

The New York Environmental Lawyer

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

Message from the Chair

What Is Your China Strategy?

The speaker at the annual Syracuse Chamber of Commerce luncheon was asked to give his 2005 economic forecast for upstate New York. Hundreds of us flocked with colleagues to the Onondaga County Convention Center to hear the predictions that could affect our business prospects for the coming year. We came from varied workplaces: local government, academic and health care institutions, home construction, a division of the nation’s largest defense contractor, and those who depend on all of these for their livelihoods, the bankers, accountants and lawyers.

Many in the room had witnessed traumas to the local economy over a 15-year period that we could have done without, like the closing of significant industrial facilities that made auto parts, beer, beer cans, and heating and cooling systems. These were giants in their industries who contributed generously to the local community and who paid their workers good wages. As we sipped our coffee, we were eager to hear facts that would give us hope for the short- and long-term economic health of the region where we enjoy living and working.

The PowerPoint screen was huge and the message cast upon it unsettling. Here are the facts we faced: since the recession that began in 2000, upstate has lost 7,800 manufacturing jobs. These have been replaced by 4,100 service jobs. So we are down 3,700 jobs. Buffalo’s growth is flat, Rochester is doing a little better than Buffalo, and Syracuse is doing the best of all with modest job growth that is a point or two higher than the national average.

As a litany of economic facts and figures were offered up during dessert, someone on the dais posed



this question to the audience: What’s your China strategy? There was no elaboration on that question; it simply hung in the air as we pondered the job numbers and all they represented. What China strategy are we supposed to have? One that would make upstate workers and institutions more attractive than those in China? One that would enable local businesses to set

up shop in China and create higher profits by using cheaper labor?

I pondered a China strategy that could work for environmental lawyers. In the recent past, we assisted clients by examining and providing comments on SPDES, air quality and other types of permit applica-

Inside

From the Editor	3
Comments on Proposed Site Eligibility Revisions to the Draft New York State Brownfield Cleanup Program (BCP) Guide	5
Piercing the Haze: A Comprehensive Evaluation of Efforts to Curb Haze in Our National Parks	9
(Jeffrey K. Roberson)	
Administrative Decisions Update	21
(Prepared by Jeffrey L. Zimring)	
Recent Decisions in Environmental Law	26
Newsflash: What’s Happening in the Section	31
Section Committees and Chairs	32

tions and draft permits for various facilities up and down the local waterways. But the flight of manufacturing to other regions of the United States, or indeed to China, means we have lost a portion of our regulatory permitting work for the industrial sector. However, these closed facilities are attractive locations for the new service providers. As environmental lawyers, our China strategy will involve retooling so that we are prepared to assist clients with the legal issues that arise when they redevelop old sites for their new service-oriented businesses. The emerging issues are (1) brownfield investigations, risk assessments and remediation; (2) soil vapor intrusion; and (3) sediment impacts.

1. Brownfields

Former industrial sites are attractive because they tend to be located near transportation corridors and they already have in place a valuable utility infrastructure. But the potential for a site's redevelopment will be affected by the uncertainty associated with environmental legal liabilities lurking in soil and groundwater. The New York State brownfield statute holds the promise of environmental protection and job creation through economic incentives. We should focus on the new opportunities offered by cleanup objectives tied to the proposed reuse of a property. We need to learn about the risk assessment process and how it can be used effectively to inform remedy selection. We can participate in the administrative process by drafting comments on brownfield guidance and regulations and meeting with the regulators to discuss ways in which the interests of the State in economic development and in protecting the environment can be satisfied.

2. Soil Vapor Intrusion

Some former industrial sites can pose a risk to new occupants from soil vapor intrusion, that is, the movement of volatile organic compounds from contaminated groundwater into the soil above the groundwater table and then into indoor spaces. The presence of these vapors raises concerns about acceptable exposure levels for residents and workers. This is an emerging issue and no uniform approach has yet been developed by the regulatory agencies charged with protecting the health of residents and workers or the environment. We

need to understand the risks posed by exposure to soil vapor and what constitutes acceptable exposure levels.

3. Sediments

Many of the State's most significant redevelopment projects are occurring at or near waterfront areas where water and sediment quality have been affected by decades of industrial use, inadequately treated sewage discharges, and precipitation runoff. In Syracuse, the Department of Environmental Conservation recently proposed a \$449 million cleanup for the sediments in Onondaga Lake, which is a state and federal superfund site that is on the National Priorities List. The remedy will require, among other things, the dredging of significant quantities of sediment. Sediment impacts can be difficult to address because of the potential for the re-suspension of sediment and the potential for recontamination from uncontrolled sources, for example, upland contaminated groundwater and combined sewer overflows. Still, regardless of the challenges involved in sediment remediation, Onondaga Lake is one of the community's greatest natural resources and its restoration is key to the development planned around its shoreline. Environmental practitioners statewide need to be familiar with the statutes and regulations that address water quality and sediment impacts in order to facilitate community development projects in waterfront locations.

Clearly, the shifts in the economy of upstate and other areas of the State pose challenges to the legal profession. The Environmental Law Section is engaged in exploring all of the issues discussed in this article. The Hazardous Waste/Site Remediation Committee continues to examine DEC's proposed Brownfield Cleanup Program guidance and awaits the issuance of draft regulations. The Fall 2004 CLE program explored the thorny issues involved in risk assessment and sediment remediation. The first half of the CLE program in January was devoted to presentations by experts on soil vapor intrusion and its risks. The Section's leaders welcome the participation of all members to assure continued success in presenting legal education programs relevant to the needs of lawyers in a changing economy. Your involvement could shape your China strategy.

Virginia C. Robbins

Catch Us on the Web at
WWW.NYSBA.ORG/ENVIRONMENTAL



From the Editor

The Chair's message offers some thoughtful comments on the need to adjust to changes in the marketplace, and some areas in which our members can do so. Ginny also alludes to dramatic changes in local and state economies occasioned by global shifts in industrial production and trading—the very kind of tectonic shifts that so frighten people whose livelihoods depend on manufacturing and textiles.



Of course, as lawyers, we have a degree of flexibility that many workers who labor in outmoded or threatened industries often lack. Our professional flexibility may allow many of us to find benefits in dire circumstances. CERCLA cleanups morph into brownfields redevelopment; hence, clear environmental and human health threats provide opportunities for financially, environmentally and socially beneficial endeavors. However, environmental specialists or advocates sometimes may lose sight of some non-environmental ramifications of undoubtedly worthy environmental goals. Ginny's column alludes to the manner in which modern environmental policies and other national goals migrate, so to speak, into each other's territories.

It is worth our while to keep in touch with how changing economic dynamics, and the often related subtext of what this means for the environment, impact on American workers, their families and their communities. It is that very real fear by economically distressed workers, who may live and work in economically moribund regions, that often results in a heart-felt but not entirely reasonable fear of "globalism" and, sometimes too, "environmentalism." Interestingly, some environmental activists and blue collar workers find an atypical common ground in opposing "globalism," a concept that really calls for clearer explication. One possible result is that the heat, so to speak, may momentarily be off "environmentalism" as a set of perceived threats to American labor. "Environmentalism," of course, is another notion—like "globalism"—that too often becomes a catchy but vague byword for the perception of an aggressive ideology foisted on the public by elite naysayers (do I hear echoes of Agnewisms?).

In any event, if only for the continued political viability of our modern environmental regulatory regime, environmental advocates would be well advised to remember the critical importance of jobs to the very

people who are taxpayers as well as voters. Modern environmental law has proven itself to be successful in providing a set of tools to comprehensively remedy generations' worth of pollution and the historically careless disposal of wastes. Of course, though, more is at stake. We should always keep in mind the interconnectedness of economics, community health, social cohesion and environmental policies. The emerging redistribution of capacities and jobs in the global economy invariably comes home to roost in regional and even neighborhood economics. Without vibrant national and even local economies, environmental goals may become harder to pay for and thus harder to advocate for. And there are always the indirect costs: industrial production shackled, profit margins evaporated, facilities closed and jobs lost. Increasing economic stress and rigidity may cramp how we can continue to use a network of environmental laws that has been admirably and appropriately flexible and dynamic in recent years. Hence, just as business people have had to learn about environmental regulations over the past couple of decades—maybe more as a consequence of legal coercion than of personal interest—so, too, we may be entering a time when environmental advocates must master basic principles of how money and resources move through increasingly porous economic structures.

Otherwise, it's hard to explain to New England fishermen why they can't harvest the increasingly expensive, and precarious, gifts of the sea, or to lumbermen in the Pacific Northwest why they can't deliver wood to an expanding American population in which home ownership—and thus housing starts—is a sacred rite of middle class entitlement. More distantly, but no less importantly, local African economies that rely on providing bushmeat need an economic substitute if they are to be receptive to notions of ecological and species preservation; Amazonians need ways to replace the strip mining and cattle foraging on which they survive. Farmers drawing down ice age aquifers to irrigate thirsty fields for each and every year's planting, and who fertilize fields to maximize the harvest, still must be able to harvest if they are to survive and to keep feeding a burgeoning population. The restriction of water rights, and the continuing challenge to reduce nitrification of water bodies that receive agricultural runoff, has to account for this fact.

Then there is the larger, harder to grasp yet harder to solve, but ultimately more compelling set of problems that fall under the rubric of global climate change. It matters that ratifying Kyoto will likely impose severe constraints on parts of our economy at a time that India

and China, which may get a pass, are furiously competing with us. This is not a reason to abandon the effort. However, it does require that environmental advocates also responsibly and knowledgeably grapple with ways to retool economic sectors and rejuvenate the economic health of communities that shoulder the impact of environmental regulations. Hence, part of the “China” problem to which Ginny alludes poses challenges to the nation that are broader than just economic competition to particular industrial sectors.

This column has argued in the past that there is a fascinating and important historical dimension to the collection of problems that we now group under the heading “environmental.” A new book, *Collapse*, by Jared Diamond, serves as a keen and well-written device to get Americans thinking about the longer term consequences of environmental stressors. The author also examines how, historically, some societies recognized the problems and successfully circumvented them—often by responsibly adjusting in the face of challenges—and others simply “collapsed.” Collapse often resulted from an aggregate of economic, political, social and environmental problems, yet the author shows that the real-life need to eat and drink in a safe and healthy society usually provided the context for the tipping point as particular societies thereafter lost the ability to rally. Collapse occurred either because of a society’s inability to recognize environmental threats for what they were, or perhaps because of technological and economic rigidities that impeded responsible adaptation. These would be poor excuses for modern America to fail the test of long-term prosperity and survival.

In this issue, we include the Environmental Law Section’s comments on DEC’s proposed site eligibility revisions to the draft Brownfield Cleanup Program (BCP) Guide. Several Section members were advocates for New York’s creation of a Brownfield program, provided input to the process from an early stage and have closely tracked how the program has operated. The general topic was well presented at Section meetings, and some concerns with the manner and practicalities of the revision process have been flagged. The several comments address apparent differences between the original legislative goals, as expressed in the statutory language, and the evolving agency interpretation of a

public interest component of site eligibility analysis. This general concern was the subject of an intense and informed discussion at our January meeting. The comments also address the constitutional issues relating thereto. The concern expressed at the January meeting was that the manner of DEC’s eligibility analysis may adversely affect the program, one which took years and considerable involvement among the Legislature, the Governor’s Office, DEC and many of our members to achieve. A related concern is that a weakened BCP may actually adversely impact on the public interest. These concerns, also, are articulated in the commentary. The Section’s comments suggest a set of more refined criteria that may be used to define the public interest.

Jeffrey Roberson, of New York University School of Law, submits an article on haze in our national parks. The article approaches the subject historically, looking back on the past quarter century’s efforts and theories in support (a period that coincides with the life of the Clean Air Act); EPA inaction after the 1990 amendments; how policies failed and/or changed; what the author contends is a current federal policy of inaction; and the role available for regional air pollution control efforts.

James Denniston again shepherded the Case Summaries. These case law analyses are prepared by students at St. John’s Law School under Phil Weinberg’s guidance. Jeffrey L. Zimring of Whiteman Osterman & Hanna LLP submitted the Administrative Update.

I also want to remind readers that we are hoping to publish a special issue that focuses on the Hudson River and its surrounding regions, in furtherance of which the Journal invites contributions. There is a burgeoning interest in the Hudson, its ecosystem, its colorful and unique history, and its vital role as a link between New York City and Upstate, and, historically, between the continental interior and the rest of the world. Today, we enjoy a cleaner river, a renewed focus on its commercial possibilities and its recreational uses, and an increasing appreciation of how all the facets of the river and its surrounding regions interweave. A notice is provided on page 31.

Kevin Anthony Reilly

Comments on Proposed Site Eligibility Revisions to the Draft New York State Brownfield Cleanup Program (BCP) Guide

November 19, 2004

The Environmental Law Section of the New York State Bar Association thanks the Department of Environmental Conservation for the opportunity to comment on the proposed site eligibility revisions to the draft Brownfield Cleanup Program Guide. The Section's Brownfields Task Force developed these comments, and they were subsequently provided to the Section's Executive Committee and Cabinet for review and comment. The Section's Executive Committee requests the Department to give these comments serious consideration.¹

Comment # 1—Statutory Authority

The proposed new restrictions on site eligibility do not have a clear basis in the statute itself. Section 27-1407(9) does state that the Department may reject the application if “the public interest would not be served” by the site’s acceptance into the program. However, the only enumerated “public interest” components to NYSDEC’s decision making regarding site acceptance focus on the applicant’s identity and prior acts— e.g., whether the applicant has been convicted of violating environmental laws, been convicted of a criminal offense, or falsified or concealed a material fact. There is no indication that the Legislature intended that the “public interest” standard be stretched to include issues with respect to the nature of the site or the site’s development potential. In fact, the “including but not limited to” phraseology, followed by factors reflecting the *identity of the applicant*, suggest the contrary. Site-based eligibility criteria are spelled out by other sections of the statute (e.g., the definition of “brownfield” in Section 27-1405 and the exclusions in Section 27-1405(2)). If the Legislature intended to have NYSDEC include an examination of economic development and financial criteria in determining the “public interest” component of site eligibility, it could easily have so provided one in the statute or in the recently enacted Senate Bill 7627 (Chapter 577).

Comment # 2—Constitutional and Due Process Issues

Comment 2.1

If the statute were construed to allow NYSDEC to define “public interest” without clear guidelines as to

what that phrase means, it would constitute a standardless delegation of power of a type that has been found to violate both New York State and federal constitutional requirements. Moreover, the proposed factors would require evaluations outside of NYSDEC’s expertise in determining “the public interest,” for example, in making decisions based on economic development criteria. The draft revisions to the Guide are objectionable because they suggest an extremely broad scope of the public interest inquiry, thereby creating a lack of predictability in the program.

Comment 2.2

The revisions do not indicate in any meaningful way how NYSDEC will apply the proposed factors, or which ones the agency will apply, in any particular situation. The factors seem to create an opportunity for unfettered discretion to “pick and choose” among projects, based on subjective criteria. There is a risk that neither proponents nor opponents of a project will have any realistic opportunity to subject NYSDEC’s determination on site eligibility to judicial review, raising serious due process concerns. There is no indication as to how the factors would be weighed one against the other, or how many together would be enough to be fatal to an application.

Comment 2.3

NYSDEC is attempting to accomplish major changes to the BCP by guidance rather than a regulation which would be subject to statutory procedural requirements and judicial review.

Comment 2.4

When finalized, the proposed revisions should not be applied to applications filed prior to their promulgation. Such an ex post facto application of these criteria would create serious equity and due process issues. Moreover, NYSDEC should not be holding pending applications in limbo while it considers these proposed revisions. NYSDEC must satisfy the statutory provisions requiring it to use “all best efforts” to make eligibility determinations within 45 days of receiving applications.

Comment # 3—Adverse Impact on the BCP

Comment 3.1

The complex and detailed inquiry on site redevelopment issues that is implied by the proposal's criteria is likely to prevent NYSDEC from adequately reviewing and reaching a decision on site eligibility within 15 days after the close of the public comment period, a deadline which the statute requires the Department to use "all best efforts" to accomplish. The rapid turnaround required by the statute for eligibility decisions is yet another basis for believing that the Legislature could not possibly have intended NYSDEC to conduct this kind of inquiry when making threshold eligibility decisions.

Comment 3.2

A major goal of the Act was to eliminate ad hoc determinations and improve the predictability of NYSDEC's decision-making process for cleaning up contaminated sites. The proposed revisions will introduce unpredictability into the application process. Predictability is crucial to site owners and developers, and potential applicants will not commit substantial up front time or money to prepare and pursue an application if they are uncertain as to whether NYSDEC will admit their site into the program, how long such a decision will take, and at what cost. A lack of predictability will have a detrimental impact on the attractiveness of the state's program, particularly in comparison to the programs of other states.

Comment 3.3

By limiting the number of sites in the BCP, NYSDEC is also limiting applicability of other reforms that the Legislature perceived were important to site cleanup, including public notice and participation, transparency of the decision-making process, and cleanups based on intended site usage. Cleanups of sites determined not to be eligible for the BCP will apparently not have the benefit of these provisions.

Comment # 4—Harm to the Public Interest

Comment 4.1

With the elimination of the Voluntary Cleanup Program, the BCP is the only mechanism by which a hazardous waste-contaminated property can be voluntarily cleaned up under NYSDEC supervision. Restricting eligibility for the BCP may result in the purported remediation of many sites contaminated with hazardous waste by site owners, at risk, without NYSDEC oversight or public involvement. Such sites may not be cleaned up to levels that adequately protect human health or the environment.

Comment 4.2

Restrictions on eligibility for the BCP will leave developers and site owners who might need state sign-off on a cleanup for reasons other than tax credits (e.g., a requirement of another governmental agency, a qualification for insurance reimbursement or a requirement of a lender), without any avenue to obtain regulatory approval for their cleanups.

Comment 4.3

If NYSDEC considers the use of a short-form order or other instrument to provide an alternative to the BCP to site owners or operators, it should do so in a way that minimizes the enforcement nature of such an opportunity to obtain the Department's sign-off on work performed. Any alternative should be established with the objective of encouraging participation.

Comment # 5—Definition of a Brownfield

Section 2.1.1 of the Draft BCP Guide states:

The definition of "brownfield site" has two elements: (1) there must be confirmed contamination on the property or a reasonable basis to believe that contamination is likely to be present on the property; and (2) the contamination or potential presence of contamination may be complicating the development or re-use of the property (ECL 27-1405.2). For purposes of the Brownfield Cleanup Program, the Department may determine that only a portion of any overall project meets the definition of "brownfield." The entire area subject to the overall project may or may not be eligible to be a "brownfield site."

Comment 5.1

There is no need to require "a reasonable basis to believe" that contamination is present at a "brownfield" because a standard Phase I Environmental Site Assessment should contain sufficient information to satisfy the Department's concerns regarding whether the site at issue does or does not have "perceived" contamination sufficient to make it a brownfield under the statutory definition.

Comment 5.2

NYSDEC's subdivision of developments, at the agency's discretion, into brownfield and non-brownfield portions may hinder a developer from proceeding with the necessary financing and project scheduling for

a site as a whole. Additionally, it is not clear how any such subdivision(s) would impact tax credits and Certificates of Completion, as both of those items were legislated in a manner that takes the entire site into contemplation.

Comment 5.3

As an alternative to the use of the “public interest” criterion to limit site eligibility, NYSDEC should consider enunciating specific and clear standards for when it believes that the contamination or potential presence of contamination “may be complicating” the development or reuse of a property. This approach has the benefit of being consistent with the statutory definitions and NYSDEC’s expertise. It would be prudent for NYSDEC to focus on the relationship between environmental conditions and any complications they may present to development or reuse. This approach avoids inquiries into areas unrelated to the environment.

Comment # 6—Public Interest Criteria

Section 2.1.2 of the Draft BCP Guide states:

A determination that the public interest would not be served by granting a request for participation in the Brownfield Cleanup Program should also be made on a case by case basis, considering the following factors in addition to the statutory criteria:

1. whether the proposed project will reduce contaminant exposure or threat of exposure;
2. whether contaminants are present at levels that exceed guidance values, standards or criterion;
3. whether contamination on the proposed site exceeds historic/background levels;
4. whether the proposed site is idled, abandoned, or underutilized;
5. whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination;
6. whether participation in the program is likely to spur redevelopment or reuse of surrounding areas;

7. whether the area of the site shows indicators of economic distress including low resident incomes, high unemployment, high commercial vacancy rates, or depressed property values;
8. whether a health advisory has been issued for the site;
9. whether the estimated cost of any necessary environmental cleanup is likely to be disproportionate to the value of the property/project;
10. whether there were industrial or commercial operations at the site which may have resulted in environmental contamination; and
11. whether the proposed project is likely to re-contaminate the site.

Comment 6.1

The need for a project to “reduce contaminant exposure or threat of exposure” (criterion 1) should be addressed as part of the work plan process, not as an eligibility criterion. Moreover, this determination can reliably be made only in connection with an exposure assessment, which is generally not performed until after a complete investigation of the site. Complete site investigations are clearly not a prerequisite under the statute for entry into the BCP.

Comment 6.2

The criterion of “whether contaminants . . . exceed guidance values” (criterion 2) does not take into account that the definition of “brownfield” specifically contemplates that a site can qualify even if there is only a “perception” of contamination (even if no contamination is actually found to exist). Moreover, this criterion cannot be investigated prior to the completion of a Phase II Environmental Site Assessment, which is clearly not statutorily required for entry into the BCP.

Comment 6.3

The criterion of whether contamination “exceeds historic/background levels” (criterion 3) could eliminate from consideration many urban sites that need to be cleaned up because of historic fill, if historic fill were to be deemed a “historic/background” condition. Moreover, the Legislature specifically contemplated that entire localities might be ubiquitously contaminated and thus eligible for brownfield treatment. This criteri-

on creates the potential for all such sites to be deemed ineligible because of such ubiquitous contamination.

Comment 6.4

The criterion of whether a proposed site is “idled, abandoned, or underutilized” (criterion 4) is not justified by the statutory definition of “brownfield” and could eliminate eligibility for sites that are currently in use (e.g., as scrap yards), but whose redevelopment for a different use would benefit the community. Furthermore, there may be a strong public interest in the remediation of occupied brownfield sites where vapor intrusion or other issues may be putting occupants at risk.

Comment 6.5

The criterion of whether a site is “unattractive for redevelopment or reuse” due to the presence of contamination (criterion 5) appears to contemplate decisions based on either aesthetics or economics, neither of which is in NYSDEC’s area of expertise.

Comment 6.6

The criterion of whether the site’s participation is “likely to spur redevelopment or reuse of surrounding areas” (criterion 6) is neither a statutory criterion nor a subject matter as to which NYSDEC has any expertise. Moreover, a contaminated site in the middle of an otherwise fully developed area may be worthy of redevelopment, irrespective of the impact on neighboring sites.

Comment 6.7

The criterion of whether the area has “indicators of economic distress” (criterion 7) artificially penalizes the eligibility of sites in higher income areas (e.g., the Anaconda site in Hastings-on-Hudson).

Comment 6.8

The criterion of “whether a health advisory has been issued for the site” (criterion 8) is largely irrelevant, since health advisories are generally reserved for highly contaminated sites rather than brownfields.

Comment 6.9

The criterion of cleanup cost being disproportionate to the value of the property/project (criterion 9) is not

only statutorily unauthorized, but vague and standardless (e.g., when would a disparity be considered “disproportionate”?). At a very minimum, NYSDEC should enunciate clear and explicit standards for what it considers “disproportionate.”

Comment 6.10

The criterion of requiring a history of industrial or commercial operations at the site (criterion 10) is not statutorily authorized and could preclude eligibility of sites affected by historic fill.

Comment 6.11

The criterion of “whether the proposed project is likely to re-contaminate the site” (criterion 11) is not an eligibility question, but rather an issue that should be addressed in the work plan through engineering or institutional controls or in an environmental easement.

Comment # 7—Alternative to Proposed Revisions

We infer that at least one reason for these proposed revisions to the draft BCP Guide is NYSDEC’s concern for the fiscal implications of the tax credit provisions in the Act.

We respectfully submit that this issue is one for the Legislature—and not NYSDEC—to address. There are many possible ways of changing the tax credit formula so that brownfields redevelopment is appropriately incentivized without providing undue benefits to certain projects. Members of the Section would be pleased to meet with appropriate representatives of NYSDEC, the Governor’s office, the Legislature and other state officials to craft such a formula. In the meantime, however, we strongly believe that these proposed revisions, in their current form, would jeopardize the viability of the BCP.

Endnote

1. The members of the Executive Committee of the Environmental Law Section who are attorneys in federal and state agencies have recused themselves from consideration of these comments.

Piercing the Haze: A Comprehensive Evaluation of Efforts to Curb Haze in Our National Parks

By Jeffrey K. Roberson

Introduction

In 1977 the United States Congress completely overhauled the Clean Air Act and introduced many features still seen today, including the Prevention of Significant Deterioration (PSD) program and complementary visibility protections contained in section 169A.¹ Congress felt that the combination of the PSD program and visibility protections would help preserve and, in some cases, reclaim the stunning vistas of the national parks spread throughout the country, particularly the Grand Canyon.² Congress declared a national goal of “the prevention of any future, and the remedying of any existing, impairment of visibility” in parks experiencing impairment resulting from manmade air pollution.³

However, despite promulgating this mandate over 26 years ago, there is no readily apparent progress being made toward achieving this laudable goal. It appears that there has been no comprehensive survey of the current state or effectiveness of the laws and policies geared toward restoring visibility to the national parks. Without such a study, it is virtually impossible to assess how close we are to solving the visibility problem, what manner of future actions are needed, or what sorts of improvements should be made to current efforts. This article endeavors to fill this gap by examining why so little has been done to specifically address concerns about visibility per se, given the visibility protections included in the 1977 Act.

This article will evaluate the effectiveness of efforts to improve visibility in our national parks from 1977 through 2003. It will then make recommendations for future efforts to ease visibility problems based on these past experiences. Part I of this article contains a short primer on the science of visibility. Without at least a cursory understanding of how visibility impairment occurs, it is difficult to understand why certain delays have occurred in implementing the Clean Air Act visibility protections and why the visibility problem has turned into a very complex problem. Part I also presents the current state of the visibility problem in the United States. Part II addresses the current federal laws and presents two theories as to why there is a dearth of federal action to solve the visibility problem. First, it offers the theory that scarcity of resources, particularly scientific knowledge, is to blame for the absence of effective federal legislation and solutions. Second, when the resources theory ceased to be persuasive in the early 1990s, another theory was presented to explain the sub-

sequent continuation of federal foot-dragging on this issue, a political economy theory. This political economy idea states that political obstacles, including heavy interest group pressure, is responsible for the delay in implementing the visibility protections from the Clean Air Act from the 1990s to the present. Part III will examine regional planning organizations necessary for effective alleviation of the visibility problem, specifically focusing on the only functional one, a program designed by several western states to set up a regional trading system to deal with visibility problems in the west and southwest. Part IV will enumerate the lessons learned from the state and federal experiences and make recommendations for future efforts.

Part I: A Short Primer on the Science of Visibility and Visibility Trends in National Parks Since 1977

Certain properties of visibility impairment make it a difficult problem to quantify and to address effectively. First, visibility impairment is caused by a multiplicity of pollutants and natural effects. Additionally, the proportional contribution of each pollutant and natural event varies by location and time of year. Secondly, visibility impairment is difficult to measure as it is an attempt to quantify the subjective impressions of the human eye and mind.

Obstruction of visibility is a complex problem caused by the combination of numerous pollutants interacting with the natural environment. Visibility impairment results from two types of phenomena: plume blights (plumes of pollution from a single source as in smoke from a smokestack) and regional haze (general pollutant build-up).⁴ The impairment from both sorts of phenomena occurs because of 1) light scattering by particles and molecules of air, and 2) light absorption by gases and particles.⁵ Light scattering by molecules of air happens naturally; for instance, it is this that makes the sky blue.⁶ However, “[l]ight scattering by particles is the most important cause of degraded visual air quality.”⁷ Fine aerosols, otherwise known as particulate matter, are the most important light-scattering particles.⁸ Particulate matter comes from sulfur dioxide, nitrous oxides, dust, soot, and organic and elemental carbon.⁹ Light absorption occurs mostly with nitrogen dioxide and, to a lesser extent, particles of “black soot (finely divided carbon) or large amounts of windblown

dust.”¹⁰ Visibility in particular areas is also affected by, amongst other things, prevailing wind patterns blowing pollutants to or away from certain areas, the time of year (visibility is lower in the summer), and humidity levels (high humidity lowers visible range).¹¹

Additionally, visibility impairment is not a problem that is easily measured. The human mind and eye can interpret the same level of visibility obstruction differently from individual to individual.¹² Compounding this difference in subjective observation, is the fact that visibility impairment is not a linear problem. The exact same reduction in pollution may result in widely variable changes in visibility depending on the baseline level of visibility impairment present prior to the reduction.¹³ This occurs because improvements (or deteriorations) are more noticeable when the air is relatively clear and hard to notice when the air is already dirty.¹⁴ The consequences of this phenomenon are threefold: 1) improvements or deteriorations in pollution concentration in dirty areas may not be noticeable, 2) slight improvements or deteriorations in clean areas is highly noticeable, and 3) there may well be a point in clean areas where people have noticed a lot of improvement in visibility (even if there has been relatively little reduction in pollution levels) and the demand for further action decreases as the perceived need for a solution also reduces.

Regional variation plays a role in addressing visibility concerns as well. The proportional effect each phenomenon and pollutant has on any given national park varies dramatically across the country. In order to pinpoint the major causes of impairment at each park protected under section 169A of the Clean Air Act, the Environmental Protection Agency (EPA) set up the Interagency Monitoring of Protected Visual Environments (IMPROVE) program in 1986 to gather empirical data.¹⁵ Areas that have visibility specially protected are those areas designated as mandatory Class I areas under the PSD program.¹⁶ Mandatory Class I areas include international parks, national wilderness areas over 5,000 acres in size, national memorial parks over 5,000 acres in size, and national parks over 6,000 acres in size.¹⁷ However, not all the original 158 Class I areas are subject to visibility protections, only those parks where visibility is “an important value of the area.”¹⁸ The EPA, after consulting with the Secretary for the Interior, found that 156 of the Class I areas deserved extra visibility safeguards, excluding Bradwell Bay, FL and Rainbow Lake, WI.¹⁹

EPA, on Congress’ orders, used the data from the IMPROVE program to publish annual trends in visibility impairment.²⁰ The data documented the extent and severity of the visibility problem as well as distinct differences in the causes and degree of the problem between the East and West of the United States.²¹ The

readings from the IMPROVE monitors are compiled into trend data indicating the average aerosol concentration and average light extinction over one- and five-year increments.²² The data for each site is expressed in terms of the pollutant concentration and light extinction on the 20% of the best-visibility days (clearest), the 20% of the worst-visibility days (haziest), and the 20% of the mid-visibility days.²³ Visual range is typically measured in deciviews. A deciview is designed to measure the amount of haze interfering with your ability to see long distances. Haze is the inverse of visibility. Therefore, a higher visibility range will have a low deciview value. For example, the 230 kilometer natural visibility range in the West is equal to 5.3 deciviews, while the 150 kilometer natural visual range in the East is equal to 9.6 deciviews.²⁴

The aerosols measured by the IMPROVE system are sulfates, nitrates, organic carbon, elemental carbon, and crustal material.²⁵ “Between 1994 and 1998, sulfate particles accounted for 23 to 78 percent of the calculated aerosol light extinction on an annual basis at the sites. Nitrate particles accounted for 3 to 39 percent of the calculated light extinction, organic carbon for 9 to 38 percent, elemental carbon for 2 to 16 percent, and crustal material for 3 to 31 percent. . . . Sulfate and nitrate aerosols are generally formed in the atmosphere from sulfur dioxide and nitrogen oxide emissions. The major manmade source of sulfur dioxide is coal combustion. Fossil fuel combustion (e.g., coal, natural gas, and oil, including gasoline and diesel) is the major source of nitrogen oxide. . . . Organic carbon aerosols can often trace their origins to emissions from vegetative growth, vegetation burning, or solvent usage processes. . . . Elemental carbon particles are often introduced into the atmosphere by incomplete combustion processes. . . . Crustal material is introduced to the atmosphere by disturbances to the soil, such as wind erosion, agricultural tilling, heavy construction, and travel on unpaved roads.”²⁶

Based upon the results of the IMPROVE study, EPA has endeavored to document any improvements in the nation’s visibility and to pinpoint the causes of the progress. The results of the analyses are included in EPA’s obligatory reports to Congress. The first report containing this sort of analysis was in 1993. That report stated that conditions on the worst visibility days (the 20% worst days) were expected to improve by approximately 3 deciviews by 2010 across much of the East and less than 1 deciview in the Southwest.²⁷ Most of the improvement was expected not from the visibility regulations, but from sulfur dioxide reductions from the acid rain program.²⁸

EPA’s 2001 Report to Congress indicates that while several IMPROVE sites measured improved visibility trends and a couple of sites measured decreased visibil-

ity trends, a vast majority of locations had no statistically significant change in visibility.²⁹ This report only looked at IMPROVE sites that were located directly in Class I areas (43 of the 156 Class I areas deemed to need visibility protection), plus Washington, DC. Acadia National Park, Great Sand Dunes National Monument, and Washington, DC all saw a trend towards improved visibility on the 20% least-impaired days (the best days) and the 20% mid-range days; Badlands National Park and Yellowstone National Park saw progress in the 20% least-impaired days; Bandelier National Monument, Dolly Sods Wilderness, and Shenandoah National Park experienced a recovery on the 20% mid-range days; and Canyonlands National Park, Mammoth Cave National Park, Redwood National Park, and San Geronio Wilderness improved on the 20% worst days.³⁰ Only Pinnacles National Monument improved across the board in each category—20% best, mid-range, and worst days.³¹ Three parks actually experienced a decrease in visibility on the 20% least-impaired days: Snoqualmie Pass-Alpine Lakes Wilderness, Chiricahua National Monument, and Lye Brook Wilderness.³² No study sites have shown a decrease in visibility on the mid-range or worst days.³³ These results seem to indicate, that on balance, a few sites have seen some improvement in their visibility problem, while somewhat less in number have seen their visibility decrease on what were formerly the clearest days. However, the vast majority of sites have seen neither improvement nor a worsening of their visibility. Thirty-five Class I areas saw no change in their visibility on the 20% least-impaired days, 37 had no change on the 20% mid-range days, and 38, and Washington, DC, had no change on the 20% worst days.³⁴ These results show that very little progress has occurred in alleviating the nation's visibility problem, but the problem has also not seemed to have gotten any worse. At most, it can be said that the nation's deterioration of visibility has been arrested. How much of this progress has been caused by visibility and haze regulations has yet to be determined in this article.

Unfortunately, EPA's reports do not quantify the observed changes very effectively nor do they indicate regional trends. EPA's most recent effort to do these tasks is found in the *National Air Quality and Emissions Trends Report, 1999* published in March 2001. Chapter 6 of this report is devoted to visibility trends across the United States, again only using data from Class I areas, as these are the only IMPROVE sites around long enough to be useful in creating trend datasets. This *National Trends Report* identifies trends for both the Eastern and Western halves of the United States. "In the East, . . . sulfate is clearly the largest contributor to visibility impairment, ranging from an average of 78–82 percent of each year's annual aerosol extinction during the haziest days to 56–63 percent on the clearest days.

. . . Organic carbon is the next largest contributor to visibility impairment in the East, accounting for 10–14 percent of annual aerosol extinction on the best days and 8–11 percent on the most impaired days. The third largest contributor in the East is nitrate, which also accounts for about 11–13 percent of annual aerosol light extinction on the best days and about 3–4 percent on the haziest days."³⁵ "In the West, sulfate is also the most significant single contributor to aerosol light extinction on the clearest, typical, and haziest days. Sulfate accounts for 33–41 percent of annual aerosol light extinction on the best days, 39–43 on the typical days, and 31–42 on the haziest days. However, organic carbon (19–30 percent), crustal material (14–26 percent), and nitrates (9–15 percent) play a more significant role (as a percentage of aerosol extinction) in western sites as compared to eastern ones."³⁶

The *National Trends Report* went on to find that the East had experienced a 15% (1.5 deciview) reduction in aerosol light extinction for the 20% worst days since 1992 with 10% of that reduction coming since 1998 (about 1 deciview).³⁷ However, even with this improvement, visibility on the 20% worst days "remains significantly impaired" (e.g. the improvement was barely noticeable to the average person observing an area).³⁸ EPA also found that there was approximately no change on the 20% clearest days and a 10% (1 deciview) improvement in the mid-range days since 1992.³⁹ In the West, since 1992, the 20% clearest days saw a 1.5 deciview improvement and the 20% mid-range days experienced an improvement of 1 deciview.⁴⁰ The 20% haziest days have seen essentially no change overall since 1992 despite a degradation of 1.5 deciviews that occurred from 1997 to 1999.⁴¹ The study indicates that visibility in the East and the West seem to have stabilized (e.g. the visibility problem is not getting worse) and a small amount of improvement has occurred in some areas.

Part II: The Current State of Federal Law

Overview

One question remains yet unanswered: how much of this successful stop of the worsening of the nation's visibility (but relative lack of improvement) can be attributed to the visibility and haze regulations and how much of the progress has occurred because of other regulations or events? All of the EPA studies merely document improvements in or deterioration of visibility across the country without claiming that the visibility rules have done anything to contribute to these trends. As will become clear in this part of the article, given that EPA has enforced its local plume rules only once (against the Navajo Generating Station), and the haze rules have not existed long enough to actually produce any sort of change in visibility (since

passage, they only have set up a monitoring regime and have just begun to set up regional commissions), it would be impossible for EPA to claim that the visibility rules have contributed to this halt in the deterioration of this nation's visibility.⁴²

EPA does assert that the new visibility rules (issued in 1999), in conjunction with numerous other programs will solve the visibility gap sometime in the future.⁴³ However, no actual evidence is produced to indicate that this might actually be the case.⁴⁴ "Besides the Regional Haze Rule [1999 regulations under 40 C.F.R. Part 51, discussed *infra*], EPA has put in place other rules and policies that have had, and will continue to have, a positive impact on visibility in mandatory Federal Class I areas and throughout the country. Title IV of the CAAA (the Acid Rain Program) called for reductions in sulfur dioxide and nitrogen oxide emissions in the 1990s, with additional reductions in the year 2000. Implementation of the Particulate Matter and Ozone National Ambient Air Quality Standards (NAAQS), through their associated emission reductions of nitrogen oxides and particulate matter, is expected to improve visibility in urban and rural areas across the country. Other efforts aimed at reducing sulfur dioxide and nitrogen oxide emissions include the recent NOx State Implementation Plan Call (NOx SIP Call) to reduce point source NOx emissions and the Tier II emission reduction rules aimed at reducing mobile source emissions."⁴⁵ EPA further emphasizes the potential positive impact on visibility of the NAAQS for 2.5 micrometer particulate matter (PM) and ozone and PM by listing them as integral parts of the long-term strategy to address visibility.⁴⁶

In fact, EPA gives credit for past improvements in visibility to other regulations, not the visibility rules. The sulfur dioxide trading program is generally credited with creating most of the progress seen in improving the nation's visibility.⁴⁷ In 1999 sulfate concentrations in the East reached the lowest observed levels on the 20% worst days for the 1990s "with a 19% decline over 1992–1999. This decline in sulfates in the eastern United States and the low 1999 level corresponds to the reported regional SO₂ emissions trends and lower average sulfate aerosol concentrations" caused by the sulfur dioxide trading program under Title IV of the Clean Air Act.⁴⁸ In addition to improvements in the 1990s, EPA credits earlier improvements in summer visibility to reductions in sulfur dioxide. ". . . [S]ummer visibility in the eastern United States improved slightly between 1980 and 1990, and continued to improve between 1991 and 1995. These trends follow overall trends in emissions of sulfur dioxides during these periods."

Why have the visibility regulations done so little to contribute to alleviating the visibility problem? The section that follows presents two plausible theories: that up until the early 1990s, EPA lacked the scientific cer-

tainty to act and once EPA did get the requisite scientific information, EPA lacked the will to act on political economy grounds.

The First Half of the Story—The Lack of Scientific Certainty from 1977 to the Early 1990s

Based mostly on circumstantial evidence readily apparent at the time of passage (1977), Congress thought that EPA would find it relatively easy to arrest visibility deterioration in the nation's parks. Congress did allow that the long-term goal of removing all existing impairment would likely take at least 10 to 15 years.⁴⁹ In hindsight, these assumptions proved too optimistic. Congress relied on the best evidence it had on hand, but, unfortunately, that evidence turned out to be insufficient.

The science available to Congress at the time of enactment indicated that visibility impairment likely resulted from sulfur dioxide, nitrous oxides, and particulate matter.⁵⁰ Circumstantial evidence indicated that a major source of these visibility disrupting emissions were large power-generating plants located near the parks that needed protection.⁵¹ The combination of the scientific evidence and the observed proximity of certain dirty plants to the parks led Congress to place deadlines on the EPA for development of solutions to the visibility problem that it felt were reasonable.⁵² The deadlines included six months to review all Class I areas covered by the legislation and determine which ones needed visibility protection; 18 months to complete a study and report to Congress on available methods for preventing and remedying visibility problems, modeling the extent of the problem, and methods of identifying and quantifying the problem pollutants; and 24 months to promulgate regulations to assure reasonable progress towards both for short-term arresting of the growth of the problem and for long-term alleviation.⁵³

However, Congress' plans were thrown off track when scientists took a hard look at the problem. The deadlines came and went as scientists discovered that visibility impairment was a much more complex problem than previously assumed. Observing the pollution coming from the nearby power plants was the easy, relatively obvious first step.⁵⁴ After that, though, came the task of addressing the regional contributions to the haze problem. Congress did note the possibility that the pollutants contributing to the visibility impairment could come from "regionally distributed sources," meaning that the pollution could be the result of a lot of pollution coming from a lot of different plants all across the region.⁵⁵ Unfortunately, Congress seems to have underestimated the difficulties involved with identifying regional sources, quantifying each source's impact, and coming up with solutions to this multi-pollutant, delocalized problem.

EPA's initial report to Congress in 1979 highlighted the potential complexities and obstacles the agency would encounter in fulfilling Congress' mandate. The EPA began by pointing out that although visibility degradation "was probably the best-understood and most easily measured effect of air pollution," there were actually many areas of research that demanded serious attention before the agency could help clear up the nation's haze problem.⁵⁶ The study indicated that EPA lacked a continuous monitoring system that could establish an empirical baseline to be used in evaluating the impact of individual point sources on the haze problem and to assess the effectiveness of proposed solutions.⁵⁷ EPA also found that it did not sufficiently understand the sources of each contributing pollutant, how the pollutants interacted over long distances, and how to monitor the formation of some of the pollutants as these processes occur far away from the point source emitting the precursors.⁵⁸ The study noted that, in addition to these other problems, the EPA lacked a predictive model to evaluate how potential regulatory actions would affect the occurrence of haze.⁵⁹ To top it all off, EPA stated that any regulatory scheme it came up with would have to account for the multitude of possible sources of visibility impairment, from industrial plumes to natural forest fires.⁶⁰

The Clean Air Act demanded that the EPA "promulgate regulations to assure . . . reasonable progress toward meeting the national goal [of the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I areas]."⁶¹ Supposedly to fulfill this obligation, EPA published regulations in 1980 ("the 1980 regulations") that required states to establish a plan to deal with visibility problems caused by sources proximate to the Class I areas within their jurisdiction.⁶² The plan was to include a 10–15 year plan for achieving the national goal, set up a monitoring network, initiate a study showing which stationary sources were to be subject to regulation, identify the Best Available Retrofit Technology (BART), and contain requirements that plants of a certain size install BART technologies.⁶³ The 1980 rules only addressed "visibility problems 'reasonably attributable' to a specific source or small group of sources"—otherwise known as plume blight problems.⁶⁴ The EPA explicitly deferred implementing national rules designed to cure regional haze until some future date ". . . when improvement in monitoring techniques provides more data on source-specific levels of visibility impairment, regional scale models become refined, and our scientific knowledge about the relationships between emitted air pollutants and visibility impairment improves."⁶⁵

However, even after promulgation of the 1980 regulations, no action was taken against even those proximate plants for which the rules allowed regulators to demand installation of BART technologies. The main

reason for this lack of action was a lack of scientific certainty. Despite the proximity of these plants to national parks, scientists have found it exceedingly hard to trace any particular pollutant to any one plant. Even when scientists thought they had one culprit, it was difficult to definitively say that the plant was contributing to the visibility problem at all, much less in specific amounts.⁶⁶ In the 1980s, it seems reasonable to assume that regulators did not know how difficult tracing pollutants to even proximate sources would turn out to be. In fact, studies in the 1990s confirmed that regional haze was the main cause of visibility impairment and that pursuing local sources would likely have little impact.⁶⁷ As the difficulty in actually assessing responsibility for visibility problems on individual sources became clear, regulators probably backed off trying to enforce their rules. This reversal is quite understandable given the general unpopularity of command and control regulations (of which BART is one) amongst the regulated community. If EPA could not back up a decision to force a company to install BART technologies, then that unpopularity would increase, the companies would probably fight even harder against future visibility standards, EPA would probably be sued, and the legitimacy of EPA's own position would be undermined as companies saw EPA enforcing rules without evidence. Proving this institutional fear of enforcing the 1980 regulations is the fact that only once, with the Navajo Generating Station in Arizona, near the Grand Canyon, has the EPA ever enforced these rules on a company.⁶⁸

EPA's "do nothing" approach may actually have been the most appropriate regulatory strategy. Using Carol M. Rose's typology for which regulatory strategy government should take, EPA seems to have calculated that the costs of regulating so far outweigh the benefits that no action was deemed the best sort of action.⁶⁹ The scientific uncertainty facing EPA over how exactly to go about addressing visibility problems meant that the benefits of regulation were hard to quantify. Against this uncertain level of benefits was arrayed the certainly extremely high administrative costs of creating a whole new regulatory scheme with little data on which to design it, high technological costs of installing lots of control technologies to contain all of the numerous pollutants that must be addressed in order to contain visibility impairment, and the probability that without a proper scientific background, EPA could likely miss significant areas that require legislation (failure costs).⁷⁰

Further compounding EPA's inaction, two court cases combined to deny states the right to try to address visibility concerns on their own, *Vermont v. Thomas* and *Maine v. Thomas*. Vermont submitted its state implementation plan in accordance with the 1980 regulations, but also included a proposal for a federally enforceable long-term plan meant to address the sulfur dioxide

emissions in other states that were the main cause of visibility impairment in Vermont's Class I area, Lye Brook National Wilderness Area.⁷¹ Vermont had concluded that it had done all it could to address visibility in Lye Brook and further action was required in other states to stop sulfur dioxide from blowing into the state and obscuring the wilderness area.⁷² Therefore, Vermont proposed that EPA disapprove the state implementation plans for upwind states.⁷³ EPA agreed that Vermont's visibility problem was caused by other states yet decided to take "no action."⁷⁴ Vermont sued and the court found that, in light of EPA's decision to defer writing regulations dealing with regional haze, there was no basis in the regulations to base Vermont's claim on.⁷⁵ Since EPA had yet to issue regulations on regional haze, Vermont had no right seek enforcement of a regional haze plan.

The decision in *Vermont* was further reinforced by the First Circuit's decision in *Maine v. Thomas*. The First Circuit held that the states and citizens could not compel EPA to write regional haze rules. The court found that EPA's inaction on the haze rule was a "final rule" and thus subject to review as such, but unfortunately the time frame for bringing a review action had already expired.⁷⁶ However, the court stated that the states were not without a remedy: since EPA had bound itself to eventually come up with regional haze rules, a petition to EPA would trigger just such a rulemaking.⁷⁷ This last means of achieving a remedy proved wishful thinking as it took another decade for EPA to finally issue regional haze rules (in 1999), discussed *infra*.⁷⁸

Congress observed EPA's foot-dragging in regards to bringing enforcement actions requiring the installation of BART technologies, the dearth of rules dealing with regional haze, and the relative lack of progress in curing the nation's visibility gap. In order to jumpstart the process and to refocus attention on what Congress considered a serious problem (that EPA was not addressing despite orders), Congress added section 169B with the 1990 Amendments to the Clean Air Act.⁷⁹ Section 169B sought to force EPA into action on regional haze issues.⁸⁰ This new section directed EPA to conduct more visibility studies, to develop interim findings, and to periodically report to Congress trends in visibility improvements.⁸¹ Section 169B also granted EPA authority to set up regional transport commissions and ordered EPA to set up a Grand Canyon visibility transport commission.⁸² Eighteen months after receipt of any recommendations from the Grand Canyon commission, EPA was to issue regional haze regulations.⁸³ EPA set up the Grand Canyon Visibility Transport Commission (GCVTC) in 1991 and its findings are discussed in Part III, *infra*.⁸⁴ Suffice to say here that the GCVTC issued its report on June 10, 1996 and EPA issued notice of proposed rules on July 31, 1997 and promulgated the required rules on July 1, 1999 (discussed *infra*).⁸⁵

Even after the 1990 Clean Air Amendments, EPA continued to do little beyond letting the GCVTC do its studies. EPA stuck to its excuse that it lacked sufficient scientific certainty to issue regional haze rules. This justification took successive hits in 1991 and 1993. In 1991 The National Acid Precipitation Assessment Program (NAPAP) published a comprehensive study of the state of visibility science. The NAPAP report concluded that visibility science had progressed significantly since 1977 and had figured out that sulfates were the major source of light extinction and that the Eastern and Western United States faced differing degrees of visibility impairment produced by different combinations of pollutants.⁸⁶ Soon thereafter, in 1993, the National Academy of Science (NAS) declared that the science was sufficient to deal with regional haze issues.⁸⁷ The NAS report also significantly concluded that the strategy for addressing visibility impairment should involve consideration of multiple sources "simultaneously on a regional basis."⁸⁸ Any strategy attempting to focus on individual point sources "is doomed to failure."⁸⁹

The Second Half of the Story—Political Economy Dictates Inaction from the Early 1990s on to the Present

As EPA's scientific uncertainty began to recede, the political costs of inaction began to rise. The excuse that scientific uncertainty demanded that EPA not act was beginning to lose force. An increase in scientific certainty as to the causes of and solutions for visibility obstruction meant that the costs of administering a program and of possibly missing an important regulatory step dramatically decreased. It still may be true that EPA feels the costs of regulating still outweigh the benefits, especially when the high costs of installing new technologies to control all of the visibility impairing pollutants still exist. However, with this technological cost remaining somewhat constant and the other costs going down, it seems likely that another force is at work now (maybe in addition to the technological cost argument). I theorize that this force is a political economy rationale that tells EPA officials that the technological costs are not worth the political h*** of trying to implement one over-arching, visibility-improving scheme that attempts to regulate all the possible pollutants.⁹⁰ Instead, EPA likely will find it easier to achieve positive change in the visibility arena by incrementally improving regulation on each pollutant individually (e.g. lowering the allowable emissions of sulfur dioxide under the acid rain program, lowering the permitted amounts of particulate matter emissions in the new particulate matter NAAQS, etc.).

At first blush, EPA's issuance of haze regulations in 1999 may seem to indict the claim that EPA is avoiding regulating to alleviate visibility impairment. However, as should become clear shortly, these regulations actual-

ly did very little, and do even less now that the courts found them illegal.

In 1999 EPA promulgated its Regional Haze Rules (sometimes referred to as “the 1999 regulations”).⁹¹ The 1999 regulations applied to all states, not just those that contain Class I areas, because, according to EPA, all states contain sources that emit pollutants that are “reasonably anticipated to contribute to regional haze in a Class I area.”⁹² The Haze Rule stipulated that states must develop a State Implementation Plan (SIP) that provides for reasonable progress toward achieving “natural visibility conditions” in that state’s parks and wilderness areas.⁹³ The regulations set several “reasonable progress goals” including: 1) the state “must provide for an improvement” on the 20% worst days, 2) “ensure no degradation” on the least impaired days, and 3) “determine the rate of progress needed to attain natural visibility conditions by the year 2064.”⁹⁴ In order to measure that these goals are actually achieved, states were required to continually monitor the visibility in the Class I areas and report the results in the standardized deciview scale.⁹⁵ States must develop long-term strategies for achieving visibility improvement and may do so on an extended timeframe if they do so in the context of a regional transport commission.⁹⁶

While this rule certainly sets goals (for the very far future), it does little in terms of actually specifying how to actually achieve those goals. Very little of substantive requirements are included in the Haze Rule. EPA admits this when it states, “. . . EPA is not specifying in this final rule what specific control measures a State must implement in its initial SIP for regional haze. That determination can only be made by a State once it has conducted the necessary technical analyses of emissions, air quality, and the other factors that go into determining reasonable progress.”⁹⁷ Overall, the Haze Rules were one large goal statement without much substance.

The only regulatory requirement EPA did include, a requirement that states identify all major stationary sources subject to BART requirements, was vacated by the D.C. Circuit.⁹⁸ The court found that EPA had actually violated Clean Air Act § 169A by taking too much power for itself and not allowing the states flexibility in determining which plants deserved BART technologies.⁹⁹ The problem with the Haze Rule was that it attempted to mandate that states declare a source BART-eligible “if it can be shown that the source emits pollutants within a geographic area from pollutants can be emitted and transported downwind to a Class I area.”¹⁰⁰ This was problematic for the court because “states must subject BART-eligible sources to BART requirements even absent empirical evidence of that source’s individual contribution to visibility impairment in a Class I area so long as the source is located

within a region that may contribute to visibility impairment.”¹⁰¹

Essentially, the court vacated the most specific section of the Haze Rules. Interestingly, the court declined to vacate the reasonable progress goals as requested by the Sierra Club. The Sierra Club argued that the goals failed to fulfill the Clean Air Act § 169A’s mandate that EPA promulgate rules that assure reasonable progress toward achieving the national goal of restoring natural visibility.¹⁰² The Sierra Club felt that the laws lacked specificity and enforceable regulatory requirements.¹⁰³ The court considered the complaints unripe, especially in consideration of the fact that the court had just remanded the entire set of regulations back to EPA. The court optimistically opined that “we cannot be sure whether on remand EPA will retain its current criteria for evaluating reasonable progress or adopt others. If the invalidation of the group-BART provisions causes EPA to doubt the efficacy of the remaining elements of the Haze Rule, perhaps EPA will see wisdom in some of Sierra Club’s complaints and, for example, increase the percentage of days during which there must be improvement in visibility, or increase the specificity of its criteria for reasonable progress. In light of the uncertainty that our decision creates with respect to the form of the rule that may emerge upon remand, the only prudent course is for us to decline to address Sierra Club’s challenges at this juncture.”¹⁰⁴

In sum, the D.C. Circuit invalidated the only specific regulation EPA had included in the Haze Rule and decline forced the agency to include more specific timetables, goals, and methods of achieving those goals. Now, not only has EPA dragged its feet for about a decade in addressing regional haze, but the agency has written the rules in such a way that the *only* specific standard it included was invalidated for not complying with the Clean Air Act’s distribution of power between the states and EPA. This is particularly devastating when one considers that this rule also appeared to be written in the only way that could reasonably deal with regional haze—by attacking the problem on an area-wide basis, not a site-specific basis, as the National Academy of Science recommended (a site-by-site approach is “doomed to failure”).¹⁰⁵ With the court vacating the BART sections of the 1999 regulations and the vagueness and lack of specificity in the remaining sections, EPA has effectively produced nothing with its Regional Haze Rule. The only substance remaining is a set of vague goals with no specific mechanisms for achieving them.

EPA recently issued notice that it was proposing a new regional haze rule. While it is certainly premature to judge the effectiveness of these rules, some preliminary observations are in order. These proposed 2004 rules are basically the same as the 1999 regulations plus

the removal of the constraints put on state action and the insertion of an appendix to assist states in the calculation of how much visibility improvement is expected from installing BART technologies on an individual plant.¹⁰⁶ These changes seem superficial and are subject to the same complaints as the 1999 regulations. The rule is mostly a list of guidelines, suggestions, and goals with very little substantive requirements. Only the BART rules have a chance of causing significant improvement in visibility impairment, but the timelines are so long and the amount of state power so great, that any substantial improvement caused by these regulations seems many years out, if not decades out.

Part III: Regional Transport Commissions— The Grand Canyon Visibility Transport Commission

Congress granted authority for the establishment of regional transport commissions with the enactment of section 169B of the Clean Air Act in 1990.¹⁰⁷ This regional approach was confirmed by the National Academy of Science as the only viable way of addressing regional haze and the resultant visibility problems.¹⁰⁸ This part of the article deals with the only example of a regional control institution in existence: the GCVTC (later renamed the Western Regional Air Partnership).¹⁰⁹

Several other regional transport commissions exist based on the authority granted in section 169B and reserved in the 1999/2004 regulations by EPA.¹¹⁰ The five commissions created now encompass all U.S. states and several Native American tribes.¹¹¹ The commissions are named the Western Regional Air Partnership (WRAP), the Central States Regional Air Partnership, the Midwest Regional Planning Organization, the Visibility Improvement State and Tribal Association of the Southeast, and the Mid-Atlantic/Northeast Visibility Union.¹¹² However, the other regional transport commissions (not including WRAP) have yet to move beyond the planning stages.¹¹³

Consequently, GCVTC/WRAP is the only regional commission in the world that has moved beyond mere planning. GCVTC/WRAP was designed to attack visibility problems from a regional level and specifically to address haze concerns at the Grand Canyon and 12 neighboring Class I areas.¹¹⁴ EPA officially set up the Grand Canyon Visibility Transport Commission in 1991.¹¹⁵ GCVTC issued its report on June 10, 1996 and EPA incorporated some of the recommendations into the 1999 Haze Rule.¹¹⁶ EPA specifically included all the GCVTC recommendations in the Haze Rule section dealing with the requirements for the GCVTC alone.¹¹⁷

The GCVTC report identified specific pollutants that had escaped extensive scrutiny as sources of visibility impairment and developed strategies to deal with

these and other sources of the haze problem. GCVTC pointed out that dust from roads and fires are significant contributors to regional haze.¹¹⁸ The Commission recommended that further study be done to determine the extent that these sources are affecting visibility.¹¹⁹ EPA mandated in the Haze Rule that the GCVTC do these studies.¹²⁰ GCVTC went on to recommend that a smoke management program be initiated to coordinate efforts to minimize the impact of smoke from fires on visibility.¹²¹ The report also found that pollution from Mexico was contributing to regional haze in the Southwest and recommended that the United States bilaterally negotiate in order to address this problem.¹²²

The GCVTC recognized that air corridors exist (essentially wind currents that blow through a particular area) and that these corridors may provide clean air to a polluted area and thus help with visibility.¹²³ In order to protect these potential sources of clean air, states should monitor areas in and around these corridors in order to ensure that sources are not polluting them.¹²⁴ GCVTC recommended that if it is observed that the air corridors are starting to become polluted, then specific controls on the responsible sources are necessary.¹²⁵

Significantly, the report pointed out that much of the expected future improvement in visibility would come from other air pollution prevention strategies. GCVTC pointed out that air pollution prevention and reduction in general will help visibility and encourages these programs to continue.¹²⁶ The report specifically called for policies that reduce air pollution through energy conservation and promotion of renewable energy resources.¹²⁷ GCVTC also recommended that regions closely monitor the impacts of current requirements under the Clean Air Act, particularly the sulfur dioxide emission targets.¹²⁸ If the targets are exceeded, GCVTC feels regional caps and market-based trading on a regional basis should occur.¹²⁹ The Commission continues to promote existing policies by stating that improvement in visibility was expected from increased tailpipe standards and fuel efficiency requirements on mobile sources.¹³⁰ The GCVTC encouraged EPA to continue to push for stricter requirements for mobile sources.¹³¹ Regional caps would not be feasible given that states lack authority to set vehicle emission standards (except California).

The solutions recommended by the GCVTC report generally concern ensuring that a coordinated effort be utilized in addressing certain sources of pollution and encourage states and EPA to continue addressing pollution with other laws. The most substantial action GCVTC/WRAP has taken in regards to air quality is that it has begun to set up a regional trading program for sulfur dioxide.¹³² EPA has reserved for the states the opportunity to adopt regional trading schemes “in lieu

of BART.”¹³³ These region-wide trading schemes could provide for cost-effective lowering of pollutants in a smaller geographic area. Small spatial plans could decrease pollutants in regions significantly over national standards if the caps are set at a low enough level. Unfortunately, GCVTC/WRAP’s regional trading scheme is yet to become operational. The GCVTC/WRAP is also considering addressing regional haze by voluntarily joining the Interstate Air Rule that seeks to minimize interstate transportation of sulfur dioxide and nitrogen oxide.¹³⁴

Part IV: Pulling It All Together—Conclusions

Overall, the visibility rules have been a resounding failure. They have not actually achieved any substantial improvement in visibility nor were they responsible for the arresting of the deterioration that has been observed. Other Clean Air Act regulations and statutes have achieved all the observed progress in this nation’s national parks and wilderness areas.

It is progress to have halted further deterioration and to have improved visibility even by a token amount in some areas, but there is no evidence that the visibility rules did any of the work. The sulfur dioxide reductions stemming from Title IV of the Clean Air Act (the Acid Rain Program) are credited with virtually all of the observed progress. It also seems reasonable to assume that the visibility rules themselves will provide little future progress. Consider these facts: 1) the visibility rules have been enforced a grand total of one time (on the Navajo Generating Station); 2) the visibility rules contain no substantial requirements that states do any particular regulatory activity or that any firm goals be achieved; and 3) the courts have found that EPA has exceeded its authority when it tried to impose the one firm requirement on the states, a rule that made states put BART on sources contributing to area-wide pollution. The only hope seems to be that the states exercise their authority to make region-wide decisions in the context of regional transport commissions. This authority does not stem from EPA regulations but from a Congressional mandate in the Clean Air Act.

To be fair, the visibility rules have done some positive things in regards to potentially addressing the visibility problem. However, these rules were dragged out of EPA after it delayed for years. It took two acts of Congress, a tongue-lashing by the National Academy of Science, and over 26 years for EPA to cumulatively come up with minimal progress. In fact, this progress can actually be construed more as delay tactics since the rules continue to lack substantive requirements. This delay, though, may be understandable in light of the extreme costs, in terms of money and political capital, of implementing a program that simultaneously addresses all visibility-impairing pollutants. Of course,

EPA did try to include one requirement, that BART be imposed on a geographic area, but that rule was vacated by the courts. The actual progress consists of setting up a monitoring system (at the urging of Congress), compiling scientific evidence (but not bringing it all together until Congress and the National Academy of Science forced EPA to), sanctioning regional transport commissions (though Congress mandated their existence under the Clean Air Act § 169B), and providing focus to the visibility problem (though, again, Congress did this by passing the visibility sections of the Clean Air Act).

The most significant step, in my mind, was the combination of a regional focus with the focusing of attention on the visibility problem. As the National Academy of Science says, the only way to solve the visibility problem is through regional coordination and a focus on site-specific actions is “doomed to failure.”¹³⁵ I believe Congress and the scientific community deserve credit for these steps as EPA dug its heels as much as possible in implementing any regional strategy. Additionally, Congress deserves credit for focusing scientists, regulators, and the public’s attention on the problem of visibility (as does the media and public for bringing it to Congress’ attention). The shift in publicity and attention helped highlight that visibility was a problem and some sort of solution was needed. “. . . [A]genda shifts frequently come about because people become aware of new aspects of old problems, and this shift in attentiveness causes changes in choice. As the public debate develops, a process of noncontradictory argumentation occurs, with each side stressing different attributes of a problem. As individuals move from one dimension of evaluation to a second dimension that is being stressed . . . , their policy choices often change.”¹³⁶ This process of focusing attention on visibility has led to recognition that regional solutions are necessary and that states need to cooperate in order to solve this inter-state externality.

Regional cooperation is the key to solving haze problems throughout the world. States must coordinate actions together on every responsible pollutant. When one considers that haze is caused by a combination of nitrogen oxides, sulfur dioxide, particulate matter, carbon, smoke, and dust, and that all of these pollutants can potentially travel across borders, it becomes clear that only regional cooperation can solve the problem. The visibility debate did provide the impetus to discovering that regional solutions were necessary. However, it may not be necessary to use visibility rules to achieve the national goal of restoring natural visibility conditions. The visibility rules at this point become duplicative of other Clean Air Act policies. Each pollutant, except dust which is not a traditional pollutant, is already being dealt with in a different section of the

Clean Air Act or in the political process (even fire fighting is being coordinated regionally—not to deter visibility, but to prevent fires and to harvest wood). The two pollutants that are not dealt with in the Clean Air Act, dust and smoke, are not actually considered pollutants by the government. I doubt they will ever be covered by the Clean Air Act as they are considered “natural” and can be dealt with in other mediums. People are generally less concerned with the visibility problems caused by forest fires than by the damage done by those fires. Because of this, fire management will likely remain outside the scope of the Clean Air Act, but in creating fire policy, states will probably consider visibility protection as a secondary benefit that comes from a good fire prevention strategy.

Is this a bad thing that the visibility rules may have outlived their usefulness in terms promoting further pollution prevention? Not necessarily, if the visibility problem is actually solved through other means like just ratcheting down on allowable pollution levels under the sulfur dioxide, nitrogen oxide, etc. sections of the Clean Air Act. On the other hand, the visibility statutes as passed by Congress are the forums in which the regional focus has been implemented. But, the Haze Rules seem to provide little of value beyond this regional focus, and the regional dimension has already been implemented. It seems that the prudent course of action is to stop worrying about specific haze regulations and open up the regional transport commissions into true region-wide enforcement bodies that will set up regional schemes for all pollutants, with visibility improvement being a secondary benefit, not the main focus—or maybe visibility improvement can be a primary goal that drives control of all the pollutants to even lower levels. The main goal of the regional institutions should be to lower pollution in entire geographic areas for all pollutants, thus helping solve the inter-state externality problem this nation faces and along the way, piercing the haze that obscures this nation’s stunning vistas.

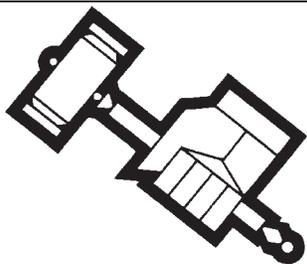
Endnotes

1. The 1977 Clean Air Act Amendments were enacted under Pub. L. 95-95, 91 Stat. 685 (Aug 7, 1977). The Prevention of Significant Deterioration program is codified at 42 U.S.C.S. §§ 7470–7479 (2003). The visibility protections are located in sections 169A and 169B at 42 U.S.C.S. § 7491–7492 (2003).
2. *A Legislative History of the Clean Air Act Amendments of 1977, a Continuation of the Clean Air Act Amendments of 1970*, together with a *Section-by-Section Index, Before Senate Committee on Environment and Public Works*, 95th Congress, 2nd Session, pp. 320–21, 535 (1978). COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, CLEAN AIR ACT AMENDMENTS OF 1977: REPORT, H.R. REP. NO. 95-294, at 105, 137–38, 146, 203–06 (1977). See also *Chevron U.S.A., Inc. v. United States Environmental Protection*, 658 F.2d 271, 272 (5th Cir. 1981) for more legislative history of the 1977 Clean Air Act Amendments dealing with visibility.
3. 42 U.S.C.S. § 7491 (a)(1).
4. 45 F.R. 80084 (1980).
5. *Protecting Visibility: An EPA Report to Congress*, EPA-450/5-79-008, chapter 2, p. 10 (EPA, October 1979), available at http://yampa.cira.colostate.edu/improve/Publications/Principle/EPA_Report/chapter2.pdf.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at chapter 2, p. 17.
10. *Id.* at chapter 2, p. 10.
11. *Id.* at chapter 2, p. 31; *Id.* at chapter 4, pp. 2-3, available at http://yampa.cira.colostate.edu/improve/Publications/Principle/EPA_Report/chapter4.pdf; National Research Council, National Academy of Science Committee on Haze in National Parks and Wilderness Areas, National Academy Press, Washington, DC, 1993, p. 29-30, 36, available at <http://www.nap.edu/books/0309048443/html/index.html>; and *Visibility in Mandatory Class I Areas, 1994-1998, A Report to Congress*, p. 1-2 (EPA, Nov 2001) (available at <http://www.epa.gov/oar/visibility/report/index.html>).
12. *Protecting Visibility: An EPA Report to Congress*, EPA-450/5-79-008, chapter 2, p. 27 (EPA, October 1979).
13. *Id.* at Chapter 2, pp. 25-27.
14. *Id.*
15. 64 F.R. 35714, 35718 (1999). IMPROVE began by monitoring 20 Class I areas in 1985. The number of locations expanded to 70 in 1999. The year 2001 saw an increase in the number of locations to a total of 143 sites. While not all the sites are located within the Class I areas the Clean Air Act specifically protects visibility in, they are located in such a way as to cover all 154 Class I areas, plus a few other locations included to cover cities and localities with low visibility and to help make nationwide trend studies possible. See the *IMPROVE Monitoring Program Overview*, frames 3 and 4 (EPA, March 2001), available at http://yampa.cira.colostate.edu/improve/Overview/IMPROVEProgram_files/frame.htm and *National Air Quality and Emissions Trends Report, 1999*, p. 99 (EPA).
16. 42 U.S.C.S. § 7491 (a)(2) (2003).
17. 42 U.S.C.S. § 7472 (a) (2003).
18. 42 U.S.C.S. § 7491 (a)(2) (2003).
19. 40 C.F.R. §§ 81.401-437. For mention of the 2 sites not included, see *Maps of Protected Areas*, available at <http://www.epa.gov/air/visibility/maps.html>. The official list of the 156 Class I sites subject to visibility protections is located in 40 C.F.R. §§ 81.401-437.
20. *Id.*
21. *Spatial and Seasonal Patterns and Temporal Variability of Haze and its Constituents in the United States*, IMPROVE Report III, May 2000, s-4, s-5, available at <http://vista.cira.colostate.edu/improve/Publications/Reports/2000/2000.htm>.
22. Available at http://vista.cira.colostate.edu/improve/Data/IMPROVE/summary_data.htm.
23. *Id.*
24. http://vista.cira.colostate.edu/improve/Tools/Vis_Haze_Metrics.htm.
25. *Visibility in Mandatory Class I Areas, 1994-1998, A Report to Congress*, p. ES-1 (EPA, Nov 2001), available at <http://www.epa.gov/oar/visibility/report/index.html>.

26. *Id.* at ES-1 to ES-3.
27. 64 F.R. 35714, 35718 (July 1, 1999).
28. *Id.*
29. *Visibility in Mandatory Class I Areas, 1994-1998, A Report to Congress*, pp. ES-5 to ES-6 (EPA, Nov 2001).
30. *Id.* at ES-5.
31. *Id.*
32. *Id.* at ES-6.
33. *Id.*
34. *Id.* at ES-5 to ES-6.
35. *National Air Quality and Emissions Trends Report, 1999*, at 106 (EPA, March 2001).
36. *Id.* at 106, 109.
37. *Id.* at 99 and 104-05.
38. *Id.* at 105.
39. *Id.*
40. *Id.*
41. *Id.*
42. These arguments are discussed more fully in *Part II: The Current State of Federal Law*. The citation for EPA only enforcing the haze rules once is Wildlaw.org's *Basics of Environmental Law*, chapter 3, Part B, The Clean Air Act, available at <http://www.wildlaw.org/Eco-Laws/basics.htm> (last modified 1998). The court ruling upholding this enforcement action is *Central Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531 (9th Cir 1993). The argument about existence of the rules relies on the fact that EPA only passed regional rules in 1999. 64 F.R. 35714 (July 1, 1999).
43. See 64 F.R. 35714, 35717 and 35719; *National Air Quality and Emissions Trends Report, 1999*, p. 114 (EPA, March 2001); and *Visibility in Mandatory Class I Areas, 1994-1998, A Report to Congress*, p. ES-4 (EPA, Nov 2001).
44. See 64 F.R. 35714.
45. *Visibility in Mandatory Class I Areas, 1994-1998, A Report to Congress*, p. ES-4 (EPA, Nov 2001).
46. 64 F.R. 35714, 35719.
47. *National Air Quality and Emissions Trends Report, 1999*, 102, 106 (EPA, March 2001).
48. *Id.* at 106.
49. 42 U.S.C.S. § 7491 (b)(2)(A) (2003).
50. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, CLEAN AIR ACT AMENDMENTS OF 1977: REPORT, H.R. REP. NO. 95-294, at 137, 204-05 (1977).
51. Congress seemed distinctly concerned with the impact of the Four Corners Power Plant in New Mexico and the Navajo Generating Station in Arizona and their effects on the Grand Canyon. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, CLEAN AIR ACT AMENDMENTS OF 1977: REPORT, H.R. REP. NO. 95-294, at 204-05 (1977).
52. *A Legislative History of the Clean Air Act Amendments of 1977, a Continuation of the Clean Air Act Amendments of 1970, together with a Section-by-Section Index, Before Senate Committee on Environment and Public Works, 95th Congress, 2nd Session*, pp. 534, 535 (1978). COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, CLEAN AIR ACT AMENDMENTS OF 1977: REPORT, H.R. REP. NO. 95-294, at 206 (1977).
53. 42 U.S.C.S. § 7491 (a)(2), (a)(3), and (a)(4).
54. This later turned out to be not quite so "obvious" or "easy." Discussed *infra* at Part II: *The Current State of Federal Law*, specifically the 1980 regulations (40 C.F.R. Part 51).
55. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, CLEAN AIR ACT AMENDMENTS OF 1977: REPORT, H.R. REP. NO. 95-294, at 204 (1977).
56. *Protecting Visibility: An EPA Report to Congress*, EPA-450/5-79-008, chapter 1, p. 6 (different versions are variously paginated), (EPA, October 1979), available at http://yampa.cira.colostate.edu/improve/Publications/Principle/EPA_Report/ExecSumCH1.pdf.
57. *Id.* at chapter 1, p. 8.
58. *Id.* at chapter 1, p. 9.
59. *Id.* at chapter 1, p. 11.
60. *Id.* at chapter 1, p. 13.
61. 42 U.S.C.S. § 7491(a)(4) (2003). The national goal is quoted from 42 U.S.C.S. § 7491(a)(1) (2003).
62. 45 F.R. 80084.
63. *Id.*
64. 64 F.R. 35714, 35715 (1999).
65. 45 F.R. 80084.
66. National Research Council, National Academy of Science Committee on Haze in National Parks and Wilderness Areas, National Academy Press, Washington, DC, 1993, p. 240-41.
67. *Id.*
68. See Wildlaw.org's *Basics of Environmental Law*, chapter 3, Part B, The Clean Air Act (available at <http://www.wildlaw.org/Eco-Laws/basics.htm>). The court ruling upholding this enforcement action is *Central Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531 (9th Cir. 1993).
69. Carol M. Rose, *Rethinking Environmental Controls: Management Strategies For Common Resources*, 1991 Duke L.J. 1, 17 (1991).
70. *Id.* at 12.
71. *Vermont v. Thomas*, 850 F.2d 99, 101 (2d Cir. 1988).
72. *Id.*
73. *Id.*
74. *Id.* at 102.
75. *Id.* at 103-04.
76. *Maine v. Thomas*, 874 F.2d 883, 887-88 (1st Cir. 1989).
77. *Id.* at 890.
78. 64 F.R. 35714 (July 1, 1999).
79. *Clean Air Act Amendments of 1989*, 101st Congress, 2nd Session, 136 Cong. Rec. S. 2875, 2876-2879 (1990).
80. *Id.* See also *American Corn Growers Association v. EPA*, 291 F.3d 1 (D.C. Cir. 2002).
81. 42 U.S.C.S. § 7492 (2003).
82. *Id.* at (c) and (f).
83. *Id.* at (e)(1).
84. 56 F.R. 57522 (November 12, 1991) and 62 F.R. 41138 (July 31, 1997).
85. *Grand Canyon Visibility Transport Commission, Recommendations for Improving Western Vistas, Report to U.S. EPA*, June 10, 1996 (available at <http://www.westgov.org/wga/publicat/epafin.htm>). Regional Haze Rules promulgated in 64 F.R. 35714 (July 1, 1999).

86. National Acid Precipitation Assessment Program (NAPAP), *Acid Deposition: State of Science and Technology, Report 24, Visibility: Existing and Historical Conditions—Causes and Effects*, 1991, p. 114, *available at* [http://yampa.cira.colostate.edu/improve/Publications/Principle/NAPAP_SOS/Low%20Res/napap%20\(low\).htm](http://yampa.cira.colostate.edu/improve/Publications/Principle/NAPAP_SOS/Low%20Res/napap%20(low).htm).
87. National Research Council, National Academy of Science Committee on Haze in National Parks and Wilderness Areas, National Academy Press, Washington, DC, 1993, p. 242, *available at* <http://www.nap.edu/books/0309048443/html/index.html>.
88. *Id.* at 240.
89. *Id.*
90. See Robert N. Stavins, *Market-Based Environmental Policies: What Can We Learn From U.S. Experience (And Related Research)?* (July 2, 2003).
91. 64 F.R. 35714 (July 1, 1999).
92. 64 F.R. 35714, 35721.
93. 40 C.F.R. § 51.308(d)(1).
94. 40 C.F.R. § 51.308(d)(1). See also 64 F.R. 35714, 35734.
95. 40 C.F.R. § 51.305 and 51.301.
96. *Id.* at § 51.306 and 51.308(c).
97. 64 F.R. 35714, 35721.
98. *American Corn Growers Association v. EP*, 291 F.3d 1 (D.C. Cir. 2002).
99. *Id.* at 22–23.
100. 64 F.R. 35714, 35740.
101. *American Corn Growers Association v. EPA*, 291 F.3d 1 (D.C. Cir. 2002).
102. *Id.* at 36.
103. *Id.* at 37.
104. *Id.* at 38–39.
105. 64 F.R. 35714, 35739 and National Research Council, National Academy of Science Committee on Haze in National Parks and Wilderness Areas, National Academy Press, Washington, DC, 1993, p. 240.
106. Proposed Rulemaking: Guidelines for Best Available Retrofit Technology (BART) Determinations Under the Regional Haze Rule and Amendments to the Regional Haze Rule (EPA, Signed April 15, 2004), pp. 14–16, *available at* <http://www.epa.gov/air/visibility/bartproposal41504.pdf>.
107. 42 U.S.C.S. § 7492 (c) (2003).
108. National Research Council, National Academy of Science Committee on Haze in National Parks and Wilderness Areas, National Academy Press, Washington, DC, 1993, p. 240.
109. See online: <http://www.epa.gov/air/visibility/regional.html>.
110. See 42 U.S.C.S. § 7492 (c) and 40 C.F.R. §§ 51.306 and 51.308(c).
111. See online: <http://www.epa.gov/air/visibility/regional.html>.
112. *Id.*
113. Also worthy of note is the fact that the United States appears to be the only country that has a specific regulatory scheme just for visibility, much less established regional commissions. According to the United Kingdom’s Department for the Environment, Food and Rural Affairs visibility “is not perceived to be a major issue” in the UK or throughout Europe, despite it being a problem. The UK expects that its efforts to control other air pollutants will have the secondary effect of helping to improve visibility. Some improvement in visibility is expected simply by addressing sulfur dioxide, nitrogen oxide, and particulate matter. Department for the Environment, Food and Rural Affairs, *An Economic Analysis of the National Air Quality Strategy Objectives: An Interim Report*, §§ 5.3.4, 5.4.3 (February 5, 1999), *available at* <http://www.defra.gov.uk/environment/airquality/naqs/ea/05.htm>.
114. See 42 U.S.C.S. § 7492 (f) and 56 F.R. 57522 (November 12, 1991).
115. 56 F.R. 57522.
116. *Grand Canyon Visibility Transport Commission, Recommendations for Improving Western Vistas, Report to U.S. EPA*, June 10, 1996 and 64 F.R. 35714, 35717 (July 1, 1999).
117. 40 C.F.R. § 51.309.
118. *Grand Canyon Visibility Transport Commission, Recommendations for Improving Western Vistas, Report to U.S. EPA* at iii and iv.
119. *Id.*
120. 40 C.F.R. § 51.309.
121. *Grand Canyon Visibility Transport Commission, Recommendations for Improving Western Vistas, Report to U.S. EPA* at iv and 50.
122. *Grand Canyon Visibility Transport Commission, Recommendations for Improving Western Vistas, Report to U.S. EPA* at iii.
123. *Id.* at 52.
124. *Id.* at 52–53.
125. *Id.* at 53.
126. *Id.* at 2 and 30.
127. *Id.* at 30–32.
128. *Id.* at 34–36.
129. *Id.* at 36.
130. *Id.* at 39.
131. *Id.*
132. See *Western Air Quality*, Western Governor’s Association, Policy Resolution 02–06 (June 25, 2002), p. 1, *available at* http://www.westgov.org/wga/policy/02/airquality_06.pdf.
133. 64 F.R. 35714, 35739.
134. *Regional Haze, Western Partnership Seeks More Dialogue With EPA on Extending Interstate Air Rule*, Vol. 35, No. 15 BNA Environmental Reporter 752 (April 9, 2004).
135. National Research Council, National Academy of Science Committee on Haze in National Parks and Wilderness Areas, p. 240.
136. Bryan Jones, *Reconceiving Decision-Making in Democratic Politics*, p. 25 (1995).

Jeffrey K. Roberson is a student at New York University School of Law and a second place winner in the Section’s Environmental Law Essay Contest.



Administrative Decisions Update

Prepared by Jeffrey L. Zimring

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law

by
RGLL, INC., JAMES METZ, AND LAUREN SIMONS,
Respondents

Commissioner's Decision and Order

January 21, 2005

Background

Department of Environmental Conservation ("DEC") staff brought an enforcement action against RGLL, Inc. ("RGLL"), James Metz, and Lauren Simons (together, the "Respondents") because of deficiencies in the manner in which seven petroleum bulk storage ("PBS") facilities were being operated at gasoline stations in Rensselaer and Columbia Counties. The action involved violations of PBS testing and monitoring requirements and certain spill reporting procedures. Additionally, DEC staff claimed that the PBS facilities had not been registered properly since June 2002. The lack of registration, the DEC asserted, was due to the fact that RGLL, the owner of the PBS facilities and a Delaware corporation, had been informed by the New York Department of State that, due to a failure of the corporation to comply with certain New York Tax Law provisions, it was no longer authorized to conduct business in New York. Therefore, the RGLL's registration of the PBS facilities should not be recognized.¹

DEC staff argued that without authorization to conduct business in this state, the corporate Respondent was not a "person" recognized by New York's Environmental Conservation Law ("ECL") that can be considered an "owner" of a PBS facility.² RGLL, however, maintained that authorization for a foreign corporation to conduct business in New York is not a prerequisite to that corporation's being considered a "person" as that term is used in DEC regulations. Further, RGLL's lack of authorization to conduct business in New York is easily remedied by simply filing the appropriate forms with the Department of State and paying the fees due to the State.

Administrative Law Judge ("ALJ") Daniel P. O'Connell, in considering DEC staff's motion for an order without a hearing, agreed with DEC staff to the extent that violations of the PBS testing, monitoring and spill reporting requirements had been violated. The ALJ disagreed, however, with DEC staff that the revocation of the corporate respondent's authorization to conduct business in New York rendered it incapable of registering the PBS facilities as the owner under DEC regulations. DEC staff did not produce any evidence that RGLL was not a valid corporate entity or that it did not have legal or equitable title to the PBS facilities at issue. Furthermore, ALJ O'Connell ruled that DEC staff failed to produce any evidence that Mr. Metz and Ms. Simons, corporate officers of RGLL, should be held personally liable for violations attributable to the corporation.

Commissioner's Decision and Order

The Commissioner adopted each of the ALJ's findings of fact with respect to the violations of the operating requirements for the PBS facilities. Moreover, the Commissioner supports the ALJ's determination that the lack of authorization of a foreign corporation is not relevant to the question of ownership of a PBS facility. There is no statutory or regulatory provision addressing the domestic, foreign or authorized status of a corporation with respect to the application of the ECL. Moreover, the only penalty for a foreign corporation's failure to maintain authorization to conduct business in New York is the inability of that corporation to maintain an action or proceeding in this State.³ There is no provision in the General Business Law (or any other statute) that acts to deprive an unauthorized foreign corporation of title to property in this State. Therefore, the Commissioner dismissed DEC staff's charge alleging that RGLL failed to properly register the PBS facilities.

The Commissioner also agreed with the ALJ with respect to the imposition of personal liability on the corporate officers of RGLL. There was no indication that the corporate officers personally engaged in the conduct that is violative of the statutory and regulatory requirements. Additionally, no facts were developed that provide a ground for piercing RGLL's corporate veil. Final-

ly, DEC staff did not establish that the officers could be held liable for wrongful management of the corporation. Therefore, the charges against the individual Respondents were dismissed.

Conclusion

DEC staff established that the PBS facilities were not operated and maintained within the statutory and regulatory parameters. The Commissioner issued an Order providing for civil penalties against the corporate owner of the PBS facilities and directions to bring the facilities into statutory and regulatory compliance. The fact that RGLL was not authorized to conduct business in New York was not relevant in determining whether the corporation owned the PBS facilities and had properly registered them. Finally, there was no basis for imposing the liabilities of the corporation for violating the regulations on the individual corporate officers.

Endnotes

1. There was no dispute that representatives of RGLL had attempted to register the PBS facilities on RGLL's behalf.
2. See generally N.Y. Gen. Bus. L. § 1301.
3. See N.Y. Gen Bus. L. § 1312.

* * *

In the Matter of the Application for Permits to Expand a Rock Quarry Mine in the Town of Fishkill, Dutchess County, by Thalle Industries, Inc.

November 3, 2004

Decision of the Deputy Commissioner¹

Background

Thalle Industries (the "Applicant") has conducted mining operations at a rock quarry on the east side of Route 9 in the Town of Fishkill since the early 1950s. In contemplation of an expansion of the mining operation, the Applicant has applied for a mined land reclamation permit, a variance from minimum setback requirements, a state pollutant discharge elimination system ("SPDES") permit, and an air pollution control permit. After an issues conference, Administrative Law Judge ("ALJ") Edward Buhrmaster ruled that there were no issues associated with the project that required adjudication. Fishkill Ridge Community Heritage ("FRCH"), a proposed intervener in the Applicant's permit proceedings, however, appealed the ALJ's ruling that no substantive and significant issue with respect to the proposed expansion's effect on the timber rattlesnake and its habitat was raised in the issues conference. FRCH argued that the project site contains habitat suitable for timber rattlesnakes and that the site's proximity to

active dens of the snakes raises a possibility that the snakes will inhabit or use the site, particularly during the summer months. Therefore, the FRCH asserts, the project will cause an illegal "taking" of a species designated as "threatened" in New York State.

Post-Issues Conference Submission of Affidavits

After the issues conference, but before the ALJ had issued his Rulings, FRCH submitted six affidavits purporting to document the existence of timber rattlesnakes on, or in close proximity to, the project site. The Applicant and DEC staff were given the opportunity to reply to FRCH's post-issues conference submissions. DEC staff's reply included an affidavit that addressed and effectively refuted each of the points raised in FRCH's affidavits. In his Rulings on Issues and Party Status, ALJ Buhrmaster considered all of FRCH's submissions, including the post-issues conference affidavits, and concluded that FRCH had failed to meet its burden of persuasion regarding the need to adjudicate issues associated with timber rattlesnakes.

FRCH Appeal

On appeal to the Commissioner, FRCH argued that the Applicant had failed to fully evaluate the project's potential impact on the timber rattlesnake and its habitat, and, therefore, the record provided an inadequate basis on which to make the required SEQRA findings. FRCH criticized the ALJ's Rulings in that the ALJ accepted expert offerings from the Applicant's consultants (described by FRCH as lacking necessary credentials to study timber rattlesnakes) and rejected "expert testimony" offered by FRCH's two snake consultants. FRCH also maintained that reported rattlesnake sightings in the vicinity of the project cast doubt on the Applicant's on-site snake surveys conducted in 1996, 1999 and 2000 and that a new survey should be conducted. Finally, FRCH disputed the ALJ's ruling that FRCH did not demonstrate "good cause" for allowing the six post-issues conference affidavits be added to the record.²

Replies to the FRCH Appeal

In its response to FRCH's appeal, the Applicant argued that FRCH submitted only hearsay and speculation regarding the presence of timber rattlesnakes at the project site. Further, it noted that the snake surveys conducted by its consultants were specifically timed to coincide with the spring emergence of the timber rattlesnake or with the rattlesnake's movement to summering habitat. Moreover, the Applicant maintained that FRCH had not demonstrated good cause for the submission of its six affidavits offered to support its allegation that timber rattlesnakes were present on the project site after the close of the issues conference record.

DEC staff responded with an argument that FRCH's contentions about the timber rattlesnake were not supported by fact and that the information presented by FRCH was contradictory and unreliable. Staff also disagreed with an FRCH conclusion that the presence of copperhead snakes is an indication of the presence of timber rattlesnakes. DEC staff agreed with the Applicant in that FRCH did not establish good cause for submitting six affidavits after the close of the issues conference.

FRCH Reply and Responses

Although not authorized by the Commissioner or the ALJ, FRCH filed a reply to the Applicant's and DEC staff's response to its appeal. In the reply, FRCH argued that neither the Applicant nor DEC staff addressed its contention that there are large areas of timber rattlesnake denning habitat within 500 meters of the project site or that there is a "reasonably high probability" that there are active den sites near the proposed quarry. It also reiterated its argument that the Applicant's consultants were not qualified to conduct timber rattlesnake surveys.

Because of the unauthorized reply by FRCH, the Applicant and DEC staff were given the opportunity to respond to FRCH's arguments. Both used the opportunity to argue that the unauthorized reply should be stricken from the record. Substantively, DEC staff elected to rest on the record already compiled. The Applicant, however, provided additional rebuttal to the points raised in FRCH's reply. Specifically, the Applicant noted that the ALJ had found that the only timber rattlesnake dens are west of the quarry and isolated from the project by the busy Route 9. The Applicant asserted that the ALJ had considered the adequacy of the Applicant's snake surveys and specifically ruled that there was no need for additional surveys. Additionally, the ALJ's Ruling addressed the qualifications of the Applicant's consultants and found them acceptable. Finally, the Applicant argued that, the late submission notwithstanding, the ALJ had fully considered the post-issues conference affidavits and applied the substantive and significant standard correctly.

The Deputy Commissioner noted that the reply submitted by FRCH was not authorized by Department regulations. Further, unauthorized submissions are not automatically entitled to consideration. The Deputy Commissioner decided, however, to exercise his discretion and allow the reply into the record, noting that any prejudice to the parties was cured by giving them the opportunity to comment on FRCH's reply.

Discussion

The ALJ must determine the existence of an adjudicable issue in light of permit applications and related

documents, draft permits, any petitions for party status, the issues conference record, and any authorized written submissions. Further, the ALJ must make a judgment as to the strength of the proof offered by a potential party while keeping in mind that adjudication is appropriate for true factual issues that are of consequence to the proposed project's approval; it is not for settling academic debates whose outcome will not affect any permit approval or condition. Substantial deference is accorded the ALJ with respect to the factual determinations on which an issues ruling is based. On an appeal to the ALJ's Ruling, the Commissioner will only conduct an independent review of the record upon a determination that the ALJ has applied the substantive and significant standard improperly.

The ALJ correctly applied the substantive and significant standard to the issues proposed by the proposed interveners to this proceeding. The Deputy Commissioner described the Rulings as thorough and specifically addressing the concerns of FRCH with respect to denning, transient and summering habitat of the timber rattlesnake. The record fully supported the ALJ's Ruling that FRCH had failed to meet its burden of persuasion with respect to a significant and substantive issue. Although the Deputy Commissioner agreed with the ALJ that FRCH failed to demonstrate good cause for the late submission of the six affidavits, he refused to disturb the ALJ's decision to allow them into the record. Moreover, the ALJ fully considered the affidavits when issuing his Ruling.

FRCH's Submission of "New Information"

On April 16, 2004, five months after the ALJ issued his Rulings, FRCH submitted a document titled "March 2004 Assessment of Potential Impacts to Eastern Timber Rattlesnakes Related to the Proposed 'Sterling Forge Estates' Project, Town of Tuxedo, New York" (the "Assessment"). FRCH argued that the Assessment confirmed certain key facts contained in its previously submitted affidavits (including those submitted at the close of the issues conference record). Although the Deputy Commissioner noted that the Assessment and its introductory letter largely repeated previously argued points, he, nevertheless, admitted the Assessment (as well as response submissions from the Applicant and the DEC staff) to the record because it contained some information relevant to the proceedings.

In response letters to the Assessment, the Applicant and DEC staff rebutted each point made by FRCH with respect to the Assessment's "findings." The Deputy Commissioner acknowledged findings in the ALJ's Rulings that the surveys conducted by the Applicant were appropriately timed and comprehensive. The six post-issues conference affidavits, also referenced in FRCH's letter accompanying the Assessment, were also fully

considered by the ALJ in his formulation of the Rulings. Moreover, the Applicant and DEC staff made compelling arguments distinguishing the site studied for the Assessment and the site of the Applicant's proposed mine expansion. Notably, the Assessment considered an area twenty times larger than the Applicant's site that is bordered on all sides by undeveloped, undisturbed and verified timber rattlesnake habitat. The project site, in contrast, is near only two known rattlesnake dens separated from the site by a busy highway (Route 9) and does not contain any good potential rattlesnake basking areas.

The Deputy Commissioner, therefore, found no facts in FRCH's April 16, 2004, submission that supports its contention that the Applicant's permit application was deficient with respect to the project's effects on the timber rattlesnake or its habitat. Moreover, neither the Assessment nor its cover letter provide any basis for challenging the ALJ's determination that there are no adjudicable issues raised by the Applicant's permit proceedings.

Conclusion

The ALJ's Rulings are affirmed. There are no matters that require adjudication with respect to the Applicant's permit application. The matter is remanded to DEC staff for permit issuance pursuant to SEQRA and other relevant statutes subject to conditions agreed to during the issues conference.

Endnotes

1. By memorandum dated October 8, 2004, DEC Commissioner Crotty delegated decision-making authority in this proceeding to Carl Johnson, Deputy Commissioner, Air and Waste Management.
2. See 6 N.Y.C.R.R. § 624.5(c)(2)(i).

* * *

In the Matter of the Proposed Field-wide Spacing and Integration Rules for the Terry Hill South Field, pursuant to Article 23 of the Environmental Conservation Law and Parts 550 through 559 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

First Interim Decision

December 21, 2004

Department of Environmental Conservation ("DEC") commenced proceedings pursuant to 6 NYCRR Part 624 to establish field-wide spacing and integration rules for the Terry Hill South natural gas field (the "Field"). Administrative Law Judge ("ALJ") Maria Villa

presided over an issues conference in which several parties petitioned for party status and attempted to raise adjudicable issues. The ALJ found no adjudicable issues. This First Interim Decision addresses that portion of the ALJ's Ruling that concerns the gas well spacing for the Field.

Background and Proceedings

Fairman Drilling Company ("Fairman") and DEC staff entered into a stipulation concerning the spacing of natural gas wells within the Field and integration of mineral rights interests within the spacing units. Fortuna Energy, Inc. ("Fortuna"), subsequently obtained Fairman's interest in the development of the Field. DEC staff referred the petition to the DEC's Office of Hearings and Mediation Services after various owners of the mineral rights to the Field (the "Petitioners") filed a consolidated petition challenging the size and configuration of the spacing units. Petitioners also challenged the propriety of the use of a stipulation between and Fortuna and the DEC that could affect their interests in the development of the Field.

After the legislative hearing, the issues conference and the submission of post-issues conference briefs, the ALJ issued her Rulings on Issues and Party Status. The ALJ rejected Petitioners' challenge to the use of a stipulation and a contention that certain confidential information should have been shared with Petitioners. Moreover, the ALJ found that there were no issues requiring adjudication with respect to the size and configuration of the proposed spacing units. A motion by one of the Petitioners to clarify the Issues Ruling was denied. The ALJ, however, granted an extension to the time in which to appeal the Ruling. The Petitioners filed an expedited appeal¹ to which DEC staff and Fortuna timely responded.

Discussion

Statutory and Regulatory Background

The DEC is required by New York Environmental Conservation Law ("ECL") to regulate the use of the State's natural gas reserves in such a manner as to maximize the use of the resources while preventing waste and protecting the rights of all those affected by the drilling. Once a well operator has developed one or more gas-producing wells in a field, DEC staff must develop and issue an order that will result in the efficient and economic development of the natural gas pool as a whole. The size and the shape of the spacing units for the well field are arrived at through the analysis of test data and other information usually provided by the operator. While guidance for the size and shape of the spacing units is generally provided by the ECL, the DEC may grant a variance from the guidelines provided the

owners of each spacing unit receives their “just and equitable share of the production of the [natural gas] pool.” Once the operator and DEC staff agree to a stipulation describing the parameters of the well field, hearing procedures described by 6 NYCRR Part 624 are used to refine and finalize the gas well spacing order.

Applicability of Part 624 Proceedings to Gas Well Spacing Orders

The Petitioners object to the use of Part 624 hearing procedures for the development of the spacing orders. Specifically, they claim that the substantive and significant threshold for determining whether an issue is adjudicable deprives them of an opportunity to have their concerns regarding the spacing units fully considered. Petitioners claim that the proper procedure is a full adjudicatory hearing pursuant to New York’s State Administrative Procedure Act (“SAPA”). The Commissioner notes, however, that not only is the Part 624 Hearing Procedure designed to be fully compliant with SAPA, the use of the procedure is expressly mandated for gas well spacing orders by regulation. Moreover, the substantive and significant standard serves the same purpose as a summary judgment motion in a civil trial—only with a more generous standard by which adjudicable issues are admitted to full adjudication. Therefore, if a summary judgment does not deprive civil litigants of their due process rights, there is no serious argument that requiring petitioners to meet the substantive and significant standard violates the parties’ due process rights.

The Petitioners also argue that the DEC’s practice of entering into stipulations with the well operators improperly removes issues from the hearing process, unfairly binds the DEC to contractual positions in favor of the operators, and deprives petitioners of an opportunity for an evidentiary hearing in which they may present their proposals for spacing and other issues. The stipulations, though, do not remove the issue from the hearing procedure unless all parties to the proceedings, including any petitioners, agree to the stipulation. If a petitioner or other potential party disagrees with the stipulation, he or she may still insist on a hearing provided the substantive and significant standard for adjudicable issues is met.

Size and Configuration of Spacing Units

A party proposing an issue for adjudication may do so through a demonstration that the facts surrounding an application are different than those presented in the application (or, as in this case, the stipulation) and that the correct facts indicate that relevant statutory or regu-

latory requirements will not be met. Alternatively, a petitioner can demonstrate that an omission or defect in the application is likely to substantially affect permit issuance. While a petitioner’s offer of proof need not be necessarily sufficient to prevail in an adjudicatory hearing, it must be more than unsubstantiated assertion. Once an offer of proof of an issue is presented, the ALJ will consider the arguments and offers of proof submitted by the petitioner, rebuttal by the applicant, information in the application and draft permits (or stipulation), and the DEC’s expertise in the subject matter of the issue to determine whether sufficient doubt exists about the applicant’s ability to meet all statutory and regulatory criteria such that a reasonable person would inquire further.

The ALJ correctly applied the substantive and significant standard to the Petitioners’ offer of proof regarding the size and configuration of the well spacing units. The Petitioners offered proposed testimony that the proposed spacing could not be supported by the available geological and geophysical information. DEC staff, however, rebutted the Petitioners’ offer by presenting a DEC geophysicist who reviewed Fortuna’s data and explained the manner in which Fortuna’s conclusions are supported by the data. Petitioners also maintained that they were denied the opportunity to review data provided to the DEC and denied to them based on an assertion that the data comprised trade secrets. The Commissioner held that their claim was not supported by the record, though, because the Petitioners failed to exhaust their administrative remedies with respect to the DEC’s denial of access to the data through the DEC’s Freedom of Information Law regulations (i.e., the Petitioners did not administratively challenge the denial of the access prior to the issues conference).

Conclusion

The Petitioners have failed to raise an adjudicable issue with respect to the size and configuration of the spacing units for the Field. DEC staff will prepare an order establishing the Field boundaries and releasing escrowed royalties from the development of the Field to the owners of the mineral rights to the field.

Endnote

1. See 6 N.Y.C.R.R. § 624.8(d)(2).

Jeffrey L. Zimring is an associate with Whiteman Osterman & Hanna LLP in Albany, New York.



Recent Decisions in Environmental Law

Student Editor: James Denniston

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

Energry Arkansas, Inc., et al., Plaintiffs-Appellees, Central Interstate Low-Level Radioactive Waste Commission, Plaintiff-Appellee, U.S. Ecology, Inc., Intervenor Plaintiff-Appellee, v. State of Nebraska, et al., Defendants-Appellants, 358 F.3d 528.

Facts

Pursuant to the Low-Level Radioactive Waste Policy Act enacted by Congress in 1980, the states of Nebraska, Arkansas, Kansas, Louisiana, and Oklahoma created the Central Interstate Low-Level Radioactive Waste Compact (the "Compact"), which established the rights and obligations of each member state for the purpose of the creation of disposal facilities to process low-level radioactive waste. The Compact created a commission to carry out their programs, called the Central Interstate Low-Level Radioactive Waste Commission (the "Commission"), which was composed of representatives from each member state. The Commission, based on a framework established by the Compact, had the duty to select applicants to develop disposal facilities within the member states. In 1987 the Commission accepted the proposal offered by U.S. Ecology, Inc. ("USE"). It then proceeded to select Nebraska to host the first disposal facility. Nebraska officials showed hostility to the idea of a facility in their state from the beginning. They implemented a plan to undermine USE's licensing process for the facility for a period of over eight years by complicating the review process, cutting back the work of contractors doing the technical assessment of the site, denying licensing even after persuasive scientific safety and performance assessments favored the creation of the facility, and using litigation as a weapon to frustrate performance of the Compact. Lastly, the state of Nebraska announced its intention to withdraw from the Compact. In the meantime, the Commission had entered into pre-payment agreements for disposal services with five utility companies from the Compact states in order to cover the high costs of USE's licensing process.

The action was originally brought by the utility companies against the state of Nebraska and the Commission. The Commission brought cross-claims against Nebraska and the district court realigned it as plaintiff. Following a bench trial, the district court ruled in favor of plaintiffs. It held that Nebraska had waived its sovereign immunity from suit in federal court by entering into the Compact and that it failed to carry out its obligations under the Compact in good faith. It awarded the Commission over \$151 million for its expenditure in the licensing process plus interest. As for the claims by the utility companies and USE (who was joined as an intervening party), the court ruled that the claims could be asserted under the good-faith provision of the Compact. However, the court of appeals reversed, holding that the provision did not create an enforceable federal right for these parties and that the 11th Amendment was therefore applicable. The state of Nebraska filed an appeal to the Court of Appeals for the 8th Circuit in regard to the district court's judgment in favor of the Commission.

Issues

The Court of Appeals dealt with four issues raised by Nebraska. First, in regard to the nature of the suit and the monetary relief granted to the Commission, whether appellant's right to a jury trial was violated. Second, whether the district court erred by applying the "good-faith" standard, instead of the "arbitrary and capricious" standard in its consideration of appellant's obligations under the Compact. Third, whether the award of monetary damages was proper instead of remanding to the appropriate administrative agencies for injunctive relief. Finally, whether appellant retained its sovereign immunity as to the award of interests.

Rationale

The Supreme Court has established two tests in deciding whether the 7th Amendment right to jury trial is applicable to a case.¹ First, the action in question should be compared to 18th-century actions brought in the courts of England prior to the merger of the courts

of law and equity to determine whether it is more analogous to an action that would have been tried in a court of law or in equity. Second, the remedy sought should be examined to determine whether it is legal or equitable in nature. Applying the first test to the case at bar, the court opined that although the Compact could be regarded as a form of contract, it differed from the common law contract in that it affected not only the rights and obligations of the individual parties, but also those of the population, economy, and physical environment of the Compact area. In addition, the source of the Commission's right to sue differed from a right created by contract based on state common law. The Commission, acting as an enforcement agency in representation of the member states, derived its rights from the federal statutory scheme adopted by Congress through its approval of the Compact, meaning, the right to sue arose from federal law. Therefore, while contract principles may guide the interpretation of the Compact and the remedies available under it, this action was not like a contract action at common law in light of the nature of the Compact. In applying the second test, the court indicated that the decision on whether a jury trial was required should be made before trial and based on the remedy then sought. In this case, the Commission sought a judgment for injunctive relief and the award of monetary relief was the district court's own fashioning after trial, when it concluded that the dealings between the parties had become so tainted that injunctive relief could never be made to operate fairly. The district court based its decision on the *Restatement (Second) of Contracts*, which provides that a claimant may be awarded damages when the specific performance sought is not feasible in order to afford complete relief.²

The second issue addressed by this court is whether the "arbitrary and capricious" standard should be applied (as provided in Article V of the Compact regarding revocation of membership to the Compact), instead of the "bad-faith" standard (as provided by the *Restatement (Second) of Contracts*). The court concluded that the standard for revocation of membership did not control other issues under the Compact. The court pointed out that the Compact provided that "each party state has the right to rely on the good-faith performance of each other party state," and that since there is no federal common law on the meaning of good faith under an interstate compact, the district court was correct to turn to the *Restatement (Second) of Contracts* for guidance.³ The evidence supported the finding that appellant failed to act in good faith with respect to its obligations under the Compact.

Appellant also argued that the proper remedy for its flawed administrative decision should be in the form of a remand to the agency with instruction to correct the flaw, instead of an award of damages. The court

rejected this argument as the gravamen of the Commission's suit was Nebraska's breach of the duty of good faith, rather than a challenge to a particular agency action. The court restated that the district court correctly awarded monetary relief, and further declared that the funds the Commission obtained from the utility companies, as well as USE's expenditures, all became assets of the Commission, and therefore were recoverable expenditures in this lawsuit.

Lastly, the court concluded that if a state's sovereign immunity did not bar the underlying monetary award, it would not bar an award of interest.⁴ Appellant argued that Nebraska law prohibited the imposition of prejudgment interest on the state. However, the court stated that the issue of whether interest is to be allowed is a question of federal law because the action arose from a federal statute. Federal common law permits prejudgment interest to be awarded as part of the remedy for breach of an interstate compact.⁵

Conclusion

The judgment of the district court was affirmed. The district court did not err in striking Nebraska's demand for a jury trial, in finding that Nebraska breached its good-faith obligations under the Compact, in exercising its discretion in fashioning monetary relief instead of an injunction or in its award of damages and interest.

Sui Y. Jim, '07

Endnotes

1. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).
2. *Restatement (Second) of Contracts*, § 358 cmt. c (1981).
3. *Texas v. New Mexico*, 482 U.S. 124, 129 (1987). *Restatement (Second) of Contracts*, § 205 cmt. a and d (1981).
4. *Reopell v. Massachusetts*, 936 F.2d 12, 15 (1st Cir. 1991).
5. *Kansas v. Colorado*, 533 U.S. 1, 9 (2001).

* * *

Nuclear Energy Institute, Inc., Petitioner v. Environmental Protection Agency, Respondent, 373 F.3d 1251.

Facts

Petitioners include the State of Nevada, local communities, several environmental groups and the nuclear energy industry. They challenged the statutory and regulatory scheme developed to create and regulate a nuclear waste repository at Yucca Mountain, Nevada.

In response to increasing amounts of radioactive waste, Congress enacted the Nuclear Waste Policy Act (NWPA) in 1982. The Act directed the Department of Energy (DOE) to select, design, and operate a nuclear

waste repository and the Nuclear Regulatory Commission (NRC) to license the DOE-proposed facility. The Environmental Protection Agency was tasked with establishing generally applicable standards for protecting the environment from the release of radioactive material from the repository.

The NWPA directed DOE to submit a final recommendation of a site to the President after multiple sites had been extensively investigated. Once the President approved the site he was to convey his recommendation to Congress. If the state within which the recommended site was located submitted a “notice of disapproval,” the development process for that site would discontinue unless Congress passed a joint resolution approving the site and overriding the state’s disapproval.

In 1984, pursuant to this process, the President approved three sites for site evaluation based on the Energy Secretary’s recommendations. However, in 1987, Congress realized that evaluating three separate sites was expensive and time-consuming and passed the Nuclear Waste Policy Amendments Act (NWPAA), directing DOE to focus exclusively on Yucca Mountain, Nevada. DOE issued new site-suitability criteria specific to Yucca Mountain under 10 C.F.R. part 963. The Energy Secretary found Yucca Mountain a suitable repository and recommended it to the President who in turn recommended the site to Congress. Nevada submitted a notice of disapproval and Congress responded by passing a joint resolution approving the development of a repository at Yucca Mountain.

In 1992, the Energy Policy Act (EnPA) was passed requiring EPA to develop site-specific standards for Yucca Mountain that were to be based on the findings and recommendations of the National Academy of Sciences (NAS). The EnPA also directed the NRC to modify its technical requirements and criteria to bring them into conformity with EPA’s Yucca-specific rule.

Congress also exempted the Yucca Mountain site from EPA’s general environmental regulations found in part 91. EPA promulgated 40 C.F.R. part 197, requiring a 10,000 year compliance period for radiation releases and creating a control area that extends five kilometers from the repository in all directions, except southerly (the direction in which groundwater flows), where it may extend approximately 18 kilometers away. The control area establishes the maximum distance from the repository that DOE may locate and determine human exposure and groundwater contamination compliance standards. NRC licensing standards for the site were promulgated in 10 C.F.R. part 63.

Issues

Four aspects of the statutory and regulatory scheme are challenged by various entities. First, the State of Nevada and various environmental groups challenged the EPA’s radiation release regulation in 40 C.F.R. part 197 as insufficient to protect public health and safety. Also, the Nuclear Institute, Inc. (NEI), representing the nuclear energy industry, challenged the EPA’s groundwater standard as unnecessary and unlawful. Second, Nevada, Clark County and the City of Las Vegas claimed NRC’s licensing-criteria rule was arbitrary and capricious, and contrary to law. Third, Nevada, Clark County and the City of Las Vegas argue that Congress unconstitutionally singled out Nevada to bear the burden of housing the nation’s nuclear waste when it passed the joint resolution selecting Yucca Mountain. Fourth, Nevada, Clark County and the City of Las Vegas also challenge DOE’s site-suitability criteria in part 963, the Energy Secretary’s and President’s decisions to recommend Yucca Mountain for the repository development, and the DOE’s Final Environmental Impact Statement. Various jurisdictional and timing issues were also addressed by the Court.

Reasoning

Concerning the challenges brought by Nevada and the state’s various environmental groups, the Court found that it had subject matter jurisdiction over final orders of the EPA under the Hobbs Act. Although the Hobbs Act does not mention the EPA, it does mention the now-defunct Atomic Energy Commission and in issuing its orders, the EPA acted pursuant to authority transferred to it from the Atomic Energy Commission and this was sufficient to provide jurisdiction. The Court also found constitutional requirements for standing were met.

The Court vacated part 197 to the extent that it only requires DOE compliance for 10,000 years. The Court held that part 197, by requiring only a 10,000 year compliance period, violated section 801(a) of the EnPA. This section requires that the EPA standards be “based on and consistent with”¹ NAS’s findings and recommendations. However, NAS’s report had found no basis for limiting the time period to 10,000 years. Similarly, the Court vacated NRC licensing requirements for the site that used a similar 10,000 year period.

Nevada also challenged the control area and its 18 kilometer southern border as being arbitrary and capricious. However, the Court found sufficient recorded evidence to reasonably support the EPA’s belief that it would be unlikely for humans to settle within the boundary and even more unlikely for them to use local groundwater for agricultural purposes. The Court

found reasonable the EPA's conclusion that exposure limited to drinking water for anyone in the boundary would actually provide less exposure than someone outside the boundary who would consume less-contaminated water but more of it (water for drinking and agriculture). The Court also rejected Nevada's claim that the boundary violated the Safe Drinking Water Act because the EnPA had exempted the Yucca site from all EPA regulations not pertaining specifically to the repository and surrounding area.

The Court also rejected Nevada's claim that the EPA exceeded its authority by defining "disposal" differently in part 197 than it was defined in NWPA. The EnPA, the statute under which the EPA promulgated part 197, did not require the agency to use NWPA definitions.

NEI challenged part 197's use of a separate groundwater-protection standard in addition to the individual-protection standard as conflicting with the EnPA. After finding that NEI had standing, the Court rejected the challenge. The Court found the groundwater-protection standard did not exceed EPA's authority, was not arbitrary and capricious, nor did it conflict with any findings of NAS's upon which the agency was required to base the rule.

The State of Nevada, Clark County and the City of Las Vegas challenged the licensing requirements the NRC promulgated in part 63 for the Yucca site as violating the NWPA and the EnPA. After finding the claims to be timely, the Court rejected the challenges. The Court found that under the NWPA, the NRC did not have to require that the repository rely primarily on geologic means to isolate waste from the environment. It also found that the NRC did not need to promulgate specific requirements for individual barriers in the multiple-barrier system and that overall system performance requirements were sufficient.

Petitioners also claimed that NRC's licensing requirements violated the NWPA and EnPA because NRC did not require the DOE license application to show compliance with relevant EPA standards. The Court found this issue was not entitled to court review because petitioners failed to raise the claim in rule-making proceedings.

The State of Nevada also challenged the actions of the DOE and the President in selecting the Yucca Mountain site as violative of the NWPA and the Constitution. The Court rejected these claims. The Court found that the joint resolution of Congress approving the site was a final legislative action and rendered moot Nevada's claim that the selection of Yucca violated geological considerations set forth in the NWPA. Similarly, the claim that the administrative and executive actions

leading up to the selection of the site were improper was also rendered moot by the Resolution. The Court also found that the Resolution was a needful regulation that respected public lands and was therefore proper under the Property Clause. Furthermore, the Court found the selection of the site did not violate the Tenth Amendment because it did not regulate state activity nor did it commandeer the state legislature or state officials. Rather, it simply regulated federal land.

Anthony Belsito

Endnote

1. Energy Policy Act of 1992, § 801(a).

* * *

South Florida Water Management District v. Miccosukee Tribe of Indians et al., 58 ERC 1001.

Facts

Plaintiff Miccosukee Tribe of Indians lives near the Florida lands affected by the Central and South Florida Flood Control Project. The project consists of a network of levees, water storage areas, pumps, and canals in the Everglades that influence flooding, water conservation, and drainage. Defendant South Florida Water Management District is in charge of regulating the waters that flow through this system.

The particular system in question involves a 104-square-mile drainage basin that collects groundwater and rainwater from urban, agricultural, and residential developments, and transfers the water via a canal ("C-11") to a pump station ("S-9"). Once the water rises above a set level, S-9 begins pumping it into an undeveloped wetland ("WCA-3") 60 feet away. Return flow from WCA-3 to S-9 is prevented by two levees ("LL-33", "L-37"). Plaintiffs believe that the Clean Water Act of 1972 requires the Water District to use a National Pollutant Discharge Elimination System ("NPDES") permit on S-9 because of the phosphorus flow increase from the drainage basin to WCA-3. Plaintiffs support this by the Act's definitions: "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."¹ The "point source" definition is: "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."² The defendant agrees that both phosphorus is a pollutant and C-11 and WCA-3 are navigable waters.

The defendant contends that S-9's operation does not constitute a "discharge of [a] pollutant" within the meaning of the Act and the C-11 and WCA-3 impoundment areas are not two distinct water bodies, but two hydrologically indistinguishable parts of a single water body. The plaintiff contends the opposite, thus requir-

ing S-9's NPDES permit. The U.S. government filed an *amicus* brief supporting the defendant's argument.

The parties filed cross-motions for summary judgment and the District Court granted the plaintiff's motion. The Court of Appeals affirmed reasoning that the "point source, [S-9, was] the cause in fact of the discharge of pollutant."³

Issues

There are three issues the Court decided. First, the Court had to decide whether S-9 is considered a "point source" even though the actual pump does not add anything new to the water. The Court looks at the statute's language to rectify this issue.

The second issue addresses whether there has been an addition of a pollutant into navigable waters. The Court interprets the "unitary water" argument by looking at Congress' intent and case law.⁴

The third issue addresses whether there are two distinct water bodies. The Court concludes that there is insufficient factual information, thereby remanding it back to the Appellate Court for further factual investigation.

Reasoning

The Court dismisses the defendant's first argument. The Court states that the Water District, not the Government, makes this contention, and then abandons it. By quoting the statute, the Court declares "that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters."⁵

The Court does not specifically answer the second issue. Hinting what the answer might be, the Court states that 33 U.S.C. § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution from NPDES "if they *also* fall within the 'point source' definition." Under the "unitary waters" approach, a water body that flows into another, even if artificially, is still considered one

water body and would not require a NPDES. The Court states that NPDES provisions might be held to contradict the "unitary water" approach and the EPA has hinted at opposing this view.⁶ But, the Court contends, only one state (Pennsylvania) has interpreted the Act to cover interbasin water transfers.⁷ The Court remands this issue to the lower court because the defendants failed to bring it up in their briefs or to the lower court.

Presented with the third issue, the Court concludes that there are insufficient facts to determine whether C-11 and WCA-3 are distinct water bodies. The Court holds that the District Court applied its summary judgment test prematurely. The Court comes up with additional questions that the District Court did not address, e.g. what would happen if S-9 was shut down and whether S-9 was the "cause-in-fact" of the pollutant.

Conclusion

Plaintiff's contention that C-11 and WCA-3 are two separate bodies of water, therefore requiring a NPDES permit for S-9, is not found to be accurate due to a lack of factual information to be decided by the 11th Circuit Court of Appeals.

Christian Sterling, '06

Endnotes

1. 33 U.S.C.A. § 1362(12) (2000).
2. 33 U.S.C. § 1362(14) (2000).
3. *Miccosukee Tribe of Indians, et al. v. South Florida Water Management District*, 280 F.3d 1364, 1368 (11th Cir. 2003).
4. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001).
5. 33 U.S.C. § 1362(7) (2000).
6. *In re Riverside Irrigation Dist.*, 21 Op. E.P.A. Gen. Co. (1975).
7. Brief of *Amici Curiae Commonwealth of Pennsylvania, Department of Environmental Protection, South Florida Water Management District v. Miccosukee Tribe of Indians*, 58 ERC 1001 (2004) (No. 2-626).

Back issues of *The New York Environmental Lawyer* (2000-present) are available on the New York State Bar Association Web site (www.nysba.org)

Back issues are available at no charge to Section members. You must be logged in as a member to access back issues. For questions, log-in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

The New York Environmental Lawyer Index

For your convenience there is also a searchable index in pdf format. To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.



N.G. Kaul Memorial Scholarship

Many members of our Environmental Law Section had the opportunity of working with N.G. Kaul who was a longtime director of the Division of Water in the New York State Department of Environmental Conservation. He served as chair of the New England Interstate Water Pollution Control Commission and was a member of various other environmental organizations. Upon his retirement from the Department of Environmental Conservation in 2002, he was appointed as director of the U.S. Environmental Protection Agency effort to implement the dredging of PCB sediments in the Hudson River.

His commitment to environmental protection and his active involvement on environmental issues was well-recognized. Regrettably, N.G. passed away last year at the age of 57 after a brief but courageous battle with cancer. In his honor, a memorial scholarship fund has recently been created. The fund is to be a tribute to N.G. and the values he personified—service to the public and protecting and improving public health and the natural resources of New York State.

The scholarship will be awarded annually to one or more New York State students pursuing a Master's Degree at a New York State institution of higher learning in the field of environmental or civil engineering, with an intent to enter into public service. The scholarship fund is a tax-exempt 501(c) entity, so that donations are tax-deductible. Each spring, a committee composed of individuals from various public and private funding sponsors will review the scholarship applications and select one or more recipients. Anyone interested in making a donation, or obtaining more information on the scholarship, may contact: New England Interstate Water Pollution Control Commission, N.G. Kaul Memorial Scholarship Fund, Boott Mills South, 100 Foot of John Street, Lowell, Massachusetts 01852-1124.

—Louis A. Alexander

Special Issue: "Rivers and Harbors"

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

The Hudson and other rivers that feed into New York Harbor have historically been the arteries that connected

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

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

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

—Kevin Anthony Reilly

Note of Appreciation

We thank each of these sponsors of the January 27 cocktail reception for Executive Committee members and their guests. The reception was graciously hosted by Proskauer Rose LLP the evening before the Section's Annual Meeting.

- Arnold & Porter LLP
- Bond, Schoeneck & King, PLLC
- Bryan Cave LLP
- Carter, Ledyard & Milburn LLP
- Farrell Fritz, P.C.
- Harter, Secrest & Emery LLP
- Keane & Beane, P.C.
- Kirkpatrick & Lockhart Nicholson Graham LLP
- Knauf Shaw LLP
- Nixon Peabody LLP
- Periconi, LLC
- Proskauer Rose LLP
- Arthur V. Savage
- Constantine Sidamon-Eristoff
- Sive, Paget & Riesel, P.C.
- Weitz & Luxenberg, P.C.
- Young, Sommer, Ward, Ritzenberg, Baker & Moore LLC

—Virginia C. Robbins

Section Committees and Chairs

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

Adirondacks, Catskills, Forest Preserve and Natural Resource Management Committee

Carl R. Howard (Co-Chair)
290 Broadway
New York, NY 10007
(212) 637-3216
E-Mail:howard.carl@epa.gov

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

Agriculture and Rural Issues Committee

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

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

Air Quality Committee

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

Biotechnology and the Environment Committee

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

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

Coastal and Wetland Resources Committee

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

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

Continuing Legal Education Committee

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

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

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

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

Corporate Counsel Committee

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

Energy Committee

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

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

Jennifer L. Hairie (Co-Chair)
625 Broadway, 14th Floor
Albany, NY 12233
(518) 402-9188
E-Mail:jlhairie@gw.dec.state.ny.us

Enforcement and Compliance Committee

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

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

Environmental Business Transactions Committee

Louis A. Evans (Co-Chair)
990 Stewart Avenue
Garden City, NY 11530
(516) 832-7500
E-Mail:levans@nixonpeabody.com

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

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

**Environmental Impact Assessment
Committee**

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

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

**Environmental Insurance
Committee**

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

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

Environmental Justice Committee

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

Luis Guarionex Martinez (Co-Chair)
40 West 20th Street
New York, NY 10011
(212) 727-4550
E-Mail:lmartinez@nrhc.org

Jean M. McCarroll (Co-Chair)
2 Wall Street
New York, NY 10005
(212) 238-8828
E-Mail:mccarroll@clm.com

Journal Committee

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

Global Climate Change Committee

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

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

**Hazardous Waste/Site
Remediation Committee**

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

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

**Historic Preservation, Parks and
Recreation Committee**

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

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

**International Environmental Law
Committee**

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

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

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

Internet Coordinating Committee

Alan J. Knauf (Co-Chair)
2 State Street, Suite 1125
Rochester, NY 14614
(585) 546-8430
E-Mail:aknauf@nyenvlaw.com

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

Land Use Committee

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

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

Legislation Committee

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

Michael J. Lesser (Co-Chair)
625 Broadway
Albany, NY 12233
(518) 402-9535
E-Mail:mjlesser@gw.dec.state.ny.us

Membership Committee

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

Pesticides Committee

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

Pollution Prevention Committee

Dominic R. Cordisco (Co-Chair)
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550
(845) 569-4329
E-Mail: dcordisco@yahoo.com

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

**Public Participation, Intervention
and Alternative Dispute
Resolution Committee**

Jan S. Kublick (Co-Chair)
500 South Salina Street, Suite 816
Syracuse, NY 13202
(315) 424-1105
E-Mail: jsk@mkms.com

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

Solid Waste Committee

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

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

Toxic Torts Committee

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

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

Transportation Committee

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

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

Water Quality Committee

Michael J. Altieri (Co-Chair)
625 Broadway, 14th Floor
Albany, NY 12233
(518) 402-9187
E-Mail: mjaltier@gw.dec.state.ny.us

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

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

Task Force on Legal Ethics

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

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

**Task Force on Mining and Oil and
Gas Exploration**

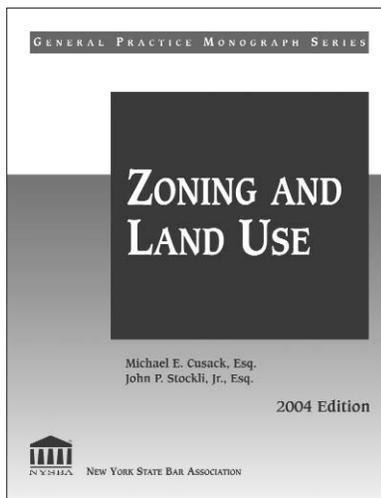
Dominic R. Cordisco (Chair)
One Corwin Court
P.O. Box 1479
Newburgh, NY 12550
(845) 569-4329
E-Mail: dcordisco@yahoo.com

Task Force on Petroleum Spills

Christopher J. Dow (Co-Chair)
300 Linden Oaks, Suite 220
Rochester, NY 14625
(585) 899-6030
E-Mail: cjd@devorsetzlaw.com

Alan J. Knauf (Co-Chair)
2 State Street, Suite 1125
Rochester, NY 14614
(585) 546-8430
E-Mail: aknauf@nyenvlaw.com

Zoning and Land Use*



Authors

Michael E. Cusack, Esq.
Independent Wireless One Corporation
Albany, NY

John P. Stockli, Jr., Esq.
Crane, Greene & Parente
Albany, NY

This publication—devoted to practitioners who need to understand the general goals, framework and statutes relevant to zoning and land use law in New York State—includes numerous practice guides. It is intended to provide a broad discussion of zoning and land use in New York State and, above all, to remove the mystique surrounding this practice area. Traditional zoning laws as well as other land use regulations are covered.

Book Prices

2004 • 114 pp., softbound
PN: 42394

NYSBA Members \$53
Non-Members \$70

Prices include shipping and handling.

Contents

- | | |
|---|-----------------------------------|
| I. Introduction | IX. Area Variances |
| II. What Is Zoning? | X. Use Variances |
| III. Other Land Use Mechanisms | XI. Varying the Variance Criteria |
| IV. Practical Implications of Land Use and Zoning | XII. Planning Boards |
| V. New York Zoning and Land Use Jurisdiction | XIII. Site Plan Review |
| VI. Zoning and Land Use Enabling Legislation | XIV. Special Use Permits |
| VII. Adoption and Amendment of Zoning Legislation | XV. Subdivision Review |
| VIII. Zoning Board of Appeals | XVI. State-Mandated Overlays |
| | XVII. Limitations on Zoning Power |
| | XVIII. Open Meetings Law |
| | XIX. Freedom of Information Law |

* The titles included in the GENERAL PRACTICE MONOGRAPH SERIES are also available as segments of the *New York Lawyer's Deskbook* and *Formbook*, a five-volume set that covers 25 areas of practice. The list price for all five volumes of the *Deskbook* and *Formbook* is \$275.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452

www.nysba.org/pubs

Mention Code: CL2444



Publication—Editorial Policy—Subscriptions

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

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

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

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

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

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

Kevin Anthony Reilly

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

Editor: James Denniston

Contributors:

Anthony Belsito
Sui Y. Jim
Christian Sterling



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

ADDRESS SERVICE REQUESTED



Printed on Recycled Paper

THE NEW YORK ENVIRONMENTAL LAWYER

Editor-in-Chief

Kevin Anthony Reilly
Appellate Division, 1st Dept.
27 Madison Avenue
New York, NY 10010

Board of Editors

Glen T. Bruening
Philip H. Dixon
Michael B. Gerrard
Prof. William R. Ginsberg
Prof. Mary L. Lyndon
Gail S. Port

Peter G. Ruppard
Daniel A. Ruzow
Kevin G. Ryan
Lawrence P. Schnapp
Prof. Philip Weinberg

Section Officers

Chair

Virginia C. Robbins
One Lincoln Center
Syracuse, NY 13202
315-218-8182 E-mail: vrobbins@bsk.com

First Vice-Chair

Miriam E. Villani
EAB Plaza, West Tower, 14th Floor
Uniondale, NY 11556
516-227-0607 E-mail: mvillani@farrellfritz.com

Second Vice-Chair

Walter E. Mugdan
290 Broadway
New York, NY 10007
212-637-3724 E-mail: mugdan.walter@epa.gov

Treasurer

Louis A. Alexander
625 Broadway, 14th Floor
Albany, NY 12233
518-402-8537 E-mail: laalexan@gw.dec.state.ny.us

Secretary

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

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

Copyright 2005 by the New York State Bar Association
ISSN 1088-9752

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