must still be provided to the Department.

VI. Payment of State Costs

A. Within 30 days after receipt of an itemized invoice from the Department, Volunteer shall pay to the Department a sum of money which shall represent reimbursement for the State's expenses for work performed at or in connection with the Site prior to the effective date of this Agreement, as well as for negotiating this Agreement and all costs associated with this Agreement, but not including any expenses incurred by the State after the Termination Date. Each such payment shall be made by certified check payable to the Department of Environmental Conservation and shall be sent to: Bureau of Program Management, Division of Environmental Remediation, New York State Department of Environmental Conservation, 50 Wolf Road, Albany, NY 12233-7010.

   Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports.

VII. Reservation of Rights

A. Except as provided in the Release and Covenant Not to Sue (Exhibit "C") after its issuance, nothing contained in this Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights including, but not limited to, the right to recover natural resources damages, the right to take any investigatory or remedial action deemed necessary, and the right to exercise summary abatement powers with respect to any party, including Volunteer.

B. This Agreement may be terminated by the Department if Volunteer fails to comply substantially with its terms and conditions.

C. Except as otherwise provided in this Agreement, Volunteer specifically reserves all defenses under applicable law respecting any Departmental assertion of remedial liability against Volunteer, and further reserves all rights respecting the enforcement of this Agreement, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Agreement or Volunteer's compliance with it shall not be construed as an admission of liability, fault or wrongdoing by Volunteer, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

D. Except as provided in Subparagraph XIV.L, Volunteer reserves such rights as it may have to seek and obtain contribution and/or indemnification from its insurers and from other potentially responsible parties or their insurers for past or future response costs.

VIII. Indemnification

Volunteer shall indemnify and hold the Department, *the Trustee*, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement except for liability arising from willful, wanton or malicious acts or acts constituting gross negligence by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Agreement.

IX. Notice of Sale or Conveyance

A. Within 30 days after the effective date of this Agreement, Volunteer shall file the Notice of Agreement, which is attached to this Agreement as Exhibit "D," with the County Clerk in the county in which the Site is located and provide evidence of such filing to the Department. Volunteer may terminate such Notice on or after the Termination Date.

B. If Volunteer proposes to convey the whole or any part of Volunteer's ownership interest in the Site, Volunteer shall, not fewer than 60 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Agreement.

X. Deed Restriction

Within 60 days of the Department's approval of the Remediation Work Plan which relies upon institutional controls, Volunteer shall record a Department-approved instrument to run with the land with the County Clerk in the county in which the Site is located which is substantially similar to Exhibit "E" attached to this Agreement, and shall provide the Department with a copy of such instrument certified by such County Clerk to be a true and faithful copy. The Volunteer may petition the Department to terminate the deed restriction filed pursuant to this Paragraph when the Site is protective of human health and the environment for residential uses without the reliance upon the restrictions set forth in such instrument. The Department will not unreasonably withhold its approval of such petition.

XI. Communications

A. All written communications required by this Agreement shall be transmitted by United States Postal Service, by private courier service, or hand delivered.

1. Communication from Volunteer shall be sent to:

2. Communication to be made from the Department to Volunteer shall be sent to:

B. The Department and Volunteer reserve the right to designate additional or different addressees for communication on written notice to the other.

XII. Termination of Agreement

In the event a party elects to terminate this Agreement, it shall terminate effective the date of either party's written notification terminating this Agreement, except that such termination shall not affect the provisions contained in Paragraphs IV, VI and VIII and in Subparagraph XIV.L, nor Volunteer's obligation to ensure that it does not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any remedial activities were commenced, which provisions and obligation shall survive the termination of this Agreement.

XIII. Dispute Resolution

Volunteer may commence dispute resolution within ten days of Volunteer's receipt of the Department's notice of disapproval of a submittal or proposed Work Plan. Volunteer shall serve upon the Department a request for the appointment of an ALJ and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis or opinion supporting its position, and all supporting documentation upon which Volunteer relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position no later than ten days after receipt of Volunteer's Statement of Position. Volunteer shall have the burden of proving by a preponderance of the evidence that the Department's position should not prevail. Upon review of the Administrative Record, the ALJ shall issue a final decision and order resolving the dispute. The ALJ's decision and order shall constitute a final agency action and Volunteer shall have the right to seek judicial review of the decision pursuant to article 78 of the CPLR if Volunteer commences such proceeding no later than 30 days after receipt of a copy of the decision. The invocation of dispute resolution shall not extend, postpone or modify Volunteer's obligations under this Agreement with respect to any item not in dispute unless or until the Department agrees or a court determines otherwise. The Department shall keep an administrative record which shall be available consistent with the New York State Freedom of Information Law.

XIV. Miscellaneous

A. 1. Volunteer hereby certifies that all information known to Volunteer and all information in the possession or control of Volunteer and its agents which relates in any way to the contamination existing at the Site on the effective date of this Agreement, and to any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Site, and to its application for this Agreement has been fully and accurately disclosed to the Department.

2. If the information provided and certifications made by Volunteer are not materially accurate and complete, this Agreement, except with respect to the provisions of Paragraphs IV, VI and VIII and Subparagraph XIV.L, at the sole discretion of the Department, shall be null and void *ab initio* 15 days after the Department's notification of such inaccuracy or incompleteness and the Department shall reserve all rights that it may have, unless, however, Volunteer submits information within that 15-day time period indicating that the information provided and the certifications made were materially accurate and complete.

C. Each party shall have the right to take samples and to obtain split samples, duplicate samples, or both, of all substances and materials sampled by the other party.

D. Volunteer shall allow the Department to attend and shall notify the Department at least 5 working days in advance of any field activities to be conducted pursuant to this Agreement as well as any prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

E. Volunteer shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Volunteer's obligations under this Agreement, except that the Department may exempt Volunteer from the requirement to obtain any permit issued by the Department for any activity that is conducted on the Site and that the Department determines satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

F. Volunteer shall not be considered an operator of the Site solely by virtue of having executed and/or implemented this Agreement.

G. Volunteer shall provide a copy of this Agreement to each contractor and subcontractor hired to perform work required by this Agreement and to each person representing Volunteer with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement.

H. The paragraph headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any provisions of this Agreement.

I. 1. The terms of this Agreement shall constitute the complete and entire Agreement between the Department and Volunteer concerning the implementation of the work plan(s) attached to this Agreement. No term, condition, understanding or agreement purporting to modify or vary any term of this Agreement shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement. In the event of a conflict between the terms of this Agreement and any Work Plan submitted pursuant to this Agreement, the terms of this Agreement shall control over the terms of the Work Plan(s) attached as Exhibit "B." Volunteer consents to and agrees not to contest the authority and jurisdiction of the Department to enter into or enforce this Agreement.

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application to the Commissioner with copies to the parties listed in Subparagraph XI.A.

J. The remedial activities to be undertaken under the terms of this Agreement are not subject to review under the State Environmental Quality Review Act, ECL article 8, and its implementing regulations.

K. If there are multiple parties, the term "Volunteer" shall be read in the plural where required to give meaning to this Agreement. Further, the obligations of the Volunteers under this Agreement are joint and several and

the "bankruptcy" or inability to continue by any Volunteer shall not affect the obligations of the remaining Volunteer(s) to carry out the obligations under this Agreement.

L. Volunteer and its employees, servants, agents, lessees, sublessees, successors, and assigns hereby waive as against the State or the Spill Fund, and agree to indemnify and hold harmless the Spill Fund from, any and all legal or equitable claims, suits, causes of action, or demands whatsoever with respect to the Site.

M. The effective date of this Agreement shall be the date it is signed by the Commissioner or his designee.

DATED:

JOHN P. CAHILL, COMMISSIONER
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

_____

CONSENT BY VOLUNTEER

Volunteer hereby consents to the issuing and entering of this Agreement, waives Volunteer's right to a hearing herein as provided by law, and agrees to be bound by this Agreement.

Volunteer's Name

By:_____

Title:_____

Date:_____

STATE OF NEW YORK)

) s.s.:

COUNTY OF)

On the _____ day of _____, in the year 2000, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

_____

Signature and Office of individual taking acknowledgment

Talk Before the Environmental Law Section of the New York State Bar Association

May 3, 2000

By Audrey Thier

The use of synthetic pesticides, a phenomenon of the post World War II era, poses a unique legal and regulatory dilemma. Pesticides are poisons, selected precisely for their ability to kill, damage, or repel living organisms. By their nature as poisons, they pose a laundry list of hazards. Many are neurotoxic, causing both acute illness and chronic neurological degeneration (including strong associations with Parkinson's disease). Recent research also indicates that certain classes of pesticides may impede normal brain development at levels too low to cause typical poisoning symptoms. These findings lead, in part, to the United States Environmental Protection Agency's (EPA) recent ban on virtually all non-agricultural uses of the chlorpyrifos, the most heavily used pesticide in New York State. In addition, approximately one-third of all pesticide active ingredients have been classified by the United States Environmental Protection Agency as known or suspected carcinogens, and the cancers most commonly associated with pesticides in the epidemiological literature are those, such as non-Hodgkin's lymphoma, whose incidence rates have risen dramatically in recent decades. Pesticides have also been implicated in birth defects, impaired fertility, immune and endocrine system disruption, and harm to wildlife.

Unlike other forms of environmental contamination that may also pose such a range of risks, pesticides are not the incidental byproducts of an unrelated process. They are intentionally released into the environment—dispersal is inherent to their function. And once released, they can persist as residues on food crops, seep into groundwater, run off into surface water, drift onto neighboring properties, evaporate and hang in outdoor air, or dissolve in rainwater, snow, fog and dew. If applied indoors they cling to upholstery, rugs, and curtains, persisting for months or even longer.

The capacity of toxic pesticides to contaminate both our personal and general environment means that we have had to construct an elaborate machinery to literally chase after them once they are released in order to document, assess, and mitigate their harm. Programs for applicator certification, enforcement, product registration, food residue sampling, and water monitoring are all made necessary by our purposeful use of these contaminants. And as large a societal expense as these programs represent, they are nevertheless chronically underfinanced and understaffed—inadequate to their Sisyphean task.

It is long past time for us as a society to ask the most glaring and fundamental question about pesticide use: should we be forced to shoulder this kind of risk and this kind of expense just because the market will bear it?

Should we, for example, allow the use of toxic chemicals for the frivolous purpose of lawn care—an application that is, in terms of public health, all risk and no benefit? Thirty to forty years ago, such a practice was unknown—everyone had an organic lawn. The marketing boom in lawn care pesticides has manufactured its own new chemical aesthetic, creating a source of hazard where there was none before.

Should we allow the continued use of pesticides where successful alternatives exist? This question is legitimately posed for virtually all pesticide uses. Yet our statutes and regulations take pesticide use as a given, and have no mechanism for encouraging the development or implementation of non-chemical means of pest management.

Should we institutionalize the precautionary principle? Rather than wait for proof of harm after widespread use and exposure (proof that is notoriously difficult to come by with crude epidemiological tools and the confounding effects of multiple exposures), ought we not instead refuse to allow chemicals to be used until proof of safety is established? This is the model we follow for pharmaceutical approvals and yet pharmaceuticals are administered with a conscious awareness of potential risk and affect only the individual who has made the choice to shoulder that risk. In contrast, pesticide exposure occurs, as often as not, without our awareness or consent. In this way it is analogous to secondhand smoke, which our society has wisely restricted in recent years.

The case of EPA's ban on chlorpyrifos is again illustrative. It was not until after approximately three decades of use, and after having become the single most common pesticide used in New York State, that regulators declared it too hazardous for use in non-agricultural settings. Far from giving comfort, this action, however laudable, should give us pause as we consider the multitude of pesticides to which we are daily exposed but which have not undergone the same scrutiny as chlorpyrifos.

There will always be a need for pest control. But pest control is not synonymous with pesticides. As long as we persist in allowing it to be defined this way, and as long as reforms that would effect even minor changes in pesticide law entail years of pitched effort to bring to fruition, we will continue to be subjected to gratuitous risk. In order to make real progress, we need changes in state statute and policy that:

- presumptively favor non-chemical pest control with bans on the most hazardous pesticides and pesticide phase-outs;
- support those farmers and pest managers that practice alternative approaches, through procurement policies and research money;
- require that those pest managers who rely on pesticides be trained in alternatives so that they can earn a livelihood without compromising their health and ours;
- establish "polluter pays" taxes or fees on pesticide manufacturers sufficient to fully fund pesticide regulatory and cleanup programs.

The good news about pesticides remains the wealth of alternatives to them. Pesticide risks are avoidable with the exercise of a little political will. That political will is being demonstrated across the state as one municipality after another passes policies that phase out the use of pesticides. Due to state primacy in matters of pesticide regulation, however, these municipalities can only influence their own proprietary use of chemicals. It is now time for our state leaders to step up and implement similarly fundamental reforms to New York's pesticide statutes and regulations.

Audrey Thier is Pesticide Project Director, Environmental Advocates.

Announcing:

2001 Environmental Law Essay Contest

The Contest:
The first prize essay will be published by the New York State Bar Association, and the second and third prize essays will be considered for publication. All three winners will also receive an invitation to the Fall 2001 conference of the Environmental Law Section.

Topic:
Any topic in environmental law.

Eligibility:
Contest open to all students enrolled in a New York State law school. Essays may have been submitted for course credit or for law reviews, but not as part of paid employment.

Length:
Maximum length, 35 double-spaced pages (including footnotes, which may be single-spaced).

Format:

Each entrant *MUST* submit a hard copy *AND* a disk (together) in either Microsoft Word or WordPerfect 5.0.

Judging:
Criteria for judging entries will be: organization, practicality, originality, quality of research, clarity of style. Entries will be judged by environmental law professors from throughout the state and other distinguished members of the Environmental Law Section.

Prizes:

First Prize –	$1,000
Second Prize –	$ 500
Third Prize –	$ 250

To Enter:
Send entry to Environmental Law Essay Contest, New York State Bar Association, One Elk Street, Albany, New York 12207. Put only your social security number on your entry—do not put your name or your school. Include with your entry a cover letter stating your name, mailing addresses (both school and permanent), telephone number, social security number, name of school, and year of graduation. This letter should also certify that the essay was not written as part of paid work. No more than one entry per student per year is allowed.

Deadline:
June 1, 2001 (Winners will be announced by September 15, 2001.)

For Further Information:
Contact your environmental law professor or Miriam Villani, Farrell Fritz, P.C., EAB Plaza, Uniondale, New York 11556 (516-227-0607).

Medical Monitoring: The Need for One Standard

By David Green

I. Introduction

The common law cause of action for medical monitoring has yielded varying results among state and federal[1] courts since its recognition in 1987.[2] The primary concern has been how to accommodate victims of toxic exposure in connection with our understanding of traditional tort law. Medical monitoring damages have developed solely to compensate for future expenses that arise as a result of the plaintiffs' need to diagnose a disease that has not yet developed.[3] Typically, "medical monitoring refers to periodic screening tests for unimpaired individuals who have been exposed to a toxic substance and are allegedly at an increased risk of developing some disease in the future."[4] "These screening tests are designed to detect 'latent diseases' before they become symptomatic and consequently problematic, in hope that such detection will allow a more favorable treatment outcome."[5]

However, costs of medical monitoring in the legal context are generally not recoverable because, by definition, the plaintiff has suffered no symptomatic injury or impairment.[6] Historically, enhanced risk itself is not compensable.[7] In contrast however, claims for medical monitoring have been successful based on the risk of some future harm, despite the fact that this has been traditionally insufficient to support a claim in tort.[8] The New Jersey Supreme Court in *Ayers* asserted that a claim for medical monitoring stands on different footing than an enhanced risk claim because the former attempts to compensate only the cost of medical care that might facilitate early diagnosis and treatment of disease, while the latter forces judges and juries to speculate about damages that may never occur.[9] The court in *Ayers* is not alone in taking this position. The author of an oft-cited article concurs, stating that claims for enhanced risk are indeed speculative because no injury exists.[10] By contrast, however, claims for medical monitoring do involve a present injury because plaintiffs are seeking compensation for readily ascertainable costs to be expended upon what can be verified as a reasonably necessary medical procedure.[11] The controversy turns on what constitutes an injury, and consequently has led courts to interpret medical monitoring claims with varying standards and therefore varying results.[12]

To date, some states permit recovery for the costs of monitoring medical conditions allegedly caused by exposure to toxic or hazardous substances, while others do not. Those states whose highest courts have allowed such recovery are California,[13] New Jersey,[14] Pennsylvania,[15] and Utah.[16] The highest court of only one state, Delaware, has rejected medical monitoring.[17] In addition to the five states whose highest courts have specifically allowed or rejected recovery, various other intermediate appellate courts[18] and federal courts have followed the lead and permitted claims.[19] Lately, courts have been inclined to allow medical monitoring, however, there still exists discrepancies. Every jurisdiction seemingly has taken a slightly different stance. Therefore, there exists a need for one standard to eliminate the uncertainty involved with medical monitoring claims.

Part II of this article will explore the historical development of medical monitoring and the treatment it has been given in various jurisdictions across the country.[20] Additionally, part II will evaluate the numerous standards that have been applied to medical monitoring claims and the effects of each.[21] In part III particular attention will be given to New York and the conflicts that exist within that state alone.[22] Furthermore, part IV will address how an injury should be defined so that it does not offend the traditional notion of tort law. Part V will then discuss the policy reasons[23] for recognizing a cause of action for medical monitoring and in part VI how damages are awarded.[24] The article will conclude in part VII by suggesting one standard that should be universally accepted across the nation.

II. Development of Case Law

A. Courts that Allow Medical Monitoring Without a Present Physical Injury

1. *Askey v. Occidental Chem. Corp.*

In 1984 New York's Fourth Department Appellate Court made an early attempt to define the conditions for which medical monitoring damages are available.[25] In *Askey v. Occidental Chem. Corp.* plaintiffs proposed a class action of nearly three thousand individuals within a nine square mile area adjacent to Three Mile Island, alleging that pollution from Three Mile Island was spreading by means of airborne dust particles, creating a health risk to the community.[26] "The plaintiffs were allowed to proceed with their claim for medical monitoring and presented expert testimony showing 'invisible genetic damage' and biochemical lesion . . . in the complex double-helix of human DNA in the nucleus of a cell . . . that leads to cancer or other health effects."[27] The *Askey* court concluded that if a plaintiff seeks medical monitoring, he must establish with a degree of reasonable medical certainty through expert testimony that such expenditures are reasonably anticipated to be incurred by reason of their exposure.[28]

Therefore, "*Askey* does not require the plaintiff to prove any increased risk of disease. It stands for the proposition that medical monitoring expenses are compensable merely if the plaintiff offers expert testimony that such expenses are probable."[29] However, expert testimony probably would not be available if it were not for the increased risk of disease and subsequent need for medical monitoring. This illustrates the close relationship among the elements that separate much of the case law discussed regarding medical monitoring. The dilemma is that under a traditional tort perspective when no present injury exists, no damages can be established. Therefore, the case must be dismissed. However, an alternative theory applied in *Askey* is that liability grows out of the invasion of the body by the foreign substance, with the assumption being that the substance acts immediately upon the body setting in motion the forces which eventually result in disease.[30] If it were not for the defendant's negligence and the resulting enhanced risk of disease the expenditures necessary for medical monitoring by the victim would not be necessary.

2. *Ayers v. Jackson Township*

In 1987 the New Jersey Supreme Court decided *Ayers v. Jackson Township*.[31] It is the first published decision in which the court specifically articulated a list of factors necessary to support a claim for medical monitoring.[32] There, Jackson Township operated the Legler landfill which contaminated the drinking water of 339 local residents.[33] The case eventually made its way to the New Jersey Supreme Court and the plaintiffs prevailed.[34] The Court awarded the plaintiffs approximately $8 million in medical monitoring, setting forth a list of four factors to consider.[35]

> [The court held] that the cost of medical [monitoring] is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, [assuming monitoring] the effect of exposure to toxic chemicals is reasonable and necessary.[36]

The identification of those four elements in *Ayers* provides a great deal more guidance than *Askey*, however, a great deal of confusion still remains. For example, the court dismissed the need for the plaintiff to show that the occurrence of disease was probable or even that the need for medical monitoring was reasonably necessary as in *Askey*, and instead required the plaintiff to show through expert testimony that the risk of disease, while unquantified, was significant.[37] However, the court never defined "significant," but outlined in its four-part test that the seriousness of the disease is a specific requirement. The serious disease requirement may mean that the disease is identified and that it is serious, perhaps life-threatening. Although this test essentially leaves it to a case-by-case analysis, the *Ayers* court clearly requires a toxicity analysis with the focus on the seriousness of the exposure and possible resulting illnesses.

The difficulty for the court in *Askey* was creating a principle rationale for compensating victims who demonstrated no present injury, no reasonable probability of injury, and no quantifiable risk of injury, but nevertheless were exposed to a toxic substance and suffered from an increased risk of disease as a result of the defendant's negligence.[38] Indeed, the logic seems a bit flawed because it violates traditional tort law principles, but the court reasoned that an injury is the "invasion of any legally protected interest of another" and held that an enhanced risk of disease is therefore an injury.[39] The court suggested that a legislative resolution to toxic contamination problems would probably be best, but, in its absence, the court was not going to allow these plaintiffs to go without a remedy.[40] This may sound arbitrary, but the opinion was nevertheless soon followed by several courts permitting post-exposure, pre-symptom plaintiffs to recover medical monitoring damages without proof of a quantified level of enhanced risk of disease.[41]

3. *In re Paoli R.R. Yard PCB Litig.*

In 1990 the *Ayers* test was adopted and slightly expanded upon by the Third Circuit Court of Appeals in *In re Paoli R.R. Yard PCB Litig*.[42] The Paoli railyard used polychlorinated biphenyls (PCBs) in the maintenance of railcars, resulting in a lawsuit by 38 persons who worked at the facility or lived nearby.[43] The plaintiffs had suffered a variety of illnesses, which they attributed to their exposure to PCBs. The plaintiffs sought compensation for medical monitoring because the presence of PCBs in the air and soil caused a need for continued diagnostic examinations.[44] According to the plaintiffs, they needed "periodic medical examinations that . . . are medically necessary to protect against the exacerbation of latent diseases brought about by the exposure to PCBs."[45] The Third Circuit agreed, noting that medical monitoring "is one of a growing number of nontraditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances."[46]

In support of their finding, the *Paoli* court set out a four-part test similar to *Ayers*. The court held that a cause of action for medical monitoring would be recognized by proving that: 1) plaintiff was significantly

exposed to a proven hazardous substance through the negligent actions of the defendant; 2) as a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; 3) increased risk makes periodic diagnostic medical examinations reasonably necessary; 4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.[47] These factors would all need to be proven by competent expert testimony.[48] In *Paoli* the court is looking at the impact of the exposure, by determining through expert testimony the toxicity of the exposure and the seriousness of the disease the plaintiff has an increased risk of contracting. Most importantly, however, the court then determines if appropriate diagnostic testing exists and whether the testing would be worthwhile before awarding damages.

While *Paoli* endorses the four elements set forth in *Ayers*, including increased risk of disease, the decision points out that the level of increased risk may be less than the more-likely-than-not standard.[49] "The appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer harm in the future, but rather whether medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnosis properly the warning signs of disease."[50] The importance of the *Paoli* decision is to clarify what the *Ayers* court meant by a significant increased risk of disease. Following *Paoli,* anything less than the more likely than not standard is sufficient to receive medical monitoring damages, provided it is supported by expert testimony and focuses on the elements of the four-part test outlined above. This standard was approved in *Potter v. Firestone Tire and Rubber Co.* by the California Supreme Court.[51] The court found the reasoning of *Paoli* and *Ayers* convincing and concluded that recovery of medical monitoring damages should not be dependent on a showing that a particular cancer or disease is reasonably certain to occur in the future, but rather whether medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease.[52]

Therefore, the *Paoli* test considers the necessity of medical monitoring and the existence of medical monitoring techniques that would permit the early detection of toxic-related illnesses. If no medical techniques exist that would permit early detection then the plaintiff would not be able to recover medical monitoring damages. However, if the plaintiff ever becomes sick due to the toxic exposure a claim for damages would definitely exist because a present physical injury would have surfaced. *Paoli* led to the Pennsylvania Supreme Court recognizing a common law action for medical monitoring, explaining that the "injury in a medical monitoring claim is the cost of the medical care."[53]

4. *Miranda v. Shell Oil Co.*

In 1992 *Miranda v. Shell Oil Co.* was decided.[54] There, the plaintiffs filed suit against the manufacturers of a chemical used in a pesticide that was later found in the water supply of a local school, and drank by the students and adults between 1965 and 1984.[55] The California Court of Appeals, 5th Appellate District, allowed the medical monitoring claims to proceed following an *Askey*-like analysis.[56] *Miranda* characterizes the need for medical monitoring as a "detriment,"[57] rather than defining detriment to mean a present physical injury as in the traditional sense. The court stated that medical monitoring damages are available to compensate a person for the reasonable certainty that he or she would be required to pay for prospective medical testing and evaluation.[58] Compensation is determined by establishing the reasonable costs of future medical examinations designed to achieve the prescribed testing and evaluations.[59] The court added that the cost of anticipated medical care reasonably certain to be required in the future has long been held to be a proper item of recoverable damages.[60] In the court's view, expenditures for prospective medical testing and evaluation, which would be unnecessary if the particular plaintiff had not been wrongfully exposed to pollutants, are a correlative detriment, and therefore a compensable injury.[61]

Furthermore, the *Miranda* court held that "a toxic-tort plaintiff may not recover for preventative medical care and checkups to which members of the public at large should prudently submit."[62] A plaintiff may only recover if the evidence establishes the necessity, as a result of the exposure, for specific monitoring beyond that which an individual would generally pursue using good sense and foresight.[63] The court makes clear that exposure alone is not enough. Instead, plaintiff's evidence must show that the need for medical monitoring is a reasonably certain consequence of the exposure, not simply a likelihood.

In *Miranda* the court stressed five factors in determining recovery of medical monitoring damages: 1) the significance and extent of the plaintiff's exposure to the chemicals; 2) the relative toxicity of the chemicals; 3) the seriousness of the disease for which the plaintiff is at increased risk; 4) the relative increase in the plaintiff's chances of developing a disease as a result of the exposure; and 5) the clinical value of early detection and diagnosis.[64] The emphasis with the *Miranda* test is on the toxicity of the chemical, the seriousness of the potential complications, and the relative increase in risk. In contrast to *Paoli* the *Miranda* court did not consider the existence of medical monitoring techniques that would permit early detection.[65] Furthermore in *Miranda*, the court stated that "[b]y sanctioning the recovery of medical monitoring costs we are not creat-

ing 'a new cause of action.' We simply recognize such expenditures are a legitimate element of consequential damages which flow from a tortious act and must be established by adequate proof."[66]

5. *Hansen v. Mountain Fuel Supply Co.*

In 1993, the Supreme Court of Utah announced for the first time its standard for recovery of medical monitoring costs.[67] The standard created succinctly mirrors the requirements established by courts in other jurisdictions.[68] The court held that to recover medical monitoring damages, a plaintiff must prove the following: 1) exposure 2) to a toxic substance, 3) which exposure was caused by the defendant's negligence, 4) resulting in an increased risk 5) of a serious disease, illness, or injury 6) for which a medical test for early detection exists 7) and for which early detection is beneficial, meaning that a treatment exists which can alter the course of the illness, 8) and which test has been prescribed by a qualified physician according to contemporary scientific principles.[69]

The Utah Supreme Court's test for medical monitoring brings together the tests from other jurisdictions that preceded it.[70] However, the Utah test adds one important factor, the eighth prong of the court's test. It safeguards against unnecessary payments by a negligent defendant and reserves recovery for plaintiffs where medical monitoring will truly make a difference. The eighth prong of the test states that "it is not enough that early detection and treatment are shown to be theoretically beneficial, [but] it must also be shown that administration of the test to a specific plaintiff is medically advisable for that plaintiff."[71]

> To illustrate, a monitoring regime might be of theoretical value in detecting and treating a particular illness, but if a reasonable physician would not prescribe it for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed. This conforms with the fact that the substantive injury being remedied is the defendant's, significantly increasing the plaintiff's risk of harm so that the plaintiff must incur medical monitoring expenses. Absent the advisability of monitoring for that particular plaintiff, the injury is not complete and no cause of action exists. As is the case where a test or a treatment does not exist, the plaintiff may sue when and if the illness occurs.[72]

The eighth prong of the Utah test has had a dramatic effect on those that preceded it. The requirement of a physician's recommendation in Utah is a prerequisite for recovery. Therefore, the emphasis on expert testimony is increased and claims for medical monitoring damages become truly individualized. In Utah even though two plaintiffs have identical circumstances, the results may differ based on the practical aspects of each plaintiff. For example age, lifestyle and preexisting conditions must all be considered. This consideration provides further safeguards for defendants because the Utah court has attempted to allow recovery only where the need for medical monitoring is necessary and will have an impact. This of course complicates matters because each claim must be analyzed on a case-by-case basis, but in order to be as fair as possible to both sides it is necessary.

6. *Redland Soccer Club Inc. v. Department of Army*

By 1997 the test for recovering medical monitoring damages began to take on a familiar face. In that year the Pennsylvania Supreme Court decided *Redland Soccer Club Inc. v. Department of Army*.[73] The court held that in order to recover on a medical monitoring claim a plaintiff must show 1) that there is exposure greater than normal background levels 2) to a proven hazardous substance 3) caused by the defendant's negligence; 4) that as a proximate result of the exposure, the plaintiff has a significantly increased risk of contracting a serious latent disease; 5) that a monitoring procedure exists that makes the early detection of the disease possible; 6) that the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and 7) that the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.[74] This analysis appears to have become the accepted approach among states recognizing medical monitoring claims. However, the difficulty arises in the various methods courts have decided to apply the test and the manner in which courts define an injury that would qualify for medical monitoring.

B. Cases Requiring a Present Bodily Injury

Medical monitoring damages have not, however, been universally accepted. For example, in *Villari v. Terminix International, Inc*. a federal district court sitting in diversity held that, under applicable Pennsylvania law, a plaintiff seeking costs of medical monitoring as an element of damages must demonstrate that he or she has suffered some physical injury.[75] However, the court added, "we do not understand Pennsylvania law to require that a plaintiff exhibit symptoms of the particular disease for which the medical monitoring is

sought."[76] Instead the court requires that some physical injury be present from the toxic exposure regardless of whether it is related to the disease for which medical monitoring is desired. It appears that the court's justification is that as long as one injury has resulted then future diseases are likely. Therefore, medical monitoring is appropriate. Nonetheless, a physical injury is still required before recovery is allowed. This standard is much in line with the traditional notion of tort law.[77]

In *Ball v. Joy Technologies*, *Inc*. the same result was reached when the court denied medical monitoring compensation for the plaintiffs because they could not demonstrate any present medical illness.[78] There, the defendant manufactured mining equipment with motors containing PCBs.[79] Additionally, the degreasing process used by the defendant utilized tricholoroethylene (TCE).[80] Consequently, the plaintiffs sought compensation for the costs of medical monitoring as a result of the toxic exposure to these chemicals.[81]

The court in *Ball* rejected medical monitoring damages to 18 former employees of the defendant, Joy Technologies, for two reasons. First, the court was concerned that the plaintiffs had not demonstrated that they were suffering from a present, physical injury that would entitle them to recover medical monitoring costs under West Virginia or Virginia law.[82] Secondly, the court stated that even though plaintiffs had offered several good public policy arguments for allowing individuals to recover the costs of medical monitoring where there has been no manifestation of physical injury, a switch from traditional tort notions is better left to the respective legislatures and highest courts.[83]

In *Thomas v. FAG Bearings Corp.* the prerequisite of a physical injury necessary for recovery under a medical monitoring claim was further bolstered.[84] There, plaintiffs were allegedly exposed to toxic substances due to contamination of groundwater by defendant's activities, but were denied medical monitoring because they failed to prove actual present injury and increased risk of future harm.[85] In fact a physician's opinion that medical monitoring would be an "excellent idea" was insufficient in the eyes of the court.[86] The court denied medical monitoring costs for the sole reason that no present injury existed.

The above case law requiring a present injury for medical monitoring may be in line with traditional notions of tort law; however, these cases confuse the entire concept of medical monitoring. If medical monitoring is to have its greatest impact it must come before an injury surfaces. By waiting for an injury to develop the entire purpose of medical monitoring is defeated. By the time an injury develops the preventive nature of medical monitoring is no longer needed, but rather damages to treat a condition that could have very well been avoided. Thus, courts requiring a present injury are not evaluating medical monitoring claims at all, they are outright rejecting the possibility. Instead they are adhering to the traditional notions of tort law, noting that if change is to occur it would have to be addressed by the Legislature.[87]

III. Status of Medical Monitoring in New York

New York remains one of the states where the result of a medical monitoring claim is uncertain. There is no controlling statute and the Court of Appeals, New York's highest court, has yet to address the issue. However, the Second Department has ruled that in order to maintain a cause of action for future medical monitoring costs following exposure to a toxic substance, a plaintiff must establish both that he or she was in fact exposed to the disease-causing agent and that there is a "rational basis" for his or her fear of contracting the disease.[88] The Court has interpreted rational basis as meaning a clinically demonstrable presence or physical manifestation of a toxic substance in the plaintiff's body.[89] The *Abusio* decision is not a single instance in New York. Several other courts have dismissed medical monitoring claims where no proof of physical injury exists.[90] However, the cases cited by the Second Department in support of that statement did not involve claims for medical monitoring at all, but claims seeking damages for emotional distress arising from fear of contracting a disease in the future as a result of the plaintiffs' exposure to a toxic substance.[91] This is different from medical monitoring and may explain the discrepancy regarding the results reached by the courts.

Alternatively, the Fourth Department has ruled that future medical monitoring expenses are a recoverable consequential damage if the plaintiff establishes, through expert testimony, with a reasonable degree of medical certainty that such expenditures are reasonably anticipated to be incurred by reason of their exposure.[92] In reaching that conclusion, the court relied upon *Schmidt v. Merchants Despatch Transp. Co.*,[93] in which the Court of Appeals held that a plaintiff has a cause of action immediately upon exposure to a foreign substance and can recover all damages which he can show resulted or "would result therefrom," even though at the time the action is commenced no serious damage to the plaintiff has developed.[94] Under this rule, the defendant is liable for reasonably anticipated consequential damages which may arise subsequent to the initial exposure although the invasion itself is an injury too slight to be noticed at the time it is inflicted.[95] Although the court made it clear that it is not easy to prevail on a claim for medical monitoring in the absence of a present injury, the court did not make the clinically demonstrable presence of a toxic substance in the plaintiff's body a requirement for such a claim.[96] This decision

created the possibility that a medical monitoring claim may be recognized in New York given the right circumstances.

In 1995 a federal district court sitting in New York confirmed this possibility.[97] In a case involving alleged workplace exposure to chemicals the court found that the New York Court of Appeals would recognize a cause of action for court supervised medical monitoring and screening, as long as evidence of increased risk of future harm was established.[98] Furthermore, relying on *Askey* and *Gibbs*, the United States District Court for the Western District of New York also held that a cause of action for medical monitoring existed in New York where prerequisites were met (namely expert testimony), however under the circumstances presented denied summary judgment, dismissing a medical monitoring claim in an asbestos exposure case.[99]

Therefore, even though New York's courts have not conclusively ruled on the availability of a medical monitoring claim in the absence of a present injury, the surrounding case law suggests that the New York Court of Appeals would embrace a medical monitoring claim. Additionally, the national acceptance is growing and it is probably, more than likely, only a matter of time before the New York Court of Appeals follows.

IV. Defining an Injury

The preceding cases that allow medical monitoring expenses do so in the absence of a present physical injury. Historically, a tort action in negligence required a present, bodily injury. However, the above jurisdictions have allowed recovery, in an attempt to provide fairness to victims of toxic exposure, even though a present bodily injury is absent. This has been problematic for many courts because it compromises what has traditionally been accepted as an injury in order to accommodate notions of fairness.[100] In response, court systems recognizing medical monitoring claims have attempted to stretch the traditional definition of an injury to encompass victims of toxic exposure. This has been done with mixed results.

Courts that don't require a present bodily injury all agree that an injury does exist because the invasion of the body is a legally protected interest in which recovery is permitted. However, these courts differ over how probable the development of injury or disease must be and what degree of injury a plaintiff must demonstrate at the time of the lawsuit in order to recover medical monitoring costs. On the issue of probability of injury, there are two main schools of thought. First, there are courts that are more lenient and only require a showing of increased risk.[101] In other words, all the plaintiff needs to establish is that he or she has an increased risk of contracting a disease based on their exposure to a toxic substance. It is not necessary to quantify the increased risk because the purpose of medical monitoring damages is not to compensate a plaintiff for the risk itself but to cover the costs of testing, whether or not the increased risk eventually results in a present physical injury.[102]

The key is that as long as an increased risk of disease exists requiring medical monitoring, then medical monitoring is justified. The underlying rationale supporting this view is that the actual injury is the need for medical monitoring, regardless of how certain it is whether the injuries will actually result. Here, the plaintiff is being compensated for the additional medical monitoring necessary as a result of the toxic exposure. It is important to understand that claims for medical monitoring are not speculative because there is a present injury. Plaintiffs are seeking compensation for readily ascertainable costs to be expended upon what can be verified as a reasonably necessary medical procedure, regardless of the extent necessary.[103]

Alternatively, probability of injury has also been evaluated with a more stringent standard where increased risk alone is not sufficient for recovery.[104] Rather, the plaintiff must prove through expert testimony that injury is reasonably certain to occur as a result of the toxic exposure, or that there is a reasonable medical probability of it occurring.[105] Recovery under this standard is more difficult because experts are needed to testify that there is a reasonable certainty that the exposure to toxic materials will result in physical injury. Under this standard the courts are not interested in whether injury is likely or probable, but want expert testimony indicating that injury is reasonably certain to result.

V. Public Policy Reasons in Support of Medical Monitoring

The public policy reasons in support of medical monitoring claims are best stated in *Redland Soccer Club Inc. v. Department of the Army*.[106] There, the court mentioned four policy reasons for allowing medical monitoring in the absence of a present injury. First, medical monitoring promotes the "early diagnosis and treatment of disease resulting from exposure caused by a tortfeasor's negligence."[107] Second, "allowing recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence" and "affords toxic-tort victims, for whom other sorts of recovery might prove difficult, immediate compensation for medical monitoring needed as a result of exposure."[108] Third, medical monitoring "furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure."[109] Finally, medical monitoring is in harmony with "the important public interest in fostering access to medical

testing for individuals whose exposure to toxic chemicals creates and enhances risk of disease."[110]

These public policy concerns, although formidable, have not come without criticism. The court in *Paoli* noted that such a flexible approach might encourage a flood of litigation, particularly on behalf of claimants seeking medical monitoring in the absence of immediate injury.[111] However, the court dismissed any concerns by acknowledging that "a plaintiff is not likely to desire to submit to additional medical testing unless he or she thinks the tests are really needed."[112] Furthermore, an increase in litigation would also be discouraged by the amount of damages recoverable. A successful medical monitoring claim does not result in large lump sum payments. Often the plaintiff does not receive any money at all, but rather the funds are controlled by the court and dispersed as necessary for the medical monitoring of the plaintiff.[113]

VI. Damages

Courts, for the most part, have handled an award of medical monitoring damages in two ways. One possibility is for the court to award lump-sum payments for the estimated cost of the medical monitoring.[114] More frequently, however, courts have addressed medical monitoring as a form of equitable relief, and established a fund administered by the court to directly provide the necessary medical services.[115] A court-administered fund allows the court to maintain control and see to it that the funds are used properly. Furthermore, it prevents the court from having to speculate on the amount of damages that are appropriate because the individual plaintiffs are not recovering directly. If ultimately the fund is untouched or a balance remains after the death of all plaintiffs then the balance may be refunded to the defendant.

A court-administered fund best protects the interests of both parties.[116] The plaintiffs will have the necessary medical services provided without actually having control of the funds. This eliminates the risk that the money is squandered by careless plaintiffs. Additionally, the defendants do not need to worry about a flood of unnecessary litigation because plaintiffs would not subject themselves to such a lawsuit, for periodic testing, unless they believed it was necessary.[117] For the foregoing reasons, this equitable fund approach is particularly common in toxic tort class action litigation.[118] It is just more feasible to allow the court more control in an area of law that remains uncertain.

The most significant support for a court-administered fund came in 1997 when the United States Supreme Court, in *Metro-North Commuter Railroad Company v. Buckley,* concluded that traditional lump-sum damages are inappropriate for medical monitoring.[119] The court reasoned that since medical monitoring is not a traditional tort it does not justify traditionally awarded damages. Therefore, the interests of both parties are best served if a court-administered fund is established.

As one would suspect the United States Supreme Court is not alone regarding this matter. In 1998 the Louisiana Supreme Court agreed.[120] The court stated "that a claim for a medical monitoring fund is significantly different from a claim for a lump-sum award of damages. A trust fund compensates the plaintiff for only the monitoring costs actually incurred. Alternatively, a lump-sum award is a monetary award and may be spent however the plaintiff sees fit."[121]

Considering these two decisions it appears that a court-administered fund is preferred. Although it remains uncertain, it appears to be the best fit considering all the circumstances. Naturally, only time will tell, but based on the U.S. Supreme Court in *Metro*, it seems likely a majority of courts will follow.

VII. Proposed Standard

Naturally, with all the case law addressing medical monitoring it is difficult to determine what standard to follow. Therefore, this proposal suggests one standard to be universally applied. The nature of the individual claims does not change from plaintiff to plaintiff, therefore neither should the evaluation by the courts. First, an injury should be defined as the invasion of any legally protected interest of another. This mirrors the definition used in *Ayers* as well as the definition given by the Restatement (Second) of Torts § 7. In this manner it is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations. Therefore, the fact that no present bodily injury exists is irrelevant.

Furthermore, I propose that the requisite elements for a medical monitoring claim should be as follows: 1) exposure greater than normal background levels; 2) to a proven hazardous substance; 3) caused by defendant's negligence; 4) as a proximate result of the exposure, plaintiff must incur expenditures to protect against contracting a serious latent disease; 5) a monitoring procedure exists that makes the early detection of the disease possible; 6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and 7) there is some demonstrated clinical value in the early detection and diagnosis of the disease.

Courts have been heading in this direction for some time and it seems likely to continue. Only elements four and five, regarding probability of expenditures and availability of monitoring respectively, require further explanation. I would require that a plaintiff establish with a degree of reasonable medical certainty, through

expert testimony, that medical monitoring expenditures are necessary. This mirrors the analysis in *Ayers, Paoli* and *Hansen*. It is not relevant whether it is reasonably probable that the plaintiff suffer harm in the future. The proposed standard is concerned with whether medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease and thus extend an individual's life. The extent of the risk does not matter so long as it is greater than that which existed before the exposure. This of course may appear to be lenient, but expert testimony is necessary to establish it and should limit frivolous actions. Also in order for recovery all the other requisite elements must be present as well. Increased risk, however, is not written out of my proposal. Instead it is implied, because without it there would be no need to undergo unnecessary testing.

The availability of medical monitoring is tremendously important because if no treatment exists that makes early detection of the disease possible then the entire purpose of medical monitoring is defeated. The purpose is to be preventative. If early detection is not possible then the best course of action would be to pursue a claim when bodily injury results or a wrongful death occurs. Some may disagree with this approach because they feel potential plaintiffs should be able to take advantage of technological advances, but that logic is flawed. Allowing plaintiffs to recover without existing treatment that makes early detection of the disease possible only adds to the speculatory nature of the claim. Most importantly, though, there would be no injury because expenditures are not being made. There must be some purpose in order to allow recovery. If no injury exists, referring to expenditures for periodic testing, then recovery should not be allowed.

If in fact all elements are met and medical monitoring is allowed, then a court-administered fund should be established. This does not seem to be such a debated topic, since the United States Supreme Court has rejected lump-sum payments. However, this proposal would require that court-administered funds be the norm since they best serve the interests of both parties.

VIII. Conclusion

Medical monitoring claims have yielded mixed results ever since they were first recognized in the 1980s. The uncertainty is very unsettling, creating the need for one standard, in hope that the uncertainty may be eliminated. A common sense approach such as that proposed above is sorely needed. It is unfair to plaintiffs, attorneys, and the community at large to allow such an important and growing area of the law to continue without more certain answers. Whether this is accomplished through case law or statute has little significance so long a universal standard is created.

Endnotes

1. *See infra* notes 12-18, 74, 77, 83 and accompanying text (depicting how various courts have handled medical monitoring claims).
2. *See Ayers v. Township of Jackso*n, 525 A.2d 287 (N.J. 1987) (recognizing that a plaintiff has a common law action for medical monitoring).
3. *See* 24 Envtl. L. Rep. 21143, 21147 (1994) (discussing medical monitoring as a cause of action and noting how it is a remedy against expenses reasonably certain to occur because of the defendant's negligence); *See also* Matthew D. Hamrick, *Theories of Injury and Recovery for Post-Exposure, Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look*, 29 Cumb. L. Rev. 461, 462 (1998-1999) (noting that plaintiffs under medical monitoring claims have no present physical injury and how this conflicts with the traditional notion of torts).
4. Thomas M. Goutman & Robert Toland II, *Recovery for Medical Monitoring*, 39 Def. Res. Inst. (1997) (describing what medical monitoring is and how it works).
5. *Id.*
6. *See id.; citing* Blackstone, Commentaries on the Laws of England, at 675 (Chase ed. 1938) (noting that negligence requires proof that the plaintiff suffered some present physical harm).
7. *See* Andrew R. Klein, *Rethinking Medical Monitoring*, 64 Brook. L. Rev. 1 (1998) (recognizing that claims for enhanced risk are purely speculative because they request compensation for an injury that may in fact never develop whereas medical monitoring claims involve a present injury (although not physical), the reasonably necessary costs to be expended upon reasonably necessary medical procedures); *see In re Paoli R.R. Yard Litigation*, 35 F.3d 717, 785 (3d Cir. 1994); *see Ayers* 525 A.2d at 307-308; *see also Potter v. Firestone Tire & Co*. 863 P.2d 795, 825 (1993) (permitting recovery for medical monitoring will not allow damages to be awarded solely upon a showing of an increased risk resulting from exposure to toxic chemicals).
8. *See Ayers*, 525 A.2d at 287 (noting that a present physical injury is not needed for a medical monitoring claim); *Hansen v. Mountain Fuel Supply Co*., 858 P.2d 970 (Utah 1993); *Merry v. Westinghouse Elec. Corp*., 684 F. Supp. 847.
9. *See Ayers* at 307-08 (recognizing the difference between a claim for enhanced risk and a claim for medical monitoring).
10. *See* Leslie S. Gara, *Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 Harv. Envtl. L. Rev. 265, 277 (1988).
11. *See id.* (noting that the need to incur medical expenses is a present injury).
12. *See infra* notes 13-19.
13. *See Potter v. Firestone Tire & Rubber Co.*, 25 Cal. Rptr. 2d 550 (1993).
14. *See Ayers*, 525 A.2d 287 (N.J. 1987).
15. *See Simmons v. PACOR, Inc*., 674 A.2d 232 (1996).
16. *Hansen v. Mountain Fuel Supply Co*., 858 P.2d 970 (1993).
17. *See Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984).
18. *See Bower v. Westinghouse Elec. Corp*., 1999 W.Va. Lexis 118 (W.Va. 1999); *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355 (La. 1998); *Redland Soccer Club, Inc. v. Dep't of the Army,* 696 A.2d 137 (Pa. 1997); *Potter v. Firestone Tire & Rubber Co.*, 25 Cal. Rptr. 2d 550 (1993); *Hansen v. Mountain Fuel Supply,* 858 P.2d 970 (Utah 1993); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987); *Ayers v. Township of Jackson,* 525 A.2d 287 (N.J. 1987); *see also Elam v. Alcolac, Inc*., 765 S.W.2d 42 (Mo. Ct. App. 1988).

19. *See Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109 (D.C. N.Ill. 1998) (applying Illinois law); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995) (applying Kansas law); *Day v. NLO*, 852 F. Supp. 869 (S.D. Ohio 1994) (applying Ohio law); *Bocook v. Ashland Oil, Inc.*, 819 F. Supp. 530 (S.D.W. Va. 1993) (applying Kentucky law); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991) (applying Colorado law); *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) (applying Pennsylvania law).
20. *See infra* notes 25-87 and accompanying text.
21. *See id.*
22. *See infra* notes 88-99 and accompanying text.
23. *See infra* notes 106-112 and accompanying text.
24. *See infra* notes 113-120 and accompanying text.
25. *See Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (4th Dep't 1984) (recognizing that under certain circumstances medical monitoring would be allowed).
26. *See id.* at 245.
27. *Id.* (noting that a medical monitoring was allowable).
28. *See id*. at 247 (outlining what requirements must be met before medical monitoring would be allowed).
29. *See id*. (stating that expert testimony is essential in order for a claim for medical monitoring to be successful).
30. *Askey*, 477 N.Y.S.2d at 247 (citing *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 216-217 (1963).
31. *See* 525 A.2d 287 (1987).
32. *See* James M. Garner et al., *Medical Monitoring: The Evolution of a Cause of Action*, 30 Envtl. L. Rep. 10024 (2000).
33. *See Ayers* at 292.
34. *Id.*
35. *Id.* at 291 (outlining the requirements necessary for a successful medical monitoring claim, according to the court in *Ayers*).
36. *See id.* at 312.
37. *See Ayers v. Township of Jackson*, 525 A.2d 287, 309 (1987).
38. *See id.* at 309 (recognizing that once again expert testimony would be necessary to establish significant risk and although this criteria is worded differently than in other jurisdictions the end result is essentially the same, the plaintiffs must be protected against the increased risk of disease).
39. *See id.* at 304-305 (recognizing that human life is more important than a business's going concern and the court therefore will not let a plaintiff go without a remedy).
40. *See id.* at 308.
41. *See* Andrew R. Klein, *Rethinking Medical Monitoring*, 64 Brook. L. Rev. 1 (1998); *see Merry v. Westinghouse Electric Corp.*, 684 F. Supp. 852 (MD Pa 1988) (noting that a risk may be unquantified and still be significant); *see Redland Soccer Club*, 696 A.2d 137; *see Potter*, 25 Cal. Rptr. 2d 550; *see Hansen*, 858 P.2d 970; *see Paoli*, 916 F.2d 829.
42. *See In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990).
43. *See id.* at 835.
44. *See id.* at 849.
45. *Id.* (using identical language as the plaintiffs used in *Askey* and *Ayers* in hope to have medical monitoring recognized as a realizable cause of action).
46. *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 849 (3d Cir. 1990).
47. *See id.* at 852 (outlining the four-part test the court used in evaluating a medical monitoring claim).
48. *See id.* (staying in conformity with jurisdictions already addressing medical monitoring).
49. *See id.* at 851 (recognizing that expert testimony does not have to establish increased risk to be greater than 50 percent in order for a plaintiff to be successful; all that is necessary is that medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease).
50. *Paoli*, 916 F.2d at 851.
51. *See* 6 Cal 4th 965 (1993); *See Stead v F.E. Myers Co., Div. Of McNeil Corp.*, 785 F. Supp. 56 (DC VT, 1990). (concluding that a quantified increase in risk is not required for recovery under medical monitoring. The Stead family complained of injuries after they were exposed to oil from the defendant's submersible pump. The Steads seek to offer proof of an increased risk of cancer that, while admittedly unquantifiable, is substantial enough to require medical monitoring for many years, the cost for which they seek recovery. When offered for this purpose, quantification of the increased risk to a reasonable degree of medical certainty is not required.)
52. *See Paoli*, 916 F.2d at 851.
53. *Simmon v. Pacor Inc.*, 647 A.2d 232 (Pa. 1996).
54. *See* 7 Cal Rptr 2d 623 (5th Dist. 1992).
55. *See id*. at 624.
56. *See supra* notes 25-30 and accompanying text.
57. *Miranda*, 7 Cal Rptr 2d at 624.
58. *See id.* at 627 (following the *Askey* approach requiring reasonable certainty that the disease will result). *See* Allan L. Schwartz, *Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R. 5th 327, § 3 (1994).
59. *See id* (recognizing that only periodic testing necessary as a result of the negligent exposure will be compensable, not routine exams that would have been required regardless of the exposure).
60. *See Miranda*, 7 Cal Rptr 2d at 626 (citing *Buswell v. City and County of San Francisco,* 200 P.2d 115 (1948)) (noting that these costs should not be the responsibility of a victim, because additional medical expenses for periodic testing would not have been necessary if it were not for the negligence of the defendant).
61. *See id*. (citing *In re Paoli R.R. Yard PCB Litig*. 916 F.2d 828, 852, (3d Cir. 1990)).
62. *Id.* at 628 (noting how restrictions do exist so that defendants are not taken advantage of).
63. *See id.* (discussing further how plaintiffs will be prevented from taking advantage of medical monitoring claims so that they may not recover for expenses that would have been incurred even if the exposure never occurred).
64. *See Miranda*, 7 Cal Rptr 2d at 627 (5th Dist. 1992).
65. *See id.* (recognizing that the Miranda five-part test makes no mention of the value of early detection).
66. *Id.* at 627 (citing *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (4th Dep't 1984)) (addressing the issue that no present physical injury exists, and explaining the reasoning that allows this type of claim to be successful and not offend the traditional notion of tort law).
67. *See Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (noting that the court formulated its standard based on those established in two earlier cases, *Merry v. Westinghouse Elec. Corp.,* 684 F. Supp. 847, 850 (M.D. Pa. 1988), and *Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987)).
68. *Id.* (referring to *Merry*, *Ayers,* and *Paoli*); s*ee supra* notes 25-66 and accompanying text.

69. *See id.* (expanding on tests developed by earlier courts in an effort to recognize potential problems with previous attempts at allowing claims for medical monitoring).

70. *See supra* note 68 and accompanying text.

71. *Id.* at 980.

72. *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 980 (Utah 1993) (explaining how the need for and extent of medical monitoring must be evaluated on a case-by-case analysis).

73. 696 A.2d 137, 137 (Penn. 1997).

74. *See id.* at 146-147 (listing the seven part test utilized in *Redland Soccer Club*).

75. *See* 663 F. Supp 727, 735 (1987 ED Pa), *see also Werlin v. United States*, 746 F. Supp. 887 (D. Minn. 1990) (noting that the District Court would not allow recovery for medical monitoring simply on the basis of increased risk, but rather required a present injury before medical monitoring would be appropriate).

76. *Id.* (meaning that some symptoms must exist as a result of the negligent exposure even though they may not be specific to the medical monitoring regime sought).

77. *See supra* notes 6-12.

78. 958 F.2d 36, 36 (4th Cir. 1992).

79. *Id*. at 37.

80. *Id.*

81. *Id.* (meeting the usual requirements for a medical monitoring claim).

82. *See Ball v. Joy Technologies, Inc*., 958 F.2d 36, 39 (4th Cir. 1992) (adhering to the traditional notion of torts, that if no present physical injury exists then no medical monitoring).

83. *See id.*

84. 846 F. Supp. 1400 (WD Mo 1994).

85. *See id*. at 1410.

86. *Id.* (expressing the strong belief that a present physical injury must be present before a medical monitoring claim may be successful).

87. *See Ball* 958 F.2d at 39 (recognizing the refusal to break from traditional tort law).

88. *See Abusio v. Consol. Edison Co.*, 238 656 N.Y.S.2d 371, 372 (2d Dep't 1997).

89. *See id.* (adhering to the traditional notion of tort law).

90. *See Jones v. Utilities Painting Corp*., 603 N.Y.S.2d 546 (2d Dep't 1993) (noting that a medical monitoring claim will be dismissed without present physical injury).

91. *Patton v. General Signal Corp.*, 984 F. Supp 666, 673 (W.D.N.Y. 1997) (recognizing that early decisions focused more on claims for enhanced risk rather than for medical monitoring).

92. *See Askey v. Occidental Chem. Corp*., 477 N.Y.S.2d 242, 247 (4th Dep't 1984).

93. *See* 270 N.Y. 287 (1936).

94. *See Patton,* 984 F. Supp. at 673 (noting a present physical injury is not necessary before recovery for medical monitoring damages will be allowed).

95. *See id.* (citing *Askey*); *see supra* notes 25-30 and accompanying text.

96. *See id.*

97. *See Gibbs v. E.I. Dupont De Nemours & Co., Inc*., 876 F. Supp. 475 (W.D.N.Y. 1995) (noting that the New York Court of Appeals would recognize a cause of action for medical monitoring in the absence of medical evidence showing the presence of asbestos in the employee's body).

98. *See id*. (recognizing that expert testimony would be required to establish the need for medical monitoring and would be evaluated on a case-by-case analysis).

99. *Patton v. General Signal Corp.*, 984 F. Supp 666, 673 (W.D.N.Y. 1997).

100. *See supra* notes 74-83 and accompanying text (discussing the difficulties courts have with allowing the recovery of medical monitoring expenses without a present physical injury).

101. *See* Susan L. Martin and Jonathon D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 127 (1995); *See also Paoli*, 916 F.2d 829 and *Ayers*, 525 A.2d 287 (defining increased risk to include any amount of risk that would not have been present if it were not for the exposure and specifically rejecting the notion that increased risk must be proven more probable than not).

102. *Id*. at 128.

103. *See Klein supra* note 7 and accompanying text.

104. *See id.* (stating that medical monitoring must be established to be necessary more likely than not, interpreted to mean the probability must be greater than 50 percent likely).

105. *Id.*; *see Askey* 477 N.Y.S.2d 242 and *Miranda* 7 Cal. Rptr. 2d 623 (requiring the need for medical monitoring to be more probable than not).

106. *See* 696 A.2d at 146-147 (depicting the various public policy reasons in favor of allowing claims for medical monitoring).

107. *Id.* (noting that the benefit is much greater if a preventative approach is taken rather than waiting until disease sets in).

108. *Id*. (recognizes that certain individuals may not be able to afford medical monitoring and therefore that burden should fall onto negligent defendants rather than risk a human life).

109. *Id.* (noting that allowing medical monitoring will bring about change because potential defendants will be held accountable).

110. *See Redland,* 696 A.2d at 154 (noting that society has compassion for those that are unfortunate enough to fall under these circumstances).

111. *See Paoli*, 916 F.2d at 829.

112. *Id.*

113. See *infra* note 115 and accompanying text.

114. *See* SD67 ALI-ABA 1, 27 (1999) (noting this is the result in most traditional tort actions).

115. *See id.* (realizing this is the more recent trend); *see infra* notes 117-118.

116. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues concerning the Administration of Medical Monitoring Program*, 20 Am. J.L. & Med. 251 (1994) (depicting how medical monitoring awards are handled); *See Paoli*, 916 F.2d at 829.

117. *See* Robert H. Sand, *Workplace Exposures and the Right to Sue for Medical Monitoring*, 21 Employee Relations L.J. 143 (1995) (quoting *Finch v. Swingly*, 42 A.D.2d 1035 (1973).

118. *See* SD67 ALI-ABA 1, 27 (noting this is the recognized method); *see supra* note 117.

119. *See* 521 U.S. 424, 440 (1997).

120. *Bourgeois v. A.P. Green Industries, Inc*., 716 So.2d 355, 357 (1998) (corroborating the United States Supreme Court's results regarding this matter).

121. *Id.*

The Commission for Environmental Cooperation's Citizen Submission Process

By David L. Markell

I. Introduction

The Commission for Environmental Cooperation (CEC) is an international institution with a North American focus. The CEC was created by the United States, Canada, and Mexico in the environmental side agreement they negotiated to the North American Free Trade Agreement (NAFTA).[1] This side agreement—itself known by the acronym NAAEC—is officially entitled the North American Agreement on Environmental Cooperation.[2] The NAAEC charges the CEC with a variety of responsibilities.

This article reviews one of the more innovative features of the CEC, its citizen submission process.[3] It begins by providing a brief overview of the origins, structure, and responsibilities of the CEC. Second, it describes the citizen submission process. Third, it provides an update on the current status of the process. Finally, the article offers a few observations concerning the future evolution of the process and it identifies several fertile areas for future research.

II. The Origins, Structure, and Responsibilities of the CEC

The NAAEC went into effect on January 1, 1994.[4] It is one of many international environmental agreements of relatively recent vintage. Two prominent commentators summarize the extraordinary increase in recent years in the number of international legal instruments involving environmental matters:

> At the time of the Stockholm conference [in 1972], there were only a few dozen multilateral treaties dealing with environmental issues.
>
> By 1992, when countries gathered again to deal with the global environment at the United Nations Conference on Environment and Development at Rio de Janeiro, there were more than 900 international legal instruments (mostly binding) that were either fully directed to environmental protection or had more than one important provision addressing the issue.[5]

As many commentators have observed, the price of passage of the NAFTA through the U.S. Congress was the adoption of a companion agreement intended to prevent the environment from bearing the costs of increased trade among the three signatory countries.[6] This price was demanded even though some have characterized NAFTA as "more attentive to environmentally-related concerns than are most if not all the preceding trade agreements . . . ."[7]

Despite its origins as something of a palliative to those concerned about the environmental implications of enhanced trade, the NAAEC's reach extends far beyond the trade and environment arena. As a result, some observers urge that the NAAEC is far more than a "side agreement" but instead is a "complete and vital agreement in its own right."[8] Article 1 of the NAAEC lists a series of ten objectives for the agreement. Most have little on the surface to do with trade but instead focus on strengthening domestic environmental regimes. These objectives include, for example, increasing cooperation among the parties "to better conserve, protect, and enhance the environment," and strengthening cooperation in developing and improving environmental laws.[9]

"Despite its origins as something of a palliative to those concerned about the environmental implications of enhanced trade, the NAAEC's reach extends far beyond the trade and environment arena."

The parties to the NAAEC created the CEC to advance achievement of its objectives.[10] The CEC has a tripartite structure. It is governed by a Council, which is comprised of the highest-level environmental officials of each member country.[11] A permanent staff known as the Secretariat is based in Montreal.[12] Finally, the Agreement creates a Joint Public Advisory Committee (JPAC),[13] comprised of fifteen citizens, five from each of the three countries.[14] JPAC's role is to, inter alia, advise the Council on any matter within the scope of the Agreement and to provide various types of information to the Secretariat.[15]

As the lengthy menu of objectives in Article 1 of the NAAEC would suggest, the CEC carries out a wide range of activities. These activities are divided into four major program areas: (1) Environment, Economy, and Trade; (2) Conservation of Biodiversity; (3) Pollutants

and Health; and (4) Law and Policy.[16] The CEC also administers the North American Fund for Environmental Cooperation (NAFEC), a grant program that provides funding for community-based environmental projects in Canada, Mexico, and the United States.[17] Another significant CEC responsibility is to implement a "citizen submission" process, in which citizens may file "submissions" asserting that any of the three signatory countries is not enforcing its environmental laws effectively.[18]

With this brief overview of the CEC's origins, structure, and substantive responsibilities,[19] I now turn to a more in-depth review of the aspect of the CEC's work that is the focus of this article, the citizen submission process.[20]

III. The Citizen Submission Process

Articles 14 and 15 of the NAAEC establish a process through which non-governmental organizations (NGOs) or persons may file a submission alleging that a member country is not enforcing its environmental law effectively.[21] The CEC web page summarizes the process as follows:

> Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission under Article 14(2). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance to Article 15. The Council, comprised of the environmental ministers (or their equivalent) of Canada, Mexico and the U.S., may then instruct the Secretariat to prepare a factual record on the submission. The final factual record is made publicly available upon a two-thirds vote of the Council.[22]

The Council adopted Guidelines in October 1995 in order to provide additional guidance concerning this process.[23] The Council approved revisions to these Guidelines during its June 1999 annual meeting in Banff, Canada.[24]

A. Article 14(1)

The Secretariat of the CEC conducts an initial review of a citizen submission under Article 14(1) of the NAAEC. The opening sentence of Article 14(1) provides that "[t]he Secretariat may consider a submission . . . asserting that a Party *is failing* to *effectively enforce its environmental law* . . . ."[25] This sentence limits the scope of the Article 14 process in three ways, to submissions involving: (1) one or more "environmental law(s)"; (2) further, to failures to "effectively enforce" such environmental laws; and (3) temporally, to failures fitting into the first two categories that are ongoing in nature.[26] These three concepts are reviewed briefly below.

"The Secretariat has determined that the definition excludes at least two types of provisions from treatment under Article 14 even though activities under these provisions may have significant adverse impacts on the environment."

1. "Environmental Law"

The Agreement defines "environmental law" to include laws "the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health . . . ."[27] The CEC has concluded that a wide variety of laws fall within this definition. Examples include the Canadian Federal Fisheries[28] and Environmental Assessment Acts;[29] Mexico's General Law for Ecological Equilibrium and Environmental Protection (LGEEPA)[30] and its regulation concerning environmental impact (RIA);[31] and the National Environmental Policy,[32] Clean Air,[33] and Clean Water Acts[34] in the United States.

The Secretariat has determined that the definition excludes at least two types of provisions from treatment under Article 14 even though activities under these provisions may have significant adverse impacts on the environment. One such type of provision is that which has as its primary purpose the exploitation or harvesting of natural resources.[35] Some commentators suggest that the plain language of the Agreement seems to dictate such a result.[36]

A second issue that has arisen involves whether international legal instruments qualify as "environmental law." The Secretariat has concluded that at least in some instances they do not. It recently addressed this issue in its determination in connection with the Great Lakes submission.[37] It found that neither the Great Lakes Water Quality Agreement[38] nor the 1986 Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste[39] should be considered an "environmental law" for purposes of Article 14, noting as follows:

> Article 45(2) of the NAAEC is the key operative provision, defining environmental law to mean "any statute or regulation of a Party. . . ." The Secretariat dismissed the Animal Alliance submission (SEM-97-005) on the ground that the Biodiversity Convention did not qualify as "environmental law" because it was an international obligation that had not been imported into domestic law by way of statute or regulation pursuant to a statute. The Animal Alliance determination is consistent with the plain language of Article 45(2) and the Secretariat follows it here. As noted concerning that submission, by making this determination, the Secretariat is not excluding the possibility that future submissions may raise questions concerning a Party's international obligations that would meet the criteria in Article 14(1).[40]

A potential third significant exclusion are laws "directly related to worker safety or health."[41] No submission to date has raised this issue. As a result, the Secretariat has not yet had occasion to apply this exclusion.

2. "Effective Enforcement"

Submissions have asserted that the parties have "failed to effectively enforce" their environmental laws on a variety of grounds. Perhaps the most common to date has been the assertion that one or more regulated parties are violating environmental requirements and the government is failing to enforce effectively the requirements because of allegedly inadequate inspection practices, prosecution-related efforts, or both. With respect to recent submissions involving the United States, some of the assertions contained in the Great Lakes submission fall into this category.[42] The BC Hydro and BC Mining submissions involving Canada do so as well.[43] The Secretariat has found that this type of assertion falls within the scope of Article 14(1).[44] Failure to enforce NEPA-type requirements has also been asserted and found to warrant a request for a response.[45]

In contrast, the Secretariat dismissed two early submissions on the ground that they challenged legislative acts and did not involve assertions of ineffective "enforcement."[46] The Secretariat dismissed the Biodiversity Legal Foundation submission, finding that a rider modifying implementation of the Endangered Species Act was not a failure to enforce environmental law.[47] The Secretariat determined that this submission, which alleged that a party's legislation did not protect the environment, was not "actionable" under the citizen submission process because its focus was on the appropriateness or effectiveness of the legislation itself.[48] The Secretariat's reasoning was as follows:

> The enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of environmental laws and statutes on the books . . . The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one.[49]

In sum, the Secretariat strategy in this area to date has been to draw a line between government efforts to establish environmental standards and government efforts to enforce such standards once they are established. It has indicated that the former are beyond the scope of Article 14 while the latter are legitimate areas of inquiry under the Article 14 process. To quote from the Great Lakes Determination, in making such a distinction the Secretariat has noted that "drawing the line between 'standard-setting' and 'enforcement' of the law may be blurred on occasion and difficult to discern at the margins."[50] Submissions on the margins are likely to elicit additional CEC efforts to draw such lines.

3. The Temporal Requirement in Article 14(1)

Two temporal issues have emerged in the implementation of Article 14. First, there is the requirement that submitters assert that a party "is failing" to effectively enforce its environmental law.[51] In *Canadian Environmental Defence Fund*, the Submitters asserted that the Canadian government had failed to enforce a Canadian law requiring environmental assessment of federal policies and programs.[52] The submission, however, was filed three years after the program at issue came into effect. The program had since been discontinued. The Secretariat dismissed the submission on the ground that it did not satisfy the temporal requirement in Article 14 that a party to the Agreement "*is failing*" to effectively enforce its environmental law.[53] The Secretariat noted that, among other things, it was "not aware of any reason that would have prevented the Submitter from filing its submission at the time it became aware of the alleged failure to enforce."[54]

The second temporal issue involves the extent to which the Secretariat may consider events that occurred before the NAAEC became effective on January 1, 1994. The Commission's response to this issue has two parts. First, it has noted that there is no indication that the Agreement is to be given retroactive effect.[55] In addition, however, the Secretariat has concluded that "conditions or situations" that existed before January 1, 1994

may be relevant to a "present, continuing failure to enforce environmental law."[56] This issue first was considered in the Cozumel submission, the third submission to come before the Secretariat.[57] The Council's Resolution directing the Secretariat to prepare a factual record concerning the BC Hydro submission provides the Council's latest word on this issue.[58] In that Resolution the Council directed the Secretariat

> to consider whether the party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record. . . .[59]

In sum, one submission to date has been dismissed on the basis that it did not satisfy the "temporal" requirement in Article 14 that a party to the Agreement be failing to effectively enforce its environmental law.[60] As a general matter, the Secretariat has determined that the NAAEC does not apply retroactively.[61] It also has determined, on the other hand, and the Council has agreed, that an alleged violation of an environmental law that occurred pre-1994 may be a relevant focus for a factual record if the alleged violation is relevant to whether a party effectively enforced its environmental law post-1994.[62]

4. Article 14(1)'s Six Listed Threshold Criteria

In addition to the three parameters for the Article 14 citizen submission process contained in Article 14(1)'s opening sentence, this provision specifically lists six threshold criteria that submissions must meet in order to trigger further consideration. Submissions must:

> (a) [be] in writing in a language designated by that Party in a notification to the Secretariat;
>
> (b) clearly identif[y] the person or organization making the submission;
>
> (c) provide[ ] sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
>
> (d) appear[ ] to be aimed at promoting enforcement rather than at harassing industry;
>
> (e) indicate[ ] that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
>
> (f) [be] filed by a person or organization residing or established in the territory of a Party.[63]

These criteria are fairly straightforward. A number of substantive points, however, warrant mention. First, the Guidelines make it clear that the Article 14(1)(c) requirement that a submitter provide "sufficient information" includes the obligation to identify the applicable environmental statute or regulation allegedly not being effectively enforced.[64] The Secretariat requested that the submitters in *Rio Magdalena* further specify which laws allegedly were not being effectively enforced.[65]

"As a general matter, the Secretariat has determined that the NAAEC does not apply retroactively."

Second, the Guidelines elaborate on the Article 14(1)(d) requirement that a submission "appear[ ] to be aimed at promoting enforcement rather than at harassing industry."[66] Guideline No. 5.4 provides that:

> A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not:
>
> (a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission;
>
> (b) the submission appears frivolous.[67]

Submitters typically have addressed Article 14(1)(d) by affirming their interest in environmental enforcement. In one submission the submitter expressly notes that it has no industry ties or commercial interest in the issue.[68] The submissions filed to date have focused on the acts or omissions of a party, not on the conduct of individual companies, though in some situations, such as state-owned companies, the distinction is a fine one. Perhaps for this reason, subsection (1)(d) of Article 14 has received relatively little attention in the Secretariat's—or the Council's—review of early submissions.

The revised Guidelines for the Article 14/15 process issued in July 1999 make one change to the process of

review under Article 14(1) that warrants reference here. The revised Guidelines require the Secretariat to include its reasons in making its determination under Article 14(1).[69] Prior to these revisions, the Secretariat had only provided such reasons in determinations in which it dismissed a submission for failing to meet the criteria. In its relatively brief determinations finding that submissions met the Article 14(1) criteria, the Secretariat typically did not go into detail concerning its reasoning. Thus, this new provision is likely to result in lengthier Article 14(1) determinations than were seen in the first few years of the process.

"The track record thus far suggests that the Secretariat is taking its initial screening responsibility under Article 14(1) seriously."

A final issue relating to Article 14(1) concerns the appropriate level of analysis at this preliminary stage of the process. The Secretariat has discussed this issue in its recent determination concerning the Great Lakes Submission, among others.[70] The Secretariat indicates that, at least conceptually, an Article 14(1) review is not intended to be unduly searching, and the requirements contained in Article 14 are not intended to place an undue burden on submitters. In the determination concerning the Animal Alliance Submission (SEM-97-005), for example, the Secretariat states as follows:

> The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable screening devices. The Secretariat also believes that Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC. . . .[71]

In its discussion in the Animal Alliance Determination of the burden under Article 14, the Secretariat noted that use of the word "assertion" in the opening sentence of Article 14(1) "supports a relatively low threshold under Article 14(1),"[72] although it also indicated that "a certain amount of substantive analysis is nonetheless required at this initial stage" because "[o]therwise, the Secretariat would be forced to consider all submissions that merely 'assert' a failure to effectively enforce environmental law."[73]

The Secretariat noted in its Great Lakes Determination that the revisions to the Guidelines implicitly recognize that a submitter's capacity to provide details to support its assertions is limited by the mechanics of the process:

> The recent revisions to the Guidelines provide further support for the notion that the Article 14(1) and (2) stages of the citizen submission process are intended as a screening mechanism. The Guidelines limit submissions to 15 pages in length. The revised Guidelines require a submitter to address a minimum of 13 criteria or factors in this limited space, indicating that a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14(1) and (2) for more in-depth consideration.[74]

The track record thus far suggests that the Secretariat is taking its initial screening responsibility under Article 14(1) seriously. Several of the twenty-six submissions made to date have been dismissed as deficient under Article 14(1).[75] It will be interesting to monitor whether the percentage of early dismissals declines over time as submitters become more comfortable with the process and as the CEC begins to establish clear parameters for the types of issues subject to Article 14 review.

B. Article 14(2)

Article 14(2) of the citizen submission process provides that when the Secretariat determines that a submission meets the Article 14(1) criteria, the Secretariat shall determine whether the submission merits a request for a response from the party. This second determination is guided by the Secretariat's consideration of whether:

> (a) the submission alleges harm to the person or organization making the submission;
>
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
>
> (c) private remedies available under the Party's law have been pursued; and
>
> (d) the submission is drawn exclusively from mass media reports.[76]

Perhaps the most important point is that these "guiding factors" play a different role in the Secretariat's review than do the criteria in Article 14(1). If a submitter fails to meet a single Article 14(1) criterion, the Secretariat must dismiss the submission.[77] In contrast, the Secretariat is guided by the Article 14(2) factors in determining whether to continue the process by

requesting that the Party respond to the submission and in making this determination the Secretariat "may assign weight to each factor as it deems appropriate in the context of a particular submission."[78]

With respect to the specific Article 14(2) factors, the Guidelines elaborate on the type of harm contemplated in Article 14(2)(a). The Guidelines indicate that the harm should be due to the asserted failure of enforcement. Further, the harm should relate to protection of the environment or prevention of danger to human life or health. Guideline No. 7.4 provides as follows:

> In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:
>
> (a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and
>
> (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.[79]

The Secretariat's request for a response in the Cozumel Submission treated the "harm" issue as follows:

> In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring[s] the submitters within the spirit and intent of Article 14 of the NAAEC.[80]

A number of commentators have applauded the Secretariat's approach concerning the notion of harm as an appropriately broad interpretation for purposes of the Agreement.[81] Professor Gal-Or, for example, suggests that "[b]y recognizing the public nature of environmental concerns and harms as well as the right of the public interest to legal standing, the Secretariat has met the expectations of many environmental activists."[82] It will be interesting to monitor the application of this provision. The issue of harm has proved contentious in the U.S. citizen suit context.[83]

The second Article 14(2) factor—subsection (b)—involves whether the submission raises matters whose further study in this process would advance the goals of the NAAEC.[84] This factor, among other things, provides an important context for the CEC's fulfillment of its responsibilities under Article 14. The Article 14 process charges an international institution, the CEC, with reviewing domestic enforcement practices. Consideration of Article 14(2)(b) should help the CEC to keep in mind its status as an international institution with a continental reach as the Secretariat addresses individual submissions and makes judgments as to which warrant further review under this process.

The Article 14(2)(c) factor of pursuit of private remedies is also worth mention. Guideline No. 7.5, adopted in Banff, Canada in June 1999, contains three guideposts for consideration of this factor. First, the Secretariat is to consider whether a submission may interfere with private domestic litigation pursued by the submitter.[85] Second, the Secretariat is to consider the value of pursuing a submission in light of any such litigation.[86] Finally, the Guidelines indicate that a "reasonableness" standard should be used in reviewing pursuit of private remedies.[87] The Guidelines provide as follows on this issue:

> In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether:
>
> (a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and
>
> (b) reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.[88]

The fourth, and final, Article 14(2) factor involves the extent to which the submission is "drawn exclusively from mass media reports."[89] This factor has received relatively little attention to date. Submissions that are drawn exclusively from mass media reports are probably less likely than others to warrant further consideration, other factors being equal.

Moving from the specific Article 14(2) factors to how Article 14(2) fits into the Article 14 process, the

Secretariat has two options upon completion of its review under Article 14(2). First, it may unilaterally dismiss a submission.[90] Alternatively, the Secretariat may decide to request a response from the party. As of April 17, 2000, the Secretariat has now requested party responses for sixteen submissions.[91] In either case, the revised Guidelines require the Secretariat to explain its reasons.[92] If the Secretariat pursues the latter course, the next phase involves the Secretariat's consideration of the response, as well as the submission, under Article 15(1) to determine whether to recommend to the Council the development of a factual record.[93]

C. Article 15

If the Secretariat determines, after receiving the party's response, that a factual record is not appropriate, it dismisses the submission and provides its reasons in the dismissal.[94] If the Secretariat considers that a factual record is warranted, it so advises the Council and provides its reasons.[95] The Council then votes whether to direct the Secretariat to develop such a record.[96] While much of the Council's work is done by "consensus,"[97] the Agreement specifically provides that a two-thirds vote is sufficient to initiate development of a factual record.[98]

If the Council decides not to direct development of a factual record, the Secretariat's last action on the submission is to notify the submitter and inform the submitter that the submission process is terminated.[99]

If the Council directs the Secretariat to develop a factual record, the Secretariat embarks on this task.[100] The Agreement authorizes the Secretariat to gather factual information relevant to the issues at stake in the submission. Article 15(4) of the Agreement authorizes the Secretariat to consider "any relevant technical, scientific or other information"[101] that is (a) publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts. In addition, the Agreement provides that the Secretariat shall consider any information furnished by a party.

The Secretariat submits its draft factual records to the Council for review. The Guidelines specify that draft factual records shall include:

> (a) a summary of the submission that initiated the process;
>
> (b) a summary of the response, if any, provided by the concerned Party;
>
> (c) a summary of any other relevant factual information; and
>
> (d) the facts presented by the Secretariat with respect to the matters raised in the submission.[102]

The Agreement provides that "[a]ny Party may provide comments on the accuracy of the draft within forty-five days thereafter."[103] The Secretariat is to incorporate, "as appropriate," any such comments in its final factual record and submit the final version to the Council.[104] The Council then determines whether to make the final factual record publicly available. Again, a two-thirds vote is sufficient to make a factual record public.[105] The issuance of a final factual record is the final phase of the Article 14/15 process.[106]

IV. A Status Update[107]

A total of twenty-six submissions have been filed since the Agreement went into effect in January 1994. Of these, nine involve Mexico, nine involve Canada, and eight involve the United States. Eleven of these submissions have been terminated in one way or another; the other fifteen are currently pending. The eleven that are no longer pending were resolved in three different ways: dismissal, withdrawal, and publication of a factual record.

Dismissed. Nine submissions are no longer pending because they have been dismissed by the Secretariat. Eight submissions have been dismissed under Article 14(1) or (2):

- Canadian Environmental Defence Fund (SEM-97-004),
- Animal Alliance of Canada et al. (SEM-97-005),
- Ortíz Martínez (SEM-98-002),
- Biodiversity Legal Foundation et al. (SEM-95-001),
- Sierra Club et al. (SEM-95-002),
- Aage Tottrup (SEM-96-002),
- Hudson River Audubon Society of Westchester, Inc. et al. (SEM-00-003), and
- Instituto de Derecho Ambiental, A.C., et al. (SEM-98-001).

The Secretariat dismissed this last submission twice in determinations dated September 13, 1999 and January 11, 2000. The Secretariat dismissed a ninth submission, Department of the Planet Earth et al. (SEM-98-003) in December 1998, but this submission is treated as currently pending because the submitter filed a revised submission following the dismissal. The Secretariat

dismissed a tenth submission, Oldman River I (SEM-96-003) in 1996. The submitters amended the submission and the Secretariat determined that it met the requirements of Articles 14(1) and (2) but later dismissed it under Article 15(1).

Withdrawn. One submission, The Southwest Center for Biological Diversity et al. (SEM-96-004), has been withdrawn.

Completed Preparation of Factual Record. One Factual Record, Comité para la Protección de los Recursos Naturales, A.C. et al. (SEM-96-001), has been prepared and made public.

Of the fifteen submissions currently under review, one is undergoing factual record development, three are pending votes from the Council in connection with the Secretariat's recommendation for development of a factual record, seven are being reviewed to determine whether development of a factual record is warranted, two are awaiting a response from a Party, and two are being reviewed under Article 14(1).

Undergoing Factual Record Development. The Secretariat is currently developing a factual record on one submission, B.C. Aboriginal Fisheries Commission et al. (SEM-97-001).

Pending Votes. Three submissions are awaiting direction from Council concerning possible development of a factual record. On July 19, 1999, the Secretariat informed the Council that the Secretariat considers that the Friends of the Oldman River submission (SEM-97-006) warrants development of a factual record. On October 29, 1999, the Secretariat informed the Council that the Secretariat considers that another submission, Centre Québécois du Droit de L'environnement et al. (SEM-97-003), also warrants developing a factual record. On March 6, 2000, the Secretariat informed the Council that the Secretariat considers that a third submission, Environmental Health Coalition, et al. (SEM-98-007), warrants developing a factual record. As indicated above, the Council may, by two-thirds vote, instruct the Secretariat to prepare a factual record on one or more of these submissions.

Awaiting Determination of Whether Development of a Factual Record is Warranted. Seven submissions are being reviewed to determine whether development of a factual record is warranted. The Secretariat is currently reviewing:

- one submission concerning Canada: Sierra Club of British Columbia, et al. (SEM-98-004);
- two concerning the United States: Department of the Planet Earth et al. (SEM-98-003), and Alliance for the Wild Rockies, et al. (SEM-99-002); and
- four concerning Mexico: Instituto de Derecho Ambiental (SEM-97-007), Grupo Ecológico Manglar A.C. (SEM-98-006), Academia Sonorense de Derecho Humanos (SEM-98-005), and Comité Pro Limpieza del Río Magadalena (SEM-97-002).

These submissions are being reviewed in light of the response to determine whether development of a factual record is warranted.

Awaiting a Response from a Party. The Secretariat has requested, and is awaiting submission of, a response for two submissions that the Secretariat has determined meet the requirements of Article 14(1) and merit a response from the Party under Article 14(2), Methanex Corporation (SEM-99-001), and Neste Canada, Inc. (SEM-00-002).

Undergoing Article 14(1) Review. One submission involving Mexico is currently being reviewed under Article 14(1), Rosa María Escalante (SEM-00-001), submitted on January 27, 2000. A submission involving Canada, David Suzuki Foundation et al. (SEM-00-004), submitted on March 15, 2000, is also currently being reviewed under Article 14(1).

The following table summarizes the work the CEC Secretariat has completed concerning submissions filed under Article 14 from 1995 through 1999.

Table 1. History of Actions Taken by the CEC Secretariat Under Articles 14 and 21[108]

Year	Total Number of Actions Taken	Undergoing Article 14(1) and 14(2) Determinations	Article 14(1) and 14(2) Dismissals	Article 21(1)(b) Requests	Dismissals Following Response	Notifications to Council	Draft Final Report	Actual Final Report
1999	16	11	2	1		2		
1998	11	6	3	1		1		
1997	10	6	1		1		1	1
1996	9	6	2			1		
1995	5	2	3					

V. Closing Observations Concerning the Administration of the Article 14 Process to Date and Prospects for the Future

There are a host of issues concerning the Article 14 process that merit close attention. This final part begins with two quite brief observations. It then offers some thoughts concerning areas for possible future research relating to the Article 14 process.

The first observation relates to the picture painted by the statistics of the CEC's actions to date. Of the twenty-six submissions filed to date, the Secretariat has terminated nine—that is, approximately thirty-five percent. Eight of these were dismissed at an early stage—Article 14(1) or (2)—while the Secretariat terminated one—the original Friends of the Oldman River submission—after receiving the party's response. In addition to these nine dismissals, the Secretariat has issued dismissals in other instances as well, but the dismissed submissions were re-submitted (e.g., Department of the Planet Earth et al. and Instituto de Derecho Ambiental).

"The one point that jumps out from the superficial rendering of numbers, however, is that the Secretariat is clearly not rubber-stamping submissions on their way through the process towards development of a factual record."

I leave to the individual interested reviewer the task of taking a close look at the details of the individual submissions to decide for himself or herself whether the percentage of dismissals is too high or too low. The one point that jumps out from the superficial rendering of numbers, however, is that the Secretariat is clearly not rubber-stamping submissions on their way through the process towards development of a factual record. To paraphrase the Secretariat's relatively early determination in Animal Alliance, the record appears to reflect that the Secretariat is taking seriously its obligation to require more than a "bare assertion" of a failure to effectively enforce in order to continue the processing of a submission.[109] At the same time, the fact that the Secretariat has concluded the Article 14(1) and (2) stages of the process for the majority of submissions by finding that such submissions warrant continued review under the process should give some comfort to those concerned that the Secretariat's relationship with the Council would compromise the Secretariat's independence in performing its responsibilities.[110]

The second observation relates to the status of the currently pending submissions. Over the past year, the Secretariat has moved a significant number of submissions through the early stages of the process. The result of this Secretariat activity is that there are now eleven submissions at the later stages of the Article 14 process. There is a bulge of seven submissions at the Article 15(1) stage of the process. That is, the Secretariat has requested and received responses from the relevant party and it is now the Secretariat's responsibility to determine whether to dismiss the submissions or to advise the Council that the development of a factual record is warranted. In addition, the Secretariat recently took the latter course with respect to three other submissions, the Friends of the Oldman River, Centre Québécois du Droit de L'environnement, and Environmental Health Coalition, and it is currently awaiting direction from the Council.[111] Further, at the direction of the Council, the Secretariat is currently preparing a factual record for the BC Hydro submission. Treatment of this substantial number of submissions by the Secretariat and Council in the coming months is likely to provide fertile soil for researchers and others interested in additional exploration of this policy tool.[112]

I now turn to some suggestions for areas of possible future research concerning the Article 14 process.[113] I offer an even ten. The first seven focus primarily on issues relating to the effectiveness of the process, an area of inquiry that is of obvious importance but also of enormous complexity.[114] The last three suggestions for areas of research are prompted by the international character of the Article 14 process and of the CEC as a whole.

The first important issue in evaluating the effectiveness of any policy approach involves determining its primary purposes. The commentary to date suggests at least three purposes of the citizen submission process. Many observers would agree that a fundamental purpose of the process is to enhance domestic environmental enforcement by the three Parties.[115] A related purpose is to enhance environmental protection. In other words, enhancement of domestic enforcement is a means to an end, and the end is to promote compliance and thereby enhance environmental protection.[116] Article 5 of the Agreement, entitled Government Enforcement Action, supports the existence of a link between the goal of enhancing enforcement and the enhancement of compliance and environmental protection. It provides that "each Party shall effectively enforce its environmental laws and regulations . . . [w]ith the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations. . . ."[117] A third likely purpose is to promote the

emergence of "civil society" in North America through creation of a new mechanism that facilitates citizens' interactions with their governments and others on the continent.[118] I offer these apparent purposes simply as possible starting points. The need to consider carefully the purposes of the process in evaluating its effectiveness is obviously a critical element in focusing future research.[119]

The logical second question involves ascertaining how best to assess the extent to which the tool is effective in accomplishing its objectives. Assuming that, for example, promoting effective enforcement is an important objective of the process, it is first necessary to define the concept of effective enforcement. The Agreement offers some general guidance in Article 5 through its reference to enhancing compliance.[120] Article 5 also provides a laundry list of activities that fit within the notion of enforcement.[121] Article 45 defines when a party has not failed to effectively enforce its environmental laws for purposes of the Agreement.[122] Nevertheless, the task of determining the scope of the concept of effective enforcement under the NAAEC is a difficult one.[123] In the United States, for example, views concerning how government enforcement efforts should be evaluated have been much in flux in recent years.[124] In 1997, the CEC initiated a project to "explore development of indicators or criteria for evaluating the performance of the Parties in implementing policies and programs for effective environmental enforcement."[125] Defining "effective enforcement," in short, appears to be a second threshold challenge for those interested in evaluating the extent to which the Article 14 process has been successful in promoting such.

"The need to consider carefully the purposes of the process in evaluating its effectiveness is obviously a critical element in focusing future research."

A third issue to explore involves determining changes in enforcement practices in the areas that are the subject of submissions—determining whether government enforcement efforts have changed in such areas and how much more effective they have become (if any).[126] Exploration of this issue requires treatment of a related question, notably the extent to which the "squeaky wheel" syndrome is partially or entirely responsible for improvements in enforcement—again, if any—in areas that are the subject of submissions. At least one World Bank study of "complaint-based" enforcement strategies suggests that communities that complain thereby may "capture" more enforcement attention from government agencies than other communities.[127] This related question, therefore, involves the extent to which any enhancement of enforcement in areas that are the subject of submissions is due to a reduction in enforcement elsewhere.

A fourth issue involves determining the extent to which the parties have strengthened their domestic enforcement practices more generally. An obvious central methodological challenge here, and with respect to the preceding issue as well, is to establish a link between the Article 14 process (including its use as well as its potential for use) and any such enhancements.

"Defining 'effective enforcement,' in short, appears to be a second threshold challenge for those interested in evaluating the extent to which the Article 14 process has been successful in promoting such."

A fifth issue that relates to the essential character of the citizen submission process has already received considerable attention in the literature. It is clear what the citizen submission process is and what it is not. The process offers the prospect of a "spotlight" on domestic enforcement practices. Some commentators are optimistic about the possible value of such a "spotlight."[128] The citizen submission process does not, however, provide for sanctions. Some have labeled the lack of sanctions a serious shortcoming.[129] Debate concerning the likely effectiveness of the Article 14 process in light of its essential character as a "spotlight" and in light of its lack of sanctions is being replayed on a wide variety of stages throughout the world. There is currently an enormous amount of debate about the relative merits of different compliance-oriented approaches. Some suggest that sanctions are needed,[130] while others tout the promise of spotlights and other creative approaches.[131] The nature of the Article 14 process may make it a profitable topic for research concerning the relative effectiveness of different policy tools.[132]

A sixth issue involves the possible impacts of the process on environmental protection. As noted above,[133] the Article 14 process focuses on the effectiveness of enforcement practices, not on the effectiveness of environmental regimes writ large. Yet, as also noted above, an important goal of the process appears to be the enhancement of environmental protection through the enhancement of enforcement.[134] At least one commentator has argued in several articles that there is a possibility that the prospect of international scrutiny of domestic enforcement practices may lead to a reduction in environmental protection.[135] Professor Raustiala suggests that such scrutiny may lessen the substantive scope of environmental legislation in the United States,

particularly because of the technology-forcing and agency-forcing nature of some laws.[136] The argument is that scrutinizing enforcement will lead countries to want to "look better" on that front and that one strategy they may follow is to lower standards in order to improve compliance rates. Future Commission actions on submissions may provide information that is useful in examining the validity of this hypothesis.

The final issue I raise relating to the question of "effectiveness" involves the impact of the process on "civil society."[137] A number of commentators have applauded the potential emergence of a "global civil society."[138] The Article 14 process is cited as a vehicle that may contribute to the development of such a society.[139] There are a variety of issues of interest concerning the extent to which the process is fulfilling its potential on this front and the reasons why it is (or is not) doing so.[140]

"[T]he existing body of work about the Article 14 process contains numerous useful insights. Researchers have the opportunity, however, to mine many more nuggets of important insight through future work on the process."

I will close by listing three other categories of issues that are of importance. First, there are issues relating to the behavior of national governments in international regimes. Commentators have observed that the parties to the Agreement have dual roles. They represent their national interests and also serve as "custodians" of the Agreement.[141] The Article 14 process may offer interesting insights into how parties perform these multiple roles and into the types of variables that may affect their behavior.[142] Second, and related, there is the issue of the relationship between national governments and secretariats—the level of autonomy/independence given to the latter, the evolution of such arrangements over time, and the workability of such arrangements.[143] Finally, there is the impact that international regimes can have on domestic politics.[144] This impact may be felt in many contexts. For example, international regimes can impact federalism—in the United States, they might impact the relationship between the federal government and the states.[145] As the Article 14 process evolves, careful study is likely to reveal interesting insights about each of these issues.[146]

In sum, the existing body of work about the Article 14 process contains numerous useful insights. Researchers have the opportunity, however, to mine many more nuggets of important insight through future work on the process. This is a process of quite recent vintage. Further, the near term is likely to produce a relatively substantial body of work. Finally, because of the relatively transparent nature of the process, much of this work is likely to be quite easily accessible.[147] Those of us involved in the citizen submission process look forward to continuing to implement it and to the insights of others interested in its operation.

Endnotes

1. North American Free Trade Agreement, *opened for signature* Dec. 8, 1992, U.S.-Can.-Mex., 32 I.L.M. 296 [hereinafter NAFTA].

2. North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC]. The Agreement, as well as many of the CEC-generated documents referenced in this article, are available on the CEC homepage, *Welcome to the Commission on Environmental Cooperation* (visited Apr. 5, 2000) <http://www.cec.org> [hereinafter CEC homepage]. Because the web site is periodically reorganized, this article will reference most CEC documents to the CEC homepage rather than to specific addresses in the web site. For discussions of the NAAEC, see, e.g., PIERRE MARC JOHNSON & ANDRE BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996); DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1245 (1998); Beatriz Bugeda, *Is NAFTA Up to its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591 (1999); Naomi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT'L ENVTL. L. REV. 53, 54 (1996); David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?*, U. CHI. LEGAL F. 331, 367 n.112 (1997) [hereinafter Wirth 1997]; David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 781 (1994) [hereinafter Wirth 1994]; Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission for Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 90-102 (1994).

3. Many commentators have suggested that active citizen participation in environmental protection in the United States is an important feature of the U.S. domestic system. Citizens have the opportunity to participate through a variety of mechanisms. These include, inter alia, involvement in rulemaking proceedings under the Administrative Procedure Act; provision of comments on proposed enforcement settlements; participation in processes under the federal Superfund law, the National Environmental Policy Act, and the Endangered Species Act; and involvement in committees created under the Federal Advisory Committee Act (FACA). Many federal environmental statutes give citizens the right to bring federal court actions under various circumstances. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 120 S. Ct. 693 (2000). *See generally* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1 (2000); David R. Hodas, *Enforcement of Environmental Federalism: Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1560-61 (1995) (suggesting that "only extensive use of citizen suits . . . can safeguard the [U.S.] enforcement system from collapse. . . .").

4. NAAEC, *supra* note 2. Several commentators have chronicled the negotiations leading to adoption of the NAAEC. *See, e.g.*, Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651 (1998); John Kirton, *The Commission for Environmental Cooperation and Canada-U.S. Environmental Governance in the NAFTA Era*, 27 AM. REV. CAN. STUD. 459 (1997). For a helpful compilation of documents relating to the negotiations as well as a summary of the discussions, see DANIEL MAGRAW, NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS (1995).

5. Harold K. Jacobson & Edith Brown Weiss, *A Framework for Analysis, in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1 (Edith Brown Weiss & Harold K. Jacobson eds., 1998). *See also* Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 537 (1997) (noting that "the last quarter century has witnessed exponential growth in the number and complexity of multilateral legal instruments aimed at environmental protection") [hereinafter Raustiala 1997]; Oran R. Young, *The Effectiveness of International Environmental Regimes*, 10 INT'L ENVTL. AFF. 267 (1998) (noting that a "striking feature of the recent past is the sharp rise . . . in the creation of international regimes as a means of addressing [environmental] problems . . .").

6. *See, e.g.*, U.S. GAO, North American Free Trade Agreement: Assessment of Major Issues, GAO/GGD-93-137B, 114 (Sept. 1993) (noting that "[s]everal major environmental groups generally believed . . . that NAFTA was worth supporting, as long as a strong parallel environmental agreement was signed" and continuing that "[s]ome environmental groups continue to oppose NAFTA, asserting that the recent side agreement is inadequate"); HUNTER ET AL., *supra* note 2, at 1245; JOHNSON & BEAULIEU, *supra* note 3, at 123 (noting that "[w]ithout a fairly comprehensive framework for environmental cooperation strengthened with enforcement provisions, many concluded that NAFTA would have no hope for survival in the American ratification process, given the environmental concerns of the legislators, the organized opposition to NAFTA, and the promises made by two Presidents"); Kirton, *supra* note 4, at 464, 480 (stating that the "CEC . . . [was] the product less of any fundamental enduring commitment to environmental values on the part of the three governments in North American than of a temporary need of a Republican, and then Democratic, president to secure sufficient domestic support to ensure legislative passage of a historic free trade agreement"); Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721, 723-24 (1996) [hereinafter Raustiala 1996] (noting that a "driving factor" for the adoption of the NAAEC was the "great concern—primarily on the part of U.S. environmental groups—that Mexican environmental law . . . was inadequately implemented and enforced" and continuing that: "In return for their political support of NAFTA, several major U.S. environmental organizations, joined by similar groups in Canada and Mexico, demanded the negotiation of a companion agreement creating a North American Commission on Environmental Cooperation"); *Four-Year Review of the North American Agreement on Environmental Cooperation: Report of the Independent Review Committee* 8 (June 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *IRC Report*] (noting that "[t]he negotiation of the NAAEC and the creation of the CEC were U.S. conditions for its adoption of NAFTA, a result of domestic opposition to the trade agreement alone").

7. JOHNSON & BEAULIEU, *supra* note 6, at 121. For a more skeptical view of NAFTA, see Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L BUS. 1, 68, 76 (1994) [hereinafter Charnovitz NAFTA] (concluding that NAFTA is not a particularly "green" trade agreement and indicating that "it is hard to understand how officials in both the Clinton and Bush administrations could characterize the NAFTA as the greenest trade agreement"). Mr. Charnovitz also notes that "[i]t is also hard to understand how the press could print such misinformation without any attempts at verification." Charnovitz, *supra*, at 76. He continues, "A truly green trade treaty would assure that the newly engendered trade does not abase the environment or undermine an environmental protection regime. Neither assurance is provided by the NAFTA." *Id.*

   See also Raymond MacCallum, Comment, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 395, 396-97 (1997) (stating that "[a]lthough the NAFTA has been hailed as the 'greenest' trade agreement ever, this claim is largely based on the fact that sustainable development and environmental protection get a few cursory mentions in the NAFTA, where such considerations are unprecedented in the history of trade agreements. In reality, it was the perceived failure of the NAFTA to seriously address the substantial concerns of environmentally conscientious critics that forced the development and adoption of the NAAEC.").

8. *See, e.g., IRC Report*, *supra* note 6, at 4-7. "The IRC believes that the long-term value of NAAEC and the Commission will be measured not so much by a technically defined environment and trade 'rule,' but rather by the contribution the CEC makes to improved environmental conditions for all people in North America, in the context of changing economic patterns—in short, by its contribution to sustainable development in North America." *Id.* at 5.

9. The objectives of the NAAEC include:

   > (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
   >
   > (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
   >
   > (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
   >
   > (d) support the environmental goals and objectives of the NAFTA;
   >
   > (e) avoid creating trade distortions or new trade barriers;
   >
   > (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
   >
   > (g) enhance compliance with, and enforcement of, environmental laws and regulations;
   >
   > (h) promote transparency and public participation in the development of environmental laws, regulations and policies;
   >
   > (i) promote economically efficient and effective environmental measures; and
   >
   > (j) promote pollution prevention policies and practices.

NAAEC, *supra* note 2, art. 1. While some of these objectives focus on the relationship between trade and the environment (e.g., Article 1(b) and (e)), others do not.

10. *See* NAAEC, *supra* note 2, art. 8.

11. *See id.* art. 9(1). Section 9(1) provides specifically that the Council is comprised of "cabinet-level or equivalent representatives of the Parties, or their designees." *Id.*

12. *See id.* art. 11.

13. *See id.* art. 16.

14. *See id.* art. 16(1). JPAC members have a range of backgrounds. For example, of the U.S. members of JPAC, Peter Berle is a lawyer, former president/CEO of the National Audubon Society, and a former Commissioner of the New York State Department of Environmental Conservation. Jonathan Plaut is the retired director of environmental quality for Allied Signal, Inc. In addition to Mr. Berle and Mr. Plaut, the other current U.S. members of JPAC are Steve Owens, an attorney in Arizona, and John Wirth, president of the North American Institute. CEC's home page provides biographical information on each JPAC member. It also contains the JPAC Vision Statement and the Rules of Procedure that govern JPAC's work. *See generally Joint Public Advisory Committee* (visited Apr. 5, 2000) <http://www.cec.org/jpac>.

15. *See* NAAEC, *supra* note 2, art. 16(4)-(5).

16. *See generally* CEC, NORTH AMERICAN AGENDA FOR ACTION 1999-2001: A THREE-YEAR PROGRAM PLAN FOR THE COMMISSION FOR ENVIRONMENTAL COOPERATION, *available at* CEC homepage, *supra* note 2 [hereinafter NORTH AMERICAN AGENDA].

17. *See* CEC, *Grants for Environmental Cooperation* (visited Apr. 8, 2000) <http://dev3.hbe.ca/grants/index.cfm?varlan=english>.

18. The CEC has various other responsibilities as well. *See, e.g.*, NORTH AMERICAN AGENDA, *supra* note 16, at 118. Some observers suggest that while the NAAEC embraces a wide array of activities and areas of focus, its primary orientation is toward enhancing enforcement of domestic environmental law. *See, e.g.*, David S. Baron, *NAFTA and the Environment—Making the Side Agreement Work*, 12 ARIZ. J. INT'L & COMP. L. 603, 607 (1995) (suggesting that "[a]lthough the Side Agreement assigns a variety of functions to the council and the Secretariat, perhaps the most important deal with proceedings to address alleged failures by Parties to adequately enforce their environmental law"); Bugeda, *supra* note 2, at 1596 (stating that the citizen submission process is "[p]erhaps the most important function of the Secretariat of the CEC, and definitely the one that has captured the most attention . . ."); A.L.C. de Mestral, *The Significance of the NAFTA Side Agreements on Environmental and Labour Cooperation*, 15 ARIZ. J. INT'L & COMP. L. 169, 176 (1998) (suggesting that "Article 14 is the core provision of the NAAEC . . ."); Raustiala 1996, *supra* note 6, at 729 (suggesting that "[t]he NAAEC, though covering a number of important trade and environmental issues, is centrally concerned with strengthening the enforcement of domestic environmental law").

19. For a more in-depth discussion of the CEC's structure and responsibilities, see, e.g., JOHNSON & BEAULIEU, *supra* note 3, at 132-60.

20. This process is by no means completely unrelated to other CEC work. For example, one of the work projects of the Law and Policy program area involves review of compliance indicators, a topic directly related to the central issue of Article 14 and 15 submissions, notably whether a party is effectively enforcing its environmental laws. *See* JOHNSON & BEAULIEU, *supra* note 3, at 113; *see also* CEC, INDICATORS OF EFFECTIVE ENVIRONMENTAL ENFORCEMENT: PROCEEDINGS OF A NORTH AMERICAN DIALOGUE (1999), *available at* CEC homepage, *supra* note 2 [hereinafter CEC INDICATORS].

21. NAAEC, *supra* note 2, art. 14(1). Section (1)(f) of Article 14 makes clear that the person or organization filing the submission must reside or be established in the territory of a party. *See id.*

22. CEC homepage, *supra* note 2.

23. *See CEC Council Resolution 95-10* (Oct. 13, 1995), *available at* CEC homepage, *supra* note 2.

24. *See CEC Council Resolution 99-06* (June 28, 1999), *available at* CEC homepage, *supra* note 2; *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (June 28, 1999), *available at* CEC homepage, *supra* note 2 [hereinafter *Guidelines*]. The Guidelines, for example, provide details on how submissions must be submitted: in writing, in a language designated by one of the Parties, not exceeding 15 pages in length excluding supporting information, etc. *See Guidelines, supra,* Nos. 3.1-3.3.

JPAC provided an Advice to Council in which JPAC advised the Council not to revise the Guidelines. *See JPAC Advice to Council 99-01* (Mar. 25, 1999), *available at* CEC homepage, *supra* note 2. JPAC explained the three primary bases for its recommendation as follows:

> By far the majority of those members of the public who provided written comments [on the proposed revisions to the Guidelines] and those who participated in the workshop held the view that the case had not been made to support the revision process;
>
> The proposed revisions were tested by the workshop participants against an agreed upon set of criteria namely, accessibility, transparency, independence of the Secretariat, balance/parity between party and submitter, impartiality, discretionality and conformity to the NAAEC. With a few minor exceptions it was concluded that the proposed revisions detracted from these criteria, in certain cases seriously so.
>
> The argument for change has not been made and to do so at this time would undermine public confidence in the citizen submission process. Indeed, the proposed changes would slow the process, make it more bureaucratic and less transparent.

Id. In finalizing its revisions to the Guidelines, the Council indicated that it was "[m]indful of the public comments received and of JPAC Advice 99-01." *CEC Council Resolution 99-06*, *supra*.

25. NAAEC, *supra* note 2, art. 14(1) (emphasis added).

26. *Id*. Article 45(1) is relevant to the scope of this clause as well, providing as follows:

> For purposes of this Agreement:
>
> A Party has not failed to "*effectively enforce its environmental law*" [emphasis added] . . . in a particular case where the action or inaction in question by agencies or officials of that Party:
>
> reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
>
> results from *bona fide* decisions to allocate resources to enforcement in respect of other envi-

ronmental matters determined to have higher priorities. . . .

Id. art. 45(1).

27. *See id.* art. 45(2)(a). Article 45(2)(a) provides as follows:

> (a) "*environmental law*" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
>
> (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
>
> (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
>
> (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
>
> (b) For greater certainty, the term "*environmental law*" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
>
> (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

Id.

28. *See* Fisheries Act, R.S.C. (1985) (Can.); *see also* CEC Secretariat, *Article 14(1) Determination, B.C. Aboriginal Fisheries Commission et al.,* SEM-97-001 (May 1, 1997), *available at* CEC homepage, *supra* note 2 (concerning the Fisheries Act).

29. *See* Canadian Environmental Assessment Act, ch. 37, S.C. (1992) (Can.); *see also* CEC Secretariat, *Article 14(1) Determination, Friends of Oldman River*, SEM-97-006 (Jan. 23, 1998), *available at* CEC homepage, *supra* note 2 (concerning the Canadian Environmental Assessment Act).

30. *See* Ley General del Equilibrio Ecologico y de Proteccion al Ambiente [LGEEPA]; *see also* CEC Secretariat, *Article 14(1) Determination,* SEM-96-001 (Feb. 6, 1996), *available at* CEC homepage, *supra* note 2 [hereinafter *Cozumel Article 14(1) Determination*] (concerning LGEEPA).

31. *See* Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Impacto Ambiental (Mex.).

32. *See* 42 U.S.C. § 4321 et seq.; *see also* CEC Secretariat, *Article 14(1) Determination, Southwest Center for Biological Diversity et al*., SEM-96-004 (Dec. 16, 1996), *available at* CEC homepage, *supra* note 2 (concerning NEPA).

33. *See* 42 U.S.C. § 7401 et seq.; *see also* CEC Secretariat, *Article 14(1) Determination, Dept. of the Planet Earth et al*., SEM-98-003 (Dec. 14, 1998), *available at* CEC homepage, *supra* note 2 (concerning the U.S. Clean Air Act and Pollution Prevention Act).

34. *See* 33 U.S.C. § 1251 et seq.

35. *See* CEC Secretariat, *Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation*, SEM-98-002 (June 23, 1998), *available at* CEC homepage, *supra* note 2 (finding that the submission involved a commercial forestry dispute not subject to Article 14). *Cf.* CEC Secretariat, *Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, SEM-95-002 (Dec. 8, 1995), *available at* CEC homepage, *supra* note 2 (dismissed on other grounds) (finding that submission involving U.S. statute that addressed harvesting of natural resources subject to Article 14 review).

36. *See, e.g.*, Raustiala 1996, *supra* note 6, at 746 (stating that "[n]atural resource management statutes are clearly environmental laws by any reasonable understanding of the word, yet they are expressly denied that status in the Article 45 definition"); Greg Block, *NAFTA's Environmental Provisions: Are They Working As Intended? Are They Adequate?*, 23 CAN.-U.S. L.J. 409, 412 (1997) (noting that "[t]he NAAEC has a rather unusual definition of environmental law, excluding from Articles 14 and 15 the exploitation or harvesting of natural resources"); Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking,* 8 TEMP. INT'L & COMP. L.J. 257, 267 (1994) [hereinafter Charnovitz 1994] (asserting that "[t]he term 'environmental law' is . . . sharply circumscribed" because of this limitation, among others).

37. *See* Dept. of Planet Earth et al., *NGO Petition to the North American Commission for Environmental Cooperation for an Investigation and Creation of a Factual Record*, SEM-98-003 (May 28, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *Great Lakes Submission*]; CEC Secretariat, *Determination Pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation,* SEM-98-003 (Sept. 8, 1999), *available at* CEC homepage, *supra* note 2 [hereinafter *Great Lakes Article 14(1) and (2) Determination*].

38. Great Lakes Water Quality Agreement of 1978, U.S.-Can., 30 U.S.T. 1383.

39. Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, *available in* 1986 WL 235022.

40. *Great Lakes Article 14(1) and (2) Determination*, *supra* note 37.

41. NAAEC, *supra* note 2, art. 45(2)(a)(iii).

42. *See Great Lakes Article 14(1) and (2) Determination*, *supra* note 37.

43. *See* B.C. Aboriginal Fisheries Commission et al., *Submission to the Commission on the Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation*, SEM-97-001 (Apr. 1997), *available at* CEC homepage, *supra* note 2 [hereinafter *BC Hydro Submission*]; Sierra Club of British Columbia, et al., *The Government of Canada's Failure to Enforce the Fisheries Act Against Mining Companies in British Columbia: A Submission To The Commission On Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation*, SEM-98-004 (June 29, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *BC Mining Submission*]. The Council has reviewed the BC Hydro submission and agreed it met the requirements of Article 14(1). *See CEC Council Resolution 98-07* (June 24, 1998), *available at* CEC homepage, *supra* note 2.

44. *See, e.g.*, *Great Lakes Submission*, *supra* note 37; *BC Hydro Submission*, *supra* note 43; *BC Mining Submission*, *supra* note 43.

45. *See, e.g.*, Comité para la Protección de los Recursos Naturales, A.C., et al., SEM-96-001 (Jan. 17, 1996), *available at* CEC home-

page, *supra* note 2 [hereinafter *Cozumel Submission*]; *Great Lakes Submission*, *supra* note 37; JOHNSON & BEAULIEU, *supra* note 3, at 153.

46. CEC Secretariat, *Determination Under Article 14(2)*, SEM 95-001 (Sept. 21, 1995), *available at* CEC homepage, *supra* note 2 [hereinafter *Biodiversity Legal Foundation 14(2) Determination*]. For a generally positive review of the Secretariat's determination, see Raustiala 1996, *supra* note 6, at 725, 746-57. For a negative evaluation, see Jay Tutchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does It Work?*, 26 Envtl. L. Rep. 10,031 (Envtl. L. Inst. 1996). For a third perspective, see MacCallum, *supra* note 7, at 405-09. The Secretariat reached the same conclusion in the Sierra Club Submission. *See* CEC Secretariat, *Determination Under Article 14 & 15 of the North American Agreement on Environmental Cooperation*, SEM-95-002 (Dec. 8, 1995), *available at* CEC homepage, *supra* note 2.

    Some commentators appear to agree that this limit exists in the Agreement but believe it should not. *See, e.g.*, JOHNSON & BEAULIEU, *supra* note 3, at 165 (suggesting that there was "no reason to restrict the NGO submissions . . . to 'enforcement' matters. NGOs should have been allowed to present evidence establishing that a NAFTA party is lowering environmental norms in an attempt to attract investments."). Other observers highlight the difficulty of separating enforcement from lawmaking, with one commentator characterizing the Secretariat's determinations in the two above-referenced submissions as "puzzling." Gal-Or, *supra* note 2, at 76. Professor Raustalia similarly suggests that the distinction between enforcement and lawmaking is a false one. *See, e.g.*, Kal Raustalia, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 131, 133, 148 (1996). The Secretariat's most recent treatment of this issue is in its Great Lakes Determination. *See* CEC Secretariat, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation,* SEM-98-003 (Dec. 14, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *Great Lakes Article 14(1) Determination*].

47. *See Biodiversity Legal Foundation 14(2) Determination, supra* note 46.

48. *See id.*

49. *Id.*

50. *Great Lakes Article 14(1) Determination*, *supra* note 46.

51. *See* NAAEC, *supra* note 2, art. 14(1).

52. Canadian Environmental Defence Fund, *Article 14 Submission Made Pursuant to the North American Agreement on Environmental Cooperation*, SEM 97-004 (May 26, 1997), *available at* CEC homepage, *supra* note 2 [hereinafter *Canadian Environmental Defence Fund Submission*].

53. CEC Secretariat, *Article 14(1) Determination,* SEM-97-004 (Aug. 25, 1997), *available at* CEC homepage, *supra* note 2 (emphasis added) [hereinafter *Canadian Environmental Defence Fund Determination*].

54. *Id.*

55. *See* CEC Secretariat, *Recommendation of the Secretariat to Council for the Development of a Factual Record in Accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, SEM-96-001 (June 7, 1996), *available at* CEC homepage, *supra* note 2 [hereinafter *Cozumel Recommendation*].

56. *Id.*

57. *See Cozumel Submission*, *supra* note 45.

58. *See CEC Council Resolution 98-07* (June 24, 1998), *available at* CEC homepage, *supra* note 2.

59. *Id.*

60. *See Canadian Environmental Defence Fund Determination*, *supra* note 52. As this article was going to press, a second submission was dismissed because, inter alia, it did not satisfy the "temporal" requirement. *See* CEC Secretariat, *Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM-00-003 (Apr. 12, 2000), *available at* CEC homepage, *supra* note 2 (determining that the submission was premature because the government action that constituted the asserted failure to effectively enforce had not yet been taken).

61. *See Cozumel Recommendation, supra* note 55.

62. *See Cozumel Submission*, *supra* note 45; *BC Hydro Submission*, *supra* note 43. In connection with the Cozumel Submission, the Secretariat stated:

    > Article 47 of the NAAEC indicates the Parties intended the Agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC. Notwithstanding the above, events or acts concluded prior to January 1, 1994, may create conditions or situations that give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law.

    Cozumel Recommendation, *supra* note 55.

63. NAAEC, *supra* note 2, art. 14(1).

64. *See Guidelines*, *supra* note 23, No. 5.2.

65. *See* CEC Secretariat, *Request for Additional Information from the Submitters*, SEM-97-002 (July 2, 1997), *available at* CEC homepage, *supra* note 2.

66. NAAEC, *supra* note 2, art. 14(1)(d).

67. *Guidelines*, *supra* note 23, No. 5.4.

68. *See* Earthlaw, *Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation,* SEM-96-004 (Nov. 14, 1996), *available at* CEC homepage, *supra* note 2.

69. *See Guidelines*, *supra* note 24, No. 7.2.

70. *See Great Lakes Article 14(1) Determination*, *supra* note 46.

71. CEC Secretariat, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM-97-005 (May 26, 1998), *available at* CEC homepage, *supra* note 2 [hereinafter *Animal Alliance Determination*].

72. The relevant part of Article 14(1) reads: "The Secretariat may consider a submission from any non governmental organization or person *asserting that* . . . ." NAAEC, *supra* note 2, art. 14(1) (emphasis added).

73. *Animal Alliance Determination*, *supra* note 71.

74. *Great Lakes Article 14(1) and 14(2) Determination*, *supra* note 37; *see also Guidelines*, *supra* note 24, No. 3.3.

75. *See infra* Part IV.

76. NAAEC, *supra* note 2, art. 14(2)(d).

77. *See id.* art. 14(1).

78. *Great Lakes Article 14(1) and 14(2) Determination*, *supra* note 37.

79. *Guidelines*, *supra* note 24, No. 7.4.

80. *Cozumel Recommendations*, *supra* note 55.

81. *See* Gal-Or, *supra* note 2, at 89.

82. *Id*. Gal-Or also suggests that environmental activists "have seen the NAAEC as a vehicle to enhancing public participation in dispute resolution." *Id. See* Bugeda, *supra* note 2, at 1609 (discussing Cozumel and noting "[i]t is clear that the Secretariat met the expectations of many environmental groups by adopting a broad interpretation of Article 14(2)(a) . . ."); *see also* Baron, *supra* note 18, at 609 (urging an interpretation of the sort articulated in Cozumel).

83. *See generally* Craig N. Johnston, *1999—The Year in Review*, 30 Envtl. L. Rep. 10,173, 10,180-85 (Envtl. L. Inst. 2000); JOHN D. ECHEVERRIA & JON T. ZEIDLER, BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW (Environmental Policy Project, Georgetown University Law Center, 1999) (on file with GEO. INT'L ENVTL. L. REV.).

84. *See* NAAEC, *supra* note 2, art. 14(2)(b).

85. *See Guidelines*, *supra* note 24, No. 7.5.

86. *See id.*

87. *See id.*

88. *Id.*

89. NAAEC, *supra* note 2, art. 14(2)(d).

90. *See infra* Part IV.

91. *See id.*

92. *See Guidelines*, *supra* note 24, No. 9.6. The Secretariat may request additional information from the party if, inter alia, the Secretariat believes such would be helpful to its completion of this stage of the process. *See* NAAEC, *supra* note 2, art. 21(1)(b).

93. *See* NAAEC, *supra* note 2, art. 15(1).

94. *See Guidelines*, *supra* note 24, No. 9.6. If the party does not provide a response within the requisite time frame, the Secretariat may nevertheless begin its consideration of whether to inform the Council that the submission warrants development of a factual record. *See id.* No. 9.5.

95. *See* NAAEC, *supra* note 2, art. 15(1).

96. A new provision in the July 1999 revised guidelines provides that the Council may seek "further explanation" when it receives a recommendation from the Secretariat to develop a factual record. *See Guidelines*, *supra* note 24, No. 10.1.

97. *See* NAAEC, art. 9(6), *supra* note 2 (providing that "[a]ll decisions and recommendations of the Council shall be taken by consensus, except as the Council may otherwise decide or as otherwise provided in this Agreement"). The term "consensus" is defined as unanimous approval. *See* Kirton, *supra* note 4, at 468 (noting that "[a]lthough the Council will normally operate by consensus, and thus empower each of the three countries with a veto, the Council moves from pure national control to *supra*national constraint in several areas [including Article 15] . . . ") (emphasis added); JOHNSON & BEAULIEU, *supra* note 3, at 133 (noting that "[t]he decision-making procedure requires unanimity, unless the agreement provides otherwise").

98. *See* NAAEC, *supra* note 2, art. 15(2).

99. *See Guidelines*, *supra* note 24, No. 10.4.

100. *See* NAAEC, *supra* note 2, art. 15(2).

101. *Id.* art. 15(4).

102. *Guidelines*, *supra* note 24, No. 12.1.

103. NAAEC, *supra* note 2, art. 15(5).

104. *Id.* art. 15(6).

105. *See id.* art. 15(7). Guideline No. 13.1 provides:

> [A]fter receiving the final factual record, the Council may decide, by a two-thirds vote, to make it public. If it so decides, the final factual record will be made public as soon as it is available in the three official languages of the Commission and a copy will be provided to the Submitter. This should normally be within 60 days of the submission of the final factual record to the Council.

Guidelines, *supra* note 24, No. 13.1.

106. Part Five of the Agreement provides a mechanism for a party to initiate a proceeding against another party regarding "whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law." NAAEC, *supra* note 2, art. 22(1). While it has not happened to date, there is the potential that a factual record or information produced pursuant to a factual record process, could be used as part of, or even to launch, a Part Five proceeding. *See* Bugeda, *supra* note 2, at 1603. For a discussion of the Part Five process, see, e.g., Kirton, *supra* note 4, at 469 (suggesting that it is likely that this procedure will see little if any use because the three governments will "accept an implicit mutual nonaggression pact, and be reluctant to launch enforcement investigations against one another for fear that their partners will retaliate by launching similarly embarrassing investigations against them"); Bugeda, *supra* note 2, at 1594-96.

107. This status update is current as of April 17, 2000. Additional information concerning each submission is available on the CEC website. Footnotes detailing the source of the information for each submission therefore are not included.

108. Article 14(1) and 14(2) determinations issued after June 1999 must include explanations of the Secretariat's reasoning, per the revised Guidelines. Previous determinations finding that a submission met the 14(1) criteria and/or warranted a response under 14(2) typically did not contain such explanations. Thus, 14(1) and 14(2) determinations issued since June 1999 tend to be more detailed and elaborate than earlier determinations.

109. CEC Secretariat, *Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM-97-005 (May 26, 1998), *available at* CEC homepage, *supra* note 2.

110. *See, e.g.*, Kirton, *supra* note 4, at 460 (identifying a critical factor in the CEC's relationship with the national government as "the independence of the CEC and its Secretariat"); Christopher N. Bolinger, *Assessing the CEC on its Record to Date*, 28 LAW & POL'Y INT'L BUS. 1107, 1125 (1997) (identifying as one criticism of the CEC that it is insufficiently independent and has to pull its punches). *See also JPAC Advice to Council 99-01* (Mar. 25, 1999), *available at* CEC homepage, *supra* note 2.

The parties are certainly aware of the issue of inappropriate influence. Article 11(4) of the Agreement is intended to insulate the Secretariat from inappropriate influence from a party:

> In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.

NAAEC, *supra* note 2, art. 11(4).

In their June 28, 1999 Council Resolution concerning the revised Guidelines for the Article 14 process, the Ministers "[r]ecogniz[e] that the revisions are designed to improve transparency and fairness of the public submissions process and are consistent with Article 11(4) of the [Agreement] and the Council's commitment to a process that honors the Secretariat's decision-making role under Article 14 of the Agreement. . . ." *CEC Council Resolution 99-06* (June 28, 1999), *available at* CEC homepage, *supra* note 2.

111. *See Friends of the Oldman River*, SEM-97-006, *available at* CEC homepage, *supra* note 2; *Centre québécois du droit de l'environnement*, SEM-97-003, *available at* CEC homepage, *supra* note 2; *Environmental Health Coalition, et. al.*, SEM-98-007, *available at* CEC homepage, *supra* note 2.

112. The Commission, for example, will create a fairly significant track record concerning the types of situations that warrant development of factual records, as well as, potentially, the types of situations that do not. *See, e.g.,* Tutchton, *supra* note 46, at 10,033 (suggesting that there are no established criteria for making such determinations). Similarly, the Commission is also likely to develop a better understanding of the tools available to the Secretariat to develop information for inclusion in factual records and of the types of information likely to be included in such factual records.

113. A considerable amount has already been written about the Article 14 process. A CEC official notes that the citizen submission process receives the "most media and scholarly attention" of the CEC's programs. Block, *supra* note 36, at 412. *See also IRC Report*, *supra* note 6, at x (noting that "[a]dministering the citizen submission process is the best known of the Secretariat's special responsibilities, and also the most controversial"). *See, e.g.*, Kirton, *supra* note 4, at 459 (noting with respect to the CEC generally that "[m]ore than three years after the CEC came into existence, there remains considerable disagreement about its overall potential and actual performance"). Many commentators, while identifying what they consider to be flaws in the citizen submission process, nevertheless have taken a position of qualified optimism regarding the NAAEC. *See, e.g.*, JOHNSON & BEAULIEU, *supra* note 3, at 152 (suggesting that the NGO submissions procedure "could very well become the most dynamic and innovative element of the fact-finding and information management mandate of the Secretariat"); Bolinger, *supra* note 110; Stephen L. Kass, *First Cases Before New NAFTA Forum Suggest Its Power Will Increase*, NAT'L L.J., June 10, 1996, at C5 (suggesting that "[d]espite its limitations, the CEC is on the verge of becoming a meaningful forum for the review of long-deferred regional environmental issues and challenges to inadequate enforcement of domestic environmental laws").

    Professor Kirton reports that "[t]he first and largest group of observers are the skeptical critics." Kirton, *supra* note 4, at 459. *See, e.g.*, Charnovitz 1994, *supra* note 36, at 272, 313; Michael J. Kelly, *Bringing a Complaint Under the NAFTA Environmental Side Accord: Difficult Steps Under a Procedural Paper Tiger, But Movement in the Right Direction*, 24 PEPP. L. REV. 71, 97 (1996) (arguing that "[t]he NAFTA Environmental Side Accord can serve as a model for future trade agreements only in a general sense. If future agreements copy its limited substantive achievements and procedural loopholes wholesale, then little progress has been made."); Tutchton, *supra* note 46, at 10,035-36 (concluding that ". . . the NAAEC's utility as an effective enforcement tool is highly debatable. While at least facially easy to use, the NAAEC citizen submission process suffers from several dramatic flaws. With the benefit of hindsight, it does not appear that the environmental community should be pleased with the NAAEC citizen submission process as it presently operates"); Wirth 1994, *supra* note 2, at 781 (indicating that "[t]here are . . . a number of potentially insurmountable impediments to a resolution of [an Article 14] submission on the merits").

    For a partial list of articles on the Article 14 process, see Raustiala 1996, *supra* note 4, at 727 n.24. *See also* US GAO, North American Free Trade Agreement: Impacts and Implementation, GAO/T-NSIAD-97-256 at 18-24 (Sept. 11, 1997) (discussing the NAAEC and concluding with respect to the NAAEC and the Labor Side Agreement that "[a]fter 3 ½ years of implementation, it is too early to say what definitive effect these side agreements will have on the environment and labor").

114. The Government Performance and Results Act (GPRA) is one example of the increasing importance attached to the issue of performance in the United States. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in scattered sections of 31 U.S.C and 39 U.S.C.). Some suggest that program evaluation is not something governments include routinely in program design or necessarily do very often or particularly well. To quote two distinguished commentators from their 1998 book on the U.S. Environmental Protection Agency:

    > [The] EPA has numerous management shortcomings, but none is more damaging to the regulatory system as a whole than the absence of feedback and evaluation. This absence means [the] EPA has no reporting system to tell whether its goals are being accomplished, whether any progress is being made, or how much work is being done.

    J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 35 (1998).

    Article 10(1)(b) of the NAAEC required the Council to review its operation and effectiveness four years after the entry into force of the Agreement. In November, 1997, the Council appointed an Independent Review Committee (IRC) to provide this assessment, which included a review of Article 14 implementation. *See IRC Report*, *supra* note 6, pt. 1. For another substantial review, see DiMento & Doughman, *supra* note 4.

115. *See, e.g.*, Sarah Richardson, *Sovereignty Revisited: Sovereignty, Trade, and the Environment—The North American Agreement on Environmental Cooperation*, 24 CAN-U.S. L.J. 183, 190 (1998) (noting that "[t]aken together, Articles 14 and 15 . . . represent a critical institutional mechanism to encourage the effective enforcement by the Parties of their domestic environmental law"). Avoiding possible trade distortions from a lack of vigorous enforcement is part of the reason for seeking such enhancement.

116. At the same time, the Secretariat has pointed out that the focus of the Article 14 process is on enforcement, not on the underlying environmental laws themselves. *See, e.g.*, *Great Lakes Article 14(1) and 14(2) Determination*, *supra* note 37. *See also* Richardson, *supra* note 115, at 190 (noting that "in signing the NAAEC, as a matter of law, no Party has given up its sovereign right to set national environmental priorities, policies, laws, and regulations at a level that it alone determines").

117. NAAEC, *supra* note 2, art. 5.

118. *See generally* MacCallum, *supra* note 7, at 395-400 (suggesting that the "apparent purpose of Articles 14 and 15 is to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective environmental laws").

119. *See generally* Young, *supra* note 5, at 268 (noting that "participants can and often do develop widely divergent perceptions of the nature or character of the problem to be solved, and regimes frequently come into existence in the absence of consensus in the realm of problem definition").

120. *See* NAAEC, *supra* note 2, art. 5.

121. *See id.*

122. *See id.* art. 45(1).

123. *See, e.g.*, Charnovitz 1994, *supra* note 36, at 268; Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT'L LAW 111, 128-29, 138 (1996) (noting that "[r]ather than setting forth precise standards for determining the effectiveness of each country's enforcement actions, the agreement leaves this level of detail to future development"). Fulton and Sperling state that "precise guidance for measuring the effectiveness of a country's enforcement program is likely to evolve through cooperative efforts of the parties to improve their programs and to report environmental results." Fulton & Sperling, *supra*, at 138. Fulton and Sperling continue, indicating that the CEC council's cooperative enforcement activities "could include developing ideas on how to measure results of enforcement programs" and they suggest that "[a] cooperative dialogue on measures of enforcement success may lead to development of new measures that will account for the behavioral and environmental benefits that result from enforcement action." Fulton & Sperling, *supra*, at 138.

124. *See generally* Markell, *supra* note 3. The United States has identified three general types of indicators of effective enforcement: (1) environmental indicators, (2) outcome measures, and (3) input measures. *See* OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. EPA, MEASURING THE PERFORMANCE OF EPA'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM (1997).

125. CEC INDICATORS, *supra* note 20.

126. Opportunities for empirical research concerning the impacts of Commission determinations and other Commission documents, including factual records, exist now and will increase in the future as additional documents are issued. As noted above, one factual record has been issued to date and preparation of another is in progress. The Secretariat has requested responses from parties for a significant number of submissions. One issue that would be interesting to explore is the extent to which different stages of the Article 14 process influence domestic enforcement policy.

127. SUSMITA DASGUPTA & DAVID WHEELER, WORLD BANK POLICY RESEARCH DEPARTMENT, ENVIRONMENT, INFRASTRUCTURE, AND AGRICULTURE DIVISION, CITIZEN COMPLAINTS AS ENVIRONMENTAL INDICATORS (1997) (concluding that a strategy in China of relying in part on complaints from citizens "undoubtedly provides some useful monitoring information, and an important avenue for community participation in environmental policy. However, it also directs a major share of China's inspection resources toward areas where individuals or communities have a high propensity to complain." They conclude that "[i]f regulators respond passively to complaints, aggressive plaintiffs may capture most of the available resources. . . . Our results imply that technical risk assessments should have priority status in determining agency resource allocation."). *Id.* at 15. *Cf.* Richard J. Lazarus, *Pursuing "Environmental Justice": the Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

128. *See, e.g.*, JOHNSON & BEAULIEU, *supra* note 2, at 166 (suggesting that "one of the CEC's most useful functions will be to cast the spotlight on public authorities that fail to fulfill their obligations—in particular, the obligation to effectively enforce domestic environmental laws"). Johnson and Beaulieu also urge that "there is essential value in independent verification of information supplied by the member states and their national bureaucracies." *Id.* at 138. *See also IRC Report*, *supra* note 6, at 5 (noting that the process makes it possible for "some 350 million pairs of eyes to alert the Council of any 'race to the bottom' through lax environmental enforcement").

129. *See* Bugeda, *supra* note 2, at 1603 (characterizing the absence of a direct remedy as a "serious shortcoming of the procedure"). The lack of sanctions has led one commentator to label the process a "procedural dead end" because the ultimate action is issuance of a factual record. *See* Charnovitz 1994, *supra* note 36, at 266.

130. For a discussion of sanctions in the international arena, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995). *See also* Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries, in* ENGAGING COUNTRIES, *supra* note 5, at 547 (noting that "[i]n some areas of international law, such as trade law or national security, sanctions have been regarded as essential to achieving compliance"). Professors Jacobson and Brown Weiss include an interesting discussion of strategies for strengthening compliance in their book. *See id.* at 542-54. They group such strategies into three primary categories: (1) sunshine methods, (2) positive incentives, and (3) coercive measures. *See id.* Professors Brown Weiss and Jacobson suggest that "different mixes of strategies will work better in different circumstances." *Id.* at 542-43. They also offer the important insight that contexts are dynamic and, as a result, "[w]hat mix will be most effective for a particular accord or country will likely change over time." *Id.* at 543. *See also* Daniel A. Farber, *Environmental Protection As a Learning Experience*, 27 LOY. L.A. L. REV. 791 (1994) (containing an insightful discussion of the need to design strategies that are adaptable in recognition of such dynamism).

131. "Spotlighting" strategies are receiving increasing attention generally, much of it positive. *See, e.g.*, *IRC Report*, *supra* note 6; Cass R. Sunstein, *Informational Regulation and the Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613, 616-17 (1999) (noting that "informational regulation, or regulation through disclosure, has become one of the most striking developments in the last generation of American law;" that disclosure of information "has become a central part of the American regulatory state—as central, in its way, as command-and-control regulation and economic incentives;" and applauding this development, concluding that informational strategies "have significant advantages" over command-and-control approaches, though noting that the former are not appropriate in all contexts); Tom Tietenberg & David Wheeler, *Empowering the Community: Information Strategies for Pollution Control* (1998) (visited Apr. 18, 2000) <http://www.worldbank.org/nipr/workpaper/ecoenv/index.htm> (labeling such strategies as the "third wave" of pollution control policy and concluding that such strategies are "effective in improving environmental results"); Markell, *supra* note 3, at 99-108.

132. The unusual nature of this policy tool obviously lends itself to research in far more ways than those described in the text. As one commentator has observed, the process "appears unique in its attention to international scrutiny of the implementation of domestic [environmental] rules." Raustiala 1996, *supra* note 4, at 725 n.15; *see also* Bugeda, *supra* note 2, at 1603 (indicating that "[t]here is common agreement that it represents a critical advance for the involvement of nongovernmental organizations (NGOs) in the North American environmental dialogue"); Gal-Or, *supra* note 2, at 56. Several other mechanisms exist for NGO involvement in international fora. *See, e.g.*, Wirth 1994, *supra* note 2; Raustiala 1997, *supra* note 5, at 549 (noting that the NAAEC is certainly not unique in incorporating NGO's in an international legal regime but asserting that the NAAEC "goes further than most multilateral treaties in terms of NGO access and participation," in part because it provides for citizen submissions).

133. *See* NAAEC, *supra* note 2, art. 14.

134. *See id.* art. 1.

135. *See* Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 50-54 (1995) [hereinafter Raustiala 1995]; Raustiala 1996, *supra* note 4, at 760-62 (suggesting the impossibility of separating lawmaking from enforcement and indicating that many laws are intended to be regularly unenforced).

136. *See* Raustiala 1995, *supra* note 135.

137. "'Civil society' has been defined by one observer as the ensemble of non-state organizations and relations that constitute associational life." Jesse C. Ribot, *Representation and Accountability in Decentralized Sahelian Forestry: Legal Instruments of Political-Administrative Control*, 12 GEO. INT'L ENVTL. L. REV. 447 (2000).

138. Raustiala 1997, *supra* note 5, at 573 (suggesting that "NGO activity within international environmental law is therefore an important practical manifestation of global civil society").

139. *IRC Report*, *supra* note 6, at 18 (noting that the citizen submission process "provide[s] growing recognition of the role of "civil society" in international environmental governance); Richardson, *supra* note 116, at 194 (indicating that "for the purpose of promoting the effective enforcement of environmental law, the NAAEC allows for the citizens of the three countries to behave as though they are North American environmental citizens").

140. *See, e.g.*, Bugeda, *supra* note 2, at 1616-17 (asking about, for example, the extent to which "civil society" thinks the process is worth the investment of time and resources needed to pursue submissions).

141. *IRC Report*, *supra* note 6, at viii (noting that "[t]he three Parties have dual roles within the CEC. On the one hand, they act as individual nations in international organizations, each reflecting its own national interest. On the other, the same representatives seek to identify and achieve goals of common interest. At times, the transition from self-interested Party to joint Council member has been difficult."). *See also* Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 631 (1999) (raising the issue of the extent to which the Parties will cede some measure of control to the Commission in noting that "[t]he identifying characteristic of the emerging legal order is the formal role given to non-national decisionmakers in the elaboration and/or control of regulatory norms that apply within national borders").

142. For example, the Independent Review Committee discusses briefly the impact that the number of Parties to an Agreement may have on party behavior. *See IRC Report*, *supra* note 6. Another aspect of this issue concerns the impact of a "spotlighting" procedure on the sustainability of the process and on party buy-in. *See* discussion *supra* note 131.

143. *See also* Kirton, *supra* note 4, at 460; Block, *supra* note 36, at 412 (observing that "Articles 14 and 15 present a special challenge because of inherent tension between evaluating allegations against a Party under these articles in our watchdog capacity and implementing consensus-based programs at the same time"). Related to this issue, as well as several of the others, is the significance of cultural and other differences among the three parties, such as availability of resources and technical capacity.

144. *See, e.g.*, Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401 (1995).

145. *See, e.g.*, Thomas W. Merrill, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOL. L.Q. 485 (1994); DAVIES & MAZUREK, *supra* note 114, at 14 (noting that "[i]nternational actions are increasingly likely to affect the directions and policies of EPA"); Science Advisory Board, United States Environmental Protection Agency, Pub. No. EPA-SAB-EC-95-007, *Beyond the Horizon: Using Foresight to Protect the Environmental Future* 17 (1995); Raustiala 1997, *supra* note 5, at 582-83. The Article 14 process, as noted above, is an international mechanism focused on domestic environmental enforcement performance. *See generally*, Charnovitz NAFTA, *supra* note 7. Some commentators question the appropriateness of making domestic standards the targets for international review. *See* Charnovitz 1994, *supra* note 36, at 278-99.

146. *See, e.g.*, Zamora, *supra* note 144, at 405 (noting that "[t]he interplay between national laws and international law is now a favorite topic of scholarly inquiry").

147. *See* CEC homepage, *supra* note 2. Most CEC documents are available for public access on the CEC web page.

At the time this article was written, David L. Markell was Director, Submissions on Enforcement Matters Unit, Commission for Environmental Cooperation. This article does not represent the views of the CEC but instead solely represents the views of the author. Professor Markell is a Professor at Albany Law School. **He would like to express his appreciation to Professors Edith Brown Weiss, John Knox, Alastair Lucas, Stephen McCaffrey, Dan Tarlock, and David Wirth, and to Carla Sbert of the CEC and Steve Charnovitz, for their insightful comments on earlier versions of this article. Any mistakes are, of course, the sole responsibility of the author. Karen Douglas, Stanford Law School, Class of 2001, provided invaluable assistance in connection with this article.**

***Reprinted with permission of the* Georgetown International Law Review.**

Section News

Names in the Move/People on the News

Wayne M. Harris has been named as Volunteer Conservationist of the Year for 2000 by the New York State Conservation Council, Inc. In addition to being a well-respected attorney with the firm of Harris, Chesworth & O'Brien, located in Rochester, Mr. Harris has gained the reputation of being a stalwart fighter for sound conservation and environmental practices. Mr. Harris was presented the award at the Council's 67th Annual Convention at the Radisson Hotel in Utica on September 15.

Thomas F. Walsh has been promoted to Managing Partner of Jaeckle Fleischmann & Mugel, LLP's Rochester office. Mr. Walsh, a partner in the firm's Environmental Practice Group, has extensive experience in state and federal Superfund issues, as well as solid and hazardous waste matters.

Section Establishes Task Force on Mining and Oil & Gas Exploration

At its Fall Meeting, the Section set up a Task Force on Mining and Oil & Gas Exploration, to be co-chaired by Terresa Bakner and Laura Zeisel. The Task Force held its first meeting in December at the offices of Whiteman Osterman and Hanna in Albany. Interested members of the Section are invited to join the Task Force.

For more information, contact Terresa Bakner at tmb@woh.com, or Laura Zeisel at lz@laurazeiselpc.com.

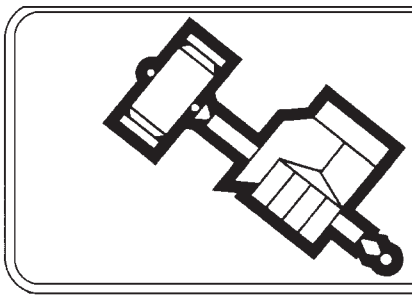
In Memoriam

Philip A. Rayhill, 1932-2000

On September 16, 2000, our colleague Philip A. Rayhill unexpectedly passed away while vacationing in Italy with his son and daughter-in-law. A member of the Environmental Law Section, Phil practiced in his hometown area of Utica, New York, for 43 years, the last ten of which were with the firm of Rayhill, Bankert, & Rayhill. He had particular expertise in environmental law, the natural outcome of a lifetime of dedication to environmental causes.

He became involved in environmental issues at an early stage of his career when, in the mid-1960s, he assisted in the development of Oneida County's wastewater treatment facility. His environmental work continued as he counseled clients in the Mohawk Valley region on environmental compliance requirements. In the 1990s he was instrumental in the development of the Regional Water Authority. In his decade-long service as General Counsel to the Oneida-Herkimer Solid Waste Management Authority, he worked on a range of solid waste issues from flow control to recycling to landfill siting. In addition, Phil was a long-standing member of the Oneida County Environmental Management Council, where he devoted his energies to initiatives to protect the local environment.

Phil was known for his commitment to family, integrity, keen sense of humor, and concern for all who needed his help. He was dedicated to the legal profession and, at the time of his death, was serving as President of the Oneida County Bar Association. He will be missed by all who had an opportunity to know and work with him.



Administrative Decisions Update

By David R. Everett and Melissa E. Osborne

CASE: ***In re the Application for a Tidal Wetlands Permit, Use and Protection of Water Permit, and Water Quality Certification Pursuant to the Environmental Conservation Law (ECL) Articles 15 and 25 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 N.Y.C.R.R.) Parts 608 and 661 by Peter Harrison and Arnold and Alice Kotzen ("Applicants").***

AUTHORITIES: ECL Article 15 (Use and Protection of Waters)

ECL Article 25 (Tidal Wetlands)

6 N.Y.C.R.R. § 608.8(a), (b) and (c) (Use and Protection of Waters)

6 N.Y.C.R.R. § 608.9(a) (Water Quality Certifications)

6 N.Y.C.R.R. § 661.9(b) (Tidal Wetlands)

DECISION: On February 28, 2000, the Commissioner of the N.Y.S. Department of Environmental Conservation (DEC) issued a decision denying the Applicants a permit to construct a bulkhead in a tidal wetland. The Commissioner held that the application did not meet the standards for issuance of a tidal wetlands permit (ECL article 25 and 6 N.Y.C.R.R. part 661), a protection of waters permit (6 N.Y.C.R.R. part 608.8) or a water quality certification (ECL article 15 and 6 N.Y.C.R.R. part 608.9).

A. Facts

The Applicants own adjacent houses on the north shore of Fire Island in the community of Ocean Bay Park. The general area consists of numerous houses along the water, most of which have bulkheads between the houses and the bay. The Applicants have no bulkhead and have experienced erosion during storms. On at least one occasion, a major storm washed away a nearby sidewalk and a water main, which the municipality had to replace. In addition, during major storms, water runs onto the street and waves hit the Applicants' homes.

To control this erosion and protect their homes, the Applicants proposed to construct a 50-foot bulkhead between their homes and the bay. The new bulkhead would connect existing bulkheads located on land adjacent to the east and west of the Applicants' homes. The Applicants proposed to backfill the proposed bulkhead with approximately 350 cubic yards of sand and build the bulkhead from treated wood attached by tie-rods to pilings.

DEC's tidal wetland map showed that, if constructed, approximately two-thirds of the bulkhead would replace a tidal wetland. Specifically, DEC classified the site as SM which denotes coastal shoals, bars, and flats. Accordingly, before beginning construction, the Applicants needed to obtain a tidal wetlands permit pursuant to ECL article 25 and 6 N.Y.C.R.R. part 661; a use and protection of waters permit pursuant to ECL article 15 and 6 N.Y.C.R.R. part 608.8; and water quality certification pursuant to 6 N.Y.C.R.R. part 608.9.

The Applicants applied for these permits and DEC issued a negative declaration under SEQRA determining that the project would not result in any significant effect on the environment.[1] DEC then referred the matter to its office of Hearings and Mediation Services to schedule a hearing. During the hearing, it was determined conclusively that the bulkhead would be located in a tidal wetland. As a result, DEC refused to issue any of the necessary permits. DEC indicated, however, that it would allow construction of a bulkhead above the mean high water line and away from the tidal wetland. The Applicants sought a determination from the Commissioner that DEC erred in refusing to issue the necessary permits.

B. Discussion

Title 6 of the N.Y.C.R.R. part 661.9(b)(1) requires an applicant to obtain a tidal wetland permit for any "regulated activity" conducted in a tidal wetland. To issue a

permit, DEC must determine, among other things, that the proposed activity is compatible with the preservation and protection of the tidal wetland.[2] Pursuant to part 661.5(b)(30), the placement of fill in a tidal wetland is a "presumptively incompatible" use in coastal shoals, bars, and flats. To obtain a protection of waters permit under part 608.8, an applicant must show that: (1) the proposed project is reasonable and necessary; (2) the proposed project will not harm the health, safety or welfare of the people; and (3) the project will not cause unreasonable or unnecessary damage to natural resources. Finally, part 608.9, which pertains to the issuance of a water quality certification, requires an applicant to comply with, among other things, water quality effluent limitations, as well as state statutes, regulations and criteria otherwise applicable to activities that may result in discharge into navigable waters.

DEC argued that the Applicants could construct a bulkhead at or above the mean high water line to prevent erosion without harming the tidal wetland. Accordingly, DEC asked the Commissioner to deny the permits because the proposed bulkhead would require the unnecessary filling of tidal wetlands.

In response, the Applicants argued that the Commissioner should order DEC to issue the necessary permits for the following five reasons: (1) a tidal wetland does not exist on the site and, therefore, DEC lacked the jurisdiction to issue a permit; (2) in the alternative, even if a wetland did exist, it has no value and the construction of the bulkhead would provide erosion protection for the Applicants' upland property, the street, and a municipal waterpipe; (3) when DEC issued a negative declaration under SEQRA, the project implicitly met the permit standards because the criteria for determining significance under SEQRA and issuing a tidal wetlands permit are nearly identical; (4) the Administrative Law Judge (ALJ) incorrectly excluded evidence regarding an off-site mitigation proposal and evidence of the benefits of the proposed bulkhead including providing recreational value; and (5) the Commissioner should adopt the Great South Beach Marine Construction case as precedent which held that the impacts from constructing a bulkhead and filling a small area of tidal wetlands did not violate DEC's permit standards.[3]

The Commissioner rejected each of the Applicants' arguments finding that the proposed bulkhead did not meet the standards for permit issuance. First, the Commissioner found that, while not unusually outstanding or attractive, the site functions as a valuable tidal wetland providing fish and wildlife habitat and marine food production. Next, the Commissioner held that DEC's decision to issue a negative declaration does not mean that the proposed action also meets the standards for issuance of a tidal wetlands permit.[4] There are clear differences between the permit standards and the criteria for determining significance under SEQRA. The Commissioner found that the SEQRA criteria for determining significance referred to "substantial" adverse impacts and removal or destruction of "large quantities" of vegetation or fauna.[5] In contrast, the standards for issuance of a protection of waters permit referred to "unreasonable, uncontrolled, or unnecessary" damage to natural resources.[6] Similarly, the tidal wetlands permit standards referred to "undue adverse impacts" on the value of wetlands for various functions.[7]

The Commissioner also found that the ALJ did not err in excluding the Applicants' evidence concerning off-site mitigation. Title 6 N.Y.C.R.R. part 661.9(e) allows DEC, in its discretion, to consider mitigation proposals made by the applicant. The provision, however, only requires consideration of a specific mitigation proposal listed in the application and in this case the Applicants failed to include such a proposal in their application. The Commissioner also noted that the site does not have much value for recreation purposes since the Applicants do not open the site to the public and because the site sometimes contains debris such as old tires, wood, and floating trash.

Finally, the Commissioner determined that the *Great South Beach* case does not support or provide precedent for the Applicants' position. In *Great South Beach,* DEC granted a permit for the construction of a retaining wall with backfill a minimum of five feet above the mean high water line. The applicants violated the permit by building the wall 30 feet seaward of the mean high water mark and filling 10,500 square feet of wetlands. DEC settled with eight of the applicants, ordering only a fine. DEC's suit against the remaining two applicants resulted in an Order of the Commissioner imposing fines, but not requiring removal of the bulkhead. DEC, in light of the settlement with the other applicants and the complexity of the case, did not seek removal of the wall. The Commissioner found that DEC in *Great South Beach* exercised its prosecutorial discretion in deciding not to require the applicants to tear down a completed project. The Commissioner determined that the instant case differed because the Applicants were not seeking to preserve a completed project, but rather seeking approval to build a new bulkhead.

Having rejected all of the Applicants' arguments, the Commissioner held that the proposed bulkhead did not comply with the standards for issuance of a tidal wetland permit pursuant to 6 N.Y.C.R.R. part 661.9(b). The Commissioner reasoned that the Applicants had

failed to overcome the presumption that the bulkhead would be incompatible with the goals of preserving, protecting, or enhancing tidal wetlands. He also noted that the Applicants could control erosion by building a bulkhead at a location which caused less harm to the wetlands.

The Commissioner further noted that the Applicants did not meet the standards for a protection of waters permit pursuant to 6 N.Y.C.R.R. part 608.8. While the Applicants demonstrated that they needed some form of erosion protection, they did not prove that the proposed bulkhead was reasonable and necessary. Because the Applicants would fill more tidal wetlands than necessary, the bulkhead would cause unnecessary damage to the natural resources of the state, specifically, fish, crustaceans, and the aquatic environment.

Finally, the Commissioner noted that a project must meet the requirements for a tidal wetlands permit, as well as protection of water permits, before a water quality certification would be issued. Because neither permit would be issued, a water quality certification was unnecessary.

C. Conclusion

For the reasons stated above, the Commissioner held that the Applicants' proposed bulkhead did not meet the standards for permit issuance and denied the application without prejudice. The Commissioner noted, however, that the Applicants could consider other erosion control alternatives that meet the permit standards. For example, the Commissioner noted that DEC would likely permit construction of a bulkhead at or above the mean high water line.

* * *

CASE: ***In re Alleged Violations of Article 19 of the Environmental Conservation Law and Parts 200 and 230 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York By Gas Stop Service Station a/k/a Pit Stop Service Station, Task Oil Corp. and Diruk, Inc., ("Respondents").***

AUTHORITIES: 6 N.Y.C.R.R. § 200.7 (Maintenance of Equipment) 6 N.Y.C.R.R. § 230.2 (g) (Gasoline dispensing sites—prohibitions and requirements)

6 N.Y.C.R.R. § 230.2 (f) (Gasoline dispensing sites—prohibitions and requirements)

DECISION: On March 17, 2000, the Commissioner of the N.Y.S. Department of Environmental Conservation (DEC) issued a decision holding the Respondents in violation of 6 N.Y.C.R.R. §§ 200.7, 230.2(f), and 230.2(g) for failing to properly maintain its stage I and stage II vapor collection systems. The Respondents were assessed a civil penalty of $10,000.

A. Facts

The Respondents own a gasoline dispensing facility located on Grand Avenue in Baldwin, N.Y. The facility has two gasoline tanks. The gas station is also equipped with stage I and stage II vapor recovery systems to prevent the release of gasoline vapors. The stage I system is designed to recover vapors that are displaced during the delivery of gasoline from various transport vehicles, while the stage II system works to prevent the displacement of vapors during the refueling of a vehicle.

On May 27, 1999, a DEC technician inspected the Respondent's facility. He discovered that vapor pressure caps were missing from the vent stacks of both gasoline tanks. The technician also detected a tear in the outer layer of one of the gasoline dispensing hoses that the Respondents had failed to remove from service. Both violations can cause the vapor recovery systems to operate ineffectively, allowing gasoline vapors to escape into the air.

Pursuant to 6 N.Y.C.R.R. §§ 200.7, 230.2(f) and 230.2(g), the DEC commenced this proceeding, alleging that the facility had failed to properly maintain its vapor recovery systems, and recommended a civil penalty of $10,000.

B. Discussion

6 N.Y.C.R.R. § 200.7 requires any person who owns an air contamination source equipped with an emission control device to maintain the device in a satisfactory state. More specifically, 6 N.Y.C.R.R. § 230.2(f) provides that an owner of a vapor collection system must make necessary modifications and repairs to the system to maintain its efficiency. Finally, 6 N.Y.C.R.R. § 230.2(g) requires the operator of a stage II vapor collection system to perform daily visual inspections of the machinery. The operator must then remove and replace any defective components from service. The machinery must be locked and sealed in order to prevent vapor loss.

DEC initiated this proceeding based on the Respondents' failure to comply with these regulations, as evidenced by the inspector's report. The Respondents answered and denied that they were the owners and operators of the facility. They also denied having

knowledge of the alleged violations. However, DEC staff offered into evidence a copy of a Registration Application for the Storage of Flammable/Combustible Liquids. This document identified the Respondents as the owners and operators of the facility, contradicting their assertion.

The Respondents raised two affirmative defenses to DEC's enforcement action. First, they claimed that the conditions complained of were created by a pressure-testing company that refused to make repairs due to a disputed payment. However, the Respondents offered no credible evidence to support this assertion. Secondly, they asserted that the Nassau County Board of Health had already initiated enforcement proceedings against them for violations at the same facility. The Commissioner rejected this claim because the complaint filed by Nassau County Board of Health alleged different violations on different dates.

C. Conclusion

The Commissioner held the Respondents liable for their failure to properly replace, repair, and maintain various components of its stage I and stage II vapor recovery systems. The Respondents were assessed a civil penalty in the amount of $10,000, and were ordered to comply with the terms of DEC's compliance schedule.

Endnotes

1. *See* ECL article 8; and 6 N.Y.C.R.R. § 617.
2. 6 N.Y.C.R.R. § 661.9(b)(c).
3. *In re Great South Beach Marine Construction, et al.*, ALJ Hearing Report by William J. Dickerson, Suffolk Co., N.Y., File Nos. 1-1361 and 1-1370 (1989) (unpublished).
4. *Brotherton v. Department of Environmental Conservation*, 189 A.D.2d 814, 592 N.Y.S.2d 437 (2d Dep't 1993); *see also Goldhirsch v. Flacke*, 114 A.D.2d 998, 495 N.Y.S.2d 436 (2d Dep't 1985).
5. *See* 6 N.Y.C.R.R. § 617.7(c)(1).
6. *See* 6 N.Y.C.R.R. § 608.8.
7. *See* 6 N.Y.C.R.R. § 661.9(b)(1).

David R. Everett and Melissa E. Osborne are attorneys in the Environmental Practice Group of Whiteman Osterman & Hanna in Albany, New York. Summer Associates William Nolan, David Kunselman and Jeffery Lindenbaum assisted in preparing these updates.

Recent Decisions in Environmental Law

Student Editor: Jennifer S. Rosa

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

American Petroleum Institute. v. U.S. Environmental Protection Agency, 198 F.3d 275 (D.C. Cir. 2000)

Facts: Automobile engines emit volatile organic compounds (VOCs) that combine with nitrogen oxides (NOx) to create ozone. Use of reformulated gasoline (RFG) can reduce these VOC emissions. The Clean Air Act (the "Act") stated that RFG should be mandatory in the nine worst ozone areas with populations over a quarter of a million people, and anywhere classified in severe nonattainment areas for ozone.[1] The Act authorized limited reliance on RFG to those worst areas, and provided for a possibility of states to opt-in to regulation. This opt-in possibility provides for election by states to demand an Environmental Protection Agency (EPA) ban on the sale of non-RFG in designated areas that are classified as Marginal, Moderate, Serious, or Severe, under the Act's nonattainment categories.[2] Under the Clean Air Act (the "Act"), five categories for areas not yet in attainment for ozone are delineated: Marginal, Moderate, Serious, Severe and Extreme.[3] EPA interpreted the opt-in provision to allow an area from one of the first four categories to participate, but also any other areas that presently were or had been out of attainment. The American Petroleum Institute (API) challenged the authority of the EPA to permit states to seek mandated use of reformulated gasoline in areas that were not designated under one of the five nonattainment categories enumerated in the Clean Air Act. API sought review of the rule, alleging EPA exceeded its authority with their interpretation of the opt-in rule.

Issue: Whether Congress intended the opt-in provision of the Act to include not only Marginal, Moderate, Serious, or Severe, but also any other areas that presently were or had been out of attainment.

Analysis: The Act requires a primary national ambient air quality standard (NAAQS) for ozone.[4] In 1979, the maximum concentration was established at 0.120 parts per million (ppm), averaged over one-hour intervals.[5] This standard is designed "to protect the public health" with "an adequate margin of safety."[6] If more than one day per year has a maximum hourly average of ozone over .120 ppm, then it is a nonattainment area. Lack of data from every hour requires the use of gap-filling estimates to determine expected attainment, so a formula is used to calculate how many days in a year will exceed .12 ppm maximum hourly average concentration. If there is more than one expected number of exceedances for a three-year period, then the area is in nonattainment.

Depending upon the severity of nonattainment, areas have different mandated dates for compliance.[7] EPA uses a "design value" to determine the extent of noncompliance.[8] The design value is equivalent to the fourth-highest daily maximum ozone concentration in an area over a three year period, when that area provides adequate data.[9] An area with a design value over .120 ppm is considered automatically a nonattainment area.[10] However, an area could possibly be in nonattainment even if its design value is 0.120 ppm or below as a result of the different way Congress treated missing data for design value and for nonattainment purposes. The EPA considered these areas to be "submarginal."[11] Additionally, it is required that areas designated nonattainment under previously applied standards shall remain nonattainment areas if they were not able to supply enough information to show they had reached attainment. These areas are called "incomplete data areas."[12]

The RFG opt-in provision states, "[u]pon the application of the Governor of a State, the Administrator shall apply the prohibition [on the sale of non-reformulated gasoline] in any area in the state classified . . . as a Marginal, Moderate, Serious, or Severe Area. Act §211(k)(6)(A), 42 U.S.C. §7545(k)(6)(A)."[13] EPA argued that the opt-in provision of § 211(k)(6) was applicable to the submarginal and incomplete data areas, even though they were not classified as within one of the four categories of nonattainment mentioned in the provision. EPA pointed to § 181(a)(1) of the Act, which states "that '[e]ach area designated nonattainment for ozone . . . shall be classified at the time of such designa-

tion . . . as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area' 42 U.S.C. §7511(a)(1),"[14] arguing that all nonattainment areas were foreseen by Congress as fitting within these categories, and that therefore Congress intended the non-RFG ban would be available to all areas in nonattainment.[15] The Court held that under the Act, Congress only intended the opt-in provision to include areas that are classified "Marginal, Moderate, Serious, or Severe." The Court recognized that the plain language of the text clearly states that an area must be within the specified categories to be able to take advantage of the RFG opt-in provision in § 211(k)(6).

The Court first used a *Chevron* analysis in assessing the EPA rule. "*Chevron* requires [the court] to determine whether Congress spoke to 'the precise question at issue.'"[16]

The Court stated that "[b]y basing the opt-in provisions in §211(k)(6) on the statutorily imposed categories in §181(a)(1), Congress could limit the scope of the RFG program to areas that clearly fall within the categories of its choosing."[17] The Court briefly recounted the legislative history to bolster its holding, stating "we are reluctant to even mention the legislative history" when the text is clear.[18]

Moreover, Congress' classification of nonattainment areas under § 181(a)(1) is according to design value, not attainment status. For an area to be considered as nonattainment, it must fall within the design values calculated for the categories.

The Court ultimately held Congress "meant what it said" when it "provided for opt-in only for areas classified as Marginal, Moderate, Serious, or Severe."[19] It was held that EPA's interpretation of the act exceeded the scope of the organization's authority.

Holly Giordano '02

Endnotes

1. *See* 42 U.S.C. § 7545 (k)(1), (5), (10)(d).
2. *See* CAA § 211(k)(6)(A), 42 U.S.C. § 7545(k)(6)(A).
3. *See* § 181(a)(1), 42 U.S.C. § 7511(a)(1).
4. *See* 42 U.S.C. § 7408-09.
5. *See* 44 Fed. Reg. 8202.
6. *See* 42 U.S.C. 7409(b)(1).
7. *See* 42 U.S.C. 751(a)(1).
8. *See id*.
9. *See American Petroleum Inst. v. United States EPA*, 198 F. 3d 275, 278 (D.C. Cir. 2000).
10. *Id*. at 276-77.
11. *See* 56 Fed. Reg. 56, 697/2 (1991).
12. *See* 56 Fed. Reg. 56, 697/3.
13. *Id*. at 276.
14. *Id*. at 278.
15. *Id*. at 279.
16. *Id*. at 278 (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984)).
17. *Id*. at 280.
18. *Id*. at 280.
19. *Id*. at 281.

* * *

Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D.W.V. 1999)

Facts: Mountaintop removal mining is a form of surface coal mining. In West Virginia, coal "is found in seams of varying thickness sandwiched between layers of rock and dirt. In mountaintop removal mining, the rock and dirt overburden or 'spoil' is removed, layer by layer, and the coal is mined at the exposed surface, as it appears."[1] The Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires that the approximate original contour of the land be restored after coal mining operations.[2] In certain conditions, not all of the spoil that is removed prior to mining is needed to restore the contour of the land. The leftover spoil is called "excess spoil" and is placed in valleys, often containing streams and stream beds. This activity results in what is called "valley fills." An SMCRA rule provides that surface mining activity shall not disturb any land within 100 feet of an intermittent or perennial stream unless the Director authorizes it after making a seven-part finding. In West Virginia, as in other states with approved programs, the State determines whether state and federal requirements are met, and then has the authority to grant permits for surface mining.[3] The mining must also be permitted under three provisions of the Clean Water Act (CWA).[4] Cross-motions for summary judgment were made and the court granted Plaintiffs' motion for summary judgment.

Issue: Whether the buffer zone rule of the SMCRA prohibits valley fills in perennial and intermittent streams.

Analysis: The Court began by reciting that SMCRA's purpose is "'establish[ing] a nationwide program to protect society and the environment from the adverse effects of coal mining operations.' 30 U.S.C. §1202(a)."[5] The federal buffer zone rule is intended to implement parts of the SMCRA, and provides that,

> [n]o land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activi-

> ties, unless . . . specifically authorize[d] . . . upon finding that . . . [the] activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.[6]

West Virginia also has a buffer zone regulation that additionally requires that the mining will not "adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards."[7] The Director of the West Virginia Department of Environmental Protection (WVDEP) admitted that he had not made the necessary findings before authorizing buffer zone variances for valley fills.[8]

The Defendants argued that the buffer zone rule applied to the "stream's entirety, so that one part of a stream, usually the headwaters and upper reaches, may be filled, i.e. covered by valley fill, as long as stream quantity and quality are not adversely affected downstream."[9] The Court, looking to the federal regulations and the state regulations, concluded that the words and intent of the regulations were to save the entire streams, not to permit portions of the streams to be destroyed as long as other parts were maintained.[10] The Defendants also argued that a Memorandum of Understanding (MOU) they agreed upon should be treated as an interpretive rule. The MOU interpreted the buffer zone requirements to be consistent with the CWA § 404(b)(1) and to substitute § 404's guidelines for the SMCRA buffer zone rule regulations. The Court agreed that it would consider the MOU as an interpretation of the buffer zone regulations. Section 404 of the CWA allows dredge and fill operations in U.S. waters when authorized by permits from the Army Corps of Engineers. The Court analyzed the definition of the term "fill material" from the CWA and found that none of the terms contained in the Corps definition included the type of waste disposal that was the primary purpose of valley fills from mountaintop removal mining. The Court then held that the MOU, as an interpretive rule, was not compatible with the CWA. Therefore, because the CWA provision did not override the SMCRA, the SMCRA buffer zone rule was valid and enforceable.

The Court noted, however, that the guidelines for CWA § 404 still had to be evaluated as to whether they were comparable to the buffer zone findings required. This step of analysis was necessary because the West Virginia Dept. of Environmental Protection can certify projects that can get a buffer zone variance. Therefore, the MOU proposal to substitute the CWA Guidelines for the SMCRA buffer zone might be acceptable. After looking at the standards of degradation allowed under the CWA and the SMCRA, the Court concluded that because the CWA allowed "significant degradation" while the SMCRA allows no adverse effect on the environment, the MOU had to be rejected. The MOU was inconsistent with the CWA and SMCRA, thus, it had no effect on the buffer zone rule.[11]

As the Director of the WVDEP admitted that he had granted buffer zone variances without making any of the findings required by the state and federal buffer zone regulations, and his rationales for doing so were made in reliance on clearly erroneous interpretations of the statutes, the Court held that "the Director has a nondiscretionary duty to make the findings required under the buffer zone rule before authorizing any incursions, including valley fills, within one hundred feet of an intermittent or perennial stream."[12] Additionally, the Court went on to note that the Director could not possibly make the required findings under the rule because in a valley fill there is no stream, and therefore no water quality. It is therefore impossible to find that the valley fill did not materially damage the water quality of the stream, as required under the rule. "The Court [held] that placement of valley fills in intermittent and perennial streams violates federal and state water quality standards by eliminating the buried stream segments for the primary purpose of waste assimilation."[13] The Director had a nondiscretionary duty to not allow valley fills in perennial and intermittent streams, the Court stated. The Court granted Plaintiffs' motion for summary judgment and for a permanent injunction against the Director from approving any valley fills or for violations of his nondiscretionary duties. As to the possible consequences of the Court's interpretation of the buffer zone rule, the Court said that if it "prevents surface area coal mining or substantially limits its application to mountaintop removal in the Appalachian coalfields, it is up to Congress and the Legislature, but not this Court to alter that result."[14]

The injunction was later stayed pending appeal in a memorandum opinion by the Court, which noted "a firestorm of reaction has come forth from Defendants and state government officials, predicting . . . unprecedented social and economic dislocation. . . . [M]any coal workers have been laid off or given WARN notices and the Governor has ordered State government to budget-cut to accommodate a ten percent decrease in expected tax revenues."[15]

Jennifer S. Rosa '01

Endnotes

1. *Bragg v. Robertson*, 72 F. Supp. 2d 642, 646 (1999).
2. *See* 30 U.S.C. § 1265(b)(3).
3. *See* U.S.C. § 1260.
4. *See* U.S.C. §§ 1341, 1342, 1344.
5. *Id.* at 649.
6. 30 C.F.R. § 816.57.
7. 38 C.S.R. § 2-5.2.
8. *See Bragg*, 72 F. Supp. 2d at 647.
9. *Id.* at 651.
10. *Id.* at 651-52.
11. *Id.* at 660.
12. *Id.* at 661.
13. *Id.* at 662.
14. *Id.* at 664.
15. *Bragg v. Robertson*, 190 F.R.D. 194, 196, 1999 U.S. District. LEXIS 17308, **6-7; 30 ELR 20165 (1999).

* * *

United States Environmental Protection Agency v. General Electric, 197 F.3d 592 (2d Cir. N.Y. 1999)

Facts: More than 50 years ago, the Grand Street Artists partnership purchased a former General Electric factory in Hoboken, New Jersey. The building was found to contain mercury and the Environmental Protection Agency (EPA) asserted jurisdiction over the building under the federal Superfund program, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[1] The residents of the building were forced to relocate. The partnership and its members filed suit against General Electric (GE). GE obtained a subpoena duces tecum for certain EPA documents about the building, which they contended were relevant to the lawsuit. The subpoena duces tecum covered records of communications between the EPA, the Army Corps of Engineers, and owners or residents of the building which were not disclosed to GE, and records of real estate appraisals of the building. The subpoena duces tecum was addressed to Walter Mugdan, Office of Regional Counsel, U.S. EPA. The EPA, through Eric Schaaf, Acting Regional Counsel, refused to produce the records stating that it would not be in the best interest of EPA to do so. Schaaf also noted that Mugdan was not assigned to the Office of Regional Counsel and did not have custody of the records. GE then filed a motion to compel enforcement of the subpoena duces tecum, and the EPA filed a cross-motion to quash. The District Court granted the motion to quash citing the doctrine of sovereign immunity. GE appealed.

Issues:

1) Whether the EPA could refuse to produce subpoenaed documents because of a defect in the subpoena duces tecum.

2) Whether EPA had waived sovereign immunity.

Analysis: The Court focused on two relevant regulations, 40 C.F.R. § 2.402(b) and 40 C.F.R. § 2.405, in deciding that the subpoena duces tecum was validly addressed and served. The regulations provide that "no EPA employee may provide testimony or produce documents in any proceeding to which this Subpart applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee."[2] The regulations address the standard to be used by the General Counsel, saying that "[u]nless the General Counsel or his designee . . . determines that compliance with the subpoena is clearly in the interests of EPA" employees may not produce documents where the U.S. is not a party to the action.[3] General Counsel authority was delegated to the Acting Regional Counsel, Eric Schaaf, with respect to determining whether production of the subpoenaed documents was within the interests of the EPA. The Court held that "[t]he Regional Counsel was the authorized official and the Acting Regional counsel made the necessary decision."[4]

The Court, after reviewing the circumstances surrounding the service of the subpoena duces tecum, deemed the subpoena duces tecum as validly addressed and served on the correct person.[5] Though it was addressed to Walter Mugdan, Office of the Regional Counsel, the Court understood that to be addressed to the holder of that office, rather than the individual named. Since Schaaf, the official with the delegated authority, received the subpoena duces tecum and responded to GE in writing in response to the subpoena's requests, the Court held that the Government waived any objections for failure to name the proper party.

The Court then dealt with the issue of sovereign immunity. Agreeing with the District Court, the Court of Appeals held that the enforcement of the subpoena duces tecum on the EPA is barred by sovereign immunity without a waiver. The Court noted the settled principle that "the United States and its agencies may not be subject to judicial proceedings unless there has been an express waiver of that immunity."[6] If the Government would be compelled to act as a result, then the action taken against the U.S. or its agencies is considered a judicial action. As EPA would be compelled to produce documents, if ordered to comply with the sub-

poena duces tecum from GE, the Court held that enforcement of the subpoena duces tecum was barred by the doctrine of sovereign immunity, unless there was a waiver.

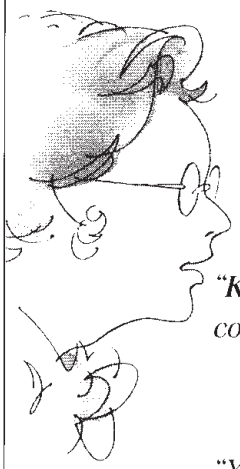
The Court found that only the Administrative Procedure Act (APA) may contain such a waiver. The APA provides for federal court review of final agency actions if "'an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority,' and the relief sought is other than money damages."[7] The APA goes on to require that, "[a]n action in a court of the United States seeking [such] relief . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States."[8] The District Court had held that the "action" required by the APA referred only to a new and separate lawsuit brought for the purpose of seeking relief.[9] This Court disagreed, and found that GE's motion to compel compliance fit within its interpretation of "action."[10] Thus, the EPA's refusal to comply with GE's subpoena duces tecum could be reviewed by the District Court.[11]

The Court vacated the District Court's order and remanded to allow review of the EPA's refusal to comply with the subpoena duces tecum.

Maria Thomas '01

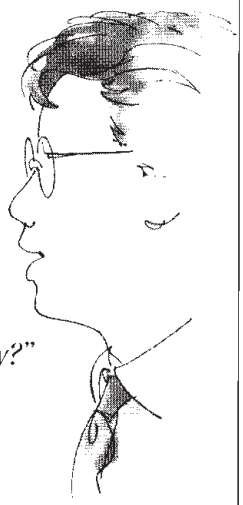
Endnotes

1. 42 U.S.C. §§ 9601, *et seq*.
2. 40 C.F.R. § 2.402(b).
3. 40 C.F.R. § 2.405.
4. *United States Environmental Protection Agency v. General Electric Company*, 197 F.3d 592, 597 (2d Cir. 1999).
5. *Id.*
6. *Id.*
7. *Id.* at 598 (citing 5 U.S.C. § 702).
8. *Id.*
9. *Id.* at 599.
10. *Id.*
11. *Id.*



*"**KeyCite** just added exclusive coverage of EPA decisions."*

"Yep... the best just keeps getting better."



"Really?"

KeyCite™ now offers you exclusive coverage of Environmental Protection Agency (EPA) decisions, including decisions of the Environmental Appeals Board.

Now you can quickly determine the direct history of any Environmental Protection Agency (EPA) decision—and locate citing references from cases, statutes, administrative materials, law reviews, practice guides and more.

KeyCite is the most comprehensive, accurate and easy-to-use citator available for federal and state case law, statutes and administrative materials. Easy-to-recognize KeyCite symbols (red and yellow flags, blue H and green C) are integrated into Westlaw™ documents, to give you instant, clear notice that the document may need further investigation.

More good things to come!

Since its introduction in 1997, KeyCite has been an overwhelming success with critics and legal researchers.

But we haven't been resting on our laurels. These new features are part of a long line of additions to KeyCite over the past few years.

And there's more coming soon—including citation coverage of tax and patents.

We haven't stopped expanding and improving KeyCite. And we never will!

For search assistance, please call the West Group Reference Attorneys at 1-800-REF-ATTY (1-800-733-2889).

KeyCite

25 Westlaw YEARS OF E-INNOVATION

WEST GROUP

(paid advertisement)

Section Committees and Chairs

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

Committee on Adirondacks, Catskills, Forest Preserve & Natural Resource Management
Carl R. Howard (Co-Chair)
140 Nassau Street, Apt. 15C
New York, NY 10038
(212) 637-3216
E-Mail:howard.carl@epamail.epa.gov

Rosemary Nichols (Co-Chair)
1241 Nineteenth Street
Watervliet, NY 12189
(518) 383-0059, x130
E-Mail:rosemary-nichols@dcgdevelopment.com

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

Committee on Air Quality
Inger K. Hultgren (Co-Chair)
1290 Avenue of the Americas
New York, NY 10004
(212) 541-2242
E-mail:hultgreni@rspab.com

Robert R. Tyson (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 422-0121
E-Mail:rtyson@bsk.com

Committee on Biotechnology and the Environment
David W. Quist (Chair)
P.O. Box 2272
Albany, NY 12220
(518) 463-8639
E-Mail:dquist@worldnet.att.net

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

Drayton Grant (Co-Chair)
17 Wurtemburg Road
Rhinebeck, NY 12572
(914) 876-2800
E-Mail:grantlyons@aol.com

Committee on Continuing Legal Education
Cheryl Cundall (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 422-0121
E-Mail:ccundall@bsk.com

Robert H. Feller (Co-Chair)
488 Broadway, Suite 512
Albany, NY 12207
(518) 465-1010
E-Mail: envirlaw@global2000.net

Barry R. Kogut (Co-Chair)
One Lincoln Center
Syracuse, NY 13202
(315) 422-0121
E-Mail:bkogut@bsk.com

James Rigano (Co-Chair)
48 South Service Road, Suite 300
Melville, NY 11747
(516) 694-8005
E-Mail:jrigano@mrbr.com

Committee on Corporate Counsel
Michael S. Elder (Co-Chair)
320 Great Oaks Boulevard
Albany, NY 12203
(518) 862-2737
E-Mail:michael.elder@corporate.ge.com

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

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

Clayton Rivet (Co-Chair)
State Capitol, Room 513
Albany, NY 12248
(518) 455-4313

David Robert Wooley (Co-Chair)
Executive Woods
5 Palisades Drive
Albany, NY 12205
(518) 472-1776
E-Mail:dwooley@igc.com

Committee on Enforcement and Compliance
Scott N. Fein (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7600
E-Mail:snf@woh.com

Jeffrey T. Lacey (Co-Chair)
101 South Salina Street
Syracuse, NY 13202
(315) 233-8324
E-Mail:laceyj@macklaw.com

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

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

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

Daniel W. Morrison, III (Co-Chair)
150 East 42nd Street
New York, NY 10017
(212) 490-3000
E-Mail:morrisond@wemed.com

Committee on Environmental Justice
Louis Alexander (Co-Chair)
111 Washington Avenue
Albany, NY 12210
(518) 462-7421
E-mail:lalexander@bsk.com

Arlene Rae Yang (Co-Chair)
116 Central Park South
Apt. 5A
New York, NY 10019
(212) 373-3462
E-Mail:arlene.yang@mit.alum.edu

Committee on *The New York Environmental Lawyer*
Kevin A. Reilly (Chair)
Appellate Division, 1st Dept.
27 Madison Avenue
New York, NY 10010
(212) 340-0404

Committee on Global Climate Change
Antonia Levine Bryson (Co-Chair)
321 West 78th Street, Apt. 4-B
New York, NY 10024
(212) 253-5563
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:healy@rspab.com

Committee on Hazardous Site Remediation
Walter E. Mugdan (Co-Chair)
251-31 42nd Avenue
Little Neck, NY 11363
(212) 637-3108
E-Mail:mugdan.walter@epa.gov

Lawrence P. Schnapf (Co-Chair)
55 East 87th Street, Room 8-B
New York, NY 10128
(212) 996-5395
E-Mail:lschnapf@environmental-law.net

Committee on Hazardous Waste
David J. Freeman (Co-Chair)
75 East 55th Street
New York, NY 10022
(212) 318-6555
E-Mail:dfreeman@phjw.com

John J. Privitera (Co-Chair)
P.O. Box 459
Albany, NY 12201
(518) 447-3337
E-Mail:johnpriv@mltw.com

Committee on Historic Preservation, Parks and Recreation
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, Apt. 2B
New York, NY 10025
(212) 854-3414

Committee on International Environmental Law
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

C. Sidamon-Eristoff (Co-Chair)
770 Lexington Avenue, 6th Floor
New York, NY 10021
(212) 935-6000
E-Mail:ceristoff@lltlaw.com

Internet Coordinating Committee
Alan J. Knauf (Co-Chair)
183 East Main Street, Suite 1250
Rochester, NY 14604
(716) 546-8430
E-Mail:aknauf@nyenvlaw.com

Alice J. Kryzan (Co-Chair)
One Grimsby Drive
Hamburg, NY 14075
(716) 646-5050
E-Mail:akryzan@harrisbeach.com

Committee on Land Use
John B. Kirkpatrick (Co-Chair)
81 Main Street, Suite 110
White Plains, NY 10601
(914) 997-8888
E-Mail:kirkpatrick@silverkirk.com

Peter R. Paden (Co-Chair)
1290 Avenue of the Americas
New York, NY 10104
(212) 541-1080
E-Mail:paden@rspab.com

Committee on Legislation
Philip H. Dixon (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7600
E-mail:phd@woh.com

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

Michael J. Lesser (Co-Chair)
50B Knights Bridge
Guilderland, NY 12084
(518) 457-7938

Committee on Membership
David R. Everett (Co-Chair)
158 Pitt Road
Old Chatham, NY 12136
(518) 487-7600
E-Mail:dre@woh.com

Eric D. Most (Co-Chair)
1585 Broadway
New York, NY 10036
(212) 969-3000
E-Mail:emost@proskauer.com

Miriam E. Villani (Co-Chair)
EAB Plaza
Uniondale, NY 11556
(516) 227-0607
E-Mail:mvillani@farrellfritz.com

Committee on Pesticides
Ann L. Goldweber (Co-Chair)
165 East 66th Street, Apt. 15A
New York, NY 10021
(718) 990-6248
E-Mail:glelaw@aol.com

Norman Spiegel (Co-Chair)
120 Broadway
New York, NY 10271
(212) 416-8454
E-Mail:epnns@oag.state.ny.us

Committee on Pollution Prevention
Shannon Martin LaFrance (Co-Chair)
110 Main Street
Poughkeepsie, NY 12601
(914) 473-7766
E-Mail:rmwsr@mhv.net

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

Committee on Public Participation, Intervention and Alternative Dispute Resolution
Jan S. Kublick (Co-Chair)
500 South Salina Street, Suite 816
Syracuse, NY 13202
(315) 424-1105

Prof. David Markell (Co-Chair)
23 Woodmont Drive
Delmar, NY 12054
(518) 472-5861
E-Mail:dmarkell@mail.als.edu

Committee on Solid Waste
Richard M. Cogen (Co-Chair)
Omni Plaza, 30 South Pearl Street
Albany, NY 12207
(518) 427-2650
E-Mail:rcogen@nixonpeabody.com

John F. Lyons (Co-Chair)
17 Wurtemburg Road
Rhinebeck, NY 12572
(914) 876-2800
E-Mail:grantlyons@aol.com

Michael G. Sterthous (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7600
E-mail:mgs@woh.com

Committee on Toxic Torts
Michael S. Bogin (Co-Chair)
460 Park Avenue, 10th Floor
New York, NY 10022
(212) 421-2150
E-Mail:mbogin@sprlaw.com

Ellen Relkin (Co-Chair)
180 Maiden Lane
New York, NY 10038
(212) 558-5715

Committee on Transportation
William C. Fahey (Co-Chair)
Rockledge Center
925 Westchester Avenue
White Plains, NY 10604
(914) 946-7200
E-Mail:iflawyers@aol.com

Prof. Philip Weinberg (Co-Chair)
8000 Utopia Parkway
Jamaica, NY 11439
(718) 990-6628

Committee on Water Quality
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)
110 Main Street
Poughkeepsie, NY 12601
(914) 473-7766
E-Mail:grodenhausen@rapportmeyers.com

Task Force on Agriculture and Rural Issues
Peter G. Ruppar (Co-Chair)
2500 Main Place Tower
Buffalo, NY 14202
(716) 855-1111
E-Mail:pruppar@pcom.net

Thomas M. Shephard (Co-Chair)
5001 Brittonfield Parkway
P.O. Box 4844
East Syracuse, NY 13057
(315) 433-0100, x507
E-mail:toms@dairylea.com

Task Force on Legal Ethics
Marla B. Rubin (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
Terresa M. Bakner (Co-Chair)
One Commerce Plaza
Albany, NY 12260
(518) 487-7615
E-Mail:tmb@woh.com

Laura Zeisel (Co-Chair)
169 Main Street, P.O. Box 9
New Paltz, NY 12561
(845) 255-9299
E-Mail:lz@laurazieselpc.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 6.1. 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 2001 is $75.00. 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: Jennifer S. Rosa

Contributors:
Holly Giordano
Jennifer S. Rosa
Maria Thomas

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

ADDRESS SERVICE REQUESTED

NYSBA Environmental Law Section
1980 - 2000
20 YEARS
Of Protecting New York's Environment

Printed on Recycled Paper

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

PRSRT STD
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155