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The New York Environmental Lawyer

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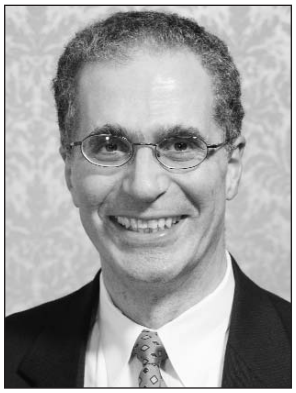
of the New York State Bar Association

A Message from the Chair



On behalf of the Section Cabinet and the Executive Committee, I congratulate our Section Secretary, Lou Alexander, on his recent appointment as Assistant Commissioner for Hearings at the Department of Environmental Conservation, and compliment Commissioner Erin Crotty on her superb choice. We're pleased, as well, that for the next few years at least, two of the Section's five officers are government officials. This strikes the best balance we've had in a long time between government and private practice attorneys in the Section's leadership.

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The relevance of our daily practice as environmental lawyers to the resolution of thorny environmental issues in our society preoccupies me these last days of August, on vacation, as I draft these remarks in a little cottage deep in a pristine, unglamorous but beautiful part of Maine—Bass Harbor, on Mount Desert Island, in Acadia National Park. Here, I am more a citizen concerned about the environment than I am an environmental lawyer concerned about environmental legal practice, per se. I try to summon up Verlyn Klinkenborg-type poetic inspiration (he's the author of the pastoral *New York Times* columns appearing at the bottom of the editorial page a couple of days a week), but before this Bronx-bred boy fails at imitating a wonderful writer, I'll write instead about those issues that link our preoccupations as practicing environmental lawyers to society's larger needs and aspirations.

So, on the state level, I find a front-page story in one of the leading Maine dailies on our first day here announcing that the state of Maine may join a lawsuit initiated by our (New York) Attorney General's Office to challenge excessive emissions of NOx and SOx by Midwestern utilities burning much dirtier coal than we can in the Northeast, emissions that travel from the Midwest to our states, causing acid rain in Acadia and

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elsewhere in Maine, as well as in the Adirondacks. ("Bravo" to Attorney General Spitzer's successful efforts in this area under the Clean Air Act Amendments of 1990.)

And Alice and I were glad to see that Maine's bottle return law puts a 15 cents deposit on wine bottles, something New York's Bottle Bill Law does not do.

Beyond Maine, American society at large shows sign of a similar preoccupation. The magazine *Mother Jones* has just published a multi-article Special Report, "The Ungreening of America," to show how, in its view, the Bush White House is eviscerating the Clean Air Act and a variety of other environmental laws. The gubernatorial recall race in California understandably worries environmental groups because of Republican leading candidate Arnold Schwarzenegger's deep personal enchantment with the gas-guzzling Humvee, the oversized vehicle that spits in the face of environmental values. Environmentalists fear that a Governor Schwarzenegger might try to roll back California's national lead (adopted by New York, among others) in zero-emission and low-emission vehicles.

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Finally, here in New York, I have set out recently to become more knowledgeable about environmental issues where I live, in Westchester County, in order to provide advice to a candidate for county-wide office. I was astonished to learn that environmental issues are not merely important in the county; they're central, and more woven into the fabric of daily communal concerns than in any other community in which I've lived. Nothing other than the county's budget commands so much constant political attention. And the environmental issues are many, broad and interrelated in part—not only the big, dramatic ones, like safety of the Indian Point nuclear plants and the adequacy of evacuation plans, but also the local development process (the subject of our program at Jiminy Peak, just passed), and growth issues generally. These include the protection of the New York City watershed, which is the source of most of the county's drinking water, sewage disposal and diversion, as a means of such protection, how to deal with failing septic systems, how to deal with the need to enlarge or replace the Tappan Zee Bridge (the influence of increased vehicular traffic on that decision, and the impacts of that decision on traffic), discharges into Long Island Sound (and consequent nitrogen overloading), and the noise and traffic impacts of County Airport operations (and concerns about potential expansion), just to name the most prominent.

By the time you read this column, I hope many of you will have attended our fall program at Jiminy Peak, where our attention was on the role of lawyers in the development process, including techniques of collaborative project planning to incorporate environmental values—even the protection of biodiversity—into the process. It is a particular pleasure to see New York once again in the forefront of innovative ways of protecting the environment.

All of these issues are related to growth, our use (and abuse) of our natural resources, and the search for a way of living sustainably on this planet, which seems especially difficult given our lavish (and wasteful) American lifestyle. Which brings us back to what we do as environmental *lawyers*: there are no federal or New York State statutory (or common law) "sustainable development" laws, as such, even though much of environmental law devolves from that issue in one way or another. Moreover, we are as a country probably required to integrate sustainable development into U.S. law as a function of our endorsement of Agenda 21 at the 1992 Earth Summit in Rio.

So in what particular ways, other than in the development process itself, can we as environmental lawyers, and as the Environmental Law Section, do more to enhance sustainable development as a guiding principle in our society, and integrate sustainable development into federal and perhaps state law?

One Section member suggested that we just start a "Sustainable Development" Committee or Task Force, to mimic, to some degree, the ABA's Section on Environment, Energy and Resources (SEER) Committee of that name, which this member chairs. The goal is to infuse sustainable development concepts in all SEER Committees. Indeed, the larger American Bar Association itself passed a resolution during the mid-August Annual Meeting adopting the principle of sustainable development (reaffirming a 1991 commitment), and urging the United States (and state governments) to meet targets and timetables for sustainable development (for the full text of the Resolution, see www.abanet.org/leadership/2003/journal/108.pdf). Our Section should take note and perhaps present a similar resolution to our House of Delegates. Ten years

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From the Editor

This column is being written upon my return home from the Section's Fall Meeting at Jiminy Peak in the Berkshires. Actually, "Fall" is a misnomer, in that we enjoyed a mid-September summer weekend (as contrasted with the snowfall during our last Jiminy Peak excursion). I have often said that these Fall Meetings are wonderful opportunities for Section members, new and old, and their families to mix, but this time it was especially so. The program was well-presented and informative, and a special presentation was quickly inserted on Sunday morning to give us an excellent update on New York's brownfields legislation by people who have been critically involved in nurturing this and similar endeavors over the years. I am told that additional CLE credit may be arranged. During the Saturday evening dinner (at which, for some reason, everyone named Kevin was required to sit at the same table (i.e., Ryan, Healy and Reilly), Joanna Underwood, President of INFORM, spoke about the underappreciated yet significant value of making environmentally friendly consumer choices and the numerous aggregate benefits that result. Her speech is included in this issue. The NYSBA staff was, as always, helpful and efficient. The Executive Session was kept on track and we all received an update on Section activities. So, from a strictly professional perspective, it was well worth the trip.

But I think the factor that tips the balance for many people who have to juggle lives and businesses to attend is the social enjoyment, and especially the ease with which families may be brought along and kept occupied. My own kids renewed acquaintances and made new friends. Jiminy Peak has been a wonderful venue for kids, and I mixed with several of our colleages and their spouses and kids on the alpine slide, the bungee jumping (at which our EPA chief Walter Mugdan gave new meaning to the term clean air, and which I wisely declined) and in the pool and elsewhere. Section members may often be adversaries in a regulatory or courtroom setting, but it's hard not to warm up to someone when the kids are playing together in the pool—as are their parents—and calling for one another after dinner. It's easier to know where the other person is coming from, so to speak, when you spend time together talking about kids and other worries. And it's especially hard to let courtroom posturing get in the way outside of the courtroom when people are singing the same out-of-key tune to which most people forgot the verses as Kevin Ryan belts out blues on his harmonica and Jim Periconi unaccountably plays the accordian and Connie Sidamon-Eristoff dances—none of which was necessarily a pretty sight, but it will likely be preserved as a jovial memory for a long time afterward. By the way, Tin Pan Alley made its appearance in the guise of some seemingly serious senior environmental lawyers who seem to be developing an itch for show tunes: their satirical efforts made for Saturday night's entertainment—and not a penny in royalties was paid! (underscoring the current leadership's seriousness on cutting costs). We're still trying to figure out whether the Section or our home-bred composers get the copyrights to some new versions of old songs, or whether these individuals (i.e., not the rest of us) committed

"[I]t's especially hard to let courtroom posturing get in the way outside of the courtroom when people are singing the same out-of-key tune to which most people forgot the verses as Kevin Ryan belts out blues on his harmonica and Jim Periconi unaccountably plays the accordian and Connie Sidamon-Eristoff dances—none of which was necessarily a pretty sight . . ."

copyright violations. This important matter has been referred to the Copyright Infringement Subsubcommittee of our Entertainment and Environment Subcommittee of a Committee yet to be titled, the latter matter—clarifying the main committee's name and purpose—to be referred to our Committee on Committees as an agenda item at its next weekend retreat. We'll report back. Anyway, the deed is already done, if a federal offense it be, and the Section will have to sort out the details. Sadly, some of the guilty were captured on film. Some of the less controversial photos are included as exhibits herein. Of course, if we acquire a copyright, undoubtedly our leadership will be doing high-fives as they anticipate a new revenue stream: I can provide personal assurances that the product is marketable. In any event, Walter Mugdan provides a musical sampling in this issue. Next year, Netscape?

So much for my annual pitch for the annual Fall Weekend. Turning to this issue, Dominic Cordisco submits an article on the Third Department's recent ruling

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A Message from the Chair

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ago the Section argued that New York could and should integrate measures, including laws, to reduce the emissions of greenhouse gases. Perhaps it's time now to do the same with sustainable development.

Returning to the more traditional issue of how we can enhance the quality of our legal skills and services to our clients, another Section member has recently suggested a CLE program to describe tax and other available cost-saving mechanisms that environmental lawyers often fail to use, such as deductions for remedial costs, expensing other environmental costs, reducing reserves, strategic use of risk management and insurance products, the use of Qualified Settlement Trusts in Superfund cases and—one of my favorites—of Supplemental Environmental Projects in enforcement settlements. This would be unusual and welcome.

Let me state unequivocally, if there is any doubt on the subject, that we welcome new ideas for Section projects (whether Continuing Legal Education, task forces or committees) of all types, whether they encourage the convergence of our daily environmental law practice with society's thorny problems, or if they, more traditionally for groups like ours, enhance our skills as practicing environmental attorneys. Hint: It helps when the suggesting party is also offering him- or herself as the person to work on that project, as Section member Lou Evans did so successfully in suggesting and then co-chairing a much-needed Environmental Business Transactions Committee a few months ago. Just let me (jpericoni@periconi.com) or any other officer know.

* * *

A final note to honor a great New York lawyer (not in our field), who died as he lived, fighting for the rights of refugees in Iraq, as he had in every part of the world, as basic human rights: Arthur Helton, a classmate and friend at NYU Law School—we co-wrote a paper in International Environmental Law on the Law of the Sea Conference and nations' rights to mine the deep seabed—died while in a meeting in U.N. Headquarters in Baghdad, blown up on August 19. Arthur showed us all how one lawyer could make a difference, as an activist, a scholar and a teacher, who also managed to chair an ABA committee on that topic. A senior fellow at the Council on Foreign Relations for the last few years, his last book, *The Price of Indifference: Refugees and Humanitarian Action in the New Century,* was a *cri du coeur*, a legal and philosophical call to arms, in the service of the least powerful people in the world, refugees. The profession and the world will sorely miss him.

James J. Periconi

From the Editor

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in *State of New York v. Speonk Fuel, Inc. [II],*[1] addressing accrual of a cause of action regarding recoupment of oil spill recovery costs for the purposes of the statute of limitations. Todd Mathes, of Albany Law School, was a finalist in the Environmental Essay Competition. He submits an article on management of the forest preserve in the Adirondack Park. Marla Rubin, diligent despite some ill health, submits another column in the general field of legal ethics and environmental law. Jeffrey L. Zimring of Whiteman Osterman & Hanna has prepared the Administrative Decisions Update. Brian Smetana has assumed responsibility as Student Editor of the case summaries submitted by students at St. John's Law School. As many Section members know, Phil Weinberg has always shepherded the case summaries. I want to remind Committee Chairs of the Section's need for articles in the area of the respective Committees' general interest and reports on Committee activities for publication in the *Journal*. I remain at the convenience of Committee Chairs or, in fact, any Section member, in this regard and can be contacted at work, (212) 340-0404. If my work phone number changes, I will indicate so in the following issue.

Kevin Anthony Reilly

Endnote

1. 2003 WL 21512510 (3d Dep't 2003).

Green Purchasing: The Power to Shape a Sustainable Future

Remarks by Joanna D. Underwood, President, INFORM

Meeting of the New York State Bar Association—Environmental Law Section
Hancock, Massachusetts—September 27, 2003

It is a pleasure to be here this evening with all of you who spend your days (and I suspect many of your nights) seeking and pursuing legal avenues through which we can do business and live well in this society while ensuring our country a resource-rich and healthy future.

I just returned from Hungary, where I spent a week with a group of 50 environmental and health leaders from 20 nations devoted to discussing how planning on the local level—whether it is in India, Tunisia, Thailand, Costa Rica or here at home—can incorporate principles of sustainable development. The concerns were common to us all: how do we preserve open space and species diversity? How do we safeguard our surface and underground water resources? How do we assure that our communities provide healthy air for their families and children? How do we plan transportation systems to maximize use of mass transit and minimize vehicle emissions?

While nations talk about and negotiate environmental values, the evidence of whether the citizens of our country or other countries care about the environment is visible in the millions of decisions made by communities and cities on the local level. That is where, to a great extent, the rubber hits the road!

I'd like to share some thoughts this evening about a new frontier in the quest to shape environmentally sustainable and healthy communities—"Green Purchasing." I would also like to seek your views on how legal mechanisms can promote progress in this new frontier.

The simple fact is that most communities do not create environmental harm through the manufacturing emissions that our vast body of environmental regulations deal with. Instead, communities leave their environmental footprints on this world largely through the myriad of products that they purchase and use. If towns and cities buy and use products containing many highly toxic constituents, it is likely they will be on the path of leaving a contaminated planet behind. If they instead buy and use environmentally preferable products, they will help leave a healthy planet to future generations.

As you well know, for several decades local planning processes have incorporated more and more regulatory guidelines and principles aimed at environmental protection—from zoning codes to protect open space, to restrictions on developing steep slopes to avoid soil erosion, to limiting "blacktop" so as not to impede the cleansing and replenishment of underground water supplies. Systematic green purchasing would add a new dimension, and a critical one, to local environmental protection efforts. I'd like to talk about three questions and points especially:

- Why green purchasing deserves to become a vital tool for environmental protection on the local level.
- How green purchasing, if practiced by governments and businesses, can be a powerful force for change—actually driving enormous transitions in our economy as companies that make products see what their customers want.

And finally, perhaps most importantly:

- What you can help do about it.

"While nations talk about and negotiate environmental values, the evidence of whether the citizens of our country or other countries care about the environment is visible in the millions of decisions made by communities and cities on the local level."

First of All, Why Is Green Purchasing an Important New Strategy?

Over these last 30 years, government environmental protection programs set up under this country's national air and water laws have given their primary attention to the waste and contamination generated by industrial plants, incinerators and electric power plants. Yet we have learned that the source of many of our environmental problems is a result of the products we use and dispose of.

A vast array of products that are bought for construction, furnishing, cleaning, decorating, transportation, and other commercial and consumer purposes contain heavy metals and thousands of toxic synthetic chemicals. It is these products (and the releases that accompany their manufacture, use and disposal) that are a major cause—sometimes *the* major cause—of health-threatening contamination problems facing communities. Recall that in barely 60 years (just a blink of an historic eye) in this country, we built more than 210,000 chemical plants that make or use 80,000 synthetic chemicals. These new substances have given us a remarkable world of new materials and products—from plastics, adhesives, paints and life-saving pharmaceuticals to nylon stockings, nail polish and home cleaners. However, the toxic materials in these products are being dispersed widely into the environment as they are used and disposed of in landfills and incinerators.

"[T]he 'innocent until proven guilty' approach underlying our policies and regulations has made removing chemicals from commercial use virtually impossible."

EPA and the chemical industry readily admit that as much as 80% of the synthetic chemicals in wide production (or more than 60,000 individual chemicals) have not been sufficiently tested to enable us to understand their effects on human health. However, the "innocent until proven guilty" approach underlying our policies and regulations has made removing chemicals from commercial use virtually impossible. What we do know about synthetic chemicals is this:

- **Synthetic chemicals have the potential to do damage.** They are carbon-based compounds that are made under conditions of heat and pressure—compounds that, as far as we know, never existed in our environment before. These compounds, when they enter the bodies of humans or other creatures, resemble the carbon-based compounds from which we ourselves are made and which our bodies use for vital processes. However, they are not compounds that our bodies have learned to metabolize. They give different signals—such as telling cells to multiply, or to mutate, or to die—that can result in cancers, in respiratory diseases, in lowered intelligence, in reproductive abnormalities, and more.
- **We have had some nasty surprises regarding the impact of chemicals we thought were safe.** Over the last 60 years, the damage being done by some chemicals in broad use have provided warnings we should heed. On the list are DDT, mercury, chlorofluorocarbons and, most recently, endocrine disrupters. In addition, since l970, we have seen unexplainable rises in the rates of many cancers, including a 1 to 2 percent rise a year in children's brain cancers and in childhood leukemia and a 60% rise in young boys' testicular cancers that have raised concerns of many health leaders.
- **Current environmental laws are providing inadequate health protection against toxic chemicals.** The U.S. Toxic Substances Control Act, passed in l976 to safeguard the public against the threats of toxic chemicals, has been largely ineffective in doing so. One reason lies in the "innocent until *proven* guilty" premise mentioned earlier. To remove any chemical from the market, the U.S. Environmental Protection Agency must meet a burden of proof of the economic and environmental consequences of removing the chemical that it has virtually never been able to meet. A l995 INFORM study of chemicals in production and use found that more than 99% of the total pounds of chemicals entering commerce consisted of substances that were already in use before the Toxic Substances Control Act was passed. So it is no wonder that even a substance such as mercury, a known neurotoxin, is used today in dozens of commercial and consumer products.
- **Some chemicals in commerce today are unsafe no matter how they are used.** There is one class of chemicals that can never be used safely. These chemicals, called Persistent Bio-accumulative Toxic substances (or PBTs) share three characteristics: they are toxic; they do not break down when they enter the environment, and they bio-accumulate in the bodies of animals and humans. Because of their ability to resist breakdown and to accumulate over time, even small individual releases of these substances will eventually build up to harmful levels. A classic example of the problems which these chemicals can cause is PCBs (polychlorinated biphenols). PCBs were broadly used in industrial processes until the mid-seventies when their bio-accumulative properties became clear. The manufacture and new uses of PCBs were banned in the U.S. in 1977; most countries around the world soon followed suit. Yet today these persistent PCBs have been found even in the remotest regions of the globe, where they have contaminated fish and the wildlife that eat them, creating severe neurological and developmental problems for many species, including highly exposed humans.

How Green Purchasing on the Local Level Can Provide a Key Solution

Recent INFORM research has found that by using the power of the purchasing dollars of individuals and institutions—whether voluntary or required—we can send compelling messages to the companies that make chemical-containing products that we want them to use their ingenuity (of which they have a great deal!) to make "greener products." Their reputations and their future profits may be at stake.

We launched this project, called Purchasing for Pollution Prevention, in 2000 with an initial focus on assessing the interest of government purchasers in buying products that were as free as possible of PBTs, which have become a top priority at EPA. Since our work began, we have identified many PBT-containing products. Lead is a component of many caulks and sealants. Cadmium and dibutyl phthalates are found in paint and finishes. Mercury is found in thermostats, thermometers and switches, and in fluorescent and high-intensity discharge (HID) lamps. Flooring, roofing and plumbing supplies contain polyvinyl chloride (PVC), which generates highly toxic dioxins when burned, either in building fires or in incinerators. Brominated flame retardants are added to electronic equipment and to furniture.

We launched our project in New Jersey, asking state purchasers if they would be interested in having us provide them with the facts on their product choices. They said yes, and since then we have found government interest to be enormous. Over the last three years, we have established working partnership with 16 states (including New Jersey and New York) and local jurisdictions. By analyzing the products that state purchasing offices buy as contracts came up, we have been able to identify for them the products containing PBTs and those containing less or none at all.

Of course, we have had to be sure to propose alternative products that were performance-tested and that were cost-competitive. We research available alternatives, compare performance and costs over the lifecycle of products, and provide manufacturer contact information. This has enabled state purchasers to make product changes secure in the knowledge that what they are buying will be reliable, cost-effective and readily accessible.

We are seeing results. Mercury-containing products have been of greatest interest to state purchasers since the toxic properties of mercury are widely known and since 47 states have mercury-related fish advisories limiting the number of fish people can eat from their waterways. Governmental decisions made in just one or a few states have been able to get industries to make wholesale shifts to mercury-free products. For example, U.S. automakers had been promising for almost a decade to remove mercury-containing switches from convenience lighting, but had failed to do so. When Minnesota, with our assistance, stated that they would no longer buy vehicles containing mercury, the automakers finally eliminated the switches; they are now moving rapidly toward altering anti-lock brake systems to eliminate mercury as well.

Similar shifts in the market are occurring on many fronts as educated consumers in the public and private sectors demand better alternatives. A few examples:

- All hospital suppliers now offer mercury-free thermometers and blood pressure cuffs as health care customers, including our partners, increasingly specify mercury-free devices.
- Dozens of manufacturing concerns have sprung up to provide bio-based fuel and lubricant alternatives, as these are increasingly specified by state and federal government agencies.
- Green building standards developed over the last decade resulted in guidelines for energy efficiency, recycling, and low-VOC products. Now construction, architecture and design firms are just beginning to focus on toxics, and particularly on PBTs as the next frontier in green building. PVC- and mercury-free alternatives for roofing, flooring, partitions, thermostats, switches, HVAC components and other uses have become increasingly common as "green building" moves out of the alternative realm and into the mainstream of government (and private) contracting.

The question at this point is: What legal mechanisms are available that can most rapidly promote use in municipalities of less-toxic products while meeting their needs for reasonable-cost, high-performance goods?

Traditionally, local communities have focused on banning the use of products or chemicals, or banning disposal of products containing these chemicals in landfills or incinerators. While these efforts can be very successful in reducing releases of toxic chemicals, they are also very time-consuming and difficult to enact in the face of manufacturer opposition and uncertainties about the outcome.

At INFORM, we have worked to develop more pragmatic, incremental approaches with our partners, including:

- Promoting government agency purchasing of less toxic products by providing information on their product choices and by assisting them in devel-

oping the contract specifications to make their product shifts. We have focused not only on the shift to products containing fewer PBTs but also on encouraging the shift in government fleets of buses and trucks from diesel fuel, which creates PBTs when burned, to much cleaner natural gas.

- Establishing policies favoring use of the "precautionary principle"[1] on the state or municipal level so that purchasers have a guideline that requires their shift to less-toxic products. San Francisco has just passed such a policy, which requires all city agencies to review purchasing and operations and set in place specifications and practices which will ensure that the city uses the least-harmful products and processes available.
- Creating standards for building or construction permits which require the use of products (again, commercially available and performance- and cost-competitive) containing no PBTs or the least amounts of these chemicals available on the current market.
- Adopting contract purchasing specifications that require vendors to disclose the type and amount of specified PBTs or of all PBTs in products they are offering where PBT-free alternatives are not available or are not cost-competitive. Disclosing such information enables buyers to use PBT content as one of the decision-making factors in product selection. They also put manufacturers on notice that there is concern in the marketplace about PBTs, and they would be well-advised to reduce or eliminate these toxic chemicals from their products.

In the 20th century, industry brought us brand-new vehicle technology that speeded us where we wanted to go, life-saving drugs, artificial body parts, a wealth of consumer goods, and rocket technologies to take us into outer space. Many of these products have been found to have downsides in the energy consumed to produce them, the wastes they create, and the toxic chemicals they release that can damage the environment and our health. Now it is a new century. We see the needs and challenges of a new age.

I hope that all of you will consider the approaches to Green Purchasing that INFORM has taken and other ways in which you can make product choices that can have a powerful and positive impact. Help ensure a healthy future for communities and our world.

Endnote

1. The precautionary principle is basically a "better safe than sorry" approach, institutionalized in the Rio declarations and many other environmental laws. It places the emphasis of government action on avoiding unnecessary risk rather than dealing with the consequences of risks that parties failed to explore ahead of time. The Precautionary Principle, in short, states: **"When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof" (from the Wingspread statement).**

Ms. Underwood is a graduate of Bryn Mawr College and holds an Honorary Doctor of Science Degree from Wheaton College. In 2001, she was named by *The Earth Times* as one of the 100 most influential voices in the global environmental movement. She currently serves on the boards of the Clean Energy Vehicle Foundation in Washington, D.C., and the Robert Sterling Clark Foundation in New York City. She has taught courses at New York and Adelphi Universities and lectured widely.

Ms. Underwood is the founder and President of INFORM, Inc., a national non-profit environmental research organization based in New York City. For more than 25 years, INFORM has been a leader in examining the impact of business practices, technologies and products on our environment and human health and in identifying innovations that can prevent waste and pollution at the source.

Six Years Means Six Years: The *Speonk Fuel II* Decision and the Statute of Limitations in Oil Spill Cost Recovery Cases

By Dominic Cordisco

When responsible parties fail to clean up oil spills, New York State or private parties can perform the necessary cleanup activities and then later seek reimbursement from those that caused the spill. New York State has a dedicated fund—the New York State Oil Spill Trust Fund (the "Fund")—to pay for the state's cleanup activities. After expending monies, either New York State or private parties can initiate cost recovery actions seeking reimbursement of their costs from the responsible parties. Such actions are based on the common law right of indemnification, which are subject to a six-year statute of limitations.[1]

There has been some debate as to when the six-year statute of limitations begins to run, especially in cases where expenditures were made over an extended period of time. Defendants have argued that it commences with the first expenditure; alternatively, plaintiffs have asserted that it commences with the last. In *State v. Speonk Fuel, Inc. [II]*,[2] the Appellate Division, Third Department reaffirmed that a cause of action accrues with each separate payment of cleanup costs. However, the Third Department further held that if any payments were made more than six years prior to the commencement of the action, then those payments are not recoverable; as to those payments, the statute of limitations had run.

The other Departments have not addressed this specific question.[3] The central offices of both the New York State Department of Law and the Department of Environmental Conservation sit in Albany, and thus the Supreme Court, Albany County (sitting in the Third Department) is the *forum conveniens* for the vast majority of oil spill cost recovery actions. New York State brings all or nearly all of its cost recovery actions in the Supreme Court, Albany County, and as a result, the Third Department's decisions are controlling precedent.

Thomas H. Mendenhall and his company Speonk Fuel, Inc. were the owner and operator of a service station in East Quogue, Suffolk County. New York State began the remediation of this site in March 1986, and commenced the cost recovery action[4] in September 1996, more than ten years later. New York State moved for partial summary judgment on the issue of damages, seeking full cost recovery of $554,363.93 plus prejudgment interest. Defendants opposed,[5] claiming that the six-year statute of limitations precluded the state's recovery of payments made more than six years prior to the September 26, 1996, commencement of the action. Defendants further claimed that they had raised a triable issue of fact regarding the reasonableness of the cleanup costs.

The Supreme Court, Albany County (Cannizzaro, J.) granted in part the state's motion, awarding judgment only for the cleanup costs incurred within six years of the commencement of the action. The Supreme Court denied the state's recovery of expenditures made more than six years before the action was commenced (i.e., September 26, 1990). The Supreme Court also denied the defendants' request for a hearing.

New York State appealed,[6] arguing that the six-year statute of limitations for all expenditures begins to run on the date of the last expenditure (i.e., when the spill is closed), and thus claiming entitlement to a full recovery. Defendants cross-appealed, seeking dismissal of the complaint on the grounds that the statute of limitations begins to run on the date of the first expenditure (i.e., when the cleanup commenced), and thus, according to the defendants, the entire action was untimely. In the alternative, defendants reasserted their claim to a hearing on the reasonableness of the expenditures.

The Appellate Division, Third Department rejected both parties' arguments, and affirmed the Supreme Court's decision that the six-year statute of limitations begins to run with each expenditure. In doing so, the Third Department corrected an inconsistent prior holding in this same case.

In an earlier proceeding,[7] the Third Department stated that a cost recovery indemnification action is timely if it "was commenced within six years after [plaintiff] expended funds for the cleanup."[8] In *Speonk Fuel I*, the Third Department held that the "plaintiff demonstrated that it expended funds as late as September 1996 and, therefore, the action is timely."[9] This holding implied that the six-year statute of limitations begins to run from the time of the last expenditure—regardless of the date of the first expenditure.

In 2003 the Third Department revisited its prior decision and reexamined the Court of Appeals' analysis in *State v. Stewart's Ice Cream Co.*[10] It was in *Stewart's Ice Cream* that the Court of Appeals first held that oil spill cost recovery actions sound in common law indemnifi-

cation, as "the Navigation Law does not expressly provide for [cost recovery actions]."[11] In *Stewart's Ice Cream*, the defendant argued that the three-year statute of limitations for liabilities imposed by statute[12] should apply. The Court of Appeals rejected this argument, noting that "it cannot be said that liability for damage to land caused by an oil spill would not exist but for the [Navigation Law]."[13] This rationale applies to both state and private actions for indemnification, as both are based on the common law right of indemnification; such actions are available to anyone who has suffered a loss leading to the unjust enrichment of the ultimately responsible party.[14]

In *Stewart's Ice Cream*, the Court of Appeals rejected "the invitation to formulate a variant accrual date for indemnity actions."[15] In general, establishing statutes of limitations requires a balancing of policy considerations—namely, balancing the defendant's "interest in defending a claim before his ability to do so has deteriorated through passage of time, and, on the other, the injured person's interest in not being deprived of his claim before he has had a reasonable chance to assert it."[16] In *Stewart's Ice Cream*, the action was commenced within six years after the state expended funds for the cleanup. On those facts, the Court of Appeals found no need to formulate a variant accrual date (i.e., a date based on various factual considerations such as the date of the spill, the date the cleanup commenced, or the date(s) the cleanup costs were paid).[17]

The facts differed in *Speonk Fuel II*. There, the cleanup began ten years prior to the initiation of the action, and the state sought full recovery of its expenditures made over that ten-year period. In a sense, both the state and the defendants sought to apply their own variant accrual dates to this action. By arguing that the action accrues with the first expenditure, the defendants sought to knock out the entire action. Contrastingly, the state argued that the action does not accrue until the cleanup is complete and the last payment is made. The Third Department focused on loss itself and "the time that *payment* was made from the Fund for cleanup and removal costs."[18] As the payment is the loss, the Third Department held that "plaintiff's cause of action for indemnification accrues—and the six-year limitations period commences—each time the Fund makes a payment for cleanup and removal costs."[19]

In *Speonk Fuel [II]* the Third Department relied on its 2001 decision in *Ackley* where it also held the six-year statute of limitations commences with each payment.[20] In *Ackley*, the Third Department noted that its holding on the statute of limitations is consistent with the Navigation Law requirement that an environmental lien must "be filed within six years from the time a disbursement is made [for cleanup costs]."[21] In *Speonk Fuel [III]*, the Third Department corrected any confusion created by the conflicting decisions in *Speonk Fuel [I]* and *Ackley*.[22] Despite *Speonk Fuel [I]* being the law of the case, the Third Department agreed with the Supreme Court that *Ackley* was supervening authority "which correctly states the law and should be followed."[23]

In *Speonk Fuel II*, the Third Department also reaffirmed that a responsible party has no right to contest the reasonableness of the cleanup costs incurred by a plaintiff.[24] It is not uncommon for a responsible party to object to the amount someone else spent cleaning up a spill. Occasionally, a defendant will request a hearing, claiming that some of the expenditures were unreasonable or unnecessary. However, as a discharger, the responsible party is strictly liable for "all cleanup and removal costs and all direct and indirect damages."[25] Thus, one cannot decide to pay later and then dispute the bill.[26]

New York State has moved for leave to appeal the *Speonk Fuel II* decision to the Court of Appeals. That motion had yet to be decided at the time of this writing.

If left unmodified by the Court of Appeals, the *Speonk Fuel II* decision will likely have two impacts. First, plaintiffs (both state and private) would be wise to initiate actions for cost recovery sooner rather than later. Instead of waiting for the complete remediation of the spill—which may take many years — plaintiffs should initiate actions well within six years of the first expenditure regardless of whether the remediation is complete. By doing so, plaintiffs may avoid the risk that recovery will be reduced because expenditures fell outside the statute of limitations.

Second, the *Speonk Fuel II* decision may impact pending and impending actions where expenditures occurred more than six years prior to case initiation. In those cases there may be a significant reduction in liability for responsible parties—especially if the bulk of the expenditures occurred at the beginning of the cleanup. The savvy defense practitioner will review the expenditure history and seek to lop off any and all expenditures made more than six years prior to the initiation of the action.

Endnotes

1. CPLR 213(2).
2. 2003 WL 21512510 (3d Dep't 2003).
3. The other Departments have, however, followed the Court of Appeals' decision in *Stewart's Ice Cream*, discussed *infra*, that the six-year statute of limitations applies to indemnification actions. *See MRI Broadway Rental, Inc. v. U.S. Mineral Products Co.*, 242 A.D.2d 440, 444 (1st Dep't 1997), *aff'd*, 92 N.Y.2d 421 (1998); *Barclays Bank of New York v. Tank Specialists, Inc.*, 236 A.D.2d 570 (2d Dep't 1997); *Patel v. Exxon Corp.*, 284 A.D.2d 1007, 2008 (4th Dep't), *lv. dismissed*, 96 N.Y.2d 937 (2001).

4. Assistant Attorney General Jeremy R. Feedore represented the state before the Supreme Court, Albany County.
5. Nicholas J. Damodeo represented defendants Speonk Fuel, Inc. and its president, Thomas H. Mendenhall.
6. Assistant Solicitor General Edward Lindner argued the appeal before the Third Department.
7. This was an appeal of a decision of the Supreme Court, Albany County (Hughes, J.) denying Speonk Fuel Inc.'s cross-motion for summary judgment. The Third Department reversed the Supreme Court's order, granting summary judgment to Speonk Fuel Inc., as it had demonstrated that it neither owned nor operated the system that caused the discharge. *See Speonk Fuel [I]*, 273 A.D.2d at 682–83. Apparently thinking better of it afterward, the parties entered into a stipulation dismissing the complaint against defendant Mendenhall and entering judgment against Speonk Fuel Inc. on the issue of liability only. *Speonk Fuel [II]*, 2003 WL 21512510 at 1.
8. *State v. Speonk Fuel Inc. [I]*, 273 A.D.2d 681 (3d Dep't 2000) (citing *State v. Stewart's Ice Cream Co.*, 64 N.Y.2d 83, 88 (1984)).
9. 273 A.D.2d at 682.
10. 64 N.Y.2d 83 (1984).
11. 64 N.Y.2d at 88.
12. *See* CPLR 214(2).
13. 64 N.Y.2d at 88.
14. *See Stewart's Ice Cream*, 64 N.Y.2d at 88; *see also McDermott v. City of New York*, 50 N.Y.2d 211 (1980).
15. 64 N.Y.2d at 88.
16. *Martin v. Edwards Laboratories*, 60 N.Y.2d 417, 426 (1983).
17. *Stewart's Ice Cream*, 64 N.Y.2d at 88.
18. *Speonk Fuel [II]*, 2003 WL 21512510 at 2 (citing *State v. Ackley*, 289 A.D.2d 812 (3d Dep't 2001), *lv. dismissed*, 99 N.Y.2d 611 (2003)) (emphasis in original).
19. *Speonk Fuel [II]*, 2003 WL 21512510 at 2.
20. 289 A.D.2d at 814.
21. 289 A.D.2d at 814 (citing Navigation Law § 181-c(1)).
22. In *Ackley*, the Third Department expressly declined to follow its 2000 decision in *Speonk Fuel [I]*. 289 A.D.2d 815.
23. *Speonk Fuel [II]*, 2003 WL 21512510 at 2.
24. *Speonk Fuel [II]*, 2003 WL 21512510 at 3 (citing cases).
25. Navigation Law § 181(1).
26. The Third Department left this door slightly ajar for actions brought under the pre-1991 provisions of the Navigation Law. For any such actions, the right to a hearing will turn on the actual wording of the provisions of the Navigation Law prior to its extensive amendments in 1991. *Speonk Fuel [II]*, 2003 WL 21512510 at 3.

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The Federal-State Relationship in Environmental Enforcement

Recent Legal Developments

By Walter Mugdan[1]

A fundamental attribute of our system of government is that we function within a nested set of sovereigns. These can be envisioned, like the Aristotelian universe, as a set of concentric spheres with the individual at the center. The federal government occupies the outermost sphere; within that is the state government, and within that are one or more municipal government spheres (county, city/town/village, etc.). We are entirely accustomed to this political arrangement which might seem—in the abstract, or perhaps to a disinterested alien visitor—to be unwieldy, inefficient, redundant, and generative of frequent disputes.

"The authors of the Constitution understood that they were creating a complex society. It was their explicit intention that power be distributed and shared, rather than concentrated and centralized."

Yet this is how it was meant to be. The authors of the Constitution understood that they were creating a complex society. It was their explicit intention that power be distributed and shared, rather than concentrated and centralized.[2] Not only did they establish a new national government while maintaining relatively independent state governments, but they also distributed and diffused power within the federal government itself by creating multiple branches with varying, overlapping and interdependent authorities. They certainly knew this was an inefficient system, and it was what they wanted. Their experience was that efficient governments were too often tyrannical governments.

The authors of the Constitution contemplated that the different levels of government would exercise authority in different spheres; and that when acting in their appointed spheres they should be accorded due deference and respect by other levels of government. But the distribution and sharing of power which is a hallmark of our system more often demands that different arms of government, and different levels of government, come together to function as partners in order to achieve their own ends.

The framers of the Constitution were by no means naive, and they did not doubt that this distribution and separation of powers would engender conflict. Like partners in other institutions, such as marriages or businesses, they expected that governmental partners would have many disputes. In establishing a national government they necessarily envisioned a hierarchy in which the laws of that national government would—*to a certain extent*—trump those of the states. The exact perimeter of that "*certain extent*" was the subject of intense debate at the time, and has continued so ever since. Nominally (if not in fact), this debate was at the heart of the greatest crisis in our nation's history, the Civil War. The outcome of that war cemented the principle that, in the partnership which is called the United States, the partners cannot simply choose to part ways. Divorce is not an option. The states with one another, and with the national polity, are partners to the bitter end.[3]

Federal-State Partnership in Environmental Regulation

The debate about the balance of powers within the federal-state partnership continues to this day, in almost every aspect of our political life. The environmental arena is no exception.

Prior to about 1970, the federal government understood the regulation of pollution to be primarily a state or local responsibility. The pre-1970 versions of the federal Clean Air Act[4] and Clean Water Act (then known as the Federal Water Pollution Control Act or FWPCA[5]) reflected this understanding. Those statutes authorized the federal government to carry out scientific research, to suggest model standards that would be protective of air and water quality, and to provide financial assistance to states to aid their efforts to regulate and control pollution. With few exceptions, however, one thing they did *not* do was authorize the federal government to promulgate and enforce national pollution control rules.

The passage of the Clean Air Act Amendments of 1970 (CAA)[6] was, therefore, a watershed event (to use a mixed-media metaphor). It reflected a recognition that pollution is almost inherently an interstate phenomenon and that without a national floor of minimum standards, the natural economic competition among states

made it unlikely that the necessary level of regulation would be achieved in many or most of them. The CAA gave the fledgling Environmental Protection Agency (EPA) the authority to regulate directly, on a national level.[7]

However, the CAA also retained a central role for the states. The same was true of other major environmental laws enacted during the subsequent years, including the FWPCA Amendments of 1972 (which would later come to be known as the Clean Water Act or CWA[8]); the Safe Drinking Water Act of 1976 (SDWA)[9]; and the 1976 amendments to the Solid Waste Disposal Act, known as the Resource Conservation and Recovery Act (RCRA).[10]

Each of these laws contemplated that the actual administration of the pollution control program would, in some manner and to somewhat varying extent, be the responsibility of the state government. Minimum standards would be established by EPA at the federal level; but the states could go further, and they could select the mix of pollution control strategies they deemed most appropriate. Each statute also provided for financial assistance from the federal to the state level.

Different approaches, with different names and somewhat different rules, were established under the different laws. Under RCRA, for example, states can be "authorized" by EPA to administer a program consisting of state rules, in lieu of the otherwise nationally applicable rules promulgated by EPA.[11] Under the SDWA, states can be granted "primacy" in the administration of the program.[12] Under the CWA, states can be "approved" to run a State Pollutant Discharge Elimination System in place of the EPA-administered National Pollutant Discharge Elimination System, and states can "assume" the section 404 wetlands program.[13] Under the CAA "State Implementation Plans" can be "approved,"[14] provided they are determined to be sufficient to achieve minimum federal ambient air quality standards. States can also be "delegated"[15] to administer some federal regulatory programs directly, such as the National Emission Standards for Hazardous Air Pollutants or the New Source Performance Standards.[16]

Each of these approaches represents a slightly different expression of the "new federalism." Each uses some combination of federal mandates, incentives and financial assistance. In each case, what was envisioned was a partnership of federal and state government working together to solve a wide range of environmental problems. It has worked about as well, and about as poorly, as the federal model in general has worked over the past two-and-a-quarter centuries. That is: it has had great success, but not without a high coefficient of friction.

Where the Shoe Pinches

That friction arises in many programs, and in many different ways; but it may be most visible in the enforcement arena. By definition, enforcement is what happens when a sovereign exercises its authority over an unwilling or uncooperative subject. When sovereign and subject agree, there is no need for the sovereign to enforce. It is only when there is a disagreement that the ability of the sovereign to enforce its will is called into play.

"[W]hat was envisioned was a partnership of federal and state government working together to solve a wide range of environmental problems. . . . [I]it has had great success, but not without a high coefficient of friction."

Federal-state friction in the enforcement arena can manifest itself in at least two very different ways: (1) one level of government may seek to enforce its rules against the other; or (2) different levels of government may seek to enforce inconsistent laws (or enforce consistent laws in an inconsistent manner) against a third party—typically, a private, regulated entity.

Manifestations of the first form of enforcement friction may include lawsuits by the federal government against a state-owned pollution source; or the reverse—lawsuits by a state government against a federally-owned pollution source. Also possible, though less frequent, are actions by the federal government seeking to enforce a federal mandate directly against a state. More frequently the federal government may use its economic power to persuade (some might say coerce) a state into behaving in a certain way, i.e., by withholding or threatening to withhold financial assistance. These manifestations of federal-state enforcement friction have existed since the day the federal government stepped onto the environmental regulatory stage.

The second form of enforcement friction is one which has also existed since the enactment of the underlying federal laws, but has only in the past three or four years been the subject of much jurisprudence. Over the decades since 1970, regulatees have found occasion to complain that they can be "whipsawed" between inconsistent federal and state obligations; and that answering to two sovereigns is in any case inefficient, redundant and unnecessarily costly. It was not until 1999, however, that these complaints achieved a measure of judicial traction. In a pair of decisions

issued within weeks of each other, regulatees were successful in arguing that an enforcement action by one sovereign would preclude the other sovereign from pursuing its own, separate enforcement action.

It is fair to say that these decisions came as a bit of a surprise to EPA and most states. For years it had been understood by both EPA and its state government partners that EPA retained contemporaneous or parallel enforcement authority, even when a state had been approved[17] for a given program. And while some states may have chafed a bit, there was little doubt that this situation was what Congress had intended. The language in many (though not all) of the statutes seemed explicit on the issue. In addition, sometimes EPA was also explicit in its document formalizing the authorization, specifically reserving all its statutory enforcement authorities. And sometimes EPA entered into separate Memoranda of Understanding with an approved state further elaborating on how the partnership would be effectuated and, in particular, how enforcement responsibilities would be shared. Often these MOUs explicitly reiterated EPA's reservation of all its authorities, although the agency might agree to defer to the state in the first instance, provided the state acted in a timely and appropriate manner.

Indeed, for the state to take "timely and appropriate" enforcement action when it became aware of a violation is very typically a specific obligation imposed by EPA and undertaken by the state in its approval application. EPA developed fairly detailed policies and guidance to provide further explanation of what is considered to be "timely and appropriate" action with respect to various kinds of violations.

Harmon and *Smithfield* Define the Debate[18]

In *Harmon Industries Inc. v. Browner*,[19] decided September 16, 1999, the U.S. Court of Appeals for the Eighth Circuit held that RCRA bars EPA from seeking civil penalties in authorized states unless the state itself fails to initiate an enforcement action, or EPA withdraws the state's authorization. The court held that this prohibition on EPA's independent enforcement authority existed even where, as in this instance, the state settled its own enforcement action for continuing hazardous waste disposal violations without requiring the payment of any penalty whatsoever. Moreover, the state did not object to EPA's issuance of its own complaint seeking $2.3 million in fines.

The *Harmon* court relied to a considerable extent on language that is unique to RCRA—i.e., language that does not appear in comparable sections of the other federal environmental statutes which provide for state approval of some sort. Considering this unique language, the *Harmon* court concluded further that EPA was similarly barred from independent enforcement action under principles of *res judicata.* The court reasoned that by EPA authorizing the state's RCRA program, EPA and the state were in privity.

Some states may have been cheered by this decision, but their enthusiasm may have been tempered within just a few weeks when a state court issued a similar ruling—but this time against a state! On October 4, 1999, a Virginia court[20] dismissed an enforcement action initiated by the state environmental agency against Smithfield Foods, Inc., for water pollution infractions. The state case asserted claims that were similar to claims on which the federal government had recently prevailed in the Fourth Circuit.[21] Like the *Harmon* court a few weeks earlier to which it cited, the Virginia court relied on principles of *res judicata*, holding that EPA and Virginia were in privity. This "reverse-*Harmon"* ruling barred the state from pursuing many of the water enforcement claims it had asserted.

In November 1999 EPA filed an unsuccessful petition for rehearing *en banc* by the Eighth Circuit in the *Harmon* case. Recognizing the many troublesome consequences of the earlier ruling, as further amplified by the intervening *Smithfield* decision in Virginia, five states representing nearly 60 million citizens filed an *amicus curiae* brief supporting EPA's position. Their brief emphasized that the *Harmon* case should not be understood as a dispute between federal and state governments, but rather that what was at stake was the ability of both levels of government to act effectively to protect citizens from environmental violators.

In January 2000 the Eighth Circuit denied the petition for rehearing. Although the federal government explicitly rejects the reasoning of the *Harmon* decision, and has vigorously argued against it in other cases (see discussion below), it chose not to appeal to the Supreme Court. In short order, numerous defendants in cases under RCRA and other environmental laws elsewhere around the nation started raising *Harmon* defenses, giving the government the opportunity to be heard again on this issue, and giving other tribunals the opportunity to weigh in on the issues raised.

Almost uniformly, these other tribunals—including two Circuit Courts, a number of District Courts and EPA's own Environmental Appeals Board—have rejected the views of the *Harmon* and *Smithfield* courts.

The Tenth Circuit was the first Court of Appeals to opine on the issue. On September 4, 2002, in *United States v. Power Engineering Co.*,[22] that court affirmed an earlier district court ruling in a federal RCRA enforcement case. EPA had won a decision that the defendants were obligated to comply with the financial assurance

requirements of Colorado's authorized hazardous waste program. As is typical in a federal RCRA enforcement case involving an authorized state program, the federal government alleged violations of state regulations which are, effectively, incorporated by reference into the Code of Federal Regulations when the authorization is granted. The Tenth Circuit found that EPA's federal enforcement action was not barred by *res judicata*, despite a separate state enforcement action, because EPA and an authorized state are not in privity unless EPA plays a substantial role ("pulls a laboring oar") in the state's enforcement action. In other words, only if the state and federal government cooperate and actively participate in the prosecution of an enforcement action would they be considered to be in privity and could one be estopped from taking action after the other had already done so. The mere fact that EPA had authorized the state program is not enough to establish privity.

In rendering its decision, the Tenth Circuit noted that RCRA was ambiguous, and therefore gave deference to EPA's interpretation of the statute; the court found that EPA's interpretation has "substantial support in the text of the statute" and is therefore a "reasonable interpretation." The Tenth Circuit was also directly and explicitly critical of the Eighth Circuit's *Harmon* decision, asserting that its "interpretation fails to account" for the language of section 3006(b) of RCRA (which governs the authorization process) and concentrates inappropriately on a few provisions while not "adequately consider[ing] the [overall] structure of the statute." The Tenth Circuit found that the Eighth Circuit's interpretation of RCRA "goes well beyond the plain language" and "reads too much" into the statute. Rejecting the *Harmon* court's view that EPA can only enforce against an entity that has already been the subject of state enforcement if it first rescinds the state's authorization, the Tenth Circuit observed that withdrawal of authorization is a drastic step, and "[n]othing in the text of the statute suggests that such a step is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement."[23]

A few months later, on December 26, 2002, in *United States v. Price*,[24] the Ninth Circuit Court of Appeals followed suit, rejecting defendant's motion to dismiss a federal criminal enforcement prosecution based on double jeopardy grounds. The defendant had previously been fined by the County Health District, the delegatee of the state for administration of air pollution regulations, for substantially the same conduct. Defendant argued, therefore, that a subsequent federal enforcement action under the Clean Air Act was barred by the Double Jeopardy Clause of the Constitution. The Ninth Circuit found that the County Health District and the United States are separate sovereigns, each deriving their respective enforcement jurisdiction from separate and distinct sources; thus the federal prosecution did not create double jeopardy.

A year earlier, in *United States v. Allan Elias*,[25] the Ninth Circuit had an opportunity to preview its reaction to the Eighth Circuit's *Harmon* ruling. The *Elias* case was an appeal from a criminal conviction of the owner of a facility in Idaho for violations of RCRA rules. Here there had been no prior (or, for that matter, subsequent) state enforcement action. However, the defendant argued that authorization of a state program under RCRA results in the elimination of federal authority to bring a criminal action under RCRA, until and unless such time as the authorization is revoked. The court rejected this argument, and instead cited favorably *United States v. Flanagan*,[26] a California district court decision which pointed out that *Harmon* does not stand for the proposition that federal enforcement authority is essentially extinguished after a state receives authorization. Notably, the *Elias* court went out of its way to challenge the *Harmon* decision, as well, for its failure to apply the traditional *Chevron* standard for deference to EPA's interpretation of the RCRA statute.[27]

Several district courts have also addressed the Eighth Circuit ruling. In 2002 the U.S. District Court for the Western District of Wisconsin considered *Harmon* in its decision in *United States v. Murphy Oil USA, Inc.*[28] This federal enforcement action included both RCRA and Clean Air Act claims. With respect to RCRA, the defendant argued that the federal enforcement action was barred because the state had begun its own action in state court. The district court disagreed, holding that *Harmon* was applicable only in the very different fact circumstances presented in that case. In *Harmon*, the state case had been settled and a consent agreement approved by the state court. In *Murphy*, by contrast, the state had merely filed a complaint, and moreover that filing occurred after EPA had filed its action in federal court.

Although the *Murphy* court concluded that *Harmon* was distinguishable on the facts, it nevertheless undertook to analyze the Eighth Circuit decision and concluded that it was "unpersuasive." The Wisconsin district court found that RCRA unambiguously allows the "federal government to bring enforcement actions in states authorized to implement and enforce the hazardous waste program, provided only that notice is given to the state." Further, it concluded that even if RCRA were ambiguous, "nothing in the legislative history" supported a finding that the federal government lacks enforcement authority, and that the court "would defer to the agency's interpretation of the law as representing a reasonable interpretation of an ambiguous statute."

The defendant in *Murphy* also raised *Harmon* arguments in connection with the federal enforcement claims under the Clean Air Act. Here, too, the *Murphy* court disagreed, rejecting the argument that the federal action was barred by principles of *res judicata.* It found that, because the Clean Air Act does not have the unique language in RCRA cited by the Eighth Circuit, *Harmon* was therefore not applicable to the Clean Air Act. More generally, the *Murphy* court did not agree that the mere act of authorization (in RCRA terms) or its counterparts under the Clean Air Act brought the state and EPA into privity.

In March 2002 the Wyoming federal district court considered similar arguments in a CAA case, *United States v. Solutia, et al.*[29] The defendants argued that the doctrine of *res judicata* barred an enforcement case by EPA seeking civil penalties under the CAA. They pointed to an earlier enforcement action by the state, predicated on essentially the same facts and citing similar violations, that had been resolved through a consent decree entered in state court. Relying *inter alia* on *Harmon*, the defendants argued that EPA was also bound by that decree.

The *Solutia* court, citing the *Murphy Oil* and *Power Engineering* decisions, concluded that EPA is free under the CAA to pursue its own, independent enforcement action, even after a state action involving the same violations. The court held that EPA and the state were not in privity for *res judicata* purposes; and that the state had no authority to bind the federal government through its consent decree.

A number of other courts have reached similar decisions over the past few years. In February 2000 the U.S. District Court for the Western District of Missouri (in the Eighth Circuit, and thus governed by the *Harmon* decision) determined that the language in both the CAA and the CWA governing state approvals and federal enforcement authority was distinguishable from the language in RCRA for the purpose of a privity analysis. *Citizens Legal Environmental Action Network (CLEAN), Inc. v. Premium Standard Farms, Inc.*[30] was an action brought by a non-governmental organization under the citizen suit provisions of these two statutes. A state court had entered a judgment against the defendant in an earlier state court action, which the defendant cited in support of its *Harmon* argument. The court concluded that CLEAN and the state were not in privity in that case. The court also rejected the defendant's argument that the proper remedy for lax enforcement by a state is the withdrawal by EPA of the program approval. The *CLEAN* court noted that such withdrawal is a drastic and time-consuming remedy, appropriate only in extreme circumstances.[31]

In June 2000 the U.S. District Court for the Northern District of Ohio similarly rejected defendant's *Harmon* argument in a federal CWA civil enforcement action, *United States v. City of Youngstown*.[32] Defendant argued that EPA should be prohibited from pursuing its action because the state had already commenced its own action before the federal case was initiated. The court disagreed, noting important differences between the language in the CWA and that in RCRA.

A few months later, the U.S. District Court for the Northern District of Ohio, in *United States v. LTV Steel Co., Inc.*,[33] denied defendant's motion for partial summary judgment, where defendant asserted that EPA's action was precluded by a previous settlement between it and the city of Cleveland. That city had been delegated certain authority from the Ohio EPA; however, the court found that the city did not have the authority to act on behalf of either the state or EPA.

In April 2001 the U.S. District Court for the Central District of Illinois joined the growing list of courts that either rejected *Harmon* outright, or declined to apply its reasoning to other environmental statutes. In *United States v. City of Rock Island, Illinois, et al.*,[34] a federal CWA enforcement action, the court denied defendant's motion to dismiss. Defendant cited *Harmon*, and asserted that the same reasoning should apply to the CWA. The defendant also argued that a Memorandum of Agreement between the state and EPA in connection with the program approval should yield the same outcome. The court disagreed on both counts, noting that the CWA specifically provides that state program approval does not circumscribe EPA's enforcement authority.

Finally, in an administrative case before EPA's Environmental Appeals Board (EAB), *In re Bil Dry Corp.*,[35] the tribunal considered the *Harmon* issue in a RCRA context. Here the state and EPA had jointly inspected defendant's facility. The state issued a Notice of Violation (NOV), and EPA subsequently issued an administrative penalty complaint. The EAB determined that it was not bound by the *Harmon* decision, and declined to follow its reasoning, distinguishing the cases on their facts. The EAB held that the state NOV was not an enforcement action, because it imposed on obligations on the respondent and specifically reserved the state's right to later bring an enforcement action for the same violation.

As of this writing, the *Harmon* and *Smithfield* decisions, which caused considerable consternation in environmental enforcement circles, increasingly appear to represent isolated outliers rather than trend-setters. And while some states initially welcomed *Harmon*, the *Smithfield* decision a few weeks later demonstrated that

this line of reasoning creates a slippery slope down which they themselves could end up sliding. Importantly, a significant number of states distanced themselves from *Harmon* even before the *Smithfield* decision was handed down, recognizing that our system of multiple sovereigns—though sometimes inefficient—provides a valuable extra layer of protection in the environmental arena.

Supreme Court Confronts Similar Issues in "*Cominco*" Case

On October 8, 2003, the Supreme Court heard oral argument in *Alaska DEC v. EPA*, an appeal from a Ninth Circuit decision[36] that raises issues similar to those presented in *Harmon* and its progeny. The *Harmon* line of cases addressed EPA's authority to "overfile" with a federal enforcement action after an approved state has taken enforcement action itself. The *Alaska DEC* case (commonly referred to as the "*Cominco*" case for reasons that will be made clear in the following paragraph) deals with EPA's authority to do what might be called overfiling with respect to a permit previously issued by an approved state. Consistent with its rejection of *Harmon* in the *Price* and *Elias* cases, the Ninth Circuit had held in *Cominco* that EPA was free to take enforcement action to prohibit an air pollution source from acting under a state-issued permit that EPA determined was defective.

The relevant facts are as follows: The Alaska Department of Environmental Conservation (ADEC) is approved by EPA to issue Prevention of Significant Deterioration (PSD) permits to new or modified sources of air pollution under the Clean Air Act. Such permits must require that "best available control technology" or BACT be used by affected sources. ADEC issued a PSD permit to a zinc mining operation named Cominco, which sought approval to build a new diesel generator. However, the final permit imposed control technology that was significantly less stringent than had been in ADEC's proposed permit.

Of central importance is that ADEC did not have an administrative record to support its decision to accept the less stringent controls as BACT. The record indicated merely that Cominco asserted the more stringent controls would be too expensive. ADEC responded that its "foremost consideration" in issuing a permit with the cheaper, less stringent controls was to "support . . . [Cominco's] contribution to the region." However, ADEC had no data to show how the costs of the more stringent controls would affect Cominco's world competitiveness. Indeed, ADEC acknowledged that "the applicant did not present this [detailed financial] information. Therefore, no judgement [sic] can be made as to the impact of a $2.1 million control cost on . . . competitiveness of the [Cominco] Mine."

After extensive discussions with ADEC and Cominco, EPA invoked its authority under the Clean Air Act and issued an administrative order to the company prohibiting it from constructing the diesel generator pursuant to the PSD permit issued by ADEC. ADEC challenged EPA's enforcement action as an impermissible infringement on its authority as the duly approved permitting agency. In effect, ADEC's argument was similar to those made by defendants in the *Harmon* line of cases discussed above, i.e., that once EPA approves a state program, the federal agency's ability to take independent action to enforce the requirements of that program is severely circumscribed.

The Ninth Circuit disagreed with ADEC, holding that the Clean Air Act authorized EPA to take enforcement action against Cominco, and that EPA had not acted arbitrarily and capriciously when the federal agency concluded that ADEC had abused its discretion by making an internally inconsistent and unreasonable BACT determination. The court wrote, "[i]t does not follow from the placement of initial responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA in other sections of the statute." The Ninth Circuit went on to observe that Alaska's acknowledged motivation for allowing less stringent controls is "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority to protect states from industry pressure to issue ill-advised permits."[37]

Interestingly, while eleven states[38] filed with the Supreme Court an *amicus* brief supporting ADEC's appeal, thirteen states[39] filed an *amicus* brief supporting EPA's position. The Court's decision is expected by June 2004.

Endnotes

1. This article expresses the author's views. No endorsement of those views by the U.S. Environmental Protection Agency is intended or implied.
2. Unlike in a scholarly article, the reader will find no footnotes to support the author's assertions about the intentions of the framers of the Constitution regarding the federal structure they created. The author apologizes for this deviation from scholarly norms, but the fact is, he is not a scholar. (Readers whose interest is piqued are respectfully referred to *The Federalist Papers*.)
3. This is not to say that the partnership need be bitter; on the contrary, usually it is not. But even when it is bitter, it is still perforce a partnership, and must remain so.
4. Originally enacted July 14, 1955.
5. Originally enacted June 30, 1948.
6. 42 U.S.C. §§ 7401 *et seq.*

7. *See, e.g.*, sections 111 and 112 of the Act, 42 U.S.C. §§ 7411, 7412. Many other examples occur throughout the statute.
8. 33 U.S.C. § 1251 *et seq.*
9. 42 U.S.C. § 300f *et seq.*
10. 42 U.S.C. § 6901 *et seq.*
11. RCRA § 3006(b), 42 U.S.C. § 6926(b).
12. SDWA § 1413, 42 U.S.C. § 300g-2.
13. CWA § 402(b), 33 U.S.C. § 1342(b).
14. CAA § 110, 42 U.S.C. § 7410.
15. The word "delegated" is often used, loosely, to cover all these different arrangements. Technically, it has a precise and narrow meaning which is not applicable to most of the federalism arrangements mentioned. Under a true delegation arrangement, the state actually administers the federal regulations, rather than its own. Under the other arrangements, the state administers its own regulations, which are approved in some manner by EPA as being sufficient under the applicable federal statute.
16. CAA §§ 111, 112; 42 U.S.C. §§ 7411, 7412.
17. In the remainder of this paper, except where context requires otherwise, the words "approved" or "approval" should be read to mean also "authorized" or "authorization," "delegated" or "delegation," "assumed" or "assumption" and "given primacy" or "primacy."
18. The author is indebted to his colleagues Gary Jonesi and Peter Raack of the Office of Enforcement and Compliance Assurance in EPA Headquarters. In most of the discussion that follows in the text, above, the author has drawn extensively on the work of Messrs. Jonesi and Raack.
19. 191 F.3d 894 (8th Cir. 1999).
20. *Treacy v. Smithfield Foods, Inc.*, No. 97-80, bench ruling transcript at 69-76 (Va. Cir. Ct., Isle of Wight County).
21. *United States v. Smithfield Foods Inc.*, 191 F.3d 516, 49 ERC 1193 (4th Cir. 1999).
22. 303 F.3d 1232 (10th Cir. 2002).
23. The district court itself had been equally blunt in its criticism of the *Harmon* case, stating: "With all due respect, I conclude that the *Harmon* decision incorrectly interprets the RCRA." 125 F. Supp. 2d 1050 (D. Colo. 2000).
24. 314 F.3d 417 (9th Cir. 2002)
25. 269 F.3d 1003 (9th Cir. 2001)
26. 126 F. Supp. 2d 1284 (C.D. Cal. 2000)
27. Footnote 25 in the *Elias* opinion reads: "[*Harmon*] is also suspect for its marked lack of *Chevron* deference."
28. 143 F. Supp. 2d 1054 (W.D. Wis., May 18, 2001).
29. No. 00-CV-046-D (D. Wyo., Mar. 29, 2002)
30. 2000 WL 220464 (W.D. Mo., Feb. 23, 2000).
31. The court cited CWA legislative history stating that program withdrawal should only be undertaken "when there is clear evidence that the entire State program has fallen into disrepair." 2000 WL 220464 at 14 (quoting the Congressional Record).
32. 109 F. Supp. 2d 739 (N.D. Ohio 2000).
33. 118 F. Supp. 2d 827 (N.D. Ohio 2000).
34. No. 00-4076 (C.D. Ill., Apr. 23, 2001).
35. 9 E.A.D. 575, (RCRA (3008) Appeal No. 98-4, Jan. 18, 2001).
36. 298 F.3d 814 (9th Cir. 2002).
37. 298 F.3d 814, 823.
38. Alabama, Delaware, Iowa, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Virginia, Utah and Wyoming.
39. California, Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Wisconsin.

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Analysis of A.9120

By David J. Freeman

I. Cleanup Program

A. Establishment of a Statutory Program

The bill establishes a statutory Brownfield Cleanup Program for hazardous waste and petroleum-contaminated sites. Once a Brownfield Cleanup Program (BCP) application for a brownfield site has been made, that site will not be listed in any spill report or on the Inactive Hazardous Waste Disposal Site Registry (unless previously listed), so long as the applicant is acting in good faith and remains in the BCP. Certain sites are not eligible for the BCP—e.g., Class 1 or 2 sites on the Inactive Hazardous Waste Site List, NPL sites, and sites and parties already subject to enforcement. However, if a Class 1 or 2 site is owned by a volunteer, it "shall not be deemed ineligible to participate" if enrolled in the program by July 1, 2005. An application can also be rejected during the pendency of an enforcement proceeding, if the applicant has engaged in certain prohibited or illegal acts, or for "public interest" reasons.

B. Distinction Between Types of Applicants

The bill distinguishes between those applicants that caused or contributed to the contamination and those that did not. A "volunteer" is defined as any person not responsible for the contamination as of the date of the party's submission of a BCP application, or responsible only by virtue of site ownership subsequent to the disposal of contaminated materials; if the volunteer is the site owner, he/she must use appropriate care in dealing with the contamination in order to remain qualified for preferential treatment. A volunteer must investigate and clean up the site; but with respect to adjacent sites, he/she need only perform a qualitative exposure assessment, evaluating the ways by which an off-site receptor could be exposed to such contamination in order to assess the risk to public health and the environment from any contamination emanating from the property. In certain circumstances, the Department has been given the discretion to require even volunteers to perform a quantitative off-site exposure assessment (i.e., actual off-site investigation).

A "participant" is any applicant other than a volunteer (essentially, responsible parties). The work plan for a participant mandates an investigation and characterization of the nature and extent of contamination on and/or emanating from the brownfield site and may also require remediation of contamination migrating off-site.

C. Contents of a Brownfields Cleanup Agreement

The bill contains specific requirements for terms to be included in a Brownfields Cleanup Agreement with the applicant, including payment of state costs, dispute resolution, a commitment to investigate and (if necessary) remediate the site, and provisions for citizen participation.

If the remedy relies on land use controls, the applicant must completely describe them; embody them in an environmental easement; provide a mechanism for their implementation and enforcement; and the site owner must annually certify through a physical engineer their continued viability.

D. Establishment of Procedural Mechanisms and Timelines

The potential applicant must submit a request for participation to the DEC with information sufficient to determine the potential applicant's eligibility; the application must also state the reasonably anticipated use of the site in conformance to new land use criteria. The DEC must notify the potential applicant within 10 days of a request that such request is complete or incomplete; if incomplete, the DEC will specify what additional information is needed.

Upon receipt of application, the DEC shall notify the administrator of the New York Environmental Protection and Spill Compensation Fund to determine whether such applicant is known to be responsible for cleanup and removal costs; the administrator shall notify the department within 30 days. The DEC shall use best efforts to approve or reject an application to participate within 45 days of receipt of the application.

Where a site is deemed to pose a significant threat, contamination is migrating off-site, there is off-site migration, and the applicant is a volunteer, the Department is responsible for the remediation of the off-site plume. In this event, an enforcement action will be brought within six (6) months of the determination against parties known or suspected to be responsible for the off-site contamination. If such action cannot be brought, the DEC shall use its best efforts to commence remediation of off-site contamination within one (1) year of the completion of such an enforcement action or completion of the volunteer's remediation, whichever is later.

If the application is deemed complete, a 30-day comment period begins, and the department will post in Environmental Notice Bulletin and newspapers a notification of receipt of request to participate. The DEC will also notify the chief executive officer and zoning board of each county, city, town, and village in which the site is located, as well as site residents and other affected persons.

If a final investigation report describing the investigation's results is filed with the application, there will be a comment period (variously described as 30 and 45 days), and the commissioner will determine the completeness of the investigation within 60 days.

Before the DEC finalizes a proposed remedial work plan, there will be a 45-day public comment period and, under certain circumstances, a public hearing. The commissioner shall use best efforts to approve, modify, or reject a proposed work plan within 45 days of receipt or within 15 days after the close of the comment period, whichever is later.

E. Certificate of Completion; Release by State

After certification by the applicant that the remediation requirements described below in Section II have been achieved, the applicant shall submit to the DEC a final engineering report. Upon determination that the remediation requirements have been or will be achieved, the commissioner shall issue a Certificate of Completion (COC).

After receipt of such a certificate, the applicant will not be liable to the state pursuant to the liability limitation provisions for any remaining hazardous waste in, on, or emanating from the brownfield site. The release not to sue extends to an applicant's successors and assigns through acquisition of the site, or a person who develops or otherwise occupies site.

F. Liability Limitation

1. Release. The release extends to an applicant's successors and assigns through acquisition of the site, or a person who develops or otherwise occupies the site provided they use "due care" and in "good faith" adhere to the requirements of the Brownfield Cleanup Agreement (BCA) and certificate of completion. Applicants shall not be liable under statutory or common law arising out of contamination that was present in, on or emanating from a brownfield site on the effective date of the BCA, and that is the subject of the COC. The release shall not be effective until the COC is issued. A participant shall not receive a release for natural resource damages that may be available under federal law. The release doe not apply to persons responsible under statutory or common law unless they were parties to the BCA. The release must be recorded within 30 days of the COC issuance or within 30 days of acquiring title.
2. Re-openers: There are a number of circumstances that "re-open" the release:
   (1) environmental contamination at, on, or migrating from the site "if in light of such conditions," the site is no longer protective of public health or the environment;
   (2) non-compliance with BCA, workplan or COC;
   (3) fraud in relation to participation in this program;
   (4) a finding by the Department that a change in standards renders the remedy no longer protective;
   (5) the use of the site changes subsequent to the issuance of a COC;
   (6) failure to make "substantial progress" toward completion of proposed development within three years or applicant engages in unreasonable delay.

G. Contribution Protection

Contribution protection against third-party claims is arguably provided for matters addressed in the order (but does not include third-party claims for personal injury). Specifically, persons who have received a release under this program shall not be liable for contribution, except persons *responsible* shall not be released from liability for personal injury or wrongful death arising out of that person's acts or omissions.

II. Cleanup Provisions

A. Soil Source Removal

Initially, all applicants must "address sources" pursuant to the following hierarchy of source removal and control measures ranked from most preferable to least preferable:

1. Removal and/or treatment. All free product, concentrated solid or semi-solid hazardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid in soil and/or grossly contaminated soil shall be removed or treated "to the greatest extent feasible."
2. Containment. Any source remaining following source removal and/or treatment shall be contained. If full containment is not possible, it shall be contained to the greatest extent feasible.

3. Elimination of Exposure. Exposure to any source remaining following removal, treatment and/or containment shall be eliminated to the greatest extent feasible through additional measures such as alternative water supplies or methods to eliminate volatilization into buildings.

4. Treatment of Source at Point of Exposure. Treatment of the source at the point of exposure, including wellhead treatment or management of volatile contamination within buildings, "shall be considered as a measure of last resort."

5. Plume Stabilization. "Plume stabilization shall be evaluated for all remedies and the further migration of contamination from the site shall be prevented to the extent feasible."

B. Contaminant-Specific Soil Cleanup Objectives; Multi-Track Remedial Approach

1. Numeric Look-Up Tables. Regulations shall be developed establishing "three generic tables of contaminant specific remedial action objectives for soil based on a site's current, intended or reasonably anticipated future land use, including (i) unrestricted, (ii) commercial, and (iii) industrial." The level of risk associated with the remedial action objectives for each contaminant developed under Track 2 described below shall not exceed an excess cancer risk of one in one million ("$1x10^{-6}$") for carcinogenic end points and a hazard index of one ("1 Hazard Index") for non-cancer end points. Only rural, not urban, background soil concentrations may be used in developing these numbers.

   In developing these look-up tables, DEC must consider: (i) existing standards, criteria and guidance (i.e., TAGM 4046 guidance document, STARS guidance document, etc.); (ii) the behaviors of children; (iii) the protection of adjacent uses; (iv) the toxicologic, synergistic and/or additive effects of certain contaminants; and (v) the feasibility of achieving more stringent remedial action objectives based on experience under existing remedial programs, particularly where toxicological data are lacking. Based on this last criterion, it appears that DEC will be required to analyze historic cleanup levels achieved in the State Superfund, current non-statutory Voluntary Cleanup and Oil Spills programs to develop the new table of numbers. The tables must be updated every five years.

2. Multi-Track Program. Regulations shall be developed establishing "a multi-track approach for the remediation of contamination." Such regulations "shall provide that groundwater use in Tracks 1 (*sic*, should probably be 2), 3 or 4 can be either restricted or unrestricted." This last sentence in the bill is significant since it appears to recognize that not all groundwater can or will be a source for drinking water, thus the use of certain groundwater may and can be restricted.

   a. Track 1: the remedial program shall achieve "a cleanup level that will allow a site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls," and shall achieve the "unrestricted" contaminant specific soil remedial objectives in the look-up tables. With respect to groundwater, there is a "carve out" provision, which essentially reads as follows: if a volunteer has achieved the "bulk reduction of groundwater contamination to asymptotic levels" and all Track 1 soil cleanup levels have been met, but the long-term employment of engineering or institutional controls is required to restrict groundwater, then the volunteer still qualifies for Track 1. Pursuant to the "Alternatives Analysis" requirement, an applicant electing this Track need only evaluate its own preferred remedial alternative to achieve the Track 1 objectives.

   b. Track 2: based on the anticipated land use of the site, the remedial program shall achieve the applicable "Unrestricted," "Commercial" or "Industrial" contaminant specific soil remedial objectives in the look-up tables without reliance on the long-term employment of engineering or institutional controls, but the groundwater remedial program may include reliance on the long-term employment of engineering or institutional controls. It is likely that regulations will clarify the intent and meaning of this provision. Pursuant to the "Alternatives Analysis" requirement, an applicant electing this Track must evaluate its own preferred remedial alternative to achieve the Track 2 objectives, and a second alternative designed to achieve Track 1 objectives. The Department shall have the discretion to require the evaluation of additional remedial alternatives at a site that has been determined to be a significant threat site.

   c. Track 3: "the remedial program shall achieve contaminant-specific remedial action objectives for soil which conform with the criteria used to develop the generic tables . . . but

may use site specific data to determine such objectives." In other words, if a site is eligible to apply the commercial site contaminant-specific soil remedial objectives based upon meeting the land use criteria, the same assumptions used to develop the commercial look-up table numbers (e.g., human beings accessing a commercial site 8 hours per day for 210 days per year) must be used, but specific scientific information unique to the site (e.g., tight clay soil conditions) can also be utilized to develop site-specific cleanup standards. However, the site-specific cleanup standards developed under Track 3 shall not exceed the $1x10^{-6}$ cancer risk and a 1 Hazard Index for non-cancer risk.

d. Track 4: "the remedial program shall achieve a cleanup level that will be protective for the current, intended, or reasonably anticipated use with restrictions and with reliance on the long-term employment of institutional or engineering controls." However, if the $1x10^{-6}$ cancer risk and 1 Hazard Index for non-cancer risk are exceeded, institutional and engineering controls cannot be employed to eliminate exposure, and both the DEC and DOH commissioners must make formal written findings that the remedy is protective of public health and the environment. In addition, for this Track only, the top two feet of exposed surface soils on residential sites shall be remediated to the unrestricted look-up table numbers, and the top one foot of exposed surface soils on commercial/industrial sites shall be remediated to the applicable commercial or industrial look-up table numbers.

C. Institutional and Engineering Controls

Institutional and engineering controls, if part of an approved remedial program, must be described, evaluated and analyzed in the proposed remedial action plan to determine "long term viability," and cost to the state to enforce the controls such that "effective implementation" can be "reasonably expected." A licensed P.E. must annually certify under penalty of perjury "nothing has occurred [in the last year] that would impair the ability of such control to protect public health and the environment." Every five years, the owners must certify that the "assumptions made in the qualitative exposure assessment remain valid" and resample groundwater monitoring wells at site boundaries. A new database including the sites subject to controls shall be created. In addition, the Final Engineering Report shall certify that any use restrictions, institutional controls, engineering controls and operation, maintenance and monitoring requirements are contained in a self-imposed "environmental easement," held by the DEC and enforceable by the DEC and certain other affected parties created for such controls.

D. Presumptive Remedial Strategies.

To meet the requirements of Tracks 1-4, applicants may select from a list of presumptive remedial strategies developed by the Department. Such remedies may be developed for specific sites types (e.g., manufactured gas plant sites) or specific contaminants (e.g., trichloroethylene). Previous bills had panels of experts assisting the Department in the development of these strategies and the development of the look-up tables, but outside assistance from private sector experts has been eliminated from this bill.

E. Groundwater Protection and Remediation Program.

The program must protect groundwater "for its classified use, the highest of which is drinking water." A Geographic Information System shall track remedial program information in conjunction with groundwater location and use, and within three years use the information to develop a short- and long-term groundwater remedial strategy. The strategy, once developed, shall govern all groundwater remediation programs. The Department is to bring an action against responsible parties for the remediation of off-site groundwater contamination that poses a significant threat if the applicant is a volunteer and a cost recovery action against the responsible parties is unsuccessful; if such an action cannot be brought or is unsuccessful, the DEC must use best efforts to commence remediation within one year of completion of voluntary remediation or the enforcement action.

III. Liability Exemptions

A. Responsible Parties: The definitions of "persons" is expanded to include limited liability companies and joint ventures.

B. Lender, Fiduciary and Municipal Exemptions: The bill adds statutory liability exemptions for lenders and fiduciaries (CERCLA model), and municipalities that involuntarily acquire ownership or control and do not participate in development unless they caused or contributed to the release. Municipalities must provide notice to DEC within 10 days of learning of a release or lose the exemption.

C. Act of God, Act of War, Third Party and Innocent Purchaser Defenses: The bill establishes act of God, act of war, third party and innocent purchaser defenses similar to those in CERCLA.

D. Appropriate Inquiry Requirements: The bill imposes CERCLA 2002's "reasonable steps" requirements as a condition for maintaining the innocent purchaser defense. In addition, the Department must initiate a rulemaking, similar to that required by the CERCLA 2002 Amendments, to determine the standard for "all appropriate inquiry."

IV. Public Information and Participation

A. Databases

The DEC shall establish a public database for each brownfields site, including complete description of environmental easements. The DEC shall also create or modify the geographic information system (GIS) to incorporate information from its various brownfields programs.

Each county must undertake a survey to inventory inactive hazardous waste disposal sites.

The DEC must supplement the Inactive Hazardous Waste Site Disposal Registry with additional categories of information. It must update the Registry and make it publicly available on an annual basis.

B. Citizen Participation Handbook and Citizen Participation Plans

The commissioner shall prepare a Citizen Participation Handbook to guide applicants who are participating in the Brownfield Cleanup Program in the design and implementation of meaningful citizen participation plans.

All citizen participation plans shall include the following minimum elements: (1) identification of the interested public and preparation of a brownfield site contact list; (2) identification of major issues of public concern related to brownfield sites; (3) a description and schedule of public participation activities required pursuant to this section; and (4) a description and schedule of any additional public participation activities needed to address public concerns.

C. Citizen Participation Requirements

The applicant must provide notice of its request to participate in the Brownfield Cleanup Program to a newspaper and to the individuals on the brownfield site contact list. Such notice must provide for a 30-day public comment period. The applicant must also provide notice to the individuals on the contact list at the following times: before DEC finalizes the remedial investigation (RI) work-plan (30-day public comment period); before DEC approves a proposed RI report; before DEC finalizes a proposed remedial work plan (or decides no remediation is required) (45-day public comment period, and public meeting if the affected community requests it); before the applicant commences construction at the brownfield site; before DEC approves a proposed final engineering report; and within ten days of the issuance of a certificate of completion at a site which will utilize institutional or engineering controls. In addition to the formal public comment periods set forth above, the public may provide comments at any time during the remedial program.

D. Technical Assistance Grants

The Commissioner is authorized to provide grants to community groups for any site determined to pose a significant threat and which may be affected by a Brownfield Program. The community group must demonstrate that its membership represents the interests of the community affected by such site. The commissioner is also authorized to direct any applicant who is a responsible party to provide such grants.

Technical assistance grants (TAGs) may be used to obtain assistance in interpreting information, to hire health and safety experts, and for the education of interested affected community members. TAGs may not be used for collecting field sampling data, political activity, or lobbying legislative bodies.

The amount of any grant awarded may not exceed $50,000 at any one site. No matching contribution from the recipient is required.

V. Financial Incentives

A. Grants and Financial Assistance

1. Grants for Pre-Nomination Brownfield Opportunity Area Studies: Financial assistance is available to municipalities and community-based organizations (CBOs) for *pre-nomination studies* for brownfield opportunity area (BOA) designation. Assistance is available for up to 90% of the study cost, which may contain information concerning:

   - the BOA borders;
   - number and size of brownfield sites;
   - use/ownership of properties in proposed area;
   - condition of groundwater in proposed area; and
   - preliminary descriptions of potential remediation, reuse, and other improvements.

2. Financial assistance to municipalities and CBOs for *designation of a BOA*. Assistance is available for up to 90% of the cost of such nomination, and may be used for identification, preparation, creation, development and assembly of information to be included in a nomination for designation of a BOA.

3. Financial assistance to municipalities and CBOs to conduct Brownfield Site Assessments in designated BOAs. Assistance is up to 90% of the cost of such assessment, and may be used for testing to determine contamination, environmental assessments, identification of proposed remediation strategies, development, and other "appropriate" activities.

4. CBO Requirements: Non-profit CBOs are eligible entities provided they did not cause or contributed to release of hazardous waste or petroleum or generate, dispose, transport same at the brownfield site. A CBO will not be eligible if more than 25% of its members, board or officers are or were employed by a "person responsible" under Title 27 of the ECL, or under the Navigation Law. A municipality that generated, transported or disposed of wastes at the site to receive funds is ineligible for assistance.

5. Municipality Requirements: A municipality receiving assistance, and its successors, lenders, and lessees shall not be liable under statutory or common law arising out of the presence of hazardous substance existing at the time of the state assistance grant, and will be indemnified by the state provided that they did not generate, transport or dispose of hazardous materials at the site. The liability exemption does not apply to a party if the municipality fails to implement the workplan, fraudulently show cleanup levels were achieved, causes a release, or uses the property in violation of any applicable land use restrictions.

B. Tax Credits

All of the tax credits are available to parties who have participated in the new Title 14 program and received a Certificate of Completion.

1. Brownfield Redevelopment Tax Credits: These credits are available in the taxable year in which the certificate of completion is obtained beginning in the year 2005, even if obtained in 2004. The credits are applicable to costs for remediation individual site preparation, tangible property and on-site groundwater remediation. The percentage of the tax credit varies depending on whether the party is an individual or corporate taxpayer and whether the site is or is not in a BOA. If a site is in a BOA, credits up to 22 percent of these costs are available. If a site is not in a BOA, the credits drop to 12 percent for a corporate taxpayer and 10 percent for a non-corporate taxpayer.

2. Real Property Credits for Jobs: Developers of qualified sites may receive credits against eligible real property taxes imposed on the site based on employment numbers and taxes paid and the number of jobs added to a brownfield site. This benefit is currently provided in Empire Zones.

3. Environmental Insurance Credits: Taxpayers may also be eligible for environmental remediation insurance credits, equal to the lesser of $30,000 or 50% of the premium paid after the date of a Brownfield Agreement covering a qualified site.

VI. Environmental Easements

Title Owners of a brownfield site must convey an environmental easement to the state within 60 days of commencement of a remedial design that uses land use controls.

The easement may be enforced in law or equity by the grantor, state or local government against the owner of the burdened property, lessee or any person using the land.

DEC may revoke the Certificate of Completion for any person who intentionally violates an environmental easement.

For sites subject to environment easements, a local government that receives an application for a building permit or that affects land use or development is required to notify DEC. The local government shall not approve the application until it receives approval from DEC.

VII. 1996 Bond Act Brownfield Restoration Program Amendments

A. Eligibility:

Adds community-based organizations (CBOs) defined in the amendments as IRS section 501(c)(3) nonprofit corporations, as eligible entities for participation in the grant program, provided they did not cause or contribute to a release of hazardous waste or petroleum, or generate, dispose, transport same at the brownfield site. A CBO will not be eligible if more than 25% of members, board or officers are or were employed by a person responsible under Title 27 of the Navigation Law. A municipality that generated, transported or dis-

posed of wastes at the site to receive funds is not eligible for such assistance.

B. Eligible Costs:

State assistance payments are increased to 90% from 75% for on-site contamination and 100% for off-site contamination. State assistance share will be re-calculated if a municipality receives any payments from PRPs. Proceeds from sale of property that exceed the municipality's costs of property including taxes shall be equally shared with the state. Sites in designated Brownfield Opportunity Areas pursuant to General Municipal Law Section 970-4 shall receive a funding priority and preference over other sites.

C. Use of Property:

After completing the cleanup, the municipality may use the property for a public purpose or dispose of it. If sold to a PRP, the PRP must pay the amount of the State Assistance Contract (SAC) plus interest in addition to any consideration received by the municipality.

D. Recovery of Assistance:

The state is required to use reasonable efforts to pursue responsible parties (RPs) for the full amount of SAC but not parties who are RPs solely because of ownership.

E. Tax Foreclosure:

Taxing districts other than one foreclosing the tax lien may petition on 20 days notice for an order granting the taxing district temporary incidents of ownership to conduct environmental restoration projects, and relief shall be granted unless parcel has been redeemed by party having the right of redemption. The order shall stay the foreclosure proceeding until investigation is completed. The taxing district shall be eligible for SAC to perform the environmental investigation. The report is to be delivered to the court, which shall then lift its stay of the foreclosure.

F. Liability Exemption:

A municipality receiving assistance, successor, lender, lessee not liable under statutory or common law arising out of presence of hazardous substance (did not refer to waste or petroleum) existing at the time of SAC shall be indemnified by the state provided that they did not generate, transport or dispose at site. The liability exemption does not apply if these parties fail to implement workplan (including LUCs per 56-0503.2h), fraudulently show cleanup levels were achieved, cause a release, change the property's use, or use the property in violation of 56-0511.

VIII. Public Health Law Amendments

The bill amends section 1389-e of the Public Health Law to add the same defenses as are included in amended Title 13 of the Environmental Conservation Law.

IX. Navigation Law Amendments

The bill provides for a third-party defense for liability arising from discharges of petroleum under the Navigation Law.

New York State Bar Association Environmental Law Section
Extent to Which Section's October 1999 Recommendations Are Addressed by A.9120

	Addressed by A.9120?
General Principle	
• all programs should have the same remedial goal: protection of public health and the environment and, at a minimum, elimination or mitigation of all significant threats to public health and the environment presented by contaminants, through proper application of scientific and engineering principles.	yes[1]
Risk Assessment	
• use accepted risk assessment procedures to develop "look-up" tables of soil cleanup levels for different land uses (residential, commercial, industrial) which tables shall be promulgated as regulations by the New York State Department of Environmental Conservation;	yes
• allow for site-specific risk assessments to justify other cleanup levels on a case-by-case basis;	yes
• consider current, intended and reasonably anticipated future land uses at a site and surrounding properties in fashioning remedial proposals; and	yes
• allow a departure from groundwater standards in remedial decisions in area of "ubiquitous contamination" where groundwater is not used as a drinking water source, and otherwise on a case-by-case basis.	indirectly
Exemptions and Defenses	
• incorporate the lender liability protections of federal Superfund law into the State Superfund Law and oil spill program;	yes
• incorporate fiduciary liability protections of federal Superfund law into the State Superfund Law and oil spill program;	yes
• provide municipalities acquiring title involuntarily with the same liability protections in the State Superfund Law and oil spill program as are provided in the federal Superfund law;	yes
• provide liability protections to an IDA in the State Superfund Law and the oil spill program where DEC has determined that the IDA is serving in a capacity as "conduit financier"; and	no
• incorporate federal "innocent landowner" defense into the State Superfund Law and oil spill program.	partial
Settlements	
• provide *de minimis* and *de micromis* settlement strategies in the State Superfund program, consistent with current federal practice.	no
Penalties	
• authorize imposition of treble damages on parties who refuse to comply with a DEC cleanup request without good cause.	no

	Addressed by A.9120?
Voluntary Cleanup Program	
• provide a statutory basis for DEC's Voluntary Cleanup Program;	yes
• provide for enhanced liability releases. All parties participating in cleanups as volunteers under State's Voluntary Cleanup Program would be given releases from further liability upon satisfactory completion of a Department-approved cleanup, with the release limited to the scope of the investigation;	yes
• provide a single release for all State agencies;	yes
• provide for releases to run with the land and therefore be transferable to successors-in-interest;	yes
• provide that releases would confer contribution protection against claims by other potentially responsible parties;	yes
• provide re-openers for new information, fraud, and change in the use of a property (assuming the new use would have required a higher degree of cleanup);	yes
• provide for time limits for DEC responses to submissions; and	yes
• strengthen notice and enforcement provisions for institutional controls.	yes
Private Right of Action	
• create a private right of action for cost recovery for cleanups consistent with State law.	no
Financing	
• use fines and penalties received by the Hazardous Waste Remedial Fund and Oil Spill Fund solely for these program purposes;	yes
• use cost recovery funds as a revenue source for remedial programs; and	yes
• provide for loans and grants to municipal and non-profit organizations, targeted to economically-distressed communities. The making of loans and grants available to private parties should be considered, contingent upon the development of appropriate criteria.	yes
Hazardous Substances	
• broaden Title 13 to include hazardous substance sites.	yes
Mediation	
• endorse the use of mediation, to the extent possible, to resolve disputes involving State Superfund or oil spill sites.	no
Public Participation	
• broaden the rights of affected publics to participate in decision-making by providing wider notice of proposed voluntary cleanup agreements and work plans.	yes

Endnote

1. A "yes" indicates that the subject matter has been covered by the bill. It does not necessarily constitute an endorsement of the bill's specific provisions on any given topic.

Recreation in the Adirondack Park: A Look at the Paradox of Managing "Forever Wild" Forest Preserve

By Todd Mathes

I. Introduction

Governor Pataki announced in October of 1999 that the New York State Department of Environmental Conservation (DEC) would, within five years, draft and publish Unit Management Plans (UMPs) for the entirety of the Adirondack and Catskill Parks.[1] UMPs are nothing more than the name implies—management plans which enable DEC to engage in forest/wilderness area management for the purpose of public recreational use, consistent with the Adirondack and Catskill Park State Land Master Plans,[2] and more importantly, the "forever wild" clause of the New York State Constitution.[3] Notably, the Adirondack and Catskill Park State Land Master Plans are distinct entities in that the DEC administers the Catskill Park State Land Master Plan, whereas the DEC shares administrative responsibility for the Adirondack Park with the Adirondack Park Agency (APA). For this reason, UMPs are analyzed here only in the context of the Adirondack Park, although lessons learned may be duly applicable.

With one year remaining until Governor Pataki's recommended deadline passes, it is more than appropriate to reconsider the paradox suggested by notions of wilderness and management, while simultaneously analyzing whether "forever wild" is being retooled by the management process.

II. Background

The Adirondack Park ("Park") encompasses six million acres, forty percent of which is state-owned, constituting the Forest Preserve and subject to the "forever wild" clause of the State Constitution; and sixty percent of which is privately held. Both public and private land within the blue line[4] demarking the boundary of the Park is governed by strict land-use controls pursuant respectively to the Adirondack Park State Land Master Plan ("Master Plan") and Adirondack Park Land Use and Development Plan.[5] Language which governed the Park beginning in 1885 stated that it was "open for the free use of all the people for their health and pleasure, and as forestland necessary to the preservation of the headwaters of the chief rivers of the state, *and as a future supply of timber*."[6] The adoption of what would eventually become Article XIV of the State Constitution in 1894 limited this allowance, stating in pertinent part that "the lands of the state . . . constituting the forest preserve . . . shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, *nor shall the timber thereon be sold, removed or destroyed*."[7] The paradigm shift which occurred during the state's 1894 constitutional convention proscribed timber removal on forestlands principally to ensure a constant supply of water to the state's urban populace, or so it seemed.

As was previously noted, only forty percent of the land in the Adirondack Park is state-owned. More importantly, maps of the state's North Country readily reveal that the Park is an amalgam of privately held and public/Forest Preserve land.[8] Because neither watersheds nor ecosystems delineate based upon conventions of property rights, this amalgam of land ownership further reveals that recognition and active management of the private land resource is necessary to achieve the main tenet of the "forever wild" clause which applies only to Forest Preserve lands. Accordingly, the state legislature in the late 1960s responded by delegating the responsibility of creating and implementing both the Master Plan and the Adirondack Park Land Use and Development Plan to the Adirondack Park Agency (APA).[9] The result for Forest Preserve lands is a Master Plan which fragments the wilderness character of the Park, and imposes a constantly evolving management scheme to uphold these varying wilderness characters. The progeny of the Master Plan in terms of managing recreational use is the UMP.[10]

Having been only briefly introduced to the procedural framework of the Forest Preserve, it is certainly logical to question the thesis of this comment, whether a management process is capable of modifying a legal rule. As this comment endeavors to explain, the courts have struggled with providing a discernible and static interpretation of the legislature's use of "forever wild" due in part to the trans-boundary ecology of the Park, but more so because the state legislature codified necessary consideration of the almost symbiotic land-use relationship. Therefore, the extent of wildness New Yorkers are afforded from "forever wild" Forest Preserve depends wholly on the management plans, procedures, and enforcement actions taken by the DEC and APA.

III. Discussion

A. Land, Water, Conventions and Agencies

New Yorkers proudly sporting their new L.L. Bean parkas and camping gear when they hike the remote wilderness of Maine's Baxter State Park, New Hampshire's Presidential Range, or Vermont's Green Mountains, likely will not dispel the stereotype of New Yorkers as Fifth Avenue urbanites, but in light of the fact that New York is home to over 18.5 million acres of forestland—more forestland than any other state in the Northeast[11]—the stereotype is clearly unwarranted. Additionally, knowing that of these 18.5 million acres, 2.6 million acres in the Adirondack Park and an additional 300,000 in the Catskill Park are generally accessible to the public, the inquiry as to why New Yorkers would venture beyond their home state in anticipation of a sublime wilderness experience is a logical one.[12] Opportunities for wilderness recreation in the state extend beyond the nearly three million Forest Preserve acres, existing on state-owned lands outside the Parks and also as a result of the strict land-use regulations governing the vast privately held forestland in the Parks, over which numerous easements are held by the state and conservation organizations alike.[13]

If New Yorkers are looking for someone to thank for the state's expansive property holdings, tribute may be paid to participants of the state's 1894 constitutional convention, or more appropriately to dirty water, the timber industry, and recreation. *Forest and Stream,* a sportsman's periodical, beat lobbyists to the punch by about twenty years when in 1873 it published two articles declaring the watershed argument as the key to success in preserving the Adirondack wilderness.[14] Ten years later when newspapers finally picked up on declining water levels in the Erie Canal and Hudson River, the knee jerk reaction of urban residents was to vehemently condemn logging and mining in the Adirondacks.[15] Interestingly, while little was then known about the science of watershed hydrology,[16] forestland cover in the state dominated only about 25% of the landscape. Today, that figure is somewhere in the 60% range,[17] thus evidencing some logic in the placement of urban residents' aggression.

In a time when nonutilitarian uses of wilderness were only emerging in the consciousness of lawmakers, it was apparently necessary to cloak the politicking of such interests by this watershed argument.[18] Admittedly, *Forest and Stream's* intuition was spawned neither by the potentially crippling effect that declining water levels posed to commercial transport, nor by a burgeoning population's demand for an adequate water supply. Ideas of wilderness adventure, opportunities to escape the incessant chaos of city life, and in a word, recreation, were first in the minds of unlikely preservationists pushing the watershed argument.[19] Fortunately for *Forest and Stream* subscribers they were in good company. J.P. Morgan, Collis P. Huntington, the Vanderbilts, Rockefellers, and Whitneys, as well as then Senator Chauncey Depew, Governor John A. Dix, and Vice President Levi P. Morton, all owned land or camps in the Adirondacks.[20]

With the onslaught of various interests pressing for preservation of the Adirondacks, preservation is exactly what occurred. Importantly though, this was not preservation in the Muirian sense,[21] but preservation with a tangible utility. The difference being that a Muirian sense of preservation endeavors to protect a nature which is sublime, untrammeled, and uninterrupted, or one which evokes the most primitive of man's character. Whereas preservation of the Adirondack Park was a means of furthering the intent of what procedurally preceded insertion of the "forever wild" clause in the state's Constitution; namely, the creation of a Forest Preserve in 1885 to protect the "chief headwaters of the state" and the area's designation as a park in 1892.[22] Moreover, "preservation," like "wilderness," is a fluid statement, definable only in view of the context availing the term's use.

B. Today's Adirondack Park

The Adirondack Park encompasses six million acres, forty percent of which is state-owned constituting the Forest Preserve and subject to the "forever wild" clause, the remaining sixty percent being privately held, all of which is governed by strict land-use controls pursuant to the Master Plan and Adirondack Park Land Use and Development Plan.[23] The Master Plan designates Forest Preserve land in one of nine categories, or characters of wilderness, and the APA manages that land accordingly.

Wilderness is an area where the ecology is either untrammeled by man, or where the primeval character of the forest predominates.[24] *Wild forest* is an area slightly less ecocentric[25] than wilderness.[26] *Primitive* is a wilderness area which contains structures or facilities, the uses of which are inconsistent with the wilderness definition provided despite the area's dominant wilderness or wild forest character.[27] *Canoe* is an area where numerous contiguous watercourses promote water-oriented recreation in a relatively wild setting.[28] *Intensive use* is an area where outdoor recreation opportunities are promoted by state provided facilities, including campground and day use areas.[29] *Historic* constitutes either state historic sites, properties listed on the National Register of Historic Places, or properties recommended for nomination by the Committee on Registers of the New York State Board of Historic Preservation.[30] *Wild, scenic and recreational rivers* are those areas which are free from diversion or impoundment, and

generally inaccessible by modern forms of transportation.[31] *Travel corridors* constitute roads, right of ways, and the lands immediately adjacent to these improvements which are intended for intra or interstate travel.[32] Lastly, *state administrative areas* are those where state uses are non-recreational.[33] These various land-use designations demonstrate that the Forest Preserve is neither consistently managed, developed, nor regulated, and therefore raise the question as to whether the "forever wild" limitation imposed collectively on these lands is satisfied.

C. Judicial Handling of "Forever Wild"

A standard of reasonableness has emerged as the threshold by which New York courts interpret whether a challenged land use comports with the "forever wild" clause.[34] Reasonableness seemingly "permits uses compatible with public enjoyment of the wild character of the [F]orest [P]reserve."[35] Admittedly though, reasonableness is not a particularly informative threshold in that such uses fail to readily appear on one side or the other of a bright line rule.

Reasonable use was the result of a New York Court of Appeals decision, *Association for the Protection of the Adirondacks v. MacDonald*,[36] in 1930 which articulated the threshold as being limited to non-commercial, public uses which did not remove timber to any material degree.[37] The plaintiff in *MacDonald* sought to enjoin DEC from constructing and maintaining a bobsled run on Forest Preserve land on the western slope of the Sentinel Range in North Elba.[38] Construction of the run required that land on either side of a 6.5-foot by 1.25-mile path be cleared, resulting in the deforestation of approximately four acres for purposes of hosting the Olympic Winter Games.[39] To add gravity to DEC's defense, the construction was commenced pursuant to a legislative grant of authority. Among the most significant contributions of this court, Justice Crane stated that "[t]he words of the Constitution, like those of any other law, must receive a reasonable interpretation, considering the purpose and the object in view."[40] The purpose and object of the "forever wild" clause being to "close all gaps" in the law so as to prevent timber harvesting in the Park which would impede the health of the state's headwaters.[41]

Helms v. Reid[42] followed suit, enlightening the interplay between the Master Plan and the APA's execution of that plan, coupled with the APA's interpretation of the "forever wild" clause.[43] Plaintiffs in *Reid* alleged that DEC in conjunction with the APA violated the "forever wild" clause via the construction and maintenance of 42 public campsites among other recreational facilities.[44] Specifically, plaintiffs argued that the Master Plan, by classifying Forest Preserve land in one of seven basic categories of use, was *per se* violative of the "forever wild" clause, in that Article XIV read literally insists upon uniform treatment of all Forest Preserve lands.[45]

Placing special emphasis on the records of the 1894 constitutional convention, the court in *Reid* stated that "the framers of the constitutional provision apparently intended a strict interpretation of its language and application of its principles. The lands of the forest preserve were to be retained in their wild forest state, and it is clear that the application of the principle de minimus was not to be applied in the forest preserve."[46] Short of the *MacDonald* case, however, the court was without precedent to interpret the provision—and, after turning to state attorney general opinions, identified a liberalizing trend which required the court to review each case on its merits, so that the cutting of trees "would [not] impair the wild forest character of the forest preserve."[47] Ultimately, the court concluded that the intent of the "forever wild" clause was "to prevent the commercial exploitation of the forest preserve which had previously been sanctioned by the Legislature" because the strong preservationist language of "forever wild" was utilized only as a means to achieve this end.[48]

Clearly commercial logging would not be tolerated, but the question remained of how to preserve the wild character of the Forest Preserve and at the same time further the public's use of the Park.[49] Moreover, the court noted that the "concepts [of wilderness and management] are diametrically opposed as it is precisely man's presence in the preserve which threatens its wild forest character . . . "[50] Seeing as how the main factor considered in the development of the Master Plan was the physical characteristics of the land and water, and because these characteristics bear a direct relationship on the area's capacity to accept human use, cutting would be allowed in the Forest Preserve at least to some extent.[51] In balancing the wild character of the forest against human use, the court concluded that a plan enabling the state to meet these objectives was clearly permissible in view of Article XIV.[52]

Subsequent decisions and findings have also helped shape "forever wild" Forest Preserve management strategies. In *Helms v. Diamond*, the court articulated the reasonableness standard set forth by the court in *MacDonald* by relying on the legislative intent of Article XIV, which the court correctly concluded was both wilderness preservation and recreation.[53] A case arising out of the Catskill Park offered numerical direction to the material degree threshold set out in *MacDonald*, allowing the cutting of 350 trees, 312 saplings and an additional undefined amount necessary for parking lots associated with a trailhead.[54] In 1990, the state Attorney General denied DEC's proposal to issue a temporary revocable permit allowing the Town of Arietta to trim

or remove 131 trees on Forest Preserve land in order to meet Federal Aviation Agency standards at the Piseco Airport.[55] Six years later the Attorney General again denied a proposal to issue temporary revocable permits, this time proscribing the installation of electrical cable and other equipment on the beds of Raquette and Big Moose Lakes.[56]

Most recently, the rights of persons with disabilities came to a head with the "forever wild" clause in *Galusha v. Department of Environmental Conservation*, wherein disabled persons contested DEC's prohibition of all-terrain vehicles on certain Forest Preserve lands.[57] The case was settled, allowing disabled persons with proper permits to access certain roads in the Park, but not trails.[58]

These latter cases are highlighted not to contrast DEC's seemingly changing attitude to the use of Forest Preserve lands, but rather to identify other issues which land-use managers need to be conscious of when attempting to satisfy the loose threshold set out by the court in *MacDonald* and *Reid*, and when planning for the future use of Forest Preserve lands. Notably, Adirondack municipalities' regard for the "forever wild" clause is quickly becoming a Pandora's box of motorized access versus wilderness preservation as towns pass laws purporting to permit ATVs to be driven on the "public highways" of the Forest Preserve.[59]

D. The Paradox of Wilderness and Management

A brief general discussion of the paradox suggested by notions of wilderness and management is necessary, because despite the case law's handling of the issue, lingering in the minds of land-use managers, Park residents, and public interest groups alike is the fact that these two concepts literally interpreted are *diametrically opposed*. Moreover, management of "forever wild" Forest Preserve is a paradoxical statement, the relationship of its terms being strained at best, in that while management connotes the anthropocentric affirmative manipulation of an ecosystem, wilderness in this context connotes uninhabited, undeveloped forestland. The idea being, with regard to wilderness on a local scale,[60] that the less the anthropocentric influences are imposed on an ecosystem, the wilder that ecosystem will be. Thus, the extent to which management of Forest Preserve land permits or even encourages human interaction shares an inverse relationship with the Forest Preserve's wildness. Consider for instance, wilderness and land-use management in the American experience.[61]

Persisting fights to protect America's wild vistas is what has given wilderness its modern identity. John Muir and later Howard Zahniser[62] and David Brower[63] mobilized the media and the middle class, fighting, for example, to prevent the damming of the Hetch-Hetchy Valley in Yosemite National Park and Echo Park at Dinosaur National Monument, as well as to shut down operation of the Four Corners power plant near the Grand Canyon.[64] But perhaps a more appropriate understanding of wilderness in the American experience is found in the Puritans' fight to settle the evils of wilderness in the new world, James Fenimore Cooper's tales of wilderness adventure just outside what is today the Catskill Park, or Henry David Thoreau's transcendental experiences in nature when he realized that "in Wildness is the preservation of the World."[65]

While notions of wilderness and management are certainly oppositional terms, developing an understanding of each term doesn't necessarily require the analysis to stem from completely distinct fields of thought. Management in the context of the Adirondack Park, and specifically forest management, is an idea which may be timely traced to Gifford Pinchot, the "father" of modern forestry.[66] The teachings of Aldo Leopold's *A Sand County Almanac*, arriving some fifty or sixty years after Pinchot and the preservation of the Park, although untimely, are perhaps more appropriate to the analysis, because Leopold, also a forester by trade, advocated land-use concepts which are *today* revered by land-use managers planning for multiple use rather than merely active and sustainable forestry.

Leopold viewed wilderness through the lens of ecology, advocating its protection as a necessity of science and self-preservation.[67] Drawing on the concept of the tragedy of the commons, Leopold found reason for advocating a land ethic among land managers which recognizes that in the struggle for existence, a limitation on freedom of action is necessary.[68]

Management is an anthropocentric concept nonetheless, because in managing a system of ecology, we are affirmatively manipulating that system for a recognized purpose; in the case of land-use management, definitely for our children, and probably for our children's children.[69] In this sense, resource management is an admission that ecological, social, and economic problems are interdependent,[70] and regardless of whether the manager is a resource optimist or pessimist,[71] if human populations expand indefinitely, the local resource's sustenance of that population will weaken.[72]

The sublime, transcendental and untrammeled character of wilderness therefore fails to square with a process which manipulates natural systems, or at the very least manages human interplay with those systems. This is because the fact remains that regardless of what anthropocentric action is reviewed—that action ultimately impedes the ethereal fluidity of wilderness. But wilderness in its traditional sense is not the wilderness which the legislators and courts assigned to the Forest Preserve; rather, it was wilderness to sustain the health of a watershed and to provide persons in the

state opportunities for recreation. From this perspective, the paradoxical relationship of wilderness and management is explained by the science of land-use management.

IV. Analysis

A. Explaining the Paradox

When the "forever wild" provision took hold of the Forest Preserve, little was then known about the effects of forest cover on water storage, quality, and flow, but the declining health and vitality of the state's headwaters evidenced that if unfettered exploitation of the Adirondack forests continued, commerce routes and municipal water supplies would likely fail. Today, however, we know a great deal about watershed hydrology, and in the context of what inspired the protection of the Forest Preserve, about soil erosion. Consider the following brief and simple explanation of soil erosion with an eye toward understanding whether use of the term "forever wild," despite its paradoxical nature, was a logical method of achieving the ends intended.

On the world scale, approximately 75 billion tons of soil are eroded from terrestrial ecosystems each year, and on agricultural land erosion occurs somewhere between 13 and 40 times faster than the average rate of soil formation.[73] As Pimentel and Kounang point out, erosion occurs when soil is exposed to water or wind energy.[74] Specifically, when a raindrop falls onto exposed soil, the energy of the falling raindrop is transferred to the soil particles, dislodging a thin film of soil and releasing this film into the water pathways now carving their way across the land surface. The soil particles carry with them, and are themselves a source of pollution to the related water body—which subsequently poses a severe health risk to municipalities relying on the source's water supply. Soil erosion is intensified on steep slopes, and this is exactly the simplistic scientific rationale which spawned the Master Plan's consideration of factors such as gradient in assignment of land-use classifications.

Forest cover mitigates soil erosion by displacing the energy of falling raindrops and wind, which in turn allows watercourses to maintain their natural direction and provides municipalities some degree of reliable consistency concerning the water flow, storage, and supply of a watershed and its watercourses. In this sense, the crafters of the "forever wild" clause were thinking one step ahead of themselves, because, as Leopold points out, declining soil organic matter shares a direct relationship with biodiversity, and in the loss of biodiversity is the loss of wilderness.[75]

Just as part IV of *A Sand County Almanac* offers that wilderness serves a greater purpose than biodiversity alone,[76] New York chose wilderness for water and recreation. The primary threat to wilderness in the Park, however, is no longer deforestation, but one which continuously festers oftentimes but not always below the newsworthy radar—that being a constantly increasing volume of recreational users.

B. The Paradox/Parody in the Context of the Adirondack Park

In fact, it is the luring promise written into the New York State Constitution that the Forest Preserve will be "forever wild" which an Albany *Times Union* article accurately portrayed as posing the greatest threat to the vitality of the Park's most coveted region—the High Peaks.[77] Namely, hikers and campers in pursuit of a truly wild experience are trammeling the wilderness right out of the Forest Preserve—presenting a serious management challenge to the DEC and APA when the characters of the parties to the debate are considered.

In the Lows Lake-Bog River-Oswegatchie wilderness canoe area, DEC drafted a UMP which would phase out float planes over the next five years.[78] Floatplane pilots argue that because Lows Lake is "one of the few back-country lakes where float planes are still allowed . . . closing Lows [will] push them closer to the edge between profit and loss."[79] But paddlers argue that the noise is intrusive and that passengers of float plane services commandeer the best campsites.[80] Tom Helms, the pilot profiled in the article, comparing supporters of the prohibition to the Taliban, was quick to point out that "Lows is hardly a wilderness lake—it was formed when A.A. Low built a dam . . . to ensure a steady flow of water to float logs down the river."[81] Why Lows Lake is a popular float plane destination is a further wilderness curiosity worth noting, as attraction of fishermen to the area cropped up in 1985 when largemouth bass were introduced to the lake.[82]

Rafting in the Park has potentially been its largest economic boon of recent past, worth a liberal estimate of up to $10 million annually to the area.[83] Whitewater in the Park, however, is not exactly a wild experience, since this "boon" is unleashed only during periodic dam releases from Lake Abanakee.[84] In 1988 supporters of the "boon" seemingly went too far when they began paying for the releases which now occur four days a week all summer long.[85] The Hudson River Gorge Primitive Area UMP is the forum at which proponents of limiting these releases will present their case, and evidence that the releases are disturbing the Hudson River Gorge ecosystem is likely to be persuasive.

The debate amongst recreationists is really a debate as to what extent use of the Forest Preserve should be limited so as to favor recreation which in character is more wild than others. Notably, the controversy between wilderness recreationists in the Adirondack Park is not dissimilar to controversy surrounding the

national park system. Effectively, it's the "pork-and-beaners" versus the "L.L. Beaners,"[86] or to put it another way, the "pop-up campers" versus the "bivy-sack tenters." And although the debate in the national parks is often characterized as one between preservationists and recreationists, as is demonstrated by the High Peaks controversy, preservationists who "leave no footprints" when they hike wilderness areas are recreating nonetheless—the only difference being the primitiveness of the activity.[87]

The recreation threat is primarily volume-based, evidencing itself foremost in the High Peaks region as well as at easily accessible rock climbing areas,[88] leaving wilderness managers potentially at odds with their biggest supporters. As such, the UMP process must be analyzed to better understand what is resulting with regard to the wildness of Forest Preserve lands, and how the drafters of UMPs are treating the "forever wild" mandate.

C. A Quick Look at the Unit Management Plan

Anticipating whether a promulgated UMP squares legally with the "forever wild" clause and Master Plan should not be the foremost concern of attorneys, land-use managers, or any other interested party. Rather, because Forest Preserve land within the Park as it now exists defines what is "forever wild," the UMP process must be viewed in terms of what will and does characterize "forever wild" Forest Preserve when the DEC and APA attempt to balance the central purposes of the Park against one another.

The process: UMP promulgation begins with land-use managers conducting resource inventory in the designated state forest area; accordingly, written and verbal input is solicited from the public through press releases and meetings; managers then develop a draft plan and address State Environmental Quality Review issues; the draft plan is then passed on for APA review; a draft UMP is released and public hearings commenced; subsequent issues raised are resolved, and the plan for compliance with the Master Plan is revised; lastly, adoption requires the DEC Commissioner's final approval. While it is unclear whether the DEC and APA employ a universal framework beyond the above-listed seven-step process when promulgating UMPs, a common method of solving problems for rural resource managers is to in fact employ a framework, because when, as here, the UMP is reviewed, a better understanding of whether the means address the desired ends is afforded. Commonly held societal values trigger identification of the problematic situation, requiring the reviewing agency to further articulate the problem and, in response, to employ a decision-making framework.[89] In the case of UMPs, it was the state's basic value of stewardship which inspired the legislature to identify a problematic situation of land-use planning. The first step of the UMP process—resource inventory—begins to clarify this problem so that decision making, action planning, and causal analysis can follow. Solicitation of written and verbal input from the public is a further process of problem definition.

State Environmental Quality Review (SEQR) at step three functions much like the National Environmental Policy Act's Environmental Impact Statement. Complying with the process prescribed by statute is ultimately far more important than the SEQR finding,[90] because the process is what ensures that land-use managers have reached the SEQR result based upon objective and balanced information. Because the APA is the body charged with responsibility for administering care of the Park, DEC follows development of the draft plan and, after having addressed SEQR issues, hands the document off, resulting in a second round of public input which, among other purposes, is a process of legitimization.[91] The final step of the UMP process, requiring that the DEC Commissioner make final approval prior to UMP adoption, effectively gives the gubernatorial party unfettered control over the end result, as the Commissioner is appointed by the Governor. Nonetheless, with such an immense investment of bureaucratic time, money, and procedural controls, the likelihood of the Commissioner denying approval is virtually absent. And besides, the UMP is only a plan, requiring funding and agenda priority to be implemented successfully.

To offer ground truth into the functioning of the UMP process, consider the High Peaks UMP. Criteria include: unit descriptions of the Ampersand Primitive Area, Johns Brook Primitive Corridor, High Peaks Wilderness, and Adirondack Canoe Route, including their boundaries and primary access; descriptions of biophysical resources including geology, soils, terrain, water, wetlands, climate, air quality, open space, vegetation, wildlife, and fisheries; a discussion of the history, economics and cultural resources of man and wilderness; analysis of intrinsic, recreation, and non-conforming uses of wilderness; considerations of adjacent state and private land uses; and considerations of the effects of management activities which persist, as well as future management directions. The UMP concludes by setting forth specific projects to mitigate problems associated with recreational use, and by establishing certain management rules for use of the High Peaks.[92]

The result is that the High Peaks UMP restricts camping to designated sites in heavy-use travel corridors, furthers an ongoing campsite and lean-to inventory study, prohibits at-large camping above 3,500 feet, and calls for the restoration of all closed camp sites.[93] Further, the UMP calls for a regularly scheduled campsite maintenance program and the monitoring of authorized at-large camping.[94]

With regard to lean-tos, DEC's management strategies are an outgrowth of findings which indicate that camping use in these areas is relatively more detrimental to the High Peaks wilderness ecosystem as a result of heavy tent camping, number of persons in a party, and fire activity associated with these areas.[95] Despite these adverse affects, the Master Plan recognizes lean-tos as a conforming "forever wild" use and therefore 73 such areas now exist in the High Peaks.[96] Volume and frequency therefore are the root of the problem. In response, DEC set forth capacity controls on lean-to site use, and as is the case with other camping areas, prohibits such areas to be within a certain proximity of water bodies.[97]

Perhaps the most drastic management strategy of DEC was to prohibit all open fires in the High Peaks area, and to limit and study such fires in the remaining areas to which the UMP applies.[98] While the scarring which fires themselves create was of central concern to DEC, more important was the distribution of effects imposed as a result of fuel gathering.[99] The restriction is likely to alienate campers from the area who either fail to possess a camp stove or whose wilderness experience begins with the strike of a match.

The intrinsic values of wilderness were furthered by DEC; sound-pollution problems have been mitigated by observing quiet hours from ten at night until seven in the morning, and generally by requiring that noise not extend beyond a party's immediate camping area.[100] Where DEC's hands were tied in putting the wildness back into wilderness is evident with regard to highway perimeter de-icing. DEC made certain recommendations, and the management strategy calls for discussion and removal of trees which pose a safety hazard, nonetheless the recommendation of replacing salt based de-icing agents with the less intrusive calcium magnesium acetate agent is not enforceable due in part to Article XIV's exemption of public highways in the Park, but more so because it is not DEC which has the responsibility of managing these roads.[101]

In light of all this, according to the DEC, despite the fact that the High Peaks UMP herein discussed was the first attempt in 30 years to find solutions to the High Peaks use problem, less than half of the projects contemplated in the plan have been completed.[102] What the High Peaks UMP does offer in the larger context of UMPs and the "forever wild" clause, however, is that the agencies charged with responsibility for the Park are working well within the framework of the Master Plan and constitutional mandate in commanding and controlling recreational use of Forest Preserve. This framework clearly incorporates a sense of multiple use, and for that matter *balance* insofar as the health of the watershed and public access are concerned.

V. Conclusion

What New Yorkers are left with, therefore, is a loose understanding of "forever wild" due in part to the inescapable paradoxical nature of the statutory language, as well as the amalgam of land ownership in the Park which severely challenges management of the continuously surging threat of recreational use. One APA attorney describes the Master Plan as a screen in front of the "forever wild" clause, ultimately meaning that management strategies are aimed first at furthering the character of wilderness to which specific tracts of land were assigned by the Master Plan, such that the constitutional mandate of Article XIV will be satisfied. Nonetheless, recreation, once the Park's biggest supporter, is quickly becoming its greatest threat.

Although UMPs, much like the Master Plan and "forever wild" clause, pertain only to Forest Preserve land, the concept that land-use managers employ decision-making frameworks to uphold societal values indicates that the legal meaning of "forever wild" will evolve in step with the wildness of the Park. Furthermore, recreation threats such as ATV use on private lands and public highways, and perhaps even health threats such as the overzealous beech tree,[103] should be managed and analyzed similarly so as to ensure that the management process employed will ultimately protect the Park's vitality. Otherwise, the potential that such threats will undermine both the ongoing strategic and effective management of recreation on the Forest Preserve, as well as the health of the Forest Preserve in and of itself, will become a reality.

As with UMPs, land-use management is generally capable of invoking change in both legal and physical aspects of an ecosystem. In the context of the Adirondack Park, and perhaps elsewhere, lawmakers and managers need therefore to be sensitive to the fluidity and dynamics of wilderness and management, because out of such sensitivity will evolve a desirable balance of wilderness use.

Endnotes

1. *A Golden Opportunity*, Adirondack Forest Preserve Plan, newsletter (N.Y. Dep't of Env'tl. Conservation, Ray Brook, N.Y.), Oct. 2000, at 1.
2. *See* N.Y. Executive Law § 816 (McKinney 2002) (hereinafter "Exec. Law").
3. *See* 8 N.Y. Env'tl. Conservation L. § 9-0801 (McKinney 1997); *see also* N.Y. Const. art. XIV, § 1.
4. *See* Office of Legislative Research, Constitutional Protection of the Forest Preserve (1967) (unpublished history, New York State Department of Law) (explaining that the blue line delineates the boundary of the Adirondack and Catskill Parks from surrounding land). The blue line in and of itself is something of an institution, being incorporated on official state maps. *See* Norman

Van Valkenburgh, *The Forest Preserve—A Chronology*, Conservationist, May-June 1985, at 5.

5. *See generally* Adirondack Park Agency Act, Exec. Law §§ 800–820 (McKinney 2002) (hereinafter "APA Act").

6. Forest Preserve Act, ch. 283 (1885); *see also* Special Report of the New York Forest Commission on the Establishment of an Adirondack State Park, S.19, at 29 (1891) (emphasis added).

7. N.Y. Const. art. XIV, § 1 (emphasis added).

8. *See* Commission on the Adirondacks in the Twenty First Century, The Adirondack Park in the Twenty First Century: Technical Reports – Volume One 6 (1990).

9. *See* APA Act, Exec. Law §§ 800–820. Ch. 706, § 807 of the Laws of 1971 provide in pertinent part that the APA in consultation with DEC was to create a master plan dictating development of state-owned lands in the Park by classifying lands according to their characteristics and capacity to withstand use while reflecting on the actual and projected uses of private lands within the Park. Adirondack Park State Land Master Plan, pp. 1–15, *revised* 2001 (hereinafter "Master Plan"). Section 807 was an outgrowth of the intermingled and symbiotic relationship of private and Forest Preserve land in the Park. *Id.* When development on private land in the late 1960s and the resultant use and toll on public land was identified as threatening the wild nature of the Forest Preserve, the legislature's reaction was premised on a construction of "forever wild" which recognizes that Forest Preserve land together with private land inside the blue line comprised a Park which was intended to be accessible and available to the public. *Id.* The legislature thereby furthered the recreation interest in the Park, attempting to simultaneously preserve the wild character of the forest preserve by orienting the regulatory body to an interpretation of wilderness which includes man. *Id.*

10. Master Plan, p. 9, *revised* 2001.

11. Robert H. Bathrick, *Resource Management: Lands & Forests,* 7 Alb. L.J. Sci. & Tech. 159, 160 (1996) (citing Mark Weiner, *Forever Green: A Look at New York's Lush Forest*, Syracuse Herald American, Nov. 12 , 1995, at C1) (noting that the Northeast therein referred to encompasses a boundary running from "Minnesota down to Missouri, then east through West Virginia, Delaware and Maryland").

12. *See How New York State Lands are Classified* (Sept. 11, 2002), *available at* http://www.dec.state.ny.us/website/dlf/publands/landclass.html.

13. *See* Master Plan, *supra* note 9, at 3.

14. Roderick Nash, Wilderness and the American Mind 118 (3d ed. 1982).

15. *See id.* at 119.

16. Louise A. Halper, *The Adirondack Park and the Northern Forest: An Essay on Preservation and Conservation,* 19 Vt. L. Rev. 335, 343 (1995) (quoting Bernhard Edward Fernow, the first professionally trained forester in America, who in 1906 stated that "while we know much of the general philosophy of the influence of forest cover on water flow, we are not so fully informed as to the details of this influence as we might wish." *Id.* at n.33).

17. *See* Bathrick, *supra* note 11, at 159.

18. *See* Nash, *supra* note 14, at 120.

19. *See id.* at 117–18.

20. Halper, *supra* note 16, at 344.

21. John Muir championed the preservation movement, founded the Sierra Club, and wrote extensively concerning the liberty offered by a truly wild experience. *See* Nash, *supra* note 14, at 123.

22. *See* Adirondack Park Act, ch. 707 (N.Y. 1892). *See also* Charles Z. Lincoln, The Constitutional History of New York Vol. III, 422–424 (1906) (explaining that while the Forest Commission reported that use of the term 'Park' rather than 'preserve' likely would not better achieve the ends desired, the term 'Park' was in fact caught up in the consciousness and sentiment of advocates for protection of the Adirondacks). Verplanck Colvin, the son of a state legislator, was credited with offering the initial inspiration for the creation of an Adirondack Park when in the early 1870s he submitted a report of his ascent of Mount Seward to the New York State Museum of Natural History for inclusion in its Annual Report to the Legislature. *See* Frank Graham, Jr., The Adirondack Park—A Political History (1978). The report calls attention to the Adirondack watershed relationship with commerce, the source of despoliation, and offers a remedy—the creation of an Adirondack Park or timber preserve.

23. *See generally* APA Act, Exec. Law §§ 800–820 (McKinney 2002); *see also* Halper, *supra* note 16, at 341.

24. *See* Exec. Law § 810.

25. Ecocentric meaning literally earth-centered or nature-dominated, whereas anthropocentric indicates domination by human influences.

26. *See* Exec. Law § 810.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Specifically, a scenic river is one free of diversion or impoundment with limited road access, whereas a recreational river is accessible by road and may be otherwise developed. *Id.*

32. *Id.*

33. *Id.*

34. *See generally Environmental and Natural Resources Provisions in State Constitutions*, 22 J. Land Resources & Env'tl. L. 73, 178–79 (2002) (hereinafter *Provisions).*

35. *Id.*

36. 253 N.Y. 234 (1930).

37. *See Provisions, supra* note 34.

38. *Id* at 236.

39. *See id.*

40. *Id.* at 238 (citing *Popovici v. Agler*, 280 U.S. 379).

41. *Id* at 236, 242.

42. 394 N.Y.S.2d 987 (N.Y. Sup. Ct. 1977).

43. The decision here on motions for summary judgment is an outgrowth of *Helms v. Diamond*, wherein plaintiffs sought to enjoin the enforcement of a regulation which prohibited the landing of seaplanes on nearly 700 lakes in the Adirondack Park which were completely surrounded by state-owned land. 349 N.Y.S.2d 917 (N.Y. Sup. Ct. 1973). The main issue remaining before the court after several motions was whether the Adirondack Park Agency Act and the Master Plan promulgated pursuant to that Act were constitutional. *Id.*

44. *See Reid,* 394 N.Y.S.2d at 987. Recreational facilities mentioned in the decision include dirt access roads to the contested campsites, outbuildings, boat launches, sewage disposal systems, lean-tos, trails, jeep trails, fire roads, paved roads other than those specifically authorized by the Constitution, ranger stations, fire watch towers, utility lines, parking lots, and tent platforms. The court also noted other misuses that resulted in the unreasonable

widening of trails, as well as the allowance of private individuals to adversely possess forest preserve lands. *Id*.

45. *Id*.

46. *Id*.

47. *Id*.

48. *Id*.

49. *See id*. When development on private land in the late 1960s, and the resultant use and toll on public land was identified as threatening the wild nature of the Forest Preserve, the legislature's enactment of ch. 706, § 807 of the Laws of 1971—in the spirit of a "forever wild" clause which recognized that forest preserve land together with private land inside the blue line comprises a Park which was intended to be accessible and available to the public—oriented the Park's regulatory body to an interpretation of wilderness which includes man. One APA attorney describes the Master Plan as a screen in front of the constitutional mandate. The statute specifically states that the APA in consultation with DEC was to create the Master Plan dictating the development of state-owned lands in the Park by classifying lands according to their characteristics and capacity to withstand use while reflecting on the actual and projected uses of bordering private lands. Clearly section 807 is an outgrowth of the intermingled and symbiotic relationship shared by private and forest preserve land inside the Park.

50. *See id*.

51. *See id*.

52. *See id*.

53. *Diamond,* 349 N.Y.S.2d at 917 (citing debates of the state's 1894 constitutional convention).

54. *Balsam Lake Anglers Club v. Dep't of Env'tl. Conservation*, 199 A.D.2d 852 (3d Dep't 1993).

55. 1990 N.Y. Op. Atty. Gen. 15.

56. 1996 N.Y. Op. Atty. Gen. 5.

57. *See* ADK, *ADK Praises Settlement of Federal ATV Case, available at* http://www.adk.org/adk_praises_atv_settlement.htm (2002).

58. *See id.* Additionally, funding for facility improvements to Forest Preserve campgrounds, boat and canoe launches, picnic areas, wheelchair-accessible trails, horse trails, and fishing access sites was part of the settlement. *Id.* A similar controversy had previously reared its head in 1986. *See Baker v. Dep't of Env'tl. Conservation.*

59. *See* Fred LeBrun, *Forever Wild and Forever Beleaguered,* Albany Times Union, Jan. 12, 2003. The Town of Horicon in the fall of 2002 passed a local law purporting to allow ATV use on Forest Preserve land under the pretense that trail areas opened to such use fall within the public highway exception to the "forever wild" clause.

60. For spatial, temporal and maybe even religious reasons, whether and to what extent an ecosystem is wild is a question which will be grappled with indefinitely, but for the purposes of understanding the "forever wild" clause of the State Constitution, the term applies only to an ecosystem encompassing the Forest Preserve.

61. J. Baird Callicot, Earth's Insights: A Multicultural Survey of Ecological Ethics from the Mediterranean Basin to the Australian Outback 11–13 (1994) (1997) (analyzing and contrasting Western and Eastern cultural concepts of wilderness, nature, management, environment, ecology and others).

62. Howard Zahniser authored the Wilderness Act when leading the Wilderness Society during the late 1950s and early 1960s. Kirkpatrick Sale, The Green Revolution 14 (Eric Foner ed., 1993).

63. David Brower pioneered the Sierra Club's publication program and was the first to utilize full-page ads in the New York Times to drum up public support for the club's lobbying efforts. *Id.* at 16.

64. *See* Nash, *supra* note 14, at 200; *See also* Robert Gottlieb, Forcing the Spring 45 (1993).

65. Nash, *supra* note 14, at 84 (quoting Thoreau).

66. *See e.g.* Graham, *supra* note 22, at ch. XVI. Notably, Pinchot did not invent "scientific forestry" but he did pioneer the movement as Theodore Roosevelt's Chief of the USDA Forest Service. *Id.* Pinchot became Chief of the Forest Service after establishing himself as a knowledgeable forester, who, having studied forestry in Europe, returned to the U.S. to manage privately owned lands in the Adirondack Park such as the Whitney estate. *Id.* Furthermore, John Muir and Gifford Pinchot, once friends who hiked the Sierra Nevadas together, would later part ways to signal a divide in the conservation community and the creation of a preservationist character separate from the conservationist. *Id.* Although Pinchot won the debate with regard to use of federal forest lands, Muir was likely pleased with the result in the Adirondack Park.

67. *See* Nash, *supra* note 14, at 182–195.

68. Aldo Leopold, A Sand County Almanac 238 (1949) (1970). The tragedy of the commons is a concept wherein if more than one person is given unfettered access to a common resource, each individual will exploit that resource to the fullest extent possible because despite the resource's certain demise, if he fails to exploit the resource, his neighbor will not. *Id.*

69. *See* Willet Kempton, James Boster & Jennifer Hartley, Environmental Values in American Culture 95 (3d ed. 1997) (explaining findings from various surveys concerning attitudes toward the environment, wherein the emotionally strongest anthropocentric value identified was a concern for one's lineage).

70. Sandra Miller, Craig Shinn & William Bentley, Rural Resource Management xiii (1994) (introducing the challenge to resource professionals of the interdependence of ecological, social, and economic problems, in that while the interdependence perpetuates problems which must be dealt with, anything a resource manager is capable of accomplishing will likely be inconsequential when measured across this continuum).

71. Cutler Cleveland & Robert Kaufmann, The Global Environment: An Integrated Systems Approach 18 (draft) (explaining two competing views on the importance of environmental life support). Resource pessimism is a management attitude based on the belief that environmental capacities are extremely finite. *Id.* Resource optimism is a management attitude based on the belief that human ingenuity will continuously overcome apparent limits of the environment. *Id.*

72. Barry Commoner, The Closing Circle (offering four principles of ecology which indicate that environmental capacity is finite, including: everything is connected to everything else; everything goes someplace; nature knows best; and there's no such thing as a free lunch).

73. David Pimentel & Nadia Kounang, *Ecology of Soil Erosion in Ecosystems*, *in* Ecosystems No. 1, at 416–426 (1998).

74. *See id.*

75. *See* Leopold, *supra* note 68, at 277. In fact, it was Verplanck Colvin's "hanging sponge" theory, postulating that lacking a spongy forest floor covered with debris and dead leaves, water would "rush unchecked across the denuded landscape, descending into and flooding lowlands, taking the top soil with it." *See* Graham, *supra* note 22.

76. Leopold wrote separately about wilderness for recreation, biodiversity, water and aesthetic appeal.

77. *See* Dina Cappiello, *Too Many Footprints,* Albany Times Union, Aug. 18, 2003.

78. *See* Alan Wechsler, *Air War Fought Over Use of Lake,* Albany Times Union, July 21, 2002.

79. *Id.*

80. *See id.*

81. *Id.*

82. *See id.*

83. *See* Fred LeBrun, *Dam Breaks on Controversy,* Albany Times Union, July 18, 2003.

84. *See id.*

85. *See id.*

86. Nathan L. Scheg, *Preservationists v. Recreationists in our National Parks,* 5 Hastings W.-Nw. J. Env'tl. L. & Pol'y 47 (1998) (quoting Dean Rebuffoni, *All Sides are Passionate About Future of Wilderness*, Star Tribune, Aug. 19, 1995 at A1).

87. *See id.*

88. Alan Wechsler, *Swarms of Climbers Take Toll*, Albany Times Union, Jan. 12, 2003..

89. *See* Sandra Miller, Craig Shinn & William Bentley, Rural Resource Management 16 (1994).

90. Diori L. Kreske, Environmental Impact Statements: A Practical Guide for Agencies, Citizens, and Consultants 9 (1996).

91. Susan J. Buck, Understanding Environmental Administration and Law 46 (1996) (stating that "[l]egitimacy is 'a belief on the part of citizens that the current government represents a proper form of government and a willingness on the part of those citizens to accept the decrees of that government as legal and authoritative'").

92. High Peaks Wilderness Area Unit Management Plan, *available at* http://www.dec.state.ny.us/website/dlf/publands/adk/hpwa/ump.html.

93. *See id.* at 151.

94. *See id.* at 152.

95. *See id.* at 161.

96. *See id.* at 151.

97. *See id.*

98. *See id.* at 154.

99. *See id.* at 163.

100. *See id.* at 165.

101. *See id.* at 180.

102. *See* Cappiello, *supra* note 77.

103. Forestry Professor Paul Manion of the State University of New York College of Environmental Science and Forestry explains that because the beech tree typically outcompetes other tree species in the early stages of forest succession, and later falls victim to beech bark disease, it is possible that over time the stands of the Adirondack Park will become fields of young beech incapable of reaching maturity.

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THE MINEFIELD
Multijurisdictional Practice Update—Almost a Reality

By Marla B. Rubin

Multijurisdictional practice—MJP—just the thought comes out like a sigh as the concept is increasingly discussed—and accepted. Colorado, Delaware, Michigan, Nevada, North Carolina, and Virginia already have codified some forms of acceptable MJP for their states. Earlier this year, the Arizona, California, Florida, Georgia, and New Jersey bars put proposals before their states' judiciaries. Now state bars in Arkansas, Louisiana, Minnesota, New York and South Dakota have endorsed their versions of acceptable MJP.[1] Aided by American Bar Association (ABA) committee reports and the new Model Rules 5.5 and 8.5 (the ABA took the lead on this issue), the various state concepts are surprisingly consistent in addressing the concerns expressed by attorneys throughout the country.[2]

In June 2003, the New York State Bar Association proposed amendments to the *Code of Professional Responsibility* addressing the practice of law by lawyers not admitted in New York. At this writing, the proposals had not been adopted by the Appellate Divisions—they cannot become enforceable rules until that happens. The state-bar-proposed amendments address many of the concerns voiced by lawyers during hearings held by the ABA and in discussions among attorneys in this state. Out-of-state lawyers would still be prohibited from setting up a New York office, engaging in continuous legal work in New York, and holding themselves out as lawyers in New York. However, as commented below after each proposed provision, codification of the proposed amendments would allow an out-of-state lawyer with an in-state client, an in-state matter, judicial or otherwise, or preparing for an in-state matter, to practice law in New York without fear of prosecution.

The state bar proposal consists of amendments to DR 3-101. Proposed DR 3-101(C) reiterates the prohibition against the practice of law in New York by lawyers not licensed here:

> A lawyer who is not admitted to practice in this state shall not : (1) establish an office or other systematic and continuous presence in this state for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this state.

Proposed DR 3-101(D), set forth below with this author's commentary in italics below each provision, sets out the exceptions to this proscription. It states:

> A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction, may provide legal services not in violation of DR 3-101(C) in this state that:
>
> (1) are undertaken in association with a lawyer who is admitted to practice in this state and who actively participates in the matter;

Association with a local attorney is always a good idea.

> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

This provision addresses the practice of investigatory activities that are reasonably expected to lead to litigation or to a similar proceeding.

> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;

This addresses the concerns expressed by the bar that investigatory and/or preparatory activities in a nonjudicial proceeding in which pro hac vice admission is not required, such as administrative proceedings or mediation, would still be prohibited.

> or (4) are not in or reasonably related to a proceeding described in DR 3-101(D)(2) or (3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

This provision should cover such occurrences as providing legal services with respect to real estate transactions by the lawyer's clients in jurisdictions other than that of the lawyer's admission.

There is also a proposed new section DR 3-101(E), that states:

> Notwithstanding DR 3-101(c)(1), a lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this state from an office or by maintaining any other systematic and continuous presence in this state if those services:
>
> 1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission;

This provision allows corporate counsel, as well as outside counsel, to provide legal services wherever and for whatever reason the client needs them.

> or (2) are services that the lawyer is authorized to provide by federal law or other law of this state.

This provision is particularly important for environmental attorneys working on federal Superfund cases, especially at the pre-litigation stage.

Permitting multijurisdictional practice in the service of an attorney's client is, perhaps, the most needed reform in the regulation of professional conduct. It is generally thought that the impetus behind the original unauthorized-practice-of-law rules was not protection of clients from ignorant out-of-state lawyers, but, rather, turf protection. That is why the following quotation from Klaus Eppler, chair of the state bar committee that drafted the proposal, is so refreshing. As reported: "Allowing out-of-state lawyers to enter New York to follow up on a client's business . . .'is likely to enhance the position of New York as a legal center and to improve lawyers' abilities to meet client needs more effectively and efficiently.'"[3]

Turf enhancement rather than turf protection? It's a good thing.

Nota Bene: Make More Money in D.C.

A recent District of Columbia Court of Appeals decision held that padding client bills does not violate DC's Rule 8.4(c) proscribing dishonest conduct if the biller had a good-faith belief that the client expected it. Overturning a finding of ethical violation by the DC Board on Professional Responsibility, the court found that, since the billing attorney believed that the clients expected to pay premium rates, his adding extra time to their bills for hours not worked was not necessarily dishonest. However, this particular billing attorney did not walk away from the proceeding unscathed, as he had also billed another client for work an associate did for the billing attorney's father. This was too much for the court, which found ethical violations in that act. The court was particularly concerned with the bad example the billing attorney was setting for the associate.[4]

Endnotes

1. "Current Reports," *ABA/BNA Lawyers' Manual on Professional Conduct*, vol. 19, no. 15, July 16, 2003, at 409.
2. See previous column.
3. *See supra*, note 1.
4. "Current Reports," *ABA/BNA Lawyers' Manual on Professional Conduct*, vol. 19, no. 14, July 2, 2003, at 384.

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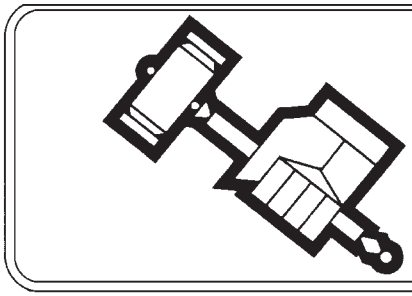

Administrative Decisions Update

Prepared by Jeffrey L. Zimring

CASE: ***In re alleged violations of the Environmental Conservation Law Articles 17, 27 and 71; Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York; and Article 12 of the Navigation Law of the State of New York, by Richard Locaparra, dba L&L Scrap Metals.***

AUTHORITIES: ECL Article 17: Water Pollution Control

- Title 5: Prohibitions
- Title 8: State Pollutant Discharge Elimination System (SPDES)
- 6 N.Y.C.R.R. Part 703: Surface Water and Groundwater Quality Standards and Groundwater Effluent Limitations
- 6 N.Y.C.R.R. Part 750: SPDES

ECL Article 71-2710: Endangering Public Health, Safety or the Environment in the Fifth Degree

Navigation Law § 173: Prohibited Discharge of Petroleum

6 N.Y.C.R.R. § 622.12: Motion for Order Without Hearing

DECISION: On June 16, 2003, the New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (the "Commissioner") adopted, in part, the ruling of DEC Administrative Law Judge (ALJ) Edward Buhrmaster holding the Respondent, Richard Locaparra, liable for two of three alleged causes of action. The ALJ's ruling was made after a motion by DEC staff for an order without hearing. The Commissioner disagreed with the ALJ's dismissal of the proceedings with respect to portions of the first and third of three causes of action (alleging illegal discharges to fresh groundwater in violation of ECL Art. 17 and the New York Navigation Law Art. 12) and the entire second cause of action (alleging violations of the State Pollutant Discharge Elimination (SPDES) permit system). The Commissioner approved the civil penalty assessed by the ALJ, but denied suspension as suggested in the recommendation. The ALJ, however, held that the penalty was entirely due to the violations of the ECL and that the violation of the Navigation Law was redundant and was not needed to support the penalty. The Commissioner disagreed and held that either the ECL violation, or the Navigation Law violation, or both, could support the civil penalty. She also noted that the authority of DEC to assess civil penalties for violations under the Navigation Law is an open question that was not before her in this case.

A. Background

In March of 2000, the DEC responded to a complaint regarding an oil spill at L&L Scrap Metals. L&L was owned by Richard P. Locaparra. An investigation by a DEC engineering technician revealed extensive contamination by petroleum and other automobile wastes. The investigation determined that the contamination was created by a car-crushing operation that was conducted with no secondary containment system. After being ordered to stop the crushing operation immediately, Mr. Locaparra was issued two tickets. In August of 2001, Mr. Locaparra was convicted in Peekskill City Justice Court of endangering the public health, safety or the environment in the fifth degree and criminal negligence in the release of more than 50 gallons or 50 pounds (whichever is less) of a hazardous substance. He was fined $17,500, sentenced to one year of probation, and ordered to complete a site cleanup before November 13, 2002.

DEC brought three civil causes of action against Mr. Locaparra based on the spill at L&L Scrap Metals. The first cause of action was for the discharge of the oil and automotive waste fluids in contravention to the state's water quality standards. The second cause of action was for discharging pollutants from an outlet or point

source without a SPDES permit. The third cause of action was based on section 173 of the Navigation Law which prohibits the discharge of petroleum. DEC moved for an order without hearing pursuant to 6 N.Y.C.R.R. § 622.12.[1] All causes of actions included charges of violations on both March 14, 2000, and March 20, 2000.

ALJ Buhrmaster stated that the first cause of action was the same violation that gave rise to the criminal conviction. The standard of proof for a criminal conviction is higher than that for establishing civil liability (proof beyond a reasonable doubt v. preponderance of the evidence), and the ALJ held, therefore, that there was no question as to whether the standard of proof had been met. The ALJ also noted that the criminal conviction on which the factual basis for his determination was grounded was open for appeal at the time of the DEC proceeding. He stated, however, that counsel for Mr. Locaparra confirmed that the appeal had not been perfected and would not, therefore, disturb the findings needed for his order. Because there was no question of fact that Mr. Locaparra could raise with respect to the release, he was found liable for the illegal discharge without the need for a hearing.

The third cause of action, violation of the Navigation Law, required a showing that there was an intentional or unintentional discharge of petroleum into the waters of the state or that such discharge might flow or drain into the waters of the state. DEC staff presented evidence in the form of affidavits from the investigators that the black discharge around the car-crushing operation exhibited the appearance and odor of a petroleum spill. Mr. Locaparra did not present any evidence whatsoever that contradicted the DEC investigators' statements. Additionally, even though there was no evidence presented that the petroleum entered the waters of New York, the ALJ took judicial notice of the fact that oil can seep through the ground into surface and groundwater and cause ecological damage. A permit to release the petroleum is an affirmative defense to a violation of the Navigation Law prohibition of releasing petroleum. Mr. Locaparra, however, did not prevent any evidence that he had a permit. Because of the uncontradicted factual assertions by DEC, judicial notice of the nature of oil spills, and the lack of an affirmative defense, the ALJ granted DEC's request for a finding of liability without a hearing on the third cause of action.

The first and third causes of action asserted that there were violations on two dates. The first date was March 14, 2000. On that date, DEC staff observed blackened soil and puddling of oil and other contaminants. DEC staff provided no additional evidence to support the charge that violations occurred again on March 20, 2000. ALJ Buhrmaster, therefore, dismissed the portions of the first and third causes of action relating to alleged violations on March 20, 2000.

The second cause of action asserted that Mr. Locaparra discharged pollutants from a point source without a SPDES permit. The ALJ noted that the likelihood that DEC would issue a permit for the type of discharge that the car-crushing operation entailed is remote. Nevertheless, the lack of the permit is an element of the prima facie case for a SPDES violation. Because the DEC did not assert, nor prove, that Mr. Locaparra did not have a SPDES permit, the ALJ, therefore, denied the motion for an order without hearing with respect to the second cause of action. Further, he recommended the cause of action be dismissed altogether.

The first and third causes of action will support civil penalties of up to $25,000 per violation per day. The DEC staff argued that the violations were such that they continued from day to day and, therefore, asked for a penalty of $110,000. Counsel for Mr. Locaparra pointed out, and the ALJ agreed, that the pleadings presented only gave notice of one violation each of the ECL and the Navigation Law on the dates of the observations by DEC staff. Additionally, the existence of the illegally discharged substance could not be deemed to be a continuing violation without further proof of a continuing discharge (which was not submitted by DEC staff) and there was no evidence presented suggesting violations on dates other than March 14, 2000. The maximum civil penalty, therefore, was found to be $50,000.

The ALJ also expressed doubt as to whether civil penalties could be assessed in an administrative proceeding for violations of the Navigation Law. Although there are conflicting rulings among the DEC ALJs regarding the authority of the DEC to levy the civil penalties, ALJ Buhrmaster declined to pursue the question, ruling instead that the violation of the Navigation Law was simply redundant of the first cause of action and, therefore, the maximum civil penalty the facts could support was $25,000. He also noted that the DEC staff failed to provide an explanation of the manner in which they arrived at the requested $110,000 in light of DEC's civil penalty guidance document. Therefore, he considered the facts of the case and arrived at his own recommended civil penalty of $7,500 based on the state of mind of Mr. Locaparra (negligent instead of knowing or intentional), the lack of proof concerning economic benefit derived from the illegal activity that the DEC staff provided, and the fact the environmental harm was neither severe nor irremediable. The civil penalty assessed, however, was suspended pending site cleanup and implementation of measures designed to prevent future damage from spills.

B. Discussion

Commissioner Crotty adopted the ALJ's findings of facts in full. She also reiterated that the standard for granting an order without hearing was the same as that for summary judgment—no triable issue of fact—and that decision without hearing (like summary judgment) can be granted on the issue of liability while leaving the issue of damages for a hearing. The motion by DEC staff in this case, however, was for an order without hearing on all issues presented.

The Commissioner agreed with ALJ Buhrmaster that all of the required elements of the first cause of action (violation of ECL § 17-0501) were proven in the criminal proceeding. Mr. Locaparra, therefore, is collaterally estopped from denying the factual assertions because he had received a full and fair opportunity to litigate the matter. The DEC, therefore, was entitled to judgment as a matter of law on the issue of liability for the first cause of action.

With respect to the violation of the Navigation Law, the Commissioner agreed with the line of reasoning followed by the ALJ concerning the elements of liability. Although the violation was not proven in a criminal proceeding, all of the factual assertions required by the cause of action were submitted by DEC staff and uncontroverted by Mr. Locaparra. Additionally, the Commissioner noted that facts necessary to prove the violation had been established in the criminal proceeding even though the violation had not been charged. Because the undisputed evidence showed that Mr. Locaparra had discharged petroleum and the ALJ exhibited a valid line of reasoning with respect to liability, the Commissioner adopted the ALJ's determination that there was a violation of the Navigation Law.

The Commissioner accepted the ALJ's determination that DEC had failed to present evidence that Mr. Locaparra had discharged pollutants without a SPDES permit. She agreed that the lack of the permit was an element that must be proved and that the DEC staff had not made the required showing. She did not, however, agree with the disposition of the second cause of action recommended by the ALJ. Although summary judgment (or an order without a hearing) can be granted to a non-moving party, a search of the complete record did not reveal facts necessary to show that no violations had occurred (specifically there were no facts in the record suggesting Mr. Locaparra had a SPDES permit). Additionally, Commissioner Crotty noted that although there was no evidence in the record establishing the portions of the first and third causes of action that allegedly took place on March 20, 2000, there was also no evidence in the record contradicting the charges. The Commissioner, therefore, held that dismissal of the second cause of action and the portions of the first and third causes of action relating to March 20, 2000, was improper and the proceedings should be continued with respect to those portions of the charges.

The ALJ had recommended a penalty of $7,500 and that it be suspended. The Commissioner confirmed the ALJ's assessment in light of the lack of supporting evidence presented by DEC staff and the ALJ's own consideration of the civil penalty adjustment factors. She did not, however, accept the recommendation that the penalty be suspended. Based on her understanding of the progress of the site remediation at the time her decision was rendered (i.e., incomplete), she held that the stated purpose of the suspension, to encourage promptness in the remediation efforts, had not been shown effective. The $7,500 penalty, therefore, was reinstated and Mr. Locaparra was ordered to complete the site remediation within 90 days of receiving a copy of the final decision.

The Commissioner also acknowledged the uncertainty within the DEC regarding the ability of the DEC to assess civil penalties for violations of the Navigation Law. Like ALJ Buhrmaster, she declined to address the issue in the context of this case because it had not been raised by the parties. She also disagreed with the ALJ's conclusion that the violation of the Navigation Law was redundant as this argument had not been raised by the parties, either. She did, however, state that the civil penalty assessed in this case was supported by Mr. Locaparra's violation of the ECL, the Navigation Law, or both.

C. Conclusion

For the foregoing reasons, the Commissioner accepted the ALJ's findings of fact in full, and his recommendations for action in part. Mr. Locaparra was ordered to continue cleanup efforts and pay the civil penalty of $7,500. Additionally, the DEC is to continue the proceedings with respect to the second cause of action and the dismissed portions of the first and third causes of action. The Commissioner did not rule on the DEC's authority to assess civil penalties for violations of the New York Navigation Law.

* * *

CASE: ***In re the Application of Besicorp-Empire Development Company, LLC, for a Part 201 Air State Facility Permit; a State Pollutant Discharge Elimination System (SPDES) Permit; a Title IV Acid Rain Permit, a Water Quality Certification; a Construction Stormwater SPDES Permit; and an Excavation and Fill Navigable Waters Permit***

AUTHORITIES: Public Service Law Article X (Siting of Major Electric Generating Facilities)

State Environmental Quality Review Act (SEQRA)
- ECL Article 8
- 6 N.Y.C.R.R. Part 617

ECL Article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste)
- Title 13 (Inactive Hazardous Waste Disposal Sites)
- 6 N.Y.C.R.R. Part 375 (Inactive Hazardous Waste Disposal Sites)

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

INTERIM DECISION: On August 22, 2003, the New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (the "Commissioner") issued an interim decision addressing the question of whether issues related to ongoing remediation of a class-2 and class-3 inactive hazardous waste disposal site are adjudicable in a DEC permit hearing procedure. Noting the differences between an ongoing enforcement action (the remediation) and the permitting process for proposed construction, the Commissioner affirmed the idea that the intent of both systems was to minimize adverse effects on the environment. Additionally, she agreed with the DEC Administrative Law Judge (ALJ) Nicholas Garlick holding that since the public has the opportunity to provide input during the remediation process, there was no need to further adjudicate issues associated with the remediation process in the context of the permit process for proposed development at the same site.

A. Background

Besicorp-Empire Development Company, LLC, ("Besicorp") has proposed the construction of a newsprint manufacturing plant and a 505-megawatt combined cycle cogeneration plant in the city of Rensselaer (the "City"). The parcel is on a former industrial manufacturing site owned by BASF. The portion of the property on which the newsprint plant is to be sited is listed as a class 2 Inactive Hazardous Waste Disposal Site by DEC (significant threat to the public health or environment) and is the subject of ongoing remediation efforts. The cogeneration plant is to be built on a class 3 site (does not present a significant threat to the public health or environment) and is the subject of a Voluntary Cleanup Agreement between DEC and BASF. BASF has submitted a draft Remedial Action Work Plan (RAWP) that will be open for public comment.

Besicorp has applied to the New York State Board on Electric Generation Siting and the Environment (the "Siting Board") for a permit to construct and operate the cogeneration plant (the Article X certificate proceeding). The DEC will issue a single set of Part 201 Air State Facility, SPDES, Title IV Acid Rain, Water Quality Certification, Construction Stormwater SPDES, and Excavation and Fill in Navigable Water permits for both the newsprint and cogeneration plants. The Article X certificate and DEC permit proceedings are being conducted on a combined record.

The City has expressed concerns about the effect that the proposed development will have on the cleanup of the class 2 inactive hazardous waste site. At a joint issues conference, the City argued that the precautions that Besicorp would follow to protect the remediation efforts should be the subject of a technical conference or adjudicatory hearing. DEC staff and Besicorp responded by contending that remedial actions were enforcement matters that are exempt from the SEQRA and Article X permit process and, therefore, should not be dealt with in the permitting proceedings. On September 27, 2002, Presiding Siting Board Examiner Jaclyn A. Brilling and DEC ALJ Nicholas Garlick issued a joint ruling addressing several procedural issues. The ruling rejected any matter associated with the existing remediation process as an issue for adjudication in either the Article X or the DEC permit proceedings.[2] The City appealed the ruling with respect to the rejection of the remediation as an issue of adjudication. This interim decision is the Commissioner's affirmance of the ALJ's ruling.

B. Discussion

The ECL provides that no person may substantially change the manner in which an inactive hazardous waste disposal site listed on the state registry is used without first notifying the DEC. Substantial change includes the erection of a building or other structure on the site. The Division of Environmental Remediation (DER) is the division within the DEC that implements the investigatory and remedial mechanisms associated with inactive hazardous waste sites. The DER creates a Record of Decision (ROD) that outlines the remedy and any legal restrictions designed to protect the remediation program from other activity on the site. Any modification to the ROD requires the DER to accept and consider public comment prior to changing the ROD. Part

of the notification process includes a demonstration that the proposed development will not significantly interfere with any remediation process proposed, completed, or in progress at the site. Therefore, to the extent that any proposed construction at an inactive hazardous waste site will affect an ongoing remediation, the DER must solicit and consider public comment before granting approval in the form of a modified ROD.

The City wanted to adjudicate the effects of Besicorp's post-remediation construction plans in the context of the DEC permitting process for the proposed newsprint and cogeneration facility. The ALJ correctly held, however, that the procedures for gaining the DER's approval for post-remedial construction activity do not need to be duplicated in the context of the permit hearings. The City had ample opportunity to comment on the effects of the proposed construction activity on the remediation efforts. Additionally, as the ALJ and the Commissioner note, enforcement proceedings (including remediation) are exempt from the SEQRA process. The Commissioner points out, however, that SEQRA's "hard look" requirement is not dispensed with simply because the effects of the proposed construction on the remediation are not examined in an adjudicatory setting. To the contrary, the purposes of the remediation begun in the enforcement process and SEQRA's review process are very similar—to minimize the negative environmental impacts of proposed development. In other words, as the Commissioner states, "SEQRA-like review is essentially provided for through the hazardous waste disposal site remedial program itself."

C. Conclusion

For the reasons stated above, the Commissioner agreed with the ALJ's holding that the effects of post-remediation activity on the remediation plan are not adjudicable in the context of the DEC permitting and SEQRA proceedings for the proposed activity. Although formal adjudication for the issues is not provided for, the regulations require, and the DER affords, public participation in the development and modification of any remedial program undertaken pursuant to ECL Article 27, Title 13.

Endnotes

1. 6 N.Y.C.R.R. § 622.12 operates in the same manner as C.P.L.R. § 3212 and allows a decision without a hearing when there is no triable issue of fact.
2. The ALJ held that remediation was an enforcement matter and, therefore, exempt from SEQRA. The Examiner held that cleanup of the site is beyond the scope of Article X.

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Recent Decisions in Environmental Law

Student Editor: Brian Smetana

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

***Amorgianos v. Amtrak*,** 137 F. Supp. 2d 147, 2001 U.S. Dist. LEXIS 3499 (E.D.N.Y. 2001).

Facts: On August 28, 1995, Nikitas Amorgianos, plaintiff, fell ill while working on a bridge painting project in Astoria, Queens. The project involved sandblasting old lead-based paint and repainting a street overpass. The plaintiff alleged that his illness was sustained as a result of inadequate ventilation and inappropriate organic vapor filters for respirators, which caused him to suffer from inhalation and dermal exposure to toxic chemicals. In particular, the plaintiff claimed that his exposure to xylene, an organic solvent contained in paints, caused him to suffer from fever, swollen joints, itchiness, headache, and difficulty moving. The plaintiff went on to claim that his condition worsened to include: no feeling in his hands, weakness in the knees that inhibited his ability to walk, no reflexes on the left side of his body, numb and tingly feelings throughout his body, and inability to engage in outdoor or athletic activity.[1]

In April 1996 Nikitas Amorgianos and his wife Donna Amorgianos filed a complaint against Amtrak in state court. The case was later removed to the United States District Court for the Eastern District of New York where it was argued before Chief District Judge Edward R. Korman. During the trial, the plaintiff introduced two expert witnesses, industrial hygienist Jack Caravanos and internist Dr. Jacqueline Moline. Jack Caravanos testified that the: (1) filter used would be ineffective against organic exposure, (2) ventilation inside the painting unit was insufficient, and (3) xylene level inside the unit was in the "thousands" parts per million (ppm); this is against OSHA regulations which set the limit at 100 ppm. Dr. Moline testified that Mr. Amorgianos suffered from persistent peripheral neuropathy, which is a central nervous system disorder caused by exposure to organic solvents. Amtrak's evidence included: surveillance footage of Mr. Amorgianos walking without difficulty, plaintiff's medical records after a 1996 automobile accident which directly contradicted the testimony of Dr. Moline, and the testimony of two experts, Dr. Rubin and Dr. Budabin, who examined the plaintiff and did not find the alleged symptoms. At the conclusion of the trial the jury awarded Mr. Amorgianos over $3 million and his wife was awarded $60,000 for loss of consortium and services.[2]

Pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure the defense filed a motion for judgment as a matter of law or, in the alternative, for a new trial. The court denied the motion for judgment as a matter of law. However, the court did conclude that the verdict was against the weight of the evidence and the motion for a new trial was granted.

The case was subsequently reassigned to Judge David G. Trager. In preparation for the new trial the plaintiff offered the testimony of three experts, including industrial hygienist Jack Caravanos and internist Dr. Jacqueline Moline, who had testified in the previous trial, as well as toxicologist Dr. Jonathan S. Rutchik. The defense filed a *Daubert* motion to prevent the plaintiff's experts from testifying because their testimony would not meet sufficient scientific grounds. This motion was granted in part and denied in part. The court ruled that Jack Caravanos' methodology to calculate the concentration of xylene was unsound and it would not be admitted. The testimony of Dr. Moline was excluded because of analytical gaps between the studies she relied on and her testimonies. None of the plaintiff's experts could testify about the alleged chronic long-term neurological conditions because their opinions were unreliable, and the plaintiff's experts could not testify about Mr. Amorgianos' length of exposure because it was beyond their expertise. The court did rule that if the plaintiff could produce admissible expert evidence regarding the concentration of xylene to which he was exposed, his experts would be allowed to testify about his alleged suffering during the two- to three-day period after he ceased work.

Since evidence regarding long-term neurological symptoms was excluded, the defendant was granted leave to file a motion for summary judgment with

respect to those claims as well as the Donna Amorgianos claim for loss of consortium. The plaintiff was also made aware that if the testimony as to the level of xylene was not remedied, the defendant would be allowed to file for summary judgment with respect to the remaining claims. The plaintiff failed to supplement the record and an oral motion for summary judgment was granted.[3]

Plaintiff appealed the decision to the U.S. Court of Appeals, Second Circuit asserting that the District Court imposed standards more stringent then those contemplated by *Daubert* and that Judge Trager usurped the role of both jury and experts by assessing credibility rather than admissibility of the expert testimony and by rendering his own opinion based on the scientific literature.[4]

Issue: What is the court's role as gatekeeper for scientific and technical testimony under *Daubert v. Merrell Dow Pharmaceuticals* and how should the required function be performed?

Analysis: Rule 702 of the Federal Rules of Evidence governs the admissibility of expert and other scientific testimony. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[5]

The *Daubert* ruling directs courts to perform a "gatekeeping" function in determining whether expert testimony rests on a reliable foundation and is relevant to the task at hand. There are several factors the court should consider when determining when scientific evidence should be admitted; these include considering whether: (1) the theory or technique can be and has been tested, (2) the theory or technique has been subject to peer review and publication, (3) standards are maintained and the rate of error is known, and (4) the theory or technique has gained general acceptance in the scientific community.[6] In general, the court must consider the methods used rather than the conclusions reached. When the evidence is deemed admissible it should be viewed in a light most favorable to the plaintiff when deciding motions for summary judgment or judgment as a matter of law.

The U.S. Court of Appeals affirmed the lower court's decision because the plaintiff's experts did not meet the requirements under *Daubert* and their testimony was rightfully excluded.

John Gizunterman '05

Endnotes

1. *Amorgianos v. Amtrak*, 137 F. Supp. 2d 147, 2001 U.S. Dist. LEXIS 3499 (E.D.N.Y. 2001).
2. *Id*. at 260.
3. *Id*. at 261.
4. *Id*. at 264.
5. *Id*. at 265.
6. *Id*. at 266.

* * *

***Massone v. Reyna*,** 2002 U.S. Dist. LEXIS 16873 (S.D.N.Y. 2002).

FACTS: This lawsuit dealt with the aftermath of the anthrax scare that struck our nation in the latter part of 2001. Plaintiff Thomas J. Massone (Massone), President of the United States Court Securities Officers of the Southern District of New York, brought suit both as President and on behalf of his labor union on November 5, 2001, in United States District Court for the Southern District of New York. The union represents both Court Security Officers (CSOs) and Special Security Officers. The defendants were Benigno G. Reyna (Reyna), Director of the United States Marshals Service (USMS) and Daya S. Khalsa, Senior Vice President of Akal Security, Inc.

Originally the suit sought declaratory, monetary, and injunctive relief against both defendants, claiming violations of both the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (RCRA), and New York State environmental law. Massone also alleged a separate cause of action based upon common law public nuisance. However, Massone withdrew the public nuisance claim voluntarily through a stipulation on March 28, 2003. Massone's final cause of action, claims against Khalsa for retaliation and discrimination under both state and federal law, was dismissed as unopposed following a motion to dismiss by defendant Khalsa to which Massone failed to respond.

Plaintiff based his lawsuit on the theory that the loading dock area at the federal courthouse in lower Manhattan was contaminated after clean-up efforts directed by New York State, which was empowered by the EPA under section 6929(b) of the RCRA. One aspect of the work done by CSOs is to screen mail at the loading dock area of the courthouse, which is received from the Morgan Processing and Distribution Facility (Morgan Facility) of the United States Postal Service (USPS).

In October 2001, anthrax spores were discovered at the Morgan Facility. Thereafter, the USPS proceeded to close down the affected areas of the facility so that it could be cleaned by environmental specialists. According to the court, "as of November 15, 2001, the continued operation of the Morgan Facility pose[d] no imminent and substantial risk to health or the environment."[1]

The instant matter before the court is a motion to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim. In the alternative, defendant Reyna asks for summary judgment as provided for under Fed. R. Civ. P. 56(b). At the date that this case was decided, September 9, 2002, plaintiff Massone had failed to submit to the court a response to the defendant's motion. Despite plaintiff's disregard of the May 3, 2002, deadline set by the court, the court attempted to reach its decision based on the merits of plaintiff's claim.

Issues:

1) Whether defendant Reyna's motion may be treated as a motion for summary judgment under Fed. R. Civ. P. 56(b).

2) Whether defendant Reyna's motion satisfies the standards required to grant a Fed. R. Civ. P. 56(b) motion for summary judgment.

Analysis: A court may convert a Rule 12(b)(6) motion to dismiss into a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) if it "accepts and considers materials outside of the pleadings in resolving the matter."[2] "Defendant Reyna submitted materials beyond the complaint in support of his dismissal motion, i.e., the Environmental Sampling Report for Bacillus Anthracis Screening relating to anthrax testing conducted at the federal courthouse, a report that the Court intends to consider in deciding the instant motion."[3] For these reasons, the court decided to convert Reyna's motion into one for summary judgment. The court held that its decision to convert was not a sua sponte conversion because the plaintiff had notice from defendant's motion itself "because of the way in which Defendant Reyna styled his motion—as one for dismissal pursuant to Rule 12(b)(6), or alternatively, as one for summary judgment under Rule 56—and because Defendant Reyna submitted evidence outside of the pleadings in connection with his motion."[4]

The court then proceeded to outline what is required in order to grant summary judgment pursuant to Rule 56(b). According to the court, summary judgment may only be granted if the moving party has proven as a matter of law that "there is no genuine dispute as to any material fact."[5] In making its determination, the court must resolve all ambiguities and inferences against the moving party. If the opposing party in any way proves that a reasonable jury may decide in its favor, then summary judgment must be denied. After weighing defendant Reyna's motion against the merits of plaintiff Massone's claims, the court granted summary judgment on all counts.

On the plaintiff's first claim of imminent and substantial danger to the public health under 42 U.S.C. § 6972(a)(1)(B), the court found no genuine dispute in regard to material fact. Massone argued that the loading dock area of the federal courthouse was still contaminated with anthrax, even after New York State's clean-up effort. However, Massone in no way provided any evidence to support this contention. Instead, the court cited that as of October 24, 2001, environmental testing had revealed that the entire courthouse, including the loading dock area, was free from anthrax contamination. For these reasons the court deemed plaintiff's claim lacked sufficient evidence and that any risk to the public health was remote. Thus, summary judgment was granted in favor of defendant Reyna.

The court dealt with the final two claims of federal and state law violations of hazardous waste permits all together. The plaintiff asserted that defendant Reyna and the USMS violated both section 6972(a)(1)(A) of RCRA and title 9 of Article 27 of the New York Environmental Conservation Law. For the clean-up of the federal courthouse, the EPA authorized the state of New York to direct and implement a hazardous waste program pursuant to section 6926(b) of RCRA. The court concedes that under RCRA section 6972(a)(1)(A) plaintiff Massone may attempt to enforce hazardous waste regulations by bringing an action for violations of RCRA. However, the court again pointed to plaintiff Massone's lack of evidence, and considered these claims to be legal conclusions without support. In the plaintiff's complaint it was argued that defendant Reyna operated a facility which stored anthrax in violation of RCRA, yet no evidence was ever given to prove this assertion. Further, the court pointed to the fact that environmental testing determined that the courthouse was free of any contamination from anthrax. For these reasons, the court granted summary judgment on the final two claims by plaintiff Massone and ordered the case closed.

Randeep Hira '05

Endnotes

1. *Massone v. Reyna*, 2002 U.S. Dist. LEXIS 16873, at *5 (S.D.N.Y., Sept. 9, 2002).
2. *Id*. at 6.
3. *Id*. at 6.
4. *Id*. at 7.
5. *Id*. at 8.

* * *

***SeaRiver Maritime Financial Holdings, Inc. v. Mineta*,** 309 F.3d 662 (9th Cir. 2002).

Facts: On March 23, 1989, the T/V *Exxon Valdez* oil tanker ran aground onto Bligh Reef in Alaska, spilling nearly 11 million gallons of oil into the Prince William Sound. The *Exxon Valdez* had been built for the purpose of carrying oil from Alaska's North Slope to United States oil refineries. Actions of the ship's master and crew caused the accident. The owners of the *Exxon Valdez* repaired the tanker, and it passed all Coast Guard inspections on August 29, 1990.

The year following the spill, Congress passed the Oil Pollution Act of 1990.[1] The Act classified Prince William Sound as an "environmentally sensitive area" and included provisions designed to protect the Sound's environment and reduce the likelihood of future spills. Section 2737 provided that, "notwithstanding any other law, tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment after March 22, 1989, are prohibited from operating on the navigable waters of Prince William Sound, Alaska."[2]

SeaRiver Maritime Financial Holdings, Inc. and SeaRiver Maritime International, the owners of the *Exxon Valdez*, and SeaRiver Maritime, Inc., its operator, brought an action for declaratory judgment seeking a declaration that section 2737 was an unconstitutional bill of attainder as applied to the plaintiffs and denied the plaintiffs due process and equal protection in violation of the Fifth Amendment. The United States District Court for the District of Alaska dismissed the complaint. The plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit summarily dismissed the due process and equal protection claims, and held that the Act was not a bill of attainder. The court's analysis of the bill of attainder issue is summarized below.

Issue: Whether section 2737 of the Oil Pollution Act of 1990, which prohibited from the Prince William Sound, ships that had spilled more than one million gallons of oil after March 22, 1989, the day before the *Exxon Valdez* spill, was an unconstitutional bill of attainder.

Analysis: The Constitution charges Congress that, "no Bill of Attainder . . . shall be passed."[3] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[4] A bill of attainder has three key features: (1) it specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial.[5] It was undisputed that section 2737 met the third requirement of a bill of attainder.

The court also decided that section 2737 met the first requirement of a bill of attainder because it singled out the plaintiffs, the owners and operator of the *Exxon Valdez*. The court looked at four factors established by the Supreme Court to determine whether legislation singles out a person or class within the meaning of the Bill of Attainder Clause: (1) whether the statute or provision explicitly names the individual or class; (2) whether the identity of the individual or class was "easily ascertainable" when the legislation was passed; (3) whether the legislation defines the individual or class by "past conduct" that operates only to designate particular persons; and (4) whether the past conduct defining the affected individual or group consists of "irrevocable acts committed by them."[6]

Although the statute did not explicitly name the plaintiffs, an analysis of the three remaining factors supported the position that section 2737 singled them out. The class of vessels that the provision would affect was easily ascertainable. When Congress enacted the Oil Pollution Act there were ten vessels that had spilled over one million gallons of oil after March 22, 1989, nine of which operated in other regions. In its analysis under the third inquiry, the court attached an overriding significance to the specific date in the statute, even though it considered the fact that the provision was open-ended and applied to future tank vessels that spill sufficient oil. The date singled out the *Exxon Valdez* on the basis of a past act that no other oil tank vessel operating in Prince William Sound had committed as of the date the Act was passed. Finally, section 2737 focused on irrevocable conduct; the provision defined the class by the irreversible act of having spilled a specified quantity of oil.

The court also considered whether section 2737 targeted only the *Exxon Valdez*, and not its owners. If it did, it would not have been a bill of attainder because the Bill of Attainder Clause is concerned with the punishment of individuals, not objects. The court decided that the vessel and its owners and operators were too closely connected for it to conclude that Congress intended to single out the vessel without regard to who owned or operated it. Because the Act jointly targeted the vessel and its owners and operator, and because section 2737 singled them out, the provision displayed the first hallmark of a bill of attainder.

Although it satisfied the first requirement of a bill of attainder, section 2737 was not unconstitutional because it did not inflict punishment. The court examined three factors to determine whether the provision inflicted punishment on the plaintiffs: (1) whether the provision fell within the historical meaning of legislative punishment; (2) whether the statute reasonably

could be said to further non-punitive legislative purposes; and (3) whether the legislative record evinced a congressional intent to punish. The court also considered whether there was a less burdensome alternative that would have achieved the same non-putative purpose.[7]

Traditionally, bills of attainder sentenced the named individual to death, imprisonment, banishment, the punitive confiscation of property by the sovereign, or erected a bar to participation in specified employments. Banishment refers to individuals, not to property such as an oil tanker, and the statute did not banish the owners of the *Exxon Valdez* from the Prince William Sound. It also did not bar the owners from any form of employment, as they continued to transport oil through Prince William Sound in other tankers. Therefore the provision did not fall within the historical meaning of legislative punishment.

The court additionally concluded that the owners of the *Exxon Valdez* did not carry their burden of establishing that the legislature's action constituted punishment and not merely the legitimate regulation of conduct. Section 2737 furthered a non-putative purpose: that of protecting the environment within Prince William Sound from a heightened risk of harm from oil spills. Therefore, Congress may have legitimately concluded that a vessel that has spilled over one million gallons of oil posed a greater risk to Prince William Sound than other vessels.

The plaintiffs were also impeded from carrying their burden on the third factor in the analysis. They were unable to establish that the legislative record demonstrated a congressional intent to punish because section 2737 was inserted in conference and essentially bereft of legislative history. Because Congress was virtually silent about section 2737, the court was unable to conclude that there was unambiguous evidence of punitive intent. Legislative materials addressing the Act as a whole supported the conclusion that the legislation as a whole was designed to serve non-punitive purposes.

Finally, the court rejected the argument that a less burdensome alternative was available. The plaintiffs argued that Congress could have restricted its actions to purely preventive measures. The court noted, however, that this would not have achieved the purpose of excluding from Prince William Sound a ship with a history of major oil spillage. The court also declined to encroach upon the powers of the legislature by determining the date that a statute must take effect or quantifying the class that the legislation may permissibly affect.

In sum, the Court of Appeals for the Ninth Circuit decided that although section 2737 of the Oil Pollution Act of 1990 addressed both the *Exxon Valdez* and its owners and operator, and although the provision singled them out, it was not an unconstitutional bill of attainder because it did not inflict punishment.

Daniel H. Leventhal '05

Endnotes

1. 33 U.S.C. §§ 2701–61.
2. 33 U.S.C. § 2737.
3. U.S. Const. art. I, § 9, cl. 3.
4. *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977).
5. *SeaRiver Maritime Financial Holdings, Inc.*, at 668.
6. *Id*. at 669.
7. *Id*. at 673.

* * *

***United States of America, State of New York v. Alcan Aluminum Corporation*,** 315 F.3d 179 (2d Cir. 2003).

Facts: From 1970 to 1977, Pollution Abatement Services (PAS) operated a waste disposal and treatment facility on 15 acres of land in Oswego County, New York, in which chemical wastes from a variety of sources were stored, processed, and disposed of. After the site became contaminated in 1976, the government began response and cleanup activities. In 1987, the U.S. government filed suit against 83 business entities to recover response costs under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), in connection with the cleanup of the inactive hazardous waste site.

During the 1970s, Alcan— a manufacturer of aluminum sheet and plate products in Oswego, New York—arranged for disposal or treatment of 4.6 million gallons of its waste emulsion at PAS, which contained several substances designated "hazardous" under CERCLA.[1] Of the 83 entities charged as potentially responsible parties in the government's 1987 lawsuit, only defendant Alcan declined to become a party to the consent decree proposed by the government.

On January 15, 1991, the district court granted summary judgment in favor of the government against Alcan, finding Alcan jointly and severally liable for the balance of the government's response costs that had not been reimbursed to it by the other 82 parties to the consent decree. On appeal before the Second Circuit in

1993, the court granted summary judgment with respect to Alcan's liability, but reversed the finding on the joint and several scope of Alcan's liability and remanded to the district court for further proceedings relating to the potential divisibility of harm and the apportionment of damages. Following consolidation with a case involving another waste site in Fulton, New York, the district court granted the government's summary judgment motion only on the issue of Alcan's liability to the government for its response costs at Fulton. After a five-day bench trial focusing on the divisibility of harm and the apportionment of damages, the district court found Alcan jointly and severally liable for response costs at both PAS and Fulton. Alcan appeals from this judgment.

Issues: Whether Alcan can escape all CERCLA liability under the special exception rule created by the court and whether the harm done by Alcan at PAS and Fulton was divisible.

Analysis: According to the Restatement (Second) of Torts § 433A, where "two or more causes have combined to bring about harm," damages from the harm are to be apportioned among the causes if "there are distinct harms" or "there is a reasonable basis for determining the contribution of each cause to a single harm."[2] Based on the common law principles of divisibility and apportionment embodied in the Restatement, the Second Circuit stated in a previous decision that Alcan may escape joint and several liability "if it either succeeds in proving that its oil emulsion, when mixed with other hazardous wastes, did not contribute to the release and clean-up costs that followed, or contributed at most to only a divisible portion of the harm."[3] In addition, although Alcan could avoid liability entirely, the Second Circuit specified that such would be a "special exception" that would permit Alcan to escape payment only if the company could prove that "its pollutants did not contribute more than background contamination and also cannot concentrate."[4] And, in the event that Alcan did not qualify for the special exception, the Second Circuit ruled that the company could nonetheless "present evidence relevant to establishing divisibility of harm" including "relative toxicity, migratory potential, and synergistic capacities of the hazardous substances at the site."[5]

The Second Circuit agreed with the district court that Alcan failed to demonstrate that the harm done at PAS and Fulton was divisible since Alcan did not claim that the harm caused by its emulsion was somehow distinct from the harm caused by other hazardous substances at the sites, nor did the company make any real effort to identify the extent to which its waste contributed to the contamination. The Second Circuit reasoned that in light of the district court's conclusion that the waste emulsion contained hazardous PCBs, it was unreasonable for Alcan to continue to insist that its waste emulsion was harmless, and appellant's analysis—focusing individually on each constituent of its waste—did not provide an acceptable basis for establishing divisibility.

The Second Circuit found that the appellant did not satisfy its substantial burden with respect to divisibility because it failed to address the totality of the impact of its waste at each of the sites, it ignored the likelihood that the cumulative impact of its waste emulsion exceeded the impact of the emulsions' constituents considered individually, and it neglected to account for the emulsion's chemical and physical interaction with other hazardous substances already at the site. The Second Circuit concluded that Alcan is jointly and severally liable for the harm caused at PAS and Fulton because the evidence suggested that Alcan's emulsion absorbed the contaminants at the sites and facilitated their transport throughout and therefore, contributed to the breadth of contamination at both PAS and Fulton. Accordingly, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

Gretchen Becht '05

Endnotes

1. 42 U.S.C. § 9607 (2003).
2. Restatement (Second) of Torts § 433A(1) (1965).
3. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3rd Cir. 1992) (*Alcan-Butler*)).
4. *Id*.
5. *Id*. (citing *Alcan-Butler*, 964 F.2d at 270 n.29, 271).

* * *

***United States v. Shell Oil*,** 294 F.3d 1045; 2002 U.S. App. LEXIS 12845 (9th Cir. 2002).

Facts: Appellees Shell Oil Co., Union Oil Co. of California, Atlantic Richfield Co., and Texaco, Inc. (Oil Companies) operated aviation fuel refineries in the Los Angeles area during World War II and dumped their waste at the McColl Superfund Site in Fullerton, California. The appellants, the United States and the state of California, brought suit to recover the cleanup costs that were incurred at the site. The Oil Companies countersued, claiming that the government was fully liable for the cleanup of the McColl site. Liability between the parties stems from the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.S. §§ 9601 to 9675 (CERCLA), which mandates the cleanup of hazardous wastes.

Aviation gasoline (avgas) is a blend of petroleum distillates and chemical additives. While the base component is gasoline, an alkylate additive was essential to the production of avgas. Alkylate is produced through a process known as alkylation, which requires 98% pure sulfuric acid as a catalyst. After the sulfuric acid is used as a catalyst, it can be reprocessed, used in other refinery processes, or dumped without being reused. Before World War II, the sulfuric acid used in alkylation was in relative equilibrium with the amounts needed in other refinery processes or reprocessing facilities. Once the war began, however, production of avgas increased more than twelve-fold, and sulfuric acid consumption increased five-fold. This created an overabundance of sulfuric acid which could not be significantly reduced by reprocessing or reuse.

Avgas was so critical to the war effort that the United States government exercised significant control over its production. In 1942, President Roosevelt established the War Production Board (WPB) and the Petroleum Administration for War (PAW) to oversee petroleum production. Although WPB and PAW had the authority to require production of avgas, they instead relied upon contractual agreements to ensure the same thing. Particularly, the government signed long-term purchasing contracts and offered low-cost loans to facilitate construction of new refineries. The Oil Companies had, and continue to have, private ownership and management of their refinery operations.

During the war, there was a chronic shortage of railroad tank cars to transport spent acid for reprocessing or reuse at sites other than where it was generated. The government refused on two occasions to allocate the materials and resources necessary to build new acid reprocessing facilities in northern California. Some reprocessing plants were built during the war, but they failed to operate at design capacity. When the lack of reprocessing and reuse avenues resulted in a bottleneck that threatened to halt avgas production, the Oil Companies dumped large quantities of the acid at the McColl site.

The government was aware that avgas production generated acid wastes and did take some steps to alleviate the waste disposal problem. For instance, in 1945, the government facilitated the lease of a large storage tank in Southern California. However, the government never specifically ordered or approved of the dumping and there is no evidence that the government knew of the disposal contracts between the Oil Companies and McColl. The government began removing the waste in the 1990s, and the costs were close to $100 million. On August 27, 1998, the McColl site was removed from the National Priorities List and converted into a wildlife sanctuary and community recreation facility.

Issues:

1) Has the government waived its sovereign immunity for purposes of liability under CERCLA?

2) Was the United States an arranger under CERCLA, and therefore liable for cleanup costs?

Analysis: Plaintiffs suing the United States must point to an "unequivocal expression" of intent to waive sovereign immunity and the relevant statutory language is to be "strictly construed" in favor of the sovereign.[1] Appellees contend that the necessary waiver exists in section 120 (a)(1) of CERCLA, codified at 42 U.S.C. § 9620(a)(1):

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of the government) shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

The Court of Appeals agreed with the appellees that the provision waives the sovereign immunity of the government for the purposes of CERCLA litigation. The Court of Appeals relied upon the Supreme Court's conclusion that the language of section 9620(a)(1) is an unambiguous waiver of the government's sovereign immunity.[2] While the court acknowledged that *Union Gas* was overruled on other grounds, it notes that nothing casts doubt as to the correctness of the Supreme Court's understanding of the meaning of section 9620(a)(1). Furthermore, this court joined the Third Circuit and found that while the heading "Federal Facilities" appears at the beginning of section 9620, this does not destroy the waiver of sovereign immunity.

The Court of Appeals specifically held that the United States has waived sovereign immunity for any liability incurred under 42 U.S.C. § 9607, which is itself a limited liability. This limited liability only applies when the United States qualifies as an owner or operator of a facility, an arranger of waste disposal, or an entity that accepts waste for treatment or disposal. The Court of Appeals accordingly affirmed the holding of the district court that section 9620(a)(1) waives the sovereign immunity of the United States under CERCLA.

The Court of Appeals then turned to whether the government is liable under these facts as an arranger of waste disposal for the acid waste dumped at the

McColl Superfund site. The Court characterized two types of arranger liability: direct arranger liability and broad arranger liability. Direct arranger liability occurs when the "sole purpose of the transaction is to arrange for the treatment or disposal of the hazardous wastes."[3] Because the government did not directly enter into arrangement to dispose of acid wastes at the McColl site, the government was not an arranger under this theory. Broad arranger liability occurs when the government's action meets the following criteria: (1) if the party supplies raw materials to be used in making a finished product, (2) it retains ownership or control of the work in progress, (3) and the generation of hazardous substances is inherent in the production process.[4] The court ultimately held that the United States was also not liable under a broad arranger theory for the non-benzol wastes at the McColl Superfund site because the government did not exert enough control to be classified as an arranger.

Under a broad theory it is critical that the government have the authority to control the handling and disposal of hazardous substances. While the government *ultimately* could have exercised control over the Oil Companies' disposal of acid waste at the McColl site, it did not do so. In fact, the government did not know about the contracts between the Oil Companies and the waste site. The court held that something more than having ultimate control must be done by the government in order for liability to be incurred. The Court stated that it would be a close call if the government had considered the avgas production plants to be "war plants" subject to maximum control, had installed government-owned manufacturing equipment, and built facilities to further the production of a product. The Court found that it is therefore unambiguous that the government was not an arranger of acid waste at the McColl site under the facts of the immediate case. Accordingly, the Court of Appeals, reversing the judgment of the district court, held that the United States is liable as an arranger under section 9607(a)(3) for the benzol wastes at the McColl Superfund site and not liable as an arranger for the non-benzol wastes.

Wayne E. Gosnell, Jr. '05

Endnotes

1. *Lane v. Pena*, 518 U.S. 187, 192, 135 L. Ed. 2d 486, 116 S. Ct. 2092 (1996).
2. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989).
3. *Shell II*, 1995 U.S. Dist. LEXIS 19788, *19, No. 91-0589.
4. *Id.* at *20.

Environmental Law Section

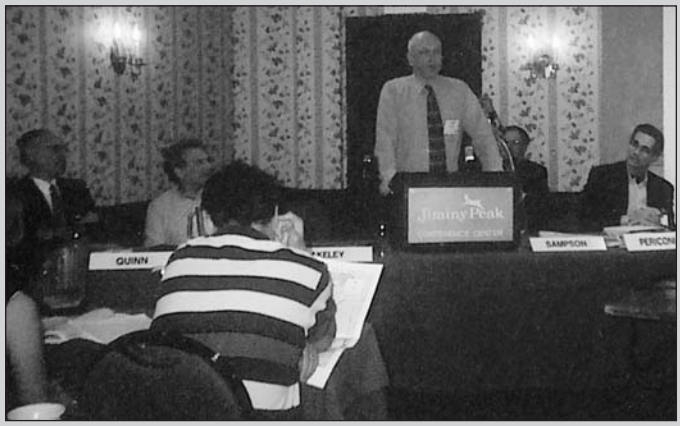
Fall Meeting

September 19-21, 2003
Jiminy Peak • Hancock, MA

"Promoting Better Land Use Decisionmaking: The Attorney's Role"

Program Co-Chair Paul Gallay introduces the "Collaborative Project Planning with Preservation of Open Space Playing a Meaningful Role" panel (l-r): Sean F. Nolon; William G. Balter; Michael W. Klemens, Ph.D.; and James Periconi, Section Chair.

John Hanna, Jr. and his wife, Jane, enjoy Saturday night's dinner.



The "How to Make Comprehensive Planning and Land Use Law Promote a Better Balance Between Preservation and Development" panel (l-r): Robert Quinn; Joel Russell; Roger Akeley; Dave Sampson, Moderator; and James Periconi, Section Chair.

(l-r) Charlotte Biblow, Miriam Villani, Telisport Putsavage, Robert Villani, Juliet Villani, Walter Mudgdan and Carl Howard at dinner Saturday night.

Saturday night's dinner (clockwise): Kevin Ryan, Kevin Healy, Virginia Robbins and Dinner Speaker Joanna D. Underwood.

Ad Hoc Committee Provides Entertainment (So to Speak) at Fall Meeting

The *Ad Hoc* Entertainment Committee for the Section's 2003 Fall Meeting, after working tirelessly throughout the spring and summer, finally disgorged the fruits of its labors on a lovely September evening at Jiminy Peak. The Committee's Report was delivered after dinner, in the Tavern; no doubt the experience of those in attendance was enhanced by the refreshments available therein.

The Report consisted of ten purportedly satirical songs, interspersed with supposedly witty observations. It was delivered by Walter Mugdan, with able assistance from his wife Vivienne Lenk (a trained actress, and thus officially a "ringer"). For one song they were joined by a talented young trio consisting of Elana Mugdan, Sophie Villani and Juliet Villani. Expert accompaniment was provided by Rosemary Nichols on steel string guitar and Jim Periconi on the (!) accordion. The most important thing about the event was that it was free . . . and worth every penny.

With tongue firmly embedded in cheek, the Committee explored the common interests shared by Environmental Law Section members, as well as our very real and important differences. After all, we are a diverse lot, working in diverse circumstances, with separate and distinct cultures. We work in staid, stuffy law firms or posh corporate offices or small boutique firms or as solo practitioners; we work in bloated government bureaucracies or for extremist advocacy groups or in the ivory towers of academia.

It is important that we try to understand those cultures that are different from our own, and dispel some of the myths. For example, those in the public sector consider attorneys in private practice to be unscrupulous and grossly overpaid. Those in the private sector think of government attorneys as incompetent underachievers feeding at the public trough. But these are just stereotypes, and the truth, as usual, is more complicated: Not all those in the private sector are *grossly* overpaid; some are just starting their careers, and are merely *over*paid. And not all those in government are underachievers; on the contrary, many are working at the maximum of their meager potential.

The talented trio: (l-r) Sophie Villani, Elana Mugdan and Juliet Villani.

Walter Mugdan belts out a tune with his wife Vivienne Lenk, aka the "ringer."

The irony is, of course, that each secretly envies the other. Don't many private attorneys dream of a practice in which one doesn't have to record one's time in 6-minute intervals, and where one can't get fired when one fouls up a case? And don't those in government likewise yearn for the elegant offices, the vast support staff and the unlimited expense accounts of their private sector colleagues? The grass does seem always to be greener on the other side of the caption.

Of course, our Section itself has its own, distinctive culture. We are some 1,300 members strong, with an engaged and energetic Executive Committee and a skilled leadership team of five officers. And it is indeed a privilege to be an officer in this Section. It takes long years of toiling in the trenches before one can gain entry into that exclusive club. But it's worth it, because of the three P's of officership—intoxicating Power, fantastic Pay, and unparalleled Perks.

In the event, a good time was had by all (or, at any rate, by the members of the Entertainment Committee). Following are the lyrics—such as they are—from three of the songs inflicted on those in attendance:

My Favorite Beans

(To the tune of "My Favorite Things" from *The Sound of Music*)

Counting the pounds of pollution prevented—
Like counting angels that dance on a pinhead;
Counting the cancers that never will be,
These are a few of my favorite beans.

Counting the miles of site fences erected,
Counting the number of people protected,
Counting the dollars paid by PRPs,
These are a few of my favorite beans.

Refrain: When the Congress or the free press
Say we're wasting time,
We tally a few of our favorite beans
To prove that we're doing fine!

Wise geographic and sector selections,
Single- and multi-media inspections,
All of them targeted painstakingly,
Counted and sorted—they're beautiful beans!

Demands and decrees yielding dollars collected;
Orders that make those infractions corrected;
Totalized costs of injunctive relief;
That's what we show when they ask, "Where's the beef?"

(Refrain)

Respondents enjoined, and defendants defeated,
Com-pliance audits commenced and completed,
Settlements embody-ing S-E-P's,
Charted and graphed—they make capital beans.

The beans that we count are as different as can be,
Great big garbanzos, *de minimis* split peas,
Simmered all year for September's fine stew;
Raw or refried, we've got plenty to chew.

(Refrain)

Hello, Young Members

(To the tune of "Hello Young Lovers" from *The King and I*)

When a young Section member
Whose heart's about to burst
Calls me up on the phone,
I expect the very worst.

Then I answer the phone,
And that member starts to whine
'Bout the officer track,
How he should be next in line.

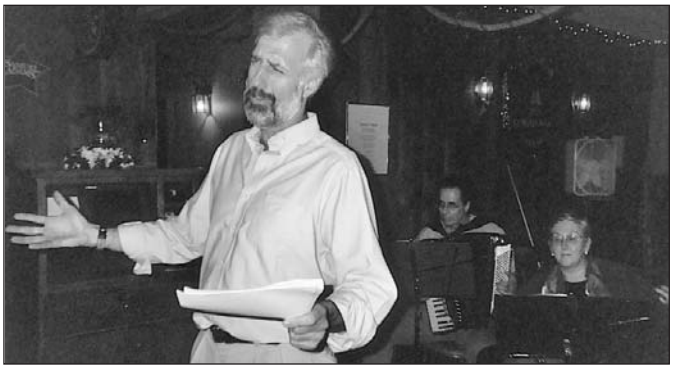
I just harden my heart
Cause I don't want to hear
The same sordid, desp'rate plea;
Oh, you must understand,
That this isn't the way
A Section member ought to be.

Hello young members, wherever you are
Whatever's the matter with you?
Syracuse, Buff'lo, Manhattan, or worse,
It's no use to whine and be blue.

Just work, young members, on programs and such,
Write articles and make phone calls.
Tell us the C'mmittee Chair Manual's great;
It's time to suck up to us all.

I know how it feels,
To feel out in left field,
Like a straggler, a laggard, a fool.
One day it may hap'
That you'll get the big tap,
And you'll finally wear the crown jewel.

Don't flinch, young members, from what lies ahead,
All this may be yours in due time:
You'll wield the power and you'll have the perks,
This glory that now is all mine.
I know the feelings that you're having now,
I was where you are, one time.



Walter Mugdan (above) with Jim Periconi on accordian and Rosemary Nichols on the steel string guitar.

Jim Periconi and Vivienne Lenk (at right).

The Impossible Dream

(To the tune of the same name, from *Man of LaMancha*)

To approve an enforceable SIP,
To achieve zero discharge at all,
To review every new source completely,
The best of controls to install;

To prevent ocean dumping of sludge,
To attain and maintain cleanly air,
To confirm every NSR offset,
To drink from the Hudson next year!

To clean every site, regardless of cost,
To save every wetland—not one acre lost,
To promulgate rules, by the dozen and score,
Whether right, whether wrong,
Just as long as there's always one more!

And I know if we'll only be true to this glorious quest . . .
We can stop every last drifting drop of those
poisonous pest-
(i-cides).

And the world will be better for this:
That we bore all these tasks on our backs;
That we papered the nation with permits;
And stopped progress dead in its tracks!

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