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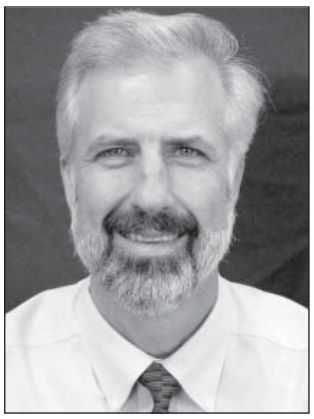
of the New York State Bar Association

Message from the Chair



I am honored, humbled and a little nervous as I move into the Chair's chair. Honored, because this figurative chair has previously been occupied by some of the most distinguished environmental lawyers in New York. Humbled, because I recognize how much there is about New York State environmental law that I don't know. (I've worked my entire career for the federal government, so I'm embarrassingly ignorant about this central focus of our Section.) And nervous, because although the task seemed manageable enough several years ago when I agreed to serve, it looks considerably more demanding from close up.

If I'm counting correctly, I will be our Section's twenty-fifth Chair. To the best of my knowledge, I'm the first one to be working in government while serving in that capacity. Quite a number of our past Chairs worked in government at some time before or after serving as a Section officer. My immediate predecessor and close friend Miriam Villani is one of them, having started her career as a colleague at EPA. At least one of our past Chairs—Jim Sevinsky—was in government when he became an officer, but had moved to the private sector by the time he became Chair. Lou Alexander, now our First Vice Chair, followed an opposite path. He was in private practice when he first became an officer, but soon thereafter moved into government.

We've been fortunate in the past to have highly respected members of academia as Section Chairs—Nick Robinson, Phil Weinberg and Bill Ginsberg (whose recent death we all mourn). Following in their footsteps is our Second Vice-Chair, Joan Leary Matthews, a professor at Albany Law School. Our current Treasurer and Secretary, Alan Knauf and Barry Kogut, are both in private practice, and will help keep Joan, Lou and me well grounded.

Under the revised Bylaws we adopted several years ago, the Section Cabinet includes the five officers plus our Section's representative to the Association's House of Delegates, and a representative from the Section Council (made up of all past Chairs). I'm very pleased to be working with Phil Dixon, our very able and diligent House of Delegates rep; and Alice Kryzan, who has graciously agreed to serve as our Section Council rep for the coming year, and whose experience and good common sense will be most helpful.

The unusual circumstance that, for the next three years, our Section will be chaired by attorneys not in private practice is attributable to our predecessors' diligent efforts to diversify the Section's membership and, in particular, its leadership. At present, about one-quarter

Inside

of the Section's Executive Committee members are not in private practice. I believe this diversity strengthens our organization and makes it more valuable to its members and to the wider community. It is important to remember, as well, that among the remaining three-quarters of Executive Committee members, their practices and work settings are also widely diversified—big firms, small firms and solo practitioners, representing all kinds of different clients from corporations to municipalities to local environmental organizations.

It has not been easy to attract more members from the public sector or environmental groups. I had been in practice ten years before Phil Weinberg persuaded me to join the Bar Association (that was in 1985; you do the math). I was not at all certain that I would find it useful or enjoyable, but it has been both. Useful, because my ability to do my job has been enhanced by the opportunity to have outside-the-office interaction with a variety of smart and interesting attorneys whose career experiences differ from mine. (I flatter myself that I've occasionally been able to return the favor by demystifying the sometimes obscure ways of government thinking.) And enjoyable, because environmental lawyers are—I am quite certain—more fun than other species of attorney. From Jim Periconi's sing-alongs to a canoe trip through Constitution Marsh, from hiking in the Adirondacks to kayaking in Lake George to riding the Alpine Slide at Jiminy Peak, I look back on many years of fine camaraderie at the Section's Fall meetings.

Speaking of Fall meetings, our next one will be at the Otesaga Hotel in Cooperstown, October 13–15, 2006. The subject of the CLE program will be Energy, with a particular focus on some of the emerging legal and policy issues surrounding alternative energy development such as wind power, coal gasification, and LNG terminals. The program is being organized by the Co-chairs of our Section's Energy Committee, Kevin Bernstein, Jennifer Hairie and Bill Helmer. The topic is a logical follow-up to the Section's extremely compelling program on global warming at our January 2006 Annual Meeting. Please mark your calendars now for the October meeting—the timing should be excellent for viewing Fall colors in one of the prettiest parts of New York State.

Over the next year I expect to continue being engaged with the important, but sometimes thorny, question of when and how our Section should take formal positions on proposed legislation, regulations and agency guidance. As a Section that has actively sought to increase the diversity of its membership, it is not surprising that there may sometimes be sharp differences among our members regarding any such proposal. A policy to guide us in this arena was developed over the past year and adopted at the April 5, 2006, Executive Committee meeting. (It will henceforth be known as the "Advocacy Policy" because its full title is way too long, for which I take sole responsibility.) The unanimous vote to adopt the policy belies the difficult and sometimes divisive issues that had to be worked through.

The question of whether and how the Section should advocate has been discussed from time to time during our 25-year history. It was raised again by Maureen Leary at the April 2005 Executive Committee meeting. Maureen then prepared a white paper entitled "Educating or Advocating," which was distributed at the Fall 2005 Executive Committee meeting. A workgroup was formed to develop a policy for the Section on this subject. The workgroup members were: Dave Freeman, Maureen Leary, Joan Leary Matthews, Rosemary Nichols, Dan Riesel and me. As is often the case, we fairly soon came to consensus on perhaps 95% of the contents of a draft policy document, but the remaining few elements proved quite difficult, with deep and principled differences of opinion.

Ultimately, we reached agreement on every outstanding issue but one. At the January 2006 Executive Committee meeting we presented our draft and flagged that one issue for discussion and further consideration. The lone remaining issue had two components. First: whether a proposal that the Section take an advocacy position should require a super-majority (more than 50%-plus-one) of the voting Executive Committee members; and second: if so, how large should the required super-majority be—two-thirds? three-quarters? somewhere in between?

The Advocacy Policy confirms that we endeavor to promote consideration of diverse views within the Section, and that we will seek consensus when possible. Requiring a super-majority ensures that the Section won't take a position with which a large minority of Executive Committee members disagree, but in a strict sense it is "anti-democratic." I personally endorsed the idea for some of the same reasons that I have grudgingly come to think that the U.S. Senate may be wise to require a two-thirds majority to cut off a filibuster. (When I was in my formative years, the filibuster was the tool of choice of the anti-civil rights crowd, and I considered it an outrage. Lately it has been a tool used or contemplated by the other side of the political spectrum.) There are various other ways in which our system of governance empowers those who find themselves, numerically, in the minority. An example is the fact that every state, no matter its size, is represented by two Senators.

Just as these examples from the national arena have been controversial on the macro scale, so too, on the micro scale, was the proposal that our Section require a super-majority when taking an advocacy position. This issue was energetically debated at the January 2006 meeting, with the range of opinions among the ExecCom members being as wide, and the views as strongly held, as among the members of the workgroup that developed the draft.

The issue was brought to a vote—actually, a series of votes—at the April 5, 2006, ExecCom meeting. Votes were held sequentially on three questions, and the ground rules for these votes were clear: each would be decided by a *simple* majority! The first two questions were in the nature of a "straw poll," while the third vote was on a motion duly made and seconded. These are the questions and the results:

1. If the Section adopts a policy on advocacy, should decisions about whether to submit advocacy comments be approved by a simple majority of the Executive Committee members voting, or by a super-majority? The vote was 21 in favor of a super-majority; 2 in favor of a simple-majority.

   (Two members present who are New York State government attorneys abstained from these three votes.)

2. How large should such a super-majority be—two-thirds, three-quarters, or 70%? The vote was 18 in favor of requiring a two-thirds super-majority; 4 in favor of a three-quarters super-majority; and 1 in favor of a 70% super-majority.

3. Finally, a motion was made and seconded to adopt the advocacy policy with the two-thirds super-majority provision. The motion passed unanimously with a vote of 23 to 0.

While the majority/super-majority issue was controversial, I believe it is significant that the workgroup did reach consensus on all other elements of the Advocacy Policy that has now been formally adopted by the Executive Committee. These elements included procedural provisions intended to ensure that the ExecCom is adequately informed about and has sufficient time for consideration of a proposal that the Section take an advocacy position. More than most, we as attorneys understand the importance of process in any form of governance, and so it is appropriate that we ensure our own Section procedures are fair and transparent. You can read the Policy on our Section website under "Section Business."[1]

I look forward to seeing many of you at our meetings and our CLE programs. I also welcome your ideas about topics for those programs. Fair warning, though: somewhere, sometime, when you least expect it, don't be surprised if someone steps up to you and says, "How would you like to be our next program Co-chair?"

Endnote

1. *See* http://www.nysba.org/environmental.

Walter Mugdan

From the Editor

I would like to open this issue's column by noting the death of Bill Ginsberg. When I mentioned Bill in the Spring issue, I had not known that he was sick. In fact, I thought he looked as sprightly as ever when we conversed at the Section's January reception hosted by Proskauer Rose. Bill, in addition to having many other qualities, was a wonderful person. He was a zealous advocate wrapped within a kind and gentle demeanor. He had a keen intelligence softened by the glint of humor in his eyes. Like so many of our senior members (some of whom are acknowledged in Walter's Chair's Message), Bill had bragging rights to professional accomplishments to which younger lawyers can only aspire and which he wore lightly—if, indeed, he even alluded to them. In recent years, Bill was the Rivkin Radler Distinguished Professor of Law at Hofstra Law School. But his involvement in government and environmental matters went back much further. He drafted Article 49 of the New York Environmental Conservation Law, and co-edited, with Phil Weinberg, West Publication's *Environmental Law and Regulation in New York*. He served as New York City's Park Commissioner under Mayor John Lindsey, and more recently was involved in structuring the historic Watershed Agreement between New York City and upstate communities. Bill also served as a long-time board member, and then as Chair, of the Catskill Center for Conservation and Development, which reflected his deep connection to the Catskills and his Woodstock home. From 1970 to 1973, Bill served as Counsel to, and Director of, the Temporary State Commission on the Powers of Local Government. It's a rare gift to have been involved in great events earlier in one's life. It probably is rarer when one returns the gift by making continuing contributions as one moves through life's later phases. I think that describes Bill. Disease intervened too early, yet he amply made his mark in the time allotted to him.

We welcome Walter Mugdan as Section Chair. Walter is being modest about his humility, or maybe humble about his modesty, but in any event he brings to the task not only a dynamic personality but an unmatched background in federal environmental law and policy. He can also sing and write the occasional show tune, to which regulars at our Fall meetings can attest. This column makes a continuing pitch to encourage Section members to attend the Fall meetings, with families. In that spirit, I can personally affirm Walter's apt description of the tenor of these weekend gatherings, the intellectual and recreational opportunities, and the camaraderie of the participants. Walter's narrative about the voting process on the question of Section advocacy does justice to the extent that people thought long and hard about the goals and the process and zealously argued in behalf of sincere positions. I found it interesting that so many people were committed to our responsibility for the structuring of public policy, a commitment that maybe differentiates our lawyers from others who, of necessity, are more client-driven. All sides of our continuing debate recognized that there could be differing opinions on any number of issues. I also found it interesting that the debates were so clearly sensitive to the integrity of the process. One might have thought that the Section is characterized by 1970s-era political science majors! Walter's column alludes to how many of our Section leaders had their formative experiences in government. One might surmise that constructing government bureaucracies (which many of our earlier Section leaders had done) and analyzing issues from the perspective of the public good has correlated with how the Section's basic wiring has developed.

In the Spring issue, Nick Robinson and Rosemary Nichols brought to the Section's attention incidents in which the New York State Department of Transportation had cut timber in the Forest Preserve to provide safe sight lines in transportation corridors. Their article questioned the need for the timber clearance as well as its compliance with the "Forever Wild" provisions of the New York State Constitution. Implicitly, the article also questioned the process by which the proposal was approved. Since then, a Consent Order has been issued that provides for some interesting remedies. The Order is worth reading and appears on p. 9 of this issue.

Newsweek recently featured the "Greening of America." Some of the articles noted that the public's interest in alternative energy sources is now mainstream. Several articles also noted how innovative many companies have become, both as consumers of energy and as vendors of energy production, in reducing our economic reliance on fossil fuels in general and foreign oil in particular. *Newsweek* lauds this as a major transformation, which it is. However, I also take note of the very fact that *Newsweek*, a general interest news publication, has now become a player in spreading the message that green is good as well as economically justifiable. If one has to look for a silver lining in the dramatic rise of energy costs, *Newsweek* shows that Americans—as consumers, business people and community leaders—are accepting the reality that oil is finite and expensive (though many expenses have been externalized historically) and increasingly shackles our foreign policy. Americans from all walks of life finally are beginning to extend efforts, by private initiative as well as corporate policy, to economize on energy. More news along these lines will hopefully extend the trend.

In this issue, Michael Donohue submits an article on Wind Power. Wind is clean, cheap and easy, if not necessarily predictable. But, if viewed as part of the solution to our energy needs, wind has a promising future. This article provides an excellent primer on both maritime and land-based wind technology and its legal ramifications. Thomas Tuori submits an article that examines a subject that is more down to earth, so to speak, and closer to home—enforcement of SEQRA's mitigation measures. The article walks the reader through basic principles of mitigation when real estate development is proposed, then analyzes case studies from upstate New York involving commercial development and land use changes. The author explains his methodology, sets forth how he compiled his base of information, and draws conclusions that will be useful to many readers. Both of these articles were first place finalists in the Section's Essay Competition.

Thomas Puchner of Whiteman Osterman and Hanna and Peter J. Van Bortel submit the Administrative Update. James Denniston of St. John's Law School orchestrated the case summaries. As always, Phil Weinberg helped by selecting the cases.

I want to remind readers about the upcoming conference in China that is being organized by the Section's International Law Committee and the New York State Bar Association's International Law and Practice and Real Property Law Sections. The conference is scheduled for October 18-29 in Shanghai. The Fall Meeting will be held in Cooperstown again, at the historic Otesaga Hotel. Each time the Section has met there has been outstanding success. With the Lake, the Baseball Hall of Fame, the Farmer's Museum, and countless other amusements, Cooperstown is also, quintessentially, family-friendly. Details are provided on pages 68-71.

Kevin Anthony Reilly

REQUEST FOR ARTICLES

If you have written an article you would like considered for publication, or have an idea for one, please contact *Environmental Lawyer* Editor:

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27 Madison Avenue
New York, NY 10010
(212) 340-0404

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

New York State Department of Environmental Conservation
Deputy Commissioner & General Counsel
Office of General Counsel, 14th Floor
625 Broadway, Albany, New York 12233-1500
Phone: (518) 402-2794 • **FAX:** (518) 402-8541
Website: www.dec.state.ny.us

Denise M. Sheehan
Commissioner

July 5, 2006

Kevin A. Reilly, Editor
The New York Environmental Lawyer
Appellate Division, 1st Department
27 Madison Avenue
New York, New York 10010

Dear Mr. Reilly:

I read with considerable interest the article in the Spring, 2006 edition of The New York Environmental Lawyer titled "The 2005 Constitutional Violation of New York's Forest Preserve: What Remedy?" by Rosemary Nichols and Nicholas A. Robinson. The article discussed excessive tree cutting on Forest Preserve lands adjacent to State Highway 3 between Tupper Lake and Saranac Lake during a Department of Transportation ("DOT") hazard tree removal project during late summer 2005, and discussed what remedies might be appropriate. I would like to take this opportunity to inform your readers how this matter has been resolved.

On March 29, 2006, an Order on Consent ("the Order") was executed by the Department of Environmental Conservation ("DEC"), the Adirondack Park Agency ("APA") and DOT. As detailed below, the Order has three components: (1) site restoration and remediation; (2) cash penalties and Environmental Benefit Projects ("EBPs"); and (3) measures to prevent similar events from occurring in the future. A copy of the Order is enclosed for your convenience.

SITE RESTORATION AND REMEDIATION. Appendix C of the Order mandates that DOT complete certain specified restoration and remediation activities for the Route 3 corridor by August 1, 2006. These activities include regrading and reseeding disturbed areas within the right of way. On disturbed adjacent Forest Preserve land, all cut trees will be limbed so that the material lies flat on the ground. Material with diameters under eight inches will be chipped and dispersed as evenly as possible beyond the bounds of the road right of way. Material greater than 8 inches in diameter will be pulled into the Forest Preserve at least 20 feet from the edge of the right of way or the tree line, whichever is greater, so that it does not constitute an eyesore from the road. At a few locations which have sparse vegetation, some trees may be moved off site to an approved disposal facility or DEC facility, provided the DEC has given its prior approval. In compliance with Adirondack Park State Land Master Plan ("Master Plan") requirements, Forest Preserve lands which were impacted by motor vehicle operation will be leveled by hand tools, and the use of motor vehicles to perform remediation work outside of the road right-of-way will not be allowed. The use of motorized equipment in those areas

classified as Wilderness by the Master Plan will be allowed only with prior written approval from the DEC Commissioner in compliance with Master Plan requirements.

PENALTIES. The Order requires that DOT pay DEC a cash penalty of $100,000, $50,000 of which was payable within 60 days of the date of the order (and has since been paid), and $50,000 of which was suspended, provided DOT complies with the other provisions of the order.

The Order's penalty provisions also require DOT to complete at least $200,000 in EBPs in the Tupper Lake/Saranac Lake region by December 31, 2008. These projects will include: the construction of four information kiosks containing information on the Forest Preserve in the Village of Saranac Lake; the repair of a community boardwalk over a sensitive wetlands area at the shoreline of Raquette Pond in the Village of Tupper Lake; the restoration of the Route 3 right of way corridor, including the planting of native seedlings and wildflowers; the construction of or repair of a parking area along Route 3 located at a trailhead leading to a stand of frequently viewed hemlock trees; and the construction of appropriate interpretive signage in the Route 3 corridor and the Indian Carry boat launch, Middle Saranac boat launch or beach, Ampersand Mountain trail head, and the parking lot near the hemlock tree stand.

Projects that will be funded if the $200,000 cap has not been exceeded by the foregoing projects include an invasive species project involving the funding of the Watershed Stewardship Program at the Adirondack Watershed Institute at Paul Smith's College in the Route 3 corridor area and the maintenance of the Ampersand Mountain and Middle Saranac beach trails, including bridge replacements, erosion control, bog bridging, and pit privy relocation.

FUTURE MEASURES. Perhaps the most important part of the Order includes provisions designed to prevent inappropriate cutting of Forest Preserve trees by DOT in the future in both the Adirondacks and Catskills. These measures include a requirement that DOT acquire a Temporary Revocable Permit ("TRP") from DEC prior to any cutting of Forest Preserve trees. DOT's TRP applications will include counts by size and species of all trees to be cut, marked in the field and pre-approved on site by Department foresters. This will help to ensure that only those Forest Preserve trees which pose a hazard to vehicular travel on the roadways will be cut. DOT will also be required to mark the bounds of the existing right of way with flagging before any cutting occurs to ensure trees will not be improperly cut on Forest Preserve lands outside the highway rights of way. There will be a narrow exception from the TRP requirement for sudden, ongoing emergencies (e.g., blowdown across a road) provided DOT will be required to submit a report to DEC on any such cutting as soon as practicable.

The Order on Consent also requires DOT, in consultation with DEC and APA, to make appropriate revisions to DOT's "Green Book" guidelines for road maintenance in the Adirondack Park. These revisions will help to ensure that the Forest Preserve lands are considered and protected when road maintenance projects are being planned through Forest Preserve lands. Proposed revisions to the Green Book will be noticed in the Environmental Notice Bulletin and provide for a 30 day period for public comment. Also, adoption of the final revisions to the Green Book will be noticed in the Environmental Notice Bulletin.

The Order on Consent also commits DOT, in consultation with DEC and APA, to develop a Travel Corridor Management Plan for existing highways in the Adirondack Park

which must be found by APA as being consistent with the requirements of the Adirondack Park State Land Master Plan. This Plan must be completed by December 31, 2007.

Finally, the Order requires that DOT assign an employee to work with DEC and APA to coordinate highway maintenance in the Adirondack Park and to work with DEC to coordinate highway maintenance in the Catskill Park.

DEC is confident that these provisions will help to ensure that what occurred along Route 3 will not happen again elsewhere in the Forest Preserve, and that Forest Preserve lands along road corridors will continue to be protected pursuant to the directives set forth in the New York State Constitution more than 110 years ago. The Forest Preserve is a magnificent legacy left to us by prior generations of New Yorkers. Provisions in the Order aimed at preventing future inappropriate tree cutting on Forest Preserve lands along roadsides will help to preserve this legacy for future generations.

Sincerely,

Alison H. Crocker

Alison H. Crocker
Acting General Counsel

Enclosure

EDMS #234937

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ADIRONDACK PARK AGENCY

In the Matter of the Alleged Violation of New York State Constitution Article XIV § 1, Articles 9 and 24 of the Environmental Conservation Law of the State of New York, Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York and Executive Law § 814 & 816:

New York State Department of Transportation;
Respondent.

ORDER ON CONSENT

Case No.: CO5-20060104-1

WHEREAS:

1. The New York State Department of Environmental Conservation ("Department"), an agency of the State of New York, is responsible for the enforcement of the Environmental Conservation Law ("ECL") and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 N.Y.C.R.R."), as well as for managing Forest Preserve lands in compliance with Article XIV, Section 1 of the New York State Constitution, applicable rules and regulations, and the Adirondack Park State Land Master Plan as set forth in Executive Law §816. It is also the responsibility of the Department to conserve, improve and protect New York State's natural resources and environment, and control water, land and air pollution in order to enhance the health, safety and welfare of the people of the State of New York and their overall social and economic well-being.

2. The Adirondack Park Agency ("APA"), an agency of the State of New York, has the responsibility pursuant to Executive Law Article 27 to ensure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park.

3. The New York State Department of Transportation, (hereinafter referred as "NYSDOT") is an agency of the State of New York, formed under Transportation Law Article 2. NYSDOT has the responsibility to reasonably maintain the highways under its jurisdiction to protect the users of such highways from hazardous trees. NYSDOT recognizes that this responsibility must be performed in accordance with applicable requirements providing for the preservation and protection of the Forest Preserve and the natural resources in the Adirondack Park.

4. New York State Constitution Article XIV § 1, states in part:

> The lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by the law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by a corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. Nothing herein contained shall prevent the state from . . . maintaining any highway heretofore specifically authorized by constitutional amendment. . . .

5. Environmental Conservation Law § 9-0303(1) generally prohibits the cutting, removal injury or destruction of any trees, or timber or other property in the Forest Preserve.

6. 6 N.Y.C.R.R. § 190.8 generally prohibits the removal, destruction or injury of trees growing on State land.

7. Executive Law § 816 states as follows:

> The department of environmental conservation is hereby authorized and directed to develop, in consultation with the agency, individual management plans for units of land classified in the master plan for management of state lands heretofore prepared by the agency in consultation with the department of environmental conservation and approved by the governor. Such management plans shall conform to the general guidelines and criteria set forth in the master plan. Until amended, the master plan for management of state lands and the individual management plans shall guide the development and management of state lands in the Adirondack park.

8. Under Environmental Conservation Law § 24-0801(2), APA has jurisdiction over freshwater wetlands located in the Adirondack Park and requires a permit for any fill or excavation in a freshwater wetland located in the Adirondack Park.

9. Environmental Conservation Law § 24-0701 and 9 N.Y.C.R.R. Part 578 require that a person who conducts any form of excavation or placing of fill in a wetland located within the Adirondack Park must obtain a permit to conduct such activity in the wetland area from the Adirondack Park Agency.

10. Executive Law § 814 (1) and (2) state as follows:

> 1. Any state agency which intends to undertake any new land use or development within the Adirondack park, other than land use or development by the department of environmental conservation pursuant to the master plan for management of state lands, irrespective of whether the land use area wherein the project is proposed to be located is governed by an approved local land use program shall give due regard to the provisions of the plan and the shoreline restrictions and shall file a notice of such intent thereof with the agency. Such notice shall be filed at the earliest time practicable in the planning of such project, and in no event later than the submission of a formal budget request for the funding of such project or any part thereof. Such notice shall contain a description of the proposed project, together with such additional information relating thereto as the agency may determine necessary and appropriate for the purposes of this section. The state agency shall not undertake such project for a period of thirty days, or such earlier time as the agency may specify, following the filing of the notice of intent.
>
> 2. During such thirty-day period, the agency may review the project to determine whether it: a. might be inconsistent with the provisions of the plan and shoreline restrictions, or b. may have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park, taking into account the economic and social benefits to be derived from such project. In making such determination, the agency shall apply the development considerations.

11. The State of New York owns real property which is depicted in lots 23 and 24 on the New York State Department of Environmental Conservation Division of Lands and Forests Adirondack map dated April 30, 1985.

12. State owned land on both sides of New York State Route 3 in the Adirondack Park constitutes lands of the Forest Preserve which are protected by the New York State Constitution as set forth in paragraph 4, above.

13. Some lands of the Forest Preserve are adjacent to and north of New York State Route 3 and are part of the Saranac Lake Wild Forest Area, as classified by the Adirondack Park State Land Master Plan, authorized by Executive Law §816.

14. Some lands of the Forest Preserve are adjacent to and south of New York State Route 3 and are part of the High Peaks Wilderness Area, as classified by the Adirondack Park State Land Master Plan, authorized by Executive Law § 816.

15. The Adirondack Park State Land Master Plan, Page 23, states the following limitations as to the use of motorized vehicles and motorized equipment on lands which it classifies as Wilderness:

> Motor vehicles, motorized equipment and aircraft
>
> 1. Public use of motor vehicles, motorized equipment and aircraft will be prohibited.
> 2. Administrative personnel will not use motor vehicles, motorized equipment or aircraft for day-to-day administration, maintenance or research.
> 3. Use of motorized equipment or aircraft, but not motor vehicles, by administrative personnel may be permitted for a specific major administrative, maintenance, rehabilitation, or construction project if that project involves conforming structures or improvements, or the removal of non-conforming structures or improvements, upon the written approval of the Commissioner of Environmental Conservation.

16. New York State Route 3 extends from Clinton County to Jefferson County with a portion traversing lands located in the Town of Harrietstown in Franklin County and is classified as a State highway by New York State Highway Law §3(1).

17. The maintenance of New York State Route 3 is the responsibility of NYSDOT pursuant to the Highway Law.

18. In early Spring 2005, the Department and NYSDOT received a request from local officials to allow the cutting of hazard trees in the New York State Route 3 corridor between Tupper Lake and Saranac Lake, because on several occasions during Winter 2004-2005, hazard trees fell onto Route 3 obstructing traffic and causing a potential hazard to motorists. Based on this request from the local officials, the Department and APA requested that NYSDOT address the hazard trees on Route 3.

19. In Spring 2005, NYSDOT, in accordance with its duty to maintain safe public highways, established a plan

to remove hazard trees from an approximately 11-mile stretch of New York State Route 3.

20. In June 2005, NYSDOT met with Department and APA staff members to discuss the project and the parameters of the project. During the meeting, NYSDOT represented that the majority of the marked trees to be cut were within the monumented NYSDOT right of way, but some hazard trees would be cut in the Forest Preserve. Department staff advised NYSDOT that any hazardous trees that were cut must remain on the Forest Preserve. Following this meeting, a site visit occurred among NYSDOT staff, Department staff and APA Staff. During the site visit, Department staff observed numerous hazard trees marked by NYSDOT. Based on NYSDOT's statements and the Department's field observations, Department staff believed that the majority of the hazard trees observed were located within the highway right of way.

21. In early July 2005, NYSDOT started the project, which was under the supervision of NYSDOT Region 7. NYSDOT, which was using chainsaws to conduct the project, stopped the project due to safety concerns. NYSDOT advised the Department of its need to use a feller buncher to complete the project. Department staff advised NYSDOT that the feller buncher must remain in the highway right of way.

22. Between August 15, 2005 and September 1, 2005, NYSDOT obtained verbal authorization from the Department to cut trees in the corridor with a feller buncher. The Department never provided written authorization for the use of the feller buncher on Forest Preserve lands. During the project, NYSDOT reported that 3,772 trees were cut with a diameter of 4 inches at breast height or greater. The trees were tallied and reported to the Department using forms provided by the Department. Soon after NYSDOT's contract for the feller buncher was completed, the Department staff member who was responsible for the oversight of the project and who had been out of state, determined that NYSDOT had cut unmarked trees on forest preserve lands without proper authorization**.** While NYSDOT was remediating the project site, and at the approximate time the Department received a public complaint, the Department requested that NYSDOT stop the remediation of the project.

23. Between September 23, 2005 and October 5, 2005, Department and APA staff conducted a stump tally of the project area. Prior to conducting the stump tally, NYSDOT located and marked the boundary line between the monumented highway right of way and the Forest Preserve, so the Department could differentiate between trees cut in the highway right of way and those trees cut on adjacent Forest Preserve land.

24. The stump tally indicated the following:

# of trees cut in highway right of way, 3" and above at breast height	2,939
# of trees cut on Forest Preserve land adjacent to the highway right of way, 3" and above at breast height	2,071

25. This stump tally indicates that more than 1,000 trees were cut on adjacent Department administered Forest Preserve lands than had been identified for cutting by NYSDOT and approved for removal by Department staff in June 2005, and that many of these trees were live trees.

26. NYSDOT's actions of cutting trees on Forest Preserve land**,** as described herein, was in violation of New York State Constitution Article XIV §1, ECL §9-0303(1) and 6 N.Y.C.R.R. §190.8(g).

27. NYSDOT's use of a feller buncher, which constitutes motorized equipment, to cut trees on Wilderness lands in the High Peaks Wilderness Area is a violation of the Adirondack Park State Land Master Plan and Executive Law § 816.

28. NYSDOT's action of cutting 2,939 trees in the New York State Route 3 highway right of way, as set forth in paragraph 24 herein, should have been treated as a potential new land use and development and been proceeded by the filing of advance written notice of the project with the APA, pursuant to Executive Law § 814(1) and Executive Order 150.

29. NYSDOT's action of operating a feller buncher in wetland areas along New York State Route 3 and subsequently grading in and adjacent to wetlands along New York State Route 3 constitutes a disturbance of a freshwater wetland without a permit issued by the Agency in violation of Environmental Conservation Law § 24-0701 and ECL § 24-0801(2).

30. NYSDOT has been cooperative, and desires to resolve this matter with the Department and APA, and consents to the issuance of this Interagency Order on Consent to remedy the violations and actions identified herein.

31. NYSDOT, having affirmatively waived its right to a hearing in these matters in the manner provided by law and having consented to the making, issuance, entering and filing of this Interagency Order pursuant to the provisions of the ECL.

NOW, having considered this matter and being duly advised, it is ORDERED**,** among the Department, APA and NYSDOT:

I. A. THAT in complete resolution of all the violations set forth in this Interagency Order, NYSDOT is hereby assessed a Civil Penalty in the sum of one-hundred thousand dollars ($100,000), fifty-thousand dollars ($50,000) of which shall be paid within 60 days of the effective date of this Interagency Order, by NYSDOT. Notification of

payment shall be provided to Scott Crisafulli, Esq. at the Department of Environmental Conservation, the Division of Environmental Enforcement, 625 Broadway, 14th Floor, Albany, NY 12233-5500.

B. the remaining fifty-thousand dollars ($50,000) shall remain suspended, provided NYSDOT adheres to all the terms and conditions of this Interagency Order on Consent, including the attached Appendices. If NYSDOT should violate any term of this Interagency Order, the Department may assess all, or any portion of, the suspended penalty. NYSDOT shall make payment of any portion of the suspended penalty, within sixty days of receiving written notice from the Department that said suspended penalty is due and payable. Payment shall be made in the same manner as set forth in paragraph I.A. above.

II. A. In addition to the Civil Penalty set forth in paragraph I above, NYSDOT shall expend at least two-hundred thousand dollars ($200,0000)("EBP Cost Cap") by December 31, 2008**,** to perform the Environmental Benefit Project(s) ("EBPs") set forth in Appendix A, which outlines the work to be performed and estimated costs of the EBPs. Appendix A is hereby incorporated into, and made an enforceable part of, this Interagency Order. All EBPs shall be performed according to the terms and schedules set forth in Appendix A, and shall be consistent with the Department's EBP Policy.

B. 1. The EBPs set forth in Appendix A are listed in order of priority. NYSDOT shall perform those EBPs numbered 1-5 in Appendix A ("the Initial EBPs") and then perform the remaining EBPs ("the Remaining EBPs"), in the order of priority in which they are listed in Appendix A, subject to the EBP Cost Cap. Subject to the requirements of paragraph II.B.2 below, NYSDOT shall perform the Remaining EBPs in priority order, until the costs of all EBPs performed under this Interagency Order equals the EBP Cost Cap, and NYSDOT shall not be obligated to perform any of the Remaining EBPs above or beyond the EBP Cost Cap.

2. If NYSDOT expends costs equal to the EBP Cost Cap, while in the process of completing one of the Remaining EBPs, NYSDOT shall complete that EBP, to the extent the final costs of that EBP does not exceed the EBP Cost Cap by more than twenty-five thousand dollars ($25,000).

C. If NYSDOT expends less than two-hundred thousand dollars ($200,000) in performing the EBPs set forth in Appendix A, the remaining funds shall be paid to the Department as a penalty, pursuant to the terms of paragraph I.A. above.

D. With respect to both the Initial and Remaining EBPs described in Appendix A of this Interagency Order ("the listed EBPs"), NYSDOT hereby certifies that:

1. NYSDOT is not required to perform or develop the listed EBPs by any law regulation or other legally binding obligation;

2. NYSDOT is not required to perform or develop the listed EBPs as injunctive relief in this or any other case;

3. NYSDOT has not received, is not presently negotiating to receive, and will not seek in the future to receive, credit in any other enforcement action or legal proceeding based upon undertaking the listed EBPs;

4. NYSDOT has not obtained and will not obtain any grant funds based upon performance of the listed EBPs;

5. NYSDOT had not planned to perform the listed EBPs, or any element thereof, at the time the violations were detected;

6. Upon completion of a specific listed EBP in satisfaction of this Interagency Order, any oral or written statement by NYSDOT (or a third party at the request of the NYSDOT) in reference to said EBP shall include language stating that said EBP was undertaken as part of the resolution of an enforcement action for the violations described in this Interagency Order.

III. A. NYSDOT agrees that when it conducts the future cutting of hazard trees or other work on Forest Preserve lands, it shall first acquire a Temporary Revocable Permit ("TRP") from the Department for such work**,** unless a sudden, actual and ongoing emergency involving the protection or preservation of human life or intrinsic resource values exists which requires immediate actions. If such an emergency condition exists, NYSDOT may perform any and all reasonable response activities to be followed by the reporting of such activities to the Department and APA, consistent with the information required by a TRP, as soon as practicable after the performance of such activities. NYSDOT's applications for such TRPs shall include a count of all trees to be cut, by size and species for all trees 3" or greater in diameter at breast height, to be reported on a form agreed to by the parties. NYSDOT shall take the measures specified in the TRPs to ensure that all work done on Forest Preserve lands is in compliance with the terms of such TRPs.

B. Prior to the issuance of any TRP, NYSDOT staff shall mark, using temporary flagging, the bounds of the right of way. Such marking shall be undertaken by establishment of periodic stations along the centerline of New York State Route 3, or any other State highway rights of way within the Forest Preserve, with offsets measured by cloth or steel tape. The guiding document for establishment of these boundaries shall be the current record plan**,** containing applicable survey documentation, developed as part of the most recently completed road realignment

project. The density of flagging shall be to a level where Department staff can confirm whether stems are within or outside the right of way. For all activities to be conducted under this Interagency Order, this boundary shall serve as an agreed-to boundary for the purpose of identifying whether cut trees are located on Department administered Forest Preserve lands or on the DOT-administered right of way. NYSDOT will abide by the provisions of this paragraph, and all TRPs, and acknowledges that this paragraph's provisions will remain in effect until completion of the revisions to the Green Book required by Paragraph IV of this Interagency Order.

IV. NYSDOT shall work with the Department and APA, to make appropriate revisions**,** as set forth in Appendix B, to NYSDOT's June 1996 Edition of its "Guidelines for the Adirondack Park," commonly referred to as the "Green Book." Appendix B is hereby incorporated into, and made an enforceable part of, this Interagency Order. These particular revisions to the Green Book, which shall be subject to notice and public comment, shall include but not be limited to the revisions required by paragraphs III , V and VI of this Interagency Order, as well as those requirements set forth in Appendix B. NYSDOT's process for the revisions to the Green Book shall include providing public notice of its proposed revisions to the Green Book in the Environmental Notice Bulletin by October 31, 2006. Prior to this public notice in the Environmental Notice Bulletin, NYSDOT shall meet with Department and APA staff, and other appropriate federal, state or local government agency representatives, to discuss and seek recommendations for revisions to the Green Book. In addition to the public notice requirement, NYSDOT shall provide a 30 day public comment period concerning the proposed revisions to the Green Book. Within 45 days after completion of the public comment period, NYSDOT shall meet with the Department and APA, as well as any other appropriate federal, state or local agency, to review and, where appropriate, incorporate relevant public comments or concerns into the Green Book. Following this interagency review and incorporation, where appropriate, of relevant public comments, NYSDOT shall provide a final notice of its revisions to the Green Book in the Environmental Notice Bulletin. The final Green Book revisions shall be published in the Environmental Notice Bulletin by February 15, 2007.

V. NYSDOT will prepare, in consultation with the Department and APA, a Travel Corridor Management Plan for the New York State Route 3 highway corridor and other corridors in the existing State highway network in the Adirondack Park, as contemplated in the Adirondack Park State Land Master Plan. The process for the development of the Travel Corridor Management Plan shall follow the procedures set forth in the Adirondack Park State Land Master Plan and the *Memorandum of Understanding on the Implementation of the State Land Master Plan* between the Department and APA. This process shall include public participation, a determination of consistency with the State Land Master Plan by the APA Board, review by Department staff, and approval by the Commissioners of Environmental Conservation and Transportation. For the Route 3 Corridor, this Plan shall be submitted to the Department and APA for their determination by December 31, 2007. For the other Travel Corridor Management Plans for highways in the Adirondack Park, other than Route 3, the parties agree that they will enter into a Memorandum of Understanding by March 1, 2007**,** governing how these non-Route 3 Plans will be developed and containing a schedule(s) for submission of the Plans.

VI. No later than September 1, 2006, NYSDOT shall assign an employee at an appropriate management level whose primary functions shall include coordinating with the Department and APA, as well as interested third parties, regarding the environmental aspects of NYSDOT's highway Maintenance Activities (as defined in Appendix B) in the Adirondack Park. Specifically, regarding these environmental aspects of NYSDOT's highway Maintenance Activities (as defined in Appendix B**)** in the Adirondack Park, such employee shall be responsible for directing the performance of inspections, the monitoring of compliance, the reporting of non-compliance, and the training of NYSDOT staff to ensure the protection of the constitutionally-protected Forest Preserve land, adherence to the Adirondack State Park Master Plan, and compliance with the Environmental Conservation Law and Executive Law as it pertains to the Adirondack Park. NYSDOT shall provide the Department and APA with the name and contact information for the assigned individual. Although no hazardous trees were improperly cut down in the Catskill Park according to this Interagency Order, the NYSDOT employee referred to in this paragraph shall also have primary responsibilities over the environmental aspects of NYSDOT's highway Maintenance Activities (as defined in Appendix B) in the Catskill Park.

VII. NYSDOT shall complete all remedial activities set forth in Appendix "C" of this Interagency Order by August 1, 2006**,** to obtain the completion of related Department and APA reviews and approvals necessary for such remedial activities. Appendix "C" is hereby incorporated into, and made an enforceable part of this Interagency Order. NYSDOT shall provide the Department and APA with an annual report regarding their progress with the requirements of this Interagency Order. The Annual Report shall include the status of the EBPs as set forth in Paragraph II.B. herein and Appendix A, including the costs of implementing such EBPs and copies of all EBP related invoices to date.

VIII. Upon notice by the Department or APA that NYSDOT has failed to comply with any provisions of this Interagency Order or its Appendices, NYSDOT shall, within thirty (30) days of such notice provide the Department and APA**,** for their approval, a written plan as to how it will bring its actions into compliance with the

terms of this Interagency Order. Once a written plan has been approved by the Department and APA, NYSDOT shall follow the terms of that plan, as approved.

IX. The provisions of this Interagency Order constitute the complete and entire Interagency Order issued to NYSDOT concerning resolution of the matters identified in this Interagency Order. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be effective unless made in writing and subscribed by the party to be bound.

X. For violations addressed by this Interagency Order, the Department shall not institute any action or proceeding for penalties or other relief for such violations other than as provided for in this Interagency Order. Upon the completion of the work required by this Interagency Order, this Interagency Order settles all claims for civil and administrative penalties against NYSDOT concerning the facts giving rise to the violations described in this Interagency Order.

XI. Nothing contained in this Interagency Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, cause of action or demands whatsoever that the Department or the APA may have against anyone other than NYSDOT, its officers, trustees, agents, servants, employees, successors and assigns;

B. The Department or APA's right, to the extent provided by law, to enforce this Interagency Order against NYSDOT in its capacity as a State Agency, in the event that NYSDOT fails to fulfill any of the terms or provisions hereof;

C. Except as otherwise provided in this Interagency Order, any legal or equitable rights or claims, actions, proceedings, suits, cause of action or demands whatsoever that the Department or the Agency may have against NYSDOT for any alleged violations of the ECL, the Executive Law, the rules or regulations promulgated thereto, or permits or Orders issued thereunder;

D. The Commissioner's or her duly authorized representative's right to exercise summary abatement powers pursuant to Section 71-0301 of the ECL;

E. Any claims or liabilities that could be asserted by the Department or the APA based upon events, actions or omissions other than those addressed in this Interagency Order; and

F. Except as otherwise provided in this Interagency Order, any defense, counterclaim, or right of the NYSDOT, including the right to contest any allegations that it has violated this Interagency Order.

XII. Any reports or notices required to be given hereunder shall be in writing and shall be delivered by mail or facsimile transmission or email followed by delivery by mail to the following addresses:

If to the Department:

New York State Department of Environmental Conservation
Region 5 Regional Attorney
Route 86
Ray Brook, NY 12977

-and-

New York State Department of Environmental Conservation
Director, Division of Lands and Forest
625 Broadway
Albany, NY 12233

-and-

Chief, Bureau of Enforcement and Compliance Assurance,
New York State Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, NY 12084-5500

If to APA:

General Counsel
Adirondack Park Agency
Ray Brook, NY

If to NYSDOT:

Executive Director, Operating Division
New York State Department of Transportation
50 Wolf Road
Albany, NY 12232

Director, Delivery Division
New York State Department of Transportation
50 Wolf Road
Albany, NY 12232

The parties reserve the right to change any of the designees noted above, upon written notice to the other parties.

XIII. MISCELLANEOUS

A. The effective date of this Interagency Order on Consent shall be the date it is signed by the Commissioner of the Department or her designee.

B. The Department shall provide NYSDOT and APA with a fully executed copy of this Interagency Order on Consent as soon as practicable after this Interagency Order has been fully executed.

C. The provisions of this Interagency Order shall inure to the benefit of and be binding upon the Department, APA and NYSDOT and their respective agents, employees, and all persons, firms, and corporations acting subordinate to them or any of them, only to such extent as authorized by Law as applicable to agencies of the State and, for their respective employees, only in their capacities as employees of the State.

D. This Interagency Order shall terminate upon the later of the: satisfaction of the EBP requirements as set forth herein, compliance with the requirements of paragraphs III, IV, V or VI; or completion of the compliance schedule set forth in Appendix C.

E. All dates set forth in this Interagency Order and all of its Appendices are subject to any written extensions authorized by the Department and APA.

DATED: March , 2006
Albany, New York

New York State
Department of Environmental Conservation
DENISE M. SHEEHAN, Commissioner

By: _____
Denise M. Sheehan,
Commissioner

Adirondack Park Agency
ROSS P. WHALEY, Chairperson

By: _____ March , 2006
Richard Lefevre Date
Executive Director

Department of Transportation
THOMAS J. MADISON, Jr., Commissioner

By: _____ March , 2006
Date

EDMS #220752v2

Appendix "A" Environmental Benefit Projects ("EBPs")

"INITIAL EBPs" as set forth in Paragraph II.B. of main text

*The EBPs set forth in this Appendix shall be completed by December 31, 2008, subject to the EBP Cost Cap and other provisions, as set forth in paragraphs II.A and II. B of the main text of the Interagency Order.

1. Village of Saranac Lake: Total Estimated Cost of EBP is $30,000

-Construction of 4 information kiosks. These kiosks would contain educational information on the Forest Preserve and be constructed within the Village of Saranac Lake.

2. Village of Tupper Lake: Total Estimated Cost of EBP(s) is $30,000

-Repair of a boardwalk traversing the shore-line of Raquette Pond. The boardwalk traverses a sensitive wetlands area and has fallen into disrepair. The EBP funds would be used to repair the boardwalk. The Village also proposed a site analysis and plan for expanding the boardwalk. If funds remain after the boardwalk was repaired they could be applied towards this project.

3. Restoration of Route 3 Corridor: Total Estimated Cost of EBP is $35,000

-The restoration of the Route 3 corridor by proper site preparation, and planting and seeding of appropriate native wildflowers along NYS DOT's right of way. This action involves grading of over-steep slopes and soil preparation, including top soil veneer, along with selecting appropriate native species and providing continued vigilance to insure that proper conditions for germination and juvenile plant survival is assured. This project could improve the appearance of the right of way while the edge of the forest recovers. The project would require minimal maintenance, improve the habitat in the right of way, and help build public awareness of the value of wildflowers in improving the natural and visual landscape. This type of project would be consistent with NYSDOT's Green and Blue Highway Stewardship Initiative.

4. Interpretive Signage: Total Estimated Cost of EBP is $20,000

-Post interpretive signage along the Route 3 Corridor. The signage can be placed in the NYSDOT right of way. Areas where signage would be placed include the: Indian Carry boat launch; Middle Saranac boat launch or beach; Ampersand Mountain trail head; and the Hemlock Tree Stand parking lot. Other locations for signage will be determined.

5. Route 3 Parking Area: Total Estimated Cost of EBP is $40,000

-Construct and/or repair a parking area along Route 3 located at a trailhead leading to a stand of frequently viewed Hemlock trees. It may be possible to construct this parking lot in the NYSDOT right of way. If not, the project may be constructed on Department property.

"REMAINING EBPs" as set forth in Paragraph II.B.

1. Invasive Species Study: Total Estimated Cost of EBP is $60,000

-A project funding the implementation of the Watershed Stewardship Program of the Adirondack Watershed Institute at Paul Smith's College at three locations in the corridor and its immediate vicinity. The Watershed Stewardship Program includes, but is not limited to, educating boaters on invasive species identification and vectors, ecosystem impacts from invasive species, surveying boater use patterns at launch sites, and physical inspection for and interdiction of aquatic invasive species on boats and trailers. The funding will be used to have teams of watershed stewards at the South Creek and State Bridge boat launch sites, and the Fish Creek Pond Campground to implement the program.

2. Ampersand Mountain and Middle Saranac Trail Maintenance: Total Estimated Cost of EBP is $10,000

C. Conduct trail work to the Ampersand Mountain and Middle Saranac beach trails. Both of these trails need repair, including bridge replacements, erosion control, bog bridging, and relocation of the pit privy at the beach to meet setback requirements from wetlands and the lake. This EBP would be related to the violations set forth in paragraphs 28 and 29 of the Interagency Order.

Appendix "B"

Green Book Revisions

I. ESTABLISHMENT OF POLICY OBJECTIVES FOR STATE HIGHWAY MAINTENANCE ACTIVITIES INSIDE THE STATE HIGHWAY RIGHTS OF WAY THAT WOULD REQUIRE DEPARTMENT OR APA APPROVAL PURSUANT TO NEW YORK STATE CONSTITUTION ARTICLE 14, THE ECL OR SECTION 814 OF THE ADIRONDACK PARK AGENCY ACT, OR FOR MAINTENANCE ACTIVITIES OUTSIDE THE STATE HIGHWAY RIGHTS OF WAY ON STATE LAND (COLLECTIVELY REFERRED TO THROUGHOUT THIS INTERAGENCY ORDER AND ALL OF ITS APPENDICES AS "MAINTENANCE ACTIVITIES").

A. By October 31, 2006, NYSDOT will establish a draft written policy for the Maintenance Activities in the Adirondack Park, that clearly and expressly communicates NYSDOT's commitment to each of the following:

1. Protection of "Forest Preserve" and adherence to New York State Constitution Article XIV § 1.
2. Compliance with the Adirondack Park State Land Master Plan.
3. Maintaining compliance with the Environmental Conservation Law and any regulations promulgated thereunder.
4. Maintaining compliance with the Adirondack Park Agency Act and any regulations promulgated thereunder.
5. Establishing a program to assess and monitor compliance, as well as to report compliance and noncompliance for each of the aforementioned constitutional and statutory and regulatory provisions.
6. Providing adequate personnel, training, and resources to train employees at all levels of the organization as to the importance of each of the aforementioned provisions.
7. Promoting coordination in the planning and implementation of NYSDOT's activities with the Department and APA.

A final version of the policy, pursuant to this Interagency Order, shall be established by November 15, 2007.

II. INTEGRATION OF POLICY OBJECTIVES IN ALL STRATEGIC AND OPERATIONAL PLANNING OF STATE HIGHWAY "MAINTENANCE ACTIVITIES" IN THE ADIRONDACK PARK.

A. Effective October 31, 2006, NYSDOT will establish draft policy objectives set forth in paragraph I of this Appendix, into all strategic and operational planning of State highway Maintenance Activities in the Adirondack Park. These requirements will include the establishment of procedures for NYSDOT to communicate its commitment to the policy objectives as set forth in paragraph I of this Appendix to its personnel and the public, and shall be finalized and fully integrated into NYSDOT practices and projects by February 15, 2007.

B. The following list of items shall be included in the planning phase of all of NYSDOT's State highway Maintenance Activities:

1. Identification of any portion of the NYSDOT's Maintenance Activities which are on Forest Preserve or on lands adjacent to Forest Preserve lands.
2. Evaluation as to whether NYSDOT's Maintenance Activities will require the issuance of a Temporary Revocable Permit from the Department.
3. Identification of any portion of NYSDOT's road Maintenance Activities which will use motorized vehicles or motorized equipment and an evaluation of whether this use of motorized vehicle or motorized equipment or any other Maintenance Activities will be in compliance with the Adirondack Park State Land Master Plan.
4. Identification and evaluation of whether NYSDOT's Maintenance Activities require written notice to APA pursuant to Executive Law § 814.
5. Identification and evaluation of all environmental aspects of the NYSDOT's Maintenance Activities.

III. ESTABLISHMENT OF TRAINING PROGRAM TO IMPROVE AND INCREASE EMPLOYEE AWARENESS AND SENSITIVITY TO LAWS PROTECTING NATURAL RESOURCES OF THE ADIRONDACK PARK.

A. By October 31, 2006, NYSDOT shall establish a draft training program for all NYSDOT Maintenance Activities in the Adirondack Park. This training program shall fully integrate the policies set forth in paragraph I of this Appendix and

be conducted in a manner that all personnel have been trained and are capable of carrying out their responsibilities in ensuring compliance with the stated goals of the written policy. This training program should include, but not be limited to, the following:

1. Identifying specific education and training required for personnel, as well as a process for documenting such training.
2. Ensuring that employees, at all levels of the appropriate State Agency, are aware of the NYSDOT environmental policies as set forth in paragraph I of this Appendix, and the procedures and practices which have been created to ensure compliance with these policies.
3. Ensuring that personnel responsible for meeting and maintaining compliance with procedure and practice design to comply with the environmental policy stated in paragraph I of this Appendix on the basis of appropriate education, training, and/or experience.

This final training program shall be completed by February 15, 2007.

IV. ESTABLISHMENT OF PROCESSES FOR SELF MONITORING, COORDINATION WITH THE DEPARTMENT AND APA, AND REPORTING OF NONCOMPLIANCE ON PROJECTS IN THE ADIRONDACK PARK.

A. NYSDOT shall establish draft procedures by November 15, 2006 designed to monitor its compliance with the policy objectives set forth in paragraph I of this Appendix. In addition, NYSDOT shall also establish a draft process by November 15, 2006 to increase and improve its coordination with the Department and APA which should include a clearly defined procedure for reporting noncompliance in a timely manner. Both of these procedures shall be finalized by February 15, 2007.

B. In establishing these procedures, NYSDOT shall focus on ensuring compliance and preventing non-compliance by:

1. *Self Monitoring Program to Assess Environmental Compliance and Promote Environmental Protection.*

a. Assessing operations for the purposes of protecting Forest Preserve lands, ensuring environmental protection, and maintaining compliance with applicable statutes and regulations.

b. Identifying operations and activities where documented standard operating procedures (SOPs) are needed to protect Forest Preserve land, ensure compliance with the Adirondack State Park Master Plan, prevent potential violations of the Environmental Conservation Law and Executive Law.

c. Defining a uniform process for developing, approving, and implementing SOPs.

d. Designing a system for conducting and documenting routine, objective self-inspections by supervisors and trained staff in key areas identified by the above assessment.

e. Identifying and developing the types of records necessary to record compliance and noncompliance with the established SOPs and the stated policy objectives set forth in paragraph I of this Appendix. This requirement shall include who maintains these records, where they are maintained, and protocols for responding to inquiries.

f. Conducting at least annually in frequency, audits of the NYSDOT's compliance with all the requirements set forth in this Appendix and the express requirements set forth in paragraph I of this Appendix. Audit results must be reported to upper management; potential violations must be addressed through corrective action procedures; and the "lessons learned" from the audits must be implemented.

2. *Reporting of Noncompliance of Constitutional, Statutory or Regulatory Laws*

a. By February 15, 2007, NYSDOT shall enter into a Memorandum of Understanding with the Department and APA which establishes a system for identifying and reporting, in a timely manner, noncompliance of environmental laws to the Department and APA.

3. *Improvement of Coordination of Project with the Department and Agency*

a. Designing a system, with specific criteria, to enable supervisor and trained staff to appropriately coordinate with Department and APA staff.

b. Integrating of the NYSDOT position, as set forth in Paragraph VI of the main text, this Interagency Order, into the planning, implementation, coordination and monitoring phases of all State highway Maintenance Activities.

Appendix "C"—Schedule of Compliance

Remedial Activities for the Violations Set Forth Herein

1. NYSDOT staff marked, using temporary flagging, the bounds of the right-of-way. Such markings were undertaken by establishment of periodic stations along the centerline of New York State Route 3 with offsets measured by cloth or steel tape. The guiding document for establishment of these boundaries was the record plan developed as part of the road realignment project undertaken in the 1990's. The density of flagging was at a level where Department staff could confirm whether stems are within or outside the right of way. For all activities to be conducted under this Interagency Order, this boundary shall serve as an agreed-to boundary.

2. Identification of cut trees: Department staff, assisted by APA staff, tallied all trees with a minimum three inch breast height diameter using Department stump tally forms, cut along the highway after the right of way boundary was established. The tally identified each stem by species, average stump diameter, and whether the tree was located in the NYSDOT-administered right of way or Department-administered Forest Preserve.

3. Site restoration—right of way:

A. NYSDOT staff, or contractors, shall complete any necessary additional regrading and reseeding of areas impacted by these operations on the road right of way consistent with their management guidelines and the Guidelines for the Adirondack Park (Green Book). This work will be completed as quickly as possible, but in any event no later than August 1, 2006. No work shall be conducted when conditions would promote excessive rutting or significant disturbance of the ground.

B. The NYSDOT should certify compliance, in writing, when they believe that all remediation activities have been completed in accordance with the Green Book (and the existing APA permits).

4. Site Restoration—Department lands: NYSDOT shall complete the following restorative actions on Department-administered Forest Preserve lands as quickly as possible, but in any event no later than August 1, 2006. No work shall be conducted when conditions would promote excessive rutting or significant disturbance of the ground. No work shall be undertaken on said lands except as expressed below.

4.1 **Commencement of operations**: No work outside the right of way shall be undertaken until Department staff have inventoried the area and undertaken a proposed stump tally, using Department stump tally forms.

4.2 **Disposition of cut material**: NYSDOT shall dispose of material cut both within and outside the right of way as follows:

4.2.1 All trees shall be limbed such that material shall lie on the ground.

4.2.2 All material with a diameter under 8" shall be chipped and dispersed as evenly as possible beyond the bounds of the right of way.

4.2.3 Material greater than 8" diameter shall pulled into the Forest Preserve at least 20 feet from the edge of the right of way or the tree line, whichever is greater.

4.2.4 Department staff will make individual determinations in writing whether material larger than 8" shall be left on site or removed to an approved disposal facility or Department facility. Soils and remaining trees should not be impacted as a result of these activities. These areas shall be identified in writing by Department as part of the stump tally/inventory, using a 3" diameter, and will be communicated by Department staff directly to the NYSDOT Resident Engineer.

4.2.5 Site restoration—Department-administered Forest Preserve: NYSDOT shall level any areas impacted by operation of motor vehicles or mechanized equipment such that the impacted area is flush with the surrounding landscape. All such work shall be through the use of hand tools - no use of excavating or other motorized equipment shall be allowed.

4.3 Use of vehicles and equipment for remediation of site.

4.3.1 Use of vehicles outside the NYSDOT right of way: Use of motor vehicles, including but not limited to skidders, feller bunchers, bulldozers and other tracked or tired equipment, shall not be used outside the marked right of way boundary under any circumstances.

4.3.2 Use of chainsaws, power winches and other portable gasoline-powered equipment: In areas classified as Wild Forest (Forest Preserve lands north of the right of way), hand tools and motorized equipment (e.g., chain saws and portable motorized winches) may be used to cut and move material once the area has been inventoried by Department staff. In areas classified as Wilderness (generally Forest Preserve lands south of the right of way) only hand tools may be used. The use of motorized equipment in Wilderness areas is allowed only if NYSDOT first acquires prior written approval from the Commissioner of Environmental Conservation in compliance with Adirondack Park State Land Master Plan ("Master Plan") guidelines. Such written approval shall be provided by the Commissioner within twenty (20) calendar days of the effective date of this Interagency Order. Any use of motorized equipment in Wilderness areas shall be limited to those uses and any areas specifically identified in the Department Commissioner's approval document.

Putting Wind Power on the Fast Track for Development

By Michael Donohue

Recently wind energy has been the source of increased public attention. A number of on- and off-shore wind farms have been proposed throughout the United States, leaving citizens and lawmakers questioning if the benefits outweigh the costs.[1] While it has been widely recognized that wind turbines provide reliable energy without any negative air pollution,[2] individuals remain concerned about possible harm to property values through aesthetic blight or noise and possible harm to birds.[3] Additionally, the past problems citizens experienced due to inferior technology have created misconceptions about wind power that must be overcome if wind development is to occur on a wide scale.[4]

Through increased regulation and statewide preemption of zoning ordinances, the government has the ability to spur development, abbreviate the approval process, and overcome the psychological and technological barriers that stand as obstacles to wind farms. Unfortunately, not all wind projects are suited for this fast track approach, and their placement should be approached with caution. The absence of any existing offshore wind farm, and the controversy surrounding the Nantucket Sound, Cape Wind project, make a fast track approval process for offshore wind farms unlikely. The land-based commercial wind turbines also face significant opposition from local communities, but stand a greater chance of seeing an abbreviated approval process than their coastal brethren due to the large number of wind farms currently operating throughout the country.[5] The only type of wind turbine design that has seen widespread statewide and municipal zoning regulations is the small use, or personal, wind turbine.[6]

This article will address the issues involved with zoning for each of the above types of wind turbines: offshore turbines, land-based commercial wind farms, and small use or private turbines. Specifically, Part I provides an introduction to wind power along with a description of the technology involved in its production. Part II analyzes the lack of a comprehensive statute governing ocean zoning and the description of the potential problems. Part III addresses commercial wind turbines, the hazard they pose to birds, and other common concerns. Part IV introduces the small use turbine, California's statewide ordinance, noise concerns, and how to draft an ordinance that will eliminate most of the common problems associated with this type of turbine.

I. An Introduction to Wind Energy

Wind energy is the fastest-growing source of energy in the world.[7] Since 1980, the generating capacity of wind power throughout the world has grown from 10 megawatts[8] to nearly 25,000 megawatts.[9] In the past three years alone, the global wind power capacity has doubled and continues to grow at a rate of 24% a year.[10] "Dozens of manufacturers are cranking out turbine models—from small designs, each aimed at providing power for a single house, to huge machines with 100-foot blades that can supply 2 million to 3 million kilowatt-hours in a year, enough to power at least 500 households."[11]

Utilizing wind energy will provide a host of benefits that extend beyond the obvious production of energy. Since wind is a renewable resource, it will help reduce the dependence on foreign oil, and will not produce air or water pollution,[12] such as mercury, smog, or climate altering pollutants like acid rain or greenhouse gases.[13] "A single 1.65 [megawatt] wind turbine will displace emissions of 2,700 tons of carbon dioxide (the leading greenhouse gas), fourteen tons of sulfur dioxide (the principal cause of acid rain), and nine tons of nitrogen oxides every year."[14] Financially, wind energy development represents "an excellent economic growth strategy . . . delivering construction jobs, [and] expanding the tax base for municipalities."[15] The technology is quiet and efficient.[16] It has the ability to run 99% of the time and maintenance can be done on individual turbines instead of having to close down the entire wind farm.[17]

Despite its benefits, wind energy has faced an uphill battle; concerns over siting, ignorance over the technology, and lack of economic investment have all hampered development.[18] The siting issue is not unique to wind energy; siting power plants of any design has traditionally been a problem.[19] Yet wind turbines have a unique advantage over other forms of power plants: their small footprint. While large amounts of space are required for the wind turbines, the actual base that supports the turbine tower consumes a small amount of land, only five percent of the total land needed for the turbine itself.[20] This makes the technology particularly attractive to agricultural regions. Farmers can use wind as a modern "cash crop" to supplement their income from traditional farming.[21] In fact, a farmer's income can be increased by "fifty percent or more by leasing a portion of their land for wind turbines," while the small footprint allows farming to continue around the turbines.[22] "The development of 2,000 [megawatts] . . . would mean annual payments of approximately $4 million to farmers and other landowners—more than $2,000/year in lease or royalty payments for each installed turbine."[23]

A. Technology

The idea behind capturing the wind's energy to do work has been around for centuries.[24] "By 5,000 B.C., the Egyptians were using the wind to sail along the Nile."[25] Two thousand years later, the concept of using

"windmills to pump water for irrigation" was proposed by the Babylonian Emperor Hammurabi.[26] By the time of the Crusades, windmill technology had become "diffused in the east" and most likely spread through Europe with the return of the Crusaders.[27] Modified and refined in Holland, the Dutch brought windmill technology to America.[28] The first windmill to produce electricity was invented by Charles Brush in the late 1800s, it was 50 feet tall and had 144 rotor blades.[29] In 1890, a Danish meteorologist, Poul la Cour, found that fewer rotor blades at a faster speed generated electricity more efficiently.[30]

The oil crisis of 1970 provided a catalyst for windmill production, and for the next 20 years America saw a "proliferation of turbine designs, ranging from two- and three-propeller horizontal generators to a vertical model that resembled an egg beater."[31] These designs were insufficient and overshadowed by the cheap electricity that could be provided by fossil fuels and nuclear power.[32] Additionally, these older models often drew opposition because of the noise they produced.[33]

The current wind power plants are "much more efficient, thanks in large part to the Danish windmill industry."[34] Today "their operational . . . cost per kilowatt-hour is comparable to the cost for plants burning fossil fuels."[35] Despite advances in technology, today's most efficient wind turbine will only capture 60% of the wind's energy, and changes in the wind's speed will have a direct effect on the amount of energy produced.[36] The individual criticisms of wind power will be discussed later.

The most predominant wind turbine design is the horizontal access turbine.[37] "This type of turbine displays a set of feather-shaped blades, usually three, mounted atop a high tower to a unit called a nacell[e]."[38] The nacelle unit is typically located around 200 feet above the surface and the blades are approximately 80 feet long,[39] although heights vary depending on the individual project.[40] Proposed offshore wind farms, for example, would utilize a nacelle 260 feet from the water and have blades over 100 feet long.[41] As the wind spins the blades, the blades turn a shaft that is "connected to a gearbox which spins magnets in the generator to produce electro-magnetic pulses," which are all housed within the nacelle.[42]

II. Ocean Zoning

Placing wind farms out to sea is arguably the most controversial aspect of wind power, making it the least likely form of wind turbine to receive an abbreviated approval process.[43] Unlike the multiple land-based commercial wind farms that exist throughout the country,[44] the United States does not have a single wind turbine lying in its waters.[45] While this absence is appreciated by those who oppose ocean development, the existence of more than "twenty offshore wind farms . . . in preliminary stages of development" suggests that a change is on the way.[46]

From an energy producing standpoint, constructing wind farms in the ocean is logical because the ocean contains an abundance of land that is not likely to be developed, and ocean development would provide access to higher continuous wind speeds.[47] While foreign nations have been taking advantage of the ocean wind for years,[48] development off our shores is hindered by a lack of statutory regulation.[49] To date, Congress has not passed any laws directly related to the placement of offshore wind farms and thus guidance must be obtained from other federal statutes.[50] A proposed wind farm off the coast of Massachusetts, known as the Cape Wind Project, is paving the way for the rest of the country, through a series of lawsuits, over acquiring permits and the regulation of offshore wind development.[51] Pending the creation of a comprehensive federal statute relating to the development of offshore wind farms, these initial lawsuits may set the standard for the rest of the country.

A. Cape Wind

Cape Wind Associates (Cape Wind) is a Massachusetts based corporation that has proposed to build a commercial wind farm in Horseshoe Shoals, a shallow area of the Nantucket Sound[52] more than three miles off the coast of Massachusetts.[53] The development would include "at least 130 industrial wind turbines, each 470 feet tall,"[54] and would spread across 24 square miles and be visible from shore.[55] To aid in construction, the company needed to obtain "extensive meteorological and oceanographic data concerning conditions" in the region and "announced plans to build a 'scientific measurement device station'" (SMDS) out at sea.[56] The SMDS would collect data for five years and would "consist of a data tower rising approximately 200 feet in the air."[57] The data tower and its "its tripodal support . . . would occupy about 900 square feet of ocean surface."[58] The United States Army Corps of Engineers (Corps) granted Cape Wind a "section ten" permit under the Rivers and Harbors Act after a six-month public comment period and two public hearings.[59] This series of events prompted two lawsuits. The first suit dealt with "whether a permit from the federal government *and* a license from the Commonwealth of Massachusetts were required before a monopole structure could be constructed . . . more than three miles off the coast of Massachusetts."[60] The second suit concerned whether the Corps had the authority to issue a permit to Cape Wind Associates for the construction of the SMDS tower.[61]

B. Regulating the Ocean Floor

The location of the proposed Cape Wind project is somewhat unique. The Nantucket Sound "is almost completely enclosed by Massachusetts's territorial sea" and has a one-mile wide channel of "federal water" that connects it to the ocean. Furthermore, the location chosen for the project is located within the Sound but "is more than three miles from any coast."[62] Therefore, the land in question is completely submerged, three miles from shore, and

surrounded by Massachusetts' territorial sea, providing for a novel question of whose law should be applied.[63]

As a general rule, the federal government maintains "paramount rights" to the seafloor as a part of its national sovereignty.[64] This rule is not absolute.[65] In 1953, Congress passed the Submerged Lands Act, which granted full title and ownership in the underlying seafloor to states within three geographical miles of their shores, including rights to develop and manage those lands.[66] This three-mile boundary was further codified in the Outer Continental Shelf Lands Act (OCSLA) in which Congress specified that "federal law governs on the 'outer Continental Shelf'—defined as all submerged lands under U.S. sovereign control lying seaward of the three-mile boundary."[67] The Supreme Court relied on the Submerged Lands Act and OCSLA when it decided *United States v. Maine*,[68] and reaffirmed the United States' sovereign rights in the land beyond the three mile border.[69] In *Maine*, the Supreme Court held that the federal government is "entitled . . . to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low-water mark."[70]

With the regulation of submerged land beyond three miles from shore in the hands of the federal government, individual states are permitted to regulate the land between the shore and the three mile limit.[71] The Magnuson-Stevens Act illustrates this point.[72] The Magnuson-Stevens Act was designed to help conserve the nation's fisheries by granting "exclusive fishery management authority" in waters extending 197 miles out to sea to the federal government.[73] The 197 miles is measured from the state's three mile boundary.[74] The Act specifically states that it does not affect the ability of the individual states to regulate fishing within their borders, which includes the water leading up to the three mile boundary already established.[75] To complicate the issue Congress passed legislation "defining all of Nantucket Sound to be within the 'jurisdiction and authority' of Massachusetts 'for the purposes of' the Magnuson-Stevens Act."[76]

Ten Taxpayer[77] argued that because of this grant of authority, Massachusetts law applied to the Cape Wind project and a state permit would be required.[78] Upon review, the First Circuit agreed with the District Court but stated that the issue was not whether "Congress gave Massachusetts the Authority to regulate on Horseshoe Shoals. Rather, . . . whether the Massachusetts statutes in question apply . . . to activities on Horseshoe Shoals; and if they do apply, whether their application to Cape Wind's construction of the SMDS would conflict with existing federal law."[79]

In resolving the first issue, whether Massachusetts statutes apply, the court rejected Ten Taxpayer's argument that any work or occupation of tidal waters requires a permit. The court refused to find that tidal water was "any location where the depth of the sea is affected by the tides," instead finding that the term most likely referred to "developments in harbors or along the shoreline."[80] In support of this position, the court cited to a series of Massachusetts cases and the state's own Department of Environmental Protection regulations that require permits only for activities in filled tidelands and waterways.[81]

In an additional attempt to have state law apply, Ten Taxpayer claimed that Massachusetts' Ocean Sanctuaries Act prohibits the "building of any structure on the seabed in an ocean sanctuary."[82] The trouble with this theory, and the reason that the court rejected it, is that the "Department of Environmental Management, which is charged with implementing Massachusetts' Ocean Sanctuaries Act . . . has expressly disclaimed authority over Horseshoe Shoals" in response to a letter sent by Ten Taxpayer.[83]

Finding that Massachusetts laws did not apply, the First Circuit turned to federal law. Under the OCSLA, Congress chose not to legislate for every conceivable circumstance that could happen on the continental shelf[84] and opted to borrow state civil and criminal laws and treat them as federal to the extent they complete any gaps in coverage and are not inconsistent with existing federal law.[85] Having found that Massachusetts law did not apply, the Court stated that even if it were to require a permit, state law would conflict with OCSLA and be preempted since Congress has "retained for the federal government the exclusive power to authorize or prohibit specific uses of the seabed beyond three miles from shore" and it "leaves no room for states to require licenses or permits for the erection of structures on the seabed of the outer Continental Shelf."[86] As a result of this opinion, it would seem that any company seeking to develop the seabed for wind farm purposes is free to ignore state or local permitting requirements within the state it intends to supply power to, provided the wind farm is three miles from shore.

C. Obtaining a Permit for the Cape Wind Project

Traditionally, Congress has created resource specific acts to govern the mining and development of nonliving marine resources: "Oil and gas leasing, exploration, and development activities are covered by the Outer Continental Shelf Lands Act;[87] hard rock extraction is covered by the Deep Seabed Hard Mineral Resource Act;[88] and ocean thermal energy conversion is subject to the Ocean Thermal Energy Conversion Act."[89] The absence of a comprehensive offshore wind farm statute has been viewed as the "hole in the regulatory doughnut" and another barrier preventing offshore wind farms from receiving a fast track approval process.[90] This void becomes especially apparent when searching for guidelines or procedures that should be followed when planning wind farm development. By comparison, OCSLA requires oil and gas developers to undergo a competitive "bidding process to obtain a lease, comply with rigorous environmental standards covering hundreds of pages of the Code

of Federal Regulations, submit to programmatic planning, and pay lease rentals and royalties to the federal government."[91]

In August 2002, after nine months of review, the Corps "issued an environmental assessment and a finding of no significant impact" under NEPA and granted Cape Wind a permit under section 10 of the Rivers and Harbors Act to construct the SMDS.[92] The Alliance to Protect Nantucket Sound[93] subsequently brought a lawsuit alleging that the Corps could not lawfully issue such a permit, and in the alternative, that the permit was invalid.[94]

In determining whether the Corps has the authority to issue a section 10 permit, the District Court first consulted the Administrative Procedure Act (APA).[95] The APA "applies to judicial review of a federal agency's decision[]," and is limited to finding that the agency's "decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law."[96]

> An agency's interpretation of a statute it is charged with administering is, accordingly entitled to deference. If the intent of Congress is not clear from the face of a statute, an agency's construction of such a statute should be upheld so long as it is reasonable. If, however, the intent of Congress is clear from the face of the statute, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[97]

The Corps is charged with the administration of section 10 of the Rivers and Harbors Act, which states that "it shall not be lawful to build or commence the building of any . . . structures in any . . . water of the United States . . . , except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. . . ."[98] The Secretary of the Army has, in turn, "authorized the chief of Engineers and his authorized representatives to issue or deny permits . . . for construction or other works in or affecting navigable waters of the United States pursuant to section 10."[99] "The body of law surrounding section 10 has evolved in such a way over the years that today 'a permit from the . . . Corps . . . is required for the installation of any structure in the navigable waters' of the United States."[100]

While the Corps' jurisdiction was originally limited to the first three miles from shore, the OCSLA extended the jurisdiction to include " 'artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf' regardless of whether they are erected for the purpose of extracting resources."[101] In 1978, Congress further amended OCSLA to provide the Corps jurisdiction over "all installations and other devices permanently or temporarily attached to the seabed."[102]

Looking at the Corps' authority, the district court in *Alliance to Protect Nantucket Sound*, determined that Congress was directly speaking to the issue. The SMDS was an artificial installation on the seabed and under the OCSLA, it did not matter if the structure did not extract minerals from the ocean floor.[103] On appeal, the First Circuit was not convinced that the statute was entirely clear; it applied a *Chevron*[104] test and determined through legislative history that Congress had not intended OCSLA to be limited to mineral extraction.[105]

The plaintiffs in *Alliance to Protect Nantucket Sound*[106] also argued that the permit to Cape Wind should have been denied under the Corps' own regulations, which require "an applicant to have sufficient property rights [in the project area] as a prerequisite for a permit."[107] As the District Court pointed out, and the First Circuit agreed,[108] this argument is based on a "fundamental misinterpretation" of the regulations.[109] In fact, the regulations are designed to keep the Corps out of property disputes.[110]

> A [Corps] permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a [Corps] permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the applications. The [Corps] will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps' public interest decision.[111]

By signing the application, Cape Winds affirmed that it "possesses or will possess" the underlying property rights to construct the SMDS tower.[112] The validity of any affirmation has yet to be determined since the Corps is without the authority to entertain any property interest issues.[113]

While the court's decision permits the construction of the SMDS tower, the district court pointed out how the same reasoning does not necessarily mean that a permit for 130 wind turbines will be approved.[114] Critics of the decision point out that while the district court's "reasoning [was] sound for the permitting of a single structure data tower," it remains to be seen whether that same reasoning will withstand the pressure of "permitting and constructi[ng] . . . a massive industrial energy generating facility covering twenty-six miles of Nantucket Sound."[115]

III. Land Based Commercial Wind Turbines

Unlike the proposed ocean turbines, 23 states have wind farms, 13 of which have a capacity over 20 megawatts.[116] This precedence does not mean that wind farms have come into wide acceptance.[117] Wind power, like any other form of power plant, faces a "not in my backyard" argument from residents who severely prohibit any attempts to place land based commercial wind turbines on an abbreviated approval process.[118] Aesthetic degradation, noise, diminished property values, and effects on birds are just some of the more popular arguments against the power plants.[119] Additionally, local zoning ordinances may stand as a barrier to development since commercial wind turbines are not usually addressed in ordinances.[120] "In areas subject to zoning, the height of meteorological towers and wind turbines usually will require a variance, conditional use permit, zone amendment or other form of local regulatory action."[121] The novelty of the technology may leave town officials unsure of the proper administrative steps or safeguards that should be required.[122]

Local governments that are situated in a region with sustained winds may "adopt special zoning provisions designed to protect both wind access for the [industry] and the safety and other interests of neighbors."[123] To determine if construction is even feasible, and a zoning provision should be developed, the municipality should consider the strength of the wind within its borders.

> Wind resources are characterized by wind power density classes, which range from Class 1 (the lowest) to Class 7 (the highest). The U.S. Department of Energy has developed a map that identifies areas with good wind potential in the U.S. . . . These areas (class 3 and above) are found along the East Coast, the Appalachian mountain chain, the Great Plains, the Pacific Northwest and in some other locations. In total, they cover more than 1 million square kilometers, or about 14% of the land area of the 48 contiguous states.[124]

If the winds are strong enough, and a zoning ordinance is to be developed, the municipality should consider a number of different factors, the most important of which is safety. In 1945, the United States' first commercial wind turbine malfunctioned and "threw an 8-ton blade 750 feet."[125] While technology has improved significantly since 1945, precaution is in order. It has been suggested that a "blade failure in a 1.5-megawatt machine could result in fragments cast a quarter of a mile."[126] Additionally, critics have speculated that ice could accumulate on the turbine and be thrown for great distances.[127] These safety concerns can be addressed through a setback requirement similar to one established by Lincoln, Nebraska that takes into account a "blade throw curve."[128] "The curve attempts to forecast the distance a rotor blade would fly in the event of breakage or machine failure."[129] Another setback requirement mandates a distance of "seven and one-half rotor diameters from downwind property lines."[130]

A setback requirement designed to protect citizens from malfunctioning turbine blades would have the secondary benefit of reducing noise concerns.[131] Since sound levels decrease with distance, a larger setback requirement for a turbine would result in a lower sound level.[132] If a planning commission were to follow the decision of Addison, Wisconsin, and require a 1,000 foot setback, a sound reading taken from the turbine will have decreased by a factor of 16 by the time it reached 1,000 feet.[133] This requirement will result in fewer turbines, but will alleviate the public's concerns over noise.[134] The concern over noise is mostly psychological: "[m]any older models drew opposition because they were noisy, but better aerodynamics and other advances have led to quieter design."[135] Moreover the sound that emanates from the gearbox or generator can be muffled by "sound absorbing materials."[136] At 350 meters, or 1,050 feet, the sound generated from a wind turbine "varies between 35–45" decibels, a level comparable to the "reading room of a library."[137] Since it is unavoidable that some of the "energy captured by wind turbines" will be "transformed into sound energy," proper siting can lead to "negligible noise impacts."[138]

Another oft-cited concern over wind power is the effect it will have on birds.[139] This concern arose from studies done "in the early 1990's [that] documented the death of raptors from collisions with wind turbines in Altamont Pass, California. It was discovered that these turbines had been sited in the middle of prime raptor habitat."[140] In reality, commercial wind turbines pose less of a threat to birds than "smokestacks, power lines [or] television towers."[141] Only one or two birds die "per turbine per year,"[142] a number considerably less than the estimated four to ten million "that die each year in the U.S. from nighttime collisions with lighted telecommunications towers."[143] In addition, the newer wind turbines spin slower, "at around seventeen to thirty revolutions per minute . . . or less" allowing birds to avoid rotors.[144] Research into tower design and "siting practices" has led to the development of more "bird safe" towers.[145] "Raptor mortality has been absent to very low at all newer generation wind plants studied in the U.S.[146] This and other information . . . strongly suggests that the level of raptor mortality observed at Altamont Pass is unique."[147] Even with "bird friendly" turbines being installed throughout the country, studies should still be conducted to prevent locating a wind park in raptor habitat.[148] While these studies could save the lives of multiple birds, the siting mistakes made at Altamont Pass, along with the age of the technology used there, have created significant barriers to fast track approval for commercial wind farms.

The location of a turbine has a direct effect on how much power can be obtained. "Tower height affects the amount of power that can be extracted by a given wind turbine. . . ."[149] At lower altitudes, wind is disrupted by trees, buildings, and other obstacles and causes stress on the rotors and tower.[150] Placing a turbine at higher elevations allows access to higher wind speeds that are not subject to terrain disruptions.[151] However, placing a turbine at high elevations means it could be visible from a further distance and will affect the area's aesthetics.[152] "Fortunately, newer rotors rotate more slowly than their predecessors, and thus are less eye-catching."[153] Additional measures can be taken to diminish the visual impact, such as painting the tower so that it matches its surroundings.[154] Even after efforts to camouflage the towers,[155] there is no denying that they are tall, most with generators located 200 feet above the ground.[156] The municipality considering the installations must weigh the aesthetic values against the public benefit, which will include an increased tax base and new jobs.[157] As one author points out "[a]s alternative energy systems become an increasingly important power supplement, citizens may welcome a mountainscape or seascape of powerful wind giants bringing renewable sources of power to previously oil-thirsty regions."[158]

With the aesthetic quality argument in mind, the Department of Energy, in 2003, commissioned a study on the effects of wind farms on property values.[159] The review was the first of its kind in the United States and in Europe and analyzed property sales in three different cases.[160]

> Case 1 looked at the changes in the view shed and comparable community for the entire period of the study; Case 2 looked at how property values changed in the view shed before and after the project came on-line; and Case 3 looked at how property values changed in the view shed and comparable community after the project came on-line.[161]

Ten projects around the country were included for analysis, and in eight of ten projects, the property values increased faster in the view shed (properties that can view the turbines from within the residence) than in the surrounding community.[162] In Case 2, nine out of ten projects reported a quicker increase in property values once the project came on-line.[163] In Case 3, the property values increased faster in the view shed after wind farm development than in the surrounding community.[164] The few cases that did not show an increase in property values were able to be explained through external factors.[165] As a result, the report concluded that "there is no support for the claim that wind development will harm property values."[166]

IV. Small Use Turbines

Small use, or personal wind turbines, have many advantages that welcome a fast track approach. Compared with their commercial counterparts, small use turbines, or personal wind turbines, are around 100 feet shorter (approximately 100 feet tall) and can provide between 400 watts to 100 kilowatts, typically enough to supply a farm or home.[167] These turbines can run on less wind, making them feasible in many more places.[168] Additionally, over its lifetime a personal turbine "can offset approximately 1.2 tons of air pollutants and 200 tons of carbon dioxide."[169] and other gases that cause climate change. The developments made in the commercial wind industry have directly translated into advances in "small turbine design, making [the] systems more reliable, quieter and safer than those introduced in the past decades."[170] Over recent years the small use turbine industry market has grown by 40%,[171] and more and more "provisions relating to wind energy generation are finding their way into local zoning ordinances."[172]

Small use turbines face much of the same complaints and siting issues as the taller commercial turbines, and many of these concerns have been addressed by existing or draft model ordinances. Currently a number of model ordinances are available for county planners to examine and experiment with.[173] Local zoning ordinances can be created in a manner that will allow landowners to install small wind turbines on their property as a matter of right, completely avoiding public hearings.[174]

Even at a reduced elevation, small use turbines are just as likely to generate safety and aesthetic concerns from neighbors and regional planners.[175] Unlike the commercial turbines, whose existence over 200 feet requires that notice be given to the FAA,[176] small use turbines often avoid notice and lighting requirements.[177] To address height limitations, a model ordinance from industry suggests the following height requirements:

> Tower heights of not more than 100 feet shall be allowed on parcels between one and five acres. For property sizes of five acres or more, there is no limitation on tower height, except as imposed by FAA regulations, provided that the application includes evidence that the proposed height does not exceed the height recommendation by the manufacturer or distributor of the system.[178]

This approach is geared toward allowing certain small use turbines as a right, and protects the safety of residents by increasing the setback requirement with the height of the tower.[179] As a further method of safety, an ordinance could require a fence surrounding the tower,[180] or limiting the "tower climbing apparatus" to twelve feet above the ground.[181] Even though this requirement is not supported by the small wind industry,[182] it is similar to other pre-

ventive measures required for similar structures such as ham radio towers.[183] The state of California recommends these safety measures even though the state has not had an injury attributed to falling from a small turbine in 25 years.[184]

Noise remains a concern of small wind turbines and is an aspect of personal wind turbines that has been litigated.[185] In *Rose v. Chaikin*[186] a New Jersey property owner had constructed a 60 foot wind turbine ten feet from the plaintiff's property line.[187] At first the neighbor obtained relief from the city council, which limited the time the turbine could run, and eventually sought a restraining order from the court under the theory of private nuisance.[188] The court noted that sound readings taken from the turbine, which range from 51-61 decibels, "would be offensive to people of normal sensibilities," exceeded the 50 decibel city zoning ordinance, and caused the plaintiffs a wide range of physical aliments such as "nervousness, dizziness, loss of sleep and fatigue."[189] Relying on previous New Jersey case law, the *Rose* Court noted that the private nuisance test is defined as: "an unreasonable interference with the use and enjoyment of land." The court further stated that "the utility of the defendant's conduct must be weighed against the *quantum* of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land."[190] Additionally, prior precedent had held excessive noise to be an "unreasonable use" of property when it "caused injury to the health and comfort of ordinary people," and the injury it caused was unreasonable under the circumstances.[191] In the present case, the court received "lay and expert testimony support[ing] the conclusion that . . . all of [the plaintiffs] had experienced stress-related symptoms when the windmill was operational."[192] Furthermore, the injury that the plaintiffs sustained outweighed the social utility of the wind turbine, and thus it constituted a private nuisance.[193]

Wind turbines produce two types of noise: the noise from the mechanical equipment and the sound of the blades when they rotate.[194] Small wind turbines operate between 75 to 100 decibels.[195] And although turbine noise increases with wind speed, so does the noise from everything else, such as the rustling of leaves on trees.[196] "Research has found that the background [noise] can be almost as noisy as the wind turbine, and at low speeds, will usually mask the wind turbine itself."[197] For a noise ordinance to avoid a vagueness claim, it should include a decibel level as read from a specified location.[198] Typically, noise is measured by the strength at the source or from a predetermined location;[199] the further from the source a reading is taken, the quieter the sound will appear.[200] For example, a turbine operating between 75-100 decibels as measured at its source will provide a reading between 40-65 decibels 100 feet away." One model ordinance suggests limiting noise to 60 decibels when measured from the closest inhabited dwelling, except during severe windstorms and short-term events.[201] A reading of 40 decibels is commensurate with an average living room, while a reading above 65 equates to a loud conversation.[202]

As a final consideration, the permitting agency should require several pieces of information from the landowner who wishes to install a small wind turbine: assurance that the electrical components comply with the National Electric Code; certification by an engineer that the structure is stable; and evidence that the owner has notified the local utility company if he or she intends to connect the turbine to the power grid.[203] These measures will ensure the safety of the operator and the public.

V. Learning from California

Currently, the only state to offer a fast track approval process for personal wind turbines is California. "In 2001, the California Legislature passed landmark legislation . . . to promote small wind turbine installations by standardizing permitting requirements."[204] The state's goal was to reduce peak energy demand, "increase in-state electricity generation, diversify the state's energy supply portfolio and make the electricity supply market more competitive by promoting consumer choice."[205] This legislation, Assembly Bill 1207, followed a series of rolling blackouts and "steep electricity rate hikes."[206]

By standardizing the permit process at the local level, the legislature removed any complications and required municipalities to grant permits provided that certain provisions were met.[207] Permitting agencies are allowed to follow "their own processes for permitting" and enforce "compatibility and use issues," but are not allowed to be more restrictive than AB 1207.[208] The requirements that the state established are similar to the model local ordinances discussed above, which include setback requirements, height limits, turbine approval/building code mandates, and notice provisions.[209]

The new statewide initiative has been met with mixed results.[210] Some counties are unaware of the law, while others have not understood that it only permits regulations that are less restrictive than those passed by the state.[211] Other counties "have changed their permitting rules . . . but have not necessarily made their processes less cumbersome," while others "have not changed their ordinances because of budget restraints."[212] The misunderstandings have left the initial landowners seeking permits to work out the kinks in the system.[213]

Nevertheless, California's series of rebates and tax credits have encouraged development and enabled the construction of towers that will pay for themselves in 6-7 years.[214] One California vineyard in particular was able to reduce its monthly electrical bill from $1,000 to $200 by installing a single turbine, while other property owners do not have to pay any electrical bill.[215]

Conclusion

As alternative sources of energy become more attractive, municipalities can expect an increase in the number of requests for building permits and variances for wind turbines. While not all projects are suited for a fast track approach, the municipality that develops a comprehensive ordinance will be well suited to handle the increase in demand while still protecting the safety and concerns of its residents. As the technology improves and previous misconceptions are overcome, it is possible that larger wind turbines will receive an abbreviated approval process, paving the way for the country to receive a substantial amount of its power from wind energy. Even after all the security issues are addressed, the conflict between clean power and aesthetic considerations will keep wind energy in the public's eye for some time.

Endnotes

1. See Donald C. Baur & Jena A. MacLean, *The Degreening of Wind Energy: Alternative Energy v. Ocean Governance*, 19 SUM Nat. Resources & Env't 44, 47 (2004); Beth Daley, *N.E. Eyed as Natural Locale for Wind Power*, THE BOSTON GLOBE, July 30, 2002 at A1.
2. *See, e.g.*, Christine Real de Azua, *The Future of Wind Energy,* 14 Tul. Envtl. L.J. 485, 490 (2001). "A single 75-kilowatt wind turbine, operated for one year at a site with Class 4 wind speeds . . . can be expected to displace a total of 2,697,175 pounds of carbon dioxide, 14,172 pounds of sulfur dioxide, and 8,688 pounds of nitrogen oxides, based on the U.S. average utility generation fuel mix." *Id.* Wind Speed Classifications are based on the amount of wind energy that is available for conversion into electricity, otherwise known as wind power density. Class 4 wind speeds range between 12.5–13.4 miles per hour. AWEA, *Basic Principles of Wind Resource Evaluation, available at* http://www.awea.org/faq/basicwr.html (last viewed April 16, 2005).
3. Renewable Energy Policy Project, *The Effect of Wind Development on Local Property Values*, *available at* http://www.Repp.org/wind.index/html (last viewed Feb. 24, 2005); California Experience Environmental Insider, *Group Will Take Action over Danger to Birds from Wind Farms,* 17 No. 12 Cal. Envtl. Insider 13 (2003).
4. Azua, *supra* note 2, at 490.
5. Ari Reeves & Fredreck Beck, *Wind Energy for Electric Power*, *available at* http://www.Repp.org/wind/index.html (last visited Feb. 24, 2005).
6. Permitting Small Wind Turbines: A Handbook Learning from the California Experience, *available at* http://www.awea.org/smallwind/toolbox/TOOLS/permitting.asp (last accessed Feb. 25, 2005) [hereinafter California Experience].
7. Michael Schulz, *Questions Blowing in the Wind: The Development of Offshore Wind as a Renewable Source of Energy in the United States*, 38 New Eng. L. Rev 415-416 (2004).
8. "As with all energy sources, wind energy is usually measured by its ability to produce energy; this unit is generally the watt. A watt is simply a basic unit to measure electric power: a kilowatt equals 1,000 watts, and a megawatt equals 1 million watts." Shane Thin Elk, *The Answer Is Blowing in the Wind: Why North Dakota Should Do More to Promote Wind Energy Development,* 6 Great Plains Nat. Resources J. 110, 111 (2001). Power output varies among power plants; a fossil fuel/coal power plant can produce 600-900MW, and a nuclear power plant can produce 1,200 MW. Jennifer Cordes, *Article X: The Future of Electric Generating Facility Siting in New York,* 6 Alb. L. Envtl. Outlook 37, n.61 (2001).
9. Schulz, *supra* note 7, at 416.
10. *Id.*
11. Matt Lake, *Alternative Energy Source Gets Second Wind: Better Design Makes Turbines More Viable*, DENVER POST, Mar. 26, 2001 E.1.
12. Schulz, *supra* note 7, at 418.
13. AWEA, *Wind Power New York, at* http://www.awea.org/wpny/index.html (last visited Feb. 25, 2005) [hereinafter Wind Power New York].
14. AWEA, *New York Energy Legislation*, *at* http://www.awea.org/wpny/ny_legis.html (last accessed, Feb. 14, 2005) [hereinafter New York Energy Legislation].
15. Wind Power New York, *supra* note 13; "Every 100 [megawatts] of wind development creates about 500 job-years of employment. Installation of 2,000 megawatts . . . would result in 10,000 job-years, mostly in construction and from secondary economic activity (equivalent to 1,000 full time jobs lasting 10 years)." New York Energy Legislation, *available at* http://www.awea.org/wpny/ny_legis.html (last accessed Feb. 14, 2005). A job year is one job that lasts for one year. Statistics revealing the number of job years a project would provide should be viewed skeptically since there are direct jobs and indirect jobs that will come from a project. An example of a direct job would be construction whereas an indirect job would be tax revenue taken from the project being used for the municipality to create another job. Telephone Interview with Valerie Strauss, Senior Policy Analyst, Young, Sommer, Ward, Ritzenberg, Baker, & Moore LLC (April 18, 2005).
16. Wind Power New York, *supra* note 13.
17. Thin Elk, *supra* note 8, at 114.
18. *See, e.g.*, Calvin Luther Martin & Nina Pierpoint, *The Wind Factor Next Door*, PRESS-REPUBLICAN, Nov. 26, 2004 at A15.
19. Thin Elk, *supra* note 8, at 114.
20. *Id.*
21. *Id.*
22. *Id.*
23. New York Energy Legislation, *supra* note 14.
24. *See* Thin Elk, *supra* note 8, at 111 (2001); *see also* Lake, *supra* note 11, at E1.
25. Thin Elk, *supra* note 8, at 111.
26. *Id.*
27. *Id.*
28. *Id*; Lake, *supra* note 11, at E1.
29. Reeves, *supra* note 5, at 8.
30. Thin Elk, *supra* note 8, at 111; Reeves, *supra* note 5, at 8.
31. Lake, *supra* note 11, at E1.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* "Wind power today costs only about one-fifth as much as in the mid-1980's, and its cost is expected to decline by another 35-40% by 2006." Azua, *supra* note 2, at 492.
36. *Id.*
37. Thin Elk, *supra* note 8, at 112.
38. *Id.*
39. *Id.*
40. *Id*.
41. *See* New England District, U.S. Army Corps of Engineers, Fact Sheet, *available at* http://www.nae.usace.army.mil (last accessed Nov. 19, 2004).
42. *Id.*
43. *See, e.g.*, *Ten Taxpayer Citizens Group v. Cape Wind Associates*, 373 F.3d 183 (1st Cir. 2004).

44. As of 2002, Texas and California provided for most of the country's wind energy production, each providing over 1,000 megawatts of power. Reeves, *supra* note 5.

45. Cape Wind has placed a data pole in the Nantucket sound to collect information. *Alliance to Protect Nantucket Sound, Inc. v. United States Dep't of the Army*, 2005 U.S. App. Lexis 2661 (2005). See *infra* II. A for a discussion on what a data pole is and the Cape Wind project.

46. Schulz, s*upra* note 7, at 412.

47. *Id.* at 418. Germany, Britain, Denmark, Australia, and Sweden have offshore wind farms. Denmark's offshore wind farm is the largest, consisting of 80 turbines that produce 160 megawatts. *Id.*

48. *Id.* at 422.

49. *See generally* Baur, *supra* note 1.

50. *Id*.

51. *Ten Taxpayer Citizen Group*, 373 F. 3d 183; *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d 64 (D. Mass. 2003).

52. What makes the Cape Wind Project even more controversial is the decision to locate it in the Nantucket Sound, an area known for fishing and tourism. It is estimated that over six million tourists visit the Cape annually. Alliance to Protect Nantucket Sound, *About Us, available at* http://www.saveoursound.org/sound (last accessed April 15, 2005).

53. *Ten Taxpayer Citizen Group*, 373 F.3d at 186.

54. *Id.*; cf. 288 F.2d 68 which states that the farm will consist of 130 turbines each 263 feet tall with 160 blade rotors; reaching a maximum height of 423 feet; against the New England District, U.S. Army Corps of Engineers, Fact Sheet, *available at* http::// www.nae.usace.army.mil (last accessed Nov. 19, 2004). (stating that the turbines will have a hub height of 260 feet with a maximum height of 420 feet above sea level).

55. *Ten Taxpayer Citizen Group*, 373 F.3d at 186; cf. New England District, U.S. Army Corps of Engineers, Fact Sheet, *supra* note 41.

56. *Ten Taxpayer Citizen Group*, 373 F.3d at 186.

57. *Id.*

58. *Id.* The Rivers and Harbors Act provides that "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited. . . ." Any such project needs to be approved by the Secretary of the Army. 33 U.S.C.A. § 403 (2005).

59. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 69.

60. *Id.* at n.1 (emphasis added).

61. *See generally Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d 66.

62. *Ten Taxpayer Citizens Group v. Cape Wind Associates*, 373 F.3d 190 (1st Cir. 2004).

63. *See generally Cape Wind Associates*, 373 F.3d at 187.

64. *Ten Taxpayer Citizens Group*, 373 F. 3d at 188 (quoting *United States v. Maine* 420 U.S. 515 (1975)).

65. *See Ten Taxpayer Citizens Group* at 183.

66. 43 U.S.C. § 1311 (1953). "It is determined and declared to be in the public interest that . . . ownership of the lands beneath navigable waters within the boundaries of the respective States, and . . . the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States." *Id.*

67. *Cape Wind Associates*, 373 F.3d at 188 citing 43 U.S.C. §§ 1331 *et seq*.

68. *United States v. Maine,* 420 U.S. at 526.

69. *Id.*

70. *Id.* at 515, 517, 522 (1975). *United States v. Maine* is one in a series of cases that determined the extent of the states to exert authority over the waters off their shores. *See, e.g., id*.

71. *See, e.g., Maine,* 420 U.S. 515.

72. *See* 16 U.S.C. §§ 1801 *et seq.*

73. *See* S. Rep. No. 104-276, 2 (1996); 16 U.S.C. § 1811.

74. 16 U.S.C. § 1811.

75. "Nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." 16 U.S.C. § 1856(a)(1).

76. 373 F.3d at 190.

77. Ten Taxpayer Citizens Group, the plaintiff, is a citizen-based group opposed to the development of a wind farm in the Sound and is led by Worcester attorney John W. Spillane. John Leaning, *Cape Group Appeals Wind Farm Case to Supreme Court,* Cape Cod Times, Nov. 26, 2004, *available at* http://www.capecodonline.com/special/windfarm/capegroup26.htm (last accessed April 15, 2005).

78. *Id.* at 187.

79. *Id.* at 194. District Court Judge Tauro granted Cape Wind's motion to dismiss and was affirmed by the Court of Appeals.

80. *Id.* at 195.

81. *Id.*

82. *Id.* at 195.

83. *Ten Taxpayer Citizens Group*, 373 F.3d at 196.

84. "The 'continental shelf' of a nation includes the territorial sea of a nation to a depth of 200 meters or beyond that limit to where the depth of the superadjacent waters admits of the exploration of the natural resources of the said areas." *Samual v. Tidewater Marine Services*, 943 F. Supp. 644, 647 (E.D. La. 1996).

85. *Ten Taxpayer Citizens Group*, 373 F. 3d at 193.

86. *Id.* at 196-97.

87. Baur, *supra* note 1 at 44, citing 43 U.S.C. §§ 1331 *et seq*.

88. *Id.* at 44, citing 30 U.S.C. §§ 1401 *et seq*.

89. *Id.* at 44, citing 42 U.S.C. §§ 9101 *et seq*.

90. *Id.* at 47.

91. *Id.*

92. *Alliance to Protect Nantucket Sound*, at 69–70.

93. The plaintiff, Alliance to Protect Nantucket Sound, is a not-for profit organization that was formed in response to Cape Wind's proposal to install turbines within the Sound. Specifically, the group states that its mission is to protect the Sound through "conservation, environmental action, and opposition to inappropriate industrial or commercial development that would threaten or negatively alter the coastal ecosystem." The group contains "environmental and business professionals who have long ties to the cape" along with political figures such as Senator Kennedy, Congressman Delahunt, and Massachusetts Attorney General Tom Reilly. Alliance to Protect Nantucket Sound, *About Us, available at* http://www.saveoursound.org/about (last accessed April 15, 2005).

94. *See Alliance to Protect Nantucket Sound,* at 64.

95. *Id.*

96. *Id.* at 71-72.

97. *Id.*

98. 33 U.S.C. § 403 (2005).

99. 33 C.F.R. § 325.8(a) (2005).

100. *Alliance to Protect Nantucket Sound*, at 72; citing PUD No. 1 of *Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

101. *Alliance to Protect Nantucket Sound*, at 74; citing 33 C.F.R. §§ 320.2(b), 322.3(b), 322.5(f).

102. *Alliance to Protect Nantucket Sound*, at 74.

103. *Id.* at 73–74.

104. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Courts provide substantial deference to an agency when interpreting a law it is charged to enforce. Stating that deference should be "accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Id*. at 844.

105. *Alliance to Protect Nantucket Sound,* 398 F.3d, 105 at 109.

106. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d 64 (2003).

107. *Id.* at 77.

108. The Court of Appeals called this argument "simply wrong." 398 F.3d, 105 at 112.

109. *Id.*

110. *Id.*

111. *Id.* at 77, quoting 33 C.F.R. § 320.4(g)(6).

112. *Id.* at 77.

113. *Alliance to Protect Nantucket Sound* at 78.

114. *Id.* at 80.

115. Schulz, *supra* note 7, at 429.

116. Reeves, *supra* note 5, at 10; Those states include Alaska, Hawaii, Oregon, Washington, California, Texas, New Mexico, Colorado, Wyoming, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Michigan, Wisconsin, Tennessee, West Virginia, Kansas, New York, Vermont, and Massachusetts. *Id*.

117. *See* Martin, *supra* note 18, at A15.

118. *See* Joel R. Burcat, *Wind Power Regarded as "NIMBY,"* THE HARRISBURG PATRIOT, Aug. 19, 2002.

119. *See, e.g.*, Kim R. York & Richard Settle, *Potential Legal Facilitation or Impediment of Wind Energy Conversion System Siting*, 58 Wash. L. Rev. 387, 402 (1983).

120. *Id.* at 402.

121. *Id.* at 406.

122. *Id.*

123. *Id.*

124. Reeves, *supra* note 5, at 6.

125. York, *supra* note 119, at 401.

126. *Id.* at 402.

127. *Id.*; Martin, *supra* note 18, at A15.

128. York, *supra* note 119, at 406.

129. *Id.* at 406.

130. *Id.* at 398.

131. California Experience, *supra* note 6, at 13.

132. "Sound levels decrease at a rate approximately equivalent to the square of the distance from the source. So a noise reading taken 25 feet away from a turbine will fall by a factor of 4 at 50 feet . . . ." California Experience, *supra* note 6, at 13.

133. *Id.* at 13; Steven Ferrey, *Dimensional Control, Law of Independent Power,* 1 L. of Indep. Power § 6:109 (2004).

134. *Id*.

135. Reeves, *supra* note 5, at 17.

136. *Id.*

137. *Id.*

138. *Id.* The term "sound energy" is referring to the noise produced by the turbine.

139. *See, e.g., id.*

140. *Id.*

141. California Experience, *supra* note 6, at 15. Between 100-190 million birds die each year from collisions with glass windows, 100 million per year die from house cats, between 50–100 million from collisions with automobiles or trucks, "up to 174 million" from collisions with electric lines, 67 million from pesticide exposure, 1-2 million from oil and gas extraction (they would bathe in the oil pits), 1,000 die from electrocutions, and over 100 million die from hunting. Curry & Kerlinger, LLC, *What Kills Birds*, *available at* http://www.currykerlinger.com/studies.htm (last accessed April, 15, 2005).

142. Reeves, *supra* note 5, at 17.

143. *Id.* at 17.

144. Azua, *supra* note 2, at 492.

145. *Id.* at 16. In 2003, Californians for Renewable Energy and the Center for Biological Diversity announced that they would challenge a decision by the Alameda County Zoning Board to renew the permits for the 1,500 turbines in Altamont Pass. The groups contended that the turbines kill between "40-60 golden eagles, 135-270 burrowing owls, and several hundred red-tailed hawks and other protected raptors each year." They also contended that these deaths were a violation of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. *Group Will Take Action over Danger to Birds from Wind Farms*, 12 Cal. Envtl. Insider 13, 2003.

146. Studies conducted during the past fifteen years involving bird fatalities and wind turbines show that with the exception of California's Altamont wind farm, bird fatalities range from zero over a two-year period to 53 during a three-year study. Arlington, Wyoming's 105 turbine wind farm had 75 bird fatalities over a two-year period, suggesting that it might be another abnormality. Curry & Kerlinger, LLC, *Wind Power and Bird Studies, available at* http://www.currykerlinger.com/studies.htm (last accessed April, 15, 2005).

147. *Synthesis and Comparison of Baseline Avian and Bat Use, Raptor Nesting and Mortality Information from Proposed and Existing Wind Developments*, West, Inc., December 2002.

148. Lake, *supra* note 11, at E1.

149. Reeves, *supra* note 5, at 17.

150. *Id.* at 6-7.

151. *Id.*

152. *Id.* at 16.

153. *Id.* at 17.

154. *Id.*

155. The towers and rotors can be painted light gray to minimize detection. California Experience, *supra* note 6, at 13.

156. See Thin Elk, *supra* note 8, at 113; see also NYSERDA, *Wind Projects*. *Available at* http://www.nyserda.org/energyresources/wind.html (last visited Dec. 1, 2004).

157. ECONorthwest, *Economic Impacts of Wind Power in Kittitas County*, at http://www.econw.com/pdf/kittitas.pdf (last accessed Feb. 24, 2005).

158. York, *supra* note 119, at 403. Currently there is a proposal to place a wind farm in an abandoned garnet mine in New York's Adirondack Park. The turbines would be visible through much of the park and, as Bill McKibben, a former staff writer for the *New Yorker* and author of *The End of Nature*, points out may even be a well received example of controlling global warming by choosing renewable energy over fossil fuels. Bill McKibben, *Tilting at Windmills*, NEW YORK TIMES, Feb. 16, 2005, at A21; AnnOnline, *Biography, available at* http://www.annonline.com/interviews/981217/biography.html (last accessed April 15, 2005).

159. Renewable Energy Policy Project, *The Effect of Wind Development on Local Property Values*, *available at* http://www.Repp.org/wind/index.html (last viewed Feb. 24, 2005).

160. *Id.* at 1.

161. *Id.*

162. *Id.* at 2.

163. *Id.*

164. *Id.*

165. *Id.* at 2. Those other factors include a pre-existing wind farm that could provide insight into how a new wind farm would affect property values, an unidentified external factor that drove up property values and could not be separated from the turbines impact, and "poor statistical explanation" that could only explain two percent of the change in property value. *Id.*

166. *Id.* at 9. While some still cling to the idea that wind farms will decrease their property values, the Department of Energy report has been met with general acceptance. *See, c.f.* AWEA *Wind Farms Do Not Hurt Property Values*, *available at* http://www.awea.org/news/news030520prp.html (last accessed, April 15, 2005); Martin, supra note 18, at A15.

167. California Experience, *supra* note 6, at 5.

168. *Id.* at 7.

169. Azua, *supra* note 2, at 492.

170. *Id.* at 5.

171. AWEA, *The US Small Wind Turbine Roadmap*, at 7, *available at* http://www.awea.org/smallwind.html (last accessed Mar. 3, 2005).

172. York, *supra* note 119, at 398.

173. *See, e.g.*, AWS Scientific, *AWS Model Zoning Ordinance: Permitted Use Regulations for Small Wind Turbines*, *available at* www.nyserda.org/programs/pdfs/AWS_Small_Wind_Zoning.pdf (last visited Mar. 18, 2005) [hereinafter AWS Scientific]; American Wind Energy Association *available at* http://www.awea.org/smallwind/documents/modelzo.html (last accessed Mar. 20, 2005).

174. AWS Scientific, *supra* note 173.

175. California Experience, *supra* note 6, at 9.

176. 14 C.F.R. § 77.13 (Requiring notice for the building or alteration of any object over 200 feet).

177. California Experience, *supra* note 6, at 9.

178. AWS Scientific, *supra* note 173.

179. *Id.*

180. California Experience, *supra* note 6, at 15.

181. Town of Fleming, Draft Zoning Ordinance, 82. (last revised September 28, 2004).

182. California Experience, *supra* note 6, at 15.

183. *Id.*

184. *Id.*

185. *See Rassier v. Houim*, 488 N.W.2d 635 (1992); *Rose v. Chaikin*, 187 N.J. Super. 210; 453 A.2d 1378 (1982).

186. 187 N.J. Super. 210, 453 A.2d 1378 (1982). Even though sound dampening technology has increased since 1981, *Rose* remains a good example of why setback ordinances should be improved for wind turbines.

187. *Id.* at 214.

188. *See id.*

189. *Id.* at 215.

190. *Sans v. Ramsey Golf & Country Club*, 29 N.J. 483, 448-49 (1959).

191. *Rose* at 217.

192. *Id.* at 216.

193. *Id.* at 220. The court also recognized how the character, duration, and volume could affect an individual's comfort. Here the volume was above the 50 decibel level permitted, its character was unique from the residential coastal community setting, and the duration was constant, only stopping when the winds dropped below eight miles per hour. *Id.* In another private nuisance case, *Rassier v. Houim*, 488 N.W.2d 635 (1991), the defendant received the protection of the "coming to the nuisance" doctrine. Here the defendant constructed a tower on his property two years before the plaintiffs moved into the adjoining lot and positioned their mobile home 40 feet from the turbine. The plaintiffs did not consult the architectural review board as was required by covenants and subjected themselves to sound levels between 50–69 decibels in a community with no noise ordinances. With several neighbors testifying in favor of the defendant, the court granted a dismissal.

194. *See, e.g.*, California Experience, *supra* note 6.

195. *Id.* at 13.

196. *Id.*

197. *Id.* at 12 "In a test conducted by the Clinton (Iowa) Detective Bureau, the noise from a 10-kW Jacobs wind system was measured in winds between 16-36 miles per hour. At 50 feet, the decibels measured between 55 dB(A) and 59 dB(A). But the detective, noting that the turbine noise was partially masked by rustling leaves, also took readings from trees that were 300 feet away. The trees registered 60 dB(A) to 62 dB(A). The report concluded that the wind generator produced 'inconsequential' noise emissions." *Id.*

198. Courts seem divided on the necessity of a decibel level; however, proving an actual disturbance would be easier if the municipality set what the acceptable levels were. *See generally Duffy v. City of Mobile*, 709 S.O. 2d 77 (1997).

199. California Experience, *supra* note 6, at 12.

200. *Id.*

201. AWS Scientific, *supra* note 173.

202. California Experience, *supra* note 6, at 12.

203. AWS Scientific, *supra* note 173, at 2; Town of Fleming, Draft Zoning Ordinance, 82. (last revised September 28, 2004).

204. California Experience, *supra* note 6, at 6.

205. *Id.* at 6.

206. *Id.* at 21.

207. *Id.*

208. *Id.*

209. *Id.* Quoting Cal. AB 1207 (2001).

210. California Experience, *supra* note 6, at 21.

211. *Id.* at 21.

212. *Id.* at 23.

213. *Id.* at 24–28.

214. *Id.* at 10.

215. *Id.* at 18, 25-29. Joe Mathewson's vineyard is located in the Paso Robles wind country in southern California. *Id.*, Paso Robles Vintners & Growers Association, *Directions, available at* http://www.pasowine.com/index.php (last accessed April 16, 2005). Gus Sansone, a California homeowner, had to negotiate with county planners to have fees reduced and zoning restrictions lifted, but eventually erected a turbine and reduced his electric bill from $100 a month to $0. California Experience, *supra* note 6, at 27.

This article tied for first place in the 2005 Environmental Law Section Professor William R. Ginsberg Memorial Essay Contest.

Enforcement of SEQRA Mitigation Measures: Discussion and Case Studies

By Thomas M. Tuori

The following discussion and case study results focus on the enforcement of mitigation measures that are imposed on actions and projects pursuant to New York's State Environmental Quality Review Act ("SEQRA").[1] SEQRA requires environmental impact statements (EISs) for actions that state and local government agencies "propose or approve which may have [] significant effect[s] on the environment."[2] In addition, SEQRA requires minimization or avoidance of the adverse environmental impacts of such actions and projects.[3] SEQRA and its implementing regulations, 6 N.Y.C.R.R. Part 617,[4] also require agencies to make explicit "findings" at the end of the EIS process.[5] When agencies decide to undertake or approve actions, their SEQRA findings must certify that adverse environmental impacts identified in EISs will be minimized or avoided "to the maximum extent practicable"[6] by mitigation measures incorporated as conditions to approval of the actions.[7] This mitigation requirement is one of the primary substantive mandates of SEQRA.[8] However, neither SEQRA nor the Part 617 regulations address the implicit duty of agencies to enforce compliance with the mitigation measures and other project limitations that they require pursuant to SEQRA.[9]

Enforcement of post-approval compliance with SEQRA mitigation measures is my central concern. In Part I, I briefly discuss SEQRA's grant of authority to Lead Agencies[10] to impose, but not necessarily enforce, mitigation measures.[11] Then I argue that Lead Agencies do in fact have an implicit *obligation* under SEQRA[12] to enforce ongoing compliance with mitigation measures.[13] In Part II, I present the results of case studies of the enforcement authority and procedures used by three municipal Lead Agencies to ensure that SEQRA mitigation measures are implemented and complied with.[14] The case study projects involve SEQRA reviews of a Home Depot store in the City of Ithaca,[15] a residential development for senior citizens in the Town of Brighton,[16] and a Wal-Mart Supercenter in the Village of Central Square.[17] In Part III, I summarize findings from the case study research.[18] Finally, I suggest amendments to the Part 617 regulations[19]and specific enforcement mechanisms that Lead Agencies should implement[20] to facilitate more effective long-term monitoring and enforcement of SEQRA mitigation measures.[21]

I. Discussion: Enforcement and the Mitigation Measures Scheme under SEQRA

It may seem self-evident that a statutory grant of power to impose conditions on an approval entails a corresponding grant of enforcement authority, if not to the government body given the conditional approval powers in the first place, then to some other regulatory agency. Further, when a statute implicitly or explicitly requires compliance with conditions imposed on an approval, a grant of enforcement authority will be accompanied by a non-discretionary duty to ensure that those conditions are in fact implemented and complied with. However, even though SEQRA provides agencies with the authority to impose mitigation measures as conditions to approvals,[22] neither the statute nor the Part 617 regulations have been interpreted to include a grant of enforcement authority.[23] In addition, despite the vital role that mitigation measures play in fulfilling SEQRA's mandate,[24] the duty SEQRA imposes on Lead Agencies to enforce ongoing compliance with mitigation measures has not been widely acknowledged or litigated.[25] The discussion that follows examines the incongruity of these three elements of enforcement under the SEQRA mitigation measures scheme: the authority of involved agencies to impose substantive mitigation measures; the absence of corresponding enforcement authority; and the implicit enforcement obligation of Lead Agencies.

A. Authority to Impose Mitigation Measures

SEQRA authorizes—and requires—involved agencies to impose substantive mitigation measures.[26] The authoritative decision, *Town of Henrietta v. Department of Environmental Conservation*,[27] established that SEQRA requires agencies to impose "whatever conditions are necessary to minimize or avoid all adverse environmental impacts revealed in the EIS."[28] This mandate applies even to conditions that are outside the agency's typical jurisdiction.[29] The New York State Department of Environmental Conservation (hereinafter "NYSDEC") revised the Part 617 regulations after *Town of Henrietta*[30] to incorporate the court's holding:[31] "SEQRA provides all involved agencies with the authority . . . to impose substantive conditions upon an action to ensure that the requirements of this Part have been satisfied."[32] The NYSDEC's *SEQR Handbook* describes Lead Agencies as having an "expanded authority" to impose "all appropriate mitigation measures as conditions" to their approvals, "even if such conditions do not specifically fall within their jurisdictional authority."[33]

B. Authority—or Lack Thereof—to Enforce Mitigation Measures

Lead Agencies will not be able to effectively discharge their SEQRA duties[34] and ensure compliance with mitigation measures without the requisite enforcement authority. Neither SEQRA nor Part 617 references the source of agencies' authority to enforce the conditions they impose under SEQRA.[35] Indeed, "the [NYS]DEC has noted that although neither SEQR[A] nor its regulations 'provide

special enforcement powers to ensure that the SEQR[A] conditions . . . are actually implemented,' these SEQR[A] conditions can be enforced using the existing agency powers related to their underlying jurisdiction. . . ."[36]

The authority of Lead Agencies to impose substantive conditions outside their jurisdiction,[37] acknowledged since *Town of Henrietta*,[38] is an empty grant of power if the mitigation measures are unenforceable. When the required mitigation measures do not fall within the normal range of the regulatory powers of the agencies, there may be instances when agencies impose mitigation measures without having any corresponding enforcement authority or mechanisms.[39] In such circumstances, Lead Agencies may condition their approval of projects on mitigation measures they cannot effectively enforce, thus limiting their ability to ensure that the SEQRA mandate is fulfilled.[40] For example, a municipal Lead Agency may require the use of created wetlands as storm water detention basins to mitigate impacts to surface water quality and visual resources, even though the municipality may not have code provisions pertaining to this type of storm water management system.[41] The Lead Agency, lacking code requirements or other underlying authority applicable to such site features, will likely lack the enforcement powers and procedures necessary to ensure proper maintenance of the man-made wetlands over the life of the development. Effective long-term mitigation of the adverse impacts to surface water quality and visual resources, however, will require ongoing maintenance of the created wetlands.

A similar enforcement dilemma may occur when Lead Agencies impose mitigation measures that are within their general scope of jurisdictional authority, but are beyond the reach of the specific enforcement powers and procedures of the agencies. These situations may arise when the mitigation measures require operational controls, recurrent compliance efforts or periodic maintenance activities by the project sponsor and the Lead Agency lacks enforcement powers or procedures that effectively address its responsibility to ensure compliance with ongoing requirements. For example, a municipality may require detailed landscaping plans as a mitigation measure for impacts to visual resources.[42] The municipality may even have the authority to require a performance guaranty to ensure that the landscaping is installed and then properly maintained for several years after construction.[43] This type of mitigation measure is surely within the municipality's land use control powers.[44] If, however, the municipality hasn't instituted a continuing post-approval inspection program, there will be no formal mechanism to ensure long-term compliance with the landscaping requirements.

C. Obligation to Enforce Mitigation Measures

SEQRA's mitigation requirement serves to further the underlying purposes and policies of the statute,[45] which include preventing and eliminating environmental damage[46] and "protect[ing] the environment for the use and enjoyment of this and all future generations."[47] The mitigation measures required by Lead Agencies are the means by which the significant adverse environmental impacts of projects are minimized or avoided. If project sponsors are allowed to ignore required mitigation measures or contravene project limitations, SEQRA's mitigation mandate will not be fulfilled and Lead Agencies will not have discharged their duties under SEQRA.[48] As stated by the court in *Committee for Environmentally Sound Development, Inc. v. City of New York*, allowing a Lead Agency to "wash its hands of all responsibility over a project after the EIS process has been completed and allow the project developer to violate the restrictions contained in the EIS would be to ignore SEQRA's requirement that [environmental] harms be mitigated or avoided, and would render SEQRA a hollow law."[49]

The implicit duty of Lead Agencies to enforce ongoing compliance with the mitigation measures, an obligation recognized by at least one court[50] and noted by several commentators,[51] can be deduced from SEQRA itself and the Part 617 implementing regulations.[52] Lead Agencies may have enforcement discretion under their jurisdictional authority[53] and they may have wide latitude under SEQRA in their decisions to impose mitigation measures[54] and in the selection of particular mitigation measures.[55] However, once Lead Agencies certify (in post-EIS findings statements[56]) that specific mitigation measures will be required as conditions to their approval,[57] and further, that the mitigation measures are necessary for compliance with SEQRA[58] and the Part 617 regulations,[59] the mitigation measures must be implemented and complied with if the Lead Agencies are to fulfill their mandate under SEQRA.

Merely *certifying* in findings statements that "adverse environmental impacts *will be* avoided or minimized . . ."[60] by the required mitigation measures will not prevent the avoidable environmental degradation that SEQRA was intended to address.[61] Actual post-approval compliance with the mitigation measures is necessary to satisfy the SEQRA mandate. Since agencies have an obligation to "use all practicable means to realize the policies and goals set forth in [SEQRA],"[62] it follows that Lead Agencies must enforce initial and ongoing compliance with the required mitigation measures, unless it would not be "practicable" to do so.

II. Case Studies

Efforts by Municipal Lead Agencies to Ensure Compliance with Mitigation Measures

The objective of the case study research was to gather empirical data on the enforcement of SEQRA mitigation measures by Lead Agencies.[63] Specifically, the research was intended to determine, to the extent possible, whether municipal Lead Agencies actively enforce the mitigation measures and project limitations that are con-

ditions to their approval of actions, and if so, to identify the enforcement powers and procedures used by the Lead Agencies.

A. Methodology

For logistical reasons,[64] I considered only projects in central and western upstate New York[65] as potential candidates for the study. First, I reviewed archived NYSDEC Environmental Notice Bulletins[66] covering the period from November 1999[67] through December 2002[68] to identify projects for which a Final Environmental Impact Statement ("FEIS") had been accepted by a Lead Agency.[69] There were sixty-one such projects (involving thirty-eight different Lead Agencies) in NYSDEC Region 7 and Region 8 between November 1999 and December 2002.[70] The Notices of FEIS Acceptance for all sixty-one of the projects were then reviewed to evaluate the types of projects and Lead Agencies involved.[71] Thirty-three projects, involving twenty-three different Lead Agencies, were selected for further research.[72] All twenty-three Lead Agencies were contacted by telephone and/or e-mail, and copies of the SEQRA Findings Statements for the majority of the thirty-three projects were requested. Numerous Lead Agencies did not respond to these requests; the author received twenty-one Findings Statements from only thirteen of the Lead Agencies within one month from the initial requests.

Based on review of the Findings Statements that were made available, follow-up conversations with the Lead Agency contacts, and a thorough review of pertinent SEQRA commentary[73] and case law,[74] I decided to focus the research on a limited number of projects that involved applicants seeking approvals from municipal Lead Agencies.[75] Ultimately, three projects with municipal Lead Agencies were selected for the case study research—one project with a city Lead Agency, one with a town Lead Agency and another with a village Lead Agency—representing each unit of local government with significant land use control authority under New York law.[76] The three case study projects satisfied all of the following required criteria:

(i) Projects with mitigation measures requiring ongoing compliance, projects with unusual mitigation measures that seem to be outside the range of conditions typically required by municipalities under their zoning and land use control jurisdiction, or projects with both ongoing and unique mitigation measures;

(ii) Projects involving physical construction by private-sector applicants, with at least one phase of construction underway as of December 2004;

(iii) Projects in municipalities with SEQRA contacts who were willing and able to dedicate time to assist the author with this research; and,

(iv) Projects in municipalities who have made their Codes and Ordinances available on the Internet.

The case study research included review of the findings statements, "approval" documents (e.g., a planning board's resolution approving a site plan) and other documentation pertaining to the projects, cursory inspections of the project sites, interviews with Lead Agency contacts, and review of applicable sections of municipal Codes and Ordinances.

B. Case Studies

The research focused on the methods used by three municipal Lead Agencies to ensure that the SEQRA mitigation measures required as conditions to their approvals of specific projects were implemented and complied with. The case study projects are a Home Depot store located in the City of Ithaca,[77] a senior citizen residential development in the Town of Brighton,[78] and a Wal-Mart in the Village of Central Square.[79] The results of the three case studies are presented in the sections that follow. Within each section, a brief project summary is provided, followed by a description of several of the mitigation measures of interest and then a discussion of the underlying authority and mechanisms relied upon by the Lead Agency to enforce compliance with the mitigation measures.

1. City of Ithaca Project: Site Plan Approval for a Home Depot Store

Project Summary

The City of Ithaca Planning and Development Board (hereinafter "Planning Board") had jurisdiction as an involved agency and authority to serve as Lead Agency because the project applicant needed site plan approval from the Planning Board.[80] After a contentious SEQRA process,[81] the Planning Board accepted the Final EIS for the project on December 11, 2001[82] and adopted the SEQRA Findings Statement on December 27, 2001. The Site Plan Approval Resolution was also adopted by the Planning Board on December 27, 2001.[83] Construction of the Home Depot development began in the Spring of 2003 and was substantially completed by September 2003.[84] The Home Depot opened for business in October 2003.[85]

The development includes the Home Depot store (approximately 190,000 square feet) and a paved parking area accommodating approximately 1,100 parking spaces, along with other site improvements, such as sidewalks and pedestrian/bike access, grading, landscaping, lighting and signage, situated on a 21.9 acre site.[86] The site is located along Elmira Road/NYS Route 13 in an area of Ithaca that was recently the subject of a land use plan and a related generic environmental impact statement.[87] Undeveloped City-owned property, which includes a creek (Cayuga Inlet) and wetland areas, borders the Home Depot site on the west.[88] The project applicant

originally controlled 43.3 acres in the project area (including the 21.9 acre Home Depot site), but donated approximately 21.4 acres to the City to be combined with the City's holdings along the Cayuga Inlet to create a 60-acre park.[89] The project site and surrounding area are visible from Buttermilk Falls State Park,[90] which is located within one-quarter mile of the Home Depot development.

Mitigation Measures of Interest

The Planning Board's SEQRA Findings Statement discusses mitigation measures intended to minimize or prevent traffic impacts; storm water drainage, hydrology and water quality impacts; visual impacts; and noise impacts.[91] Four of the mitigation measures were of particular interest because they require either ongoing maintenance and compliance efforts by the project sponsor or involve atypical, difficult to enforce project-specific limitations:

(i) Storm water, hydrology and water quality concerns were addressed by requiring treatment of runoff from the impervious areas of the site in two detention basins prior to discharge to Cayuga Inlet.[92] These basins will require periodic maintenance if they are to continue to function as designed.[93]

(ii) "[E]xtensive parking lot landscaping, extensive greenspace in the development and the proposed use of ivy on the walls of the building"[94] were required by the Planning Board to mitigate the visual impacts of the project as viewed from Buttermilk Falls State Park.[95] Adherence to the landscaping plans and adequate maintenance of plantings will presumably be necessary to effectively mitigate the visual impacts.

(iii) Mandatory posting of "'No Idling'" signs for "all vehicles" was intended to mitigate potential traffic-related noise impacts.[96]

(iv) Noise impacts, particularly impacts to campers in Buttermilk Falls State Park, were also addressed by limiting the hours of tractor-trailer deliveries between May 15th and Columbus Day (to between 7 a.m. and 10 p.m.).[97]

Enforcement Authority and Mechanisms

Discussion of the City's authority to enforce compliance with mitigation measures will be prefaced by a brief overview of its authority to impose the conditions in the first place. When the City has jurisdiction as an involved agency, it has authority under SEQRA to impose substantive mitigation measures as conditions to its approval of actions.[98] Ithaca has similar authority under its City Environmental Quality Review Ordinance ("CEQRO").[99] In addition, the site plan review authority of municipalities[100] enables them to "impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan."[101] Ithaca's Site Plan Review Ordinance,[102] which implements the authority delegated by the state, explicitly provides for approval of site plans "with conditions,"[103] in addition to unconditional approval and disapproval decisions that are available to the Planning Board.[104]

As discussed in Part I.B, SEQRA does not provide Lead Agencies with the authority to enforce compliance with required mitigation measures;[105] nor does Ithaca's CEQRO, which has a format and content that generally parallel the Part 617 regulations.[106] However, section 276-11 of Ithaca's Site Plan Review Ordinance includes enforcement, inspection and corrective action provisions.[107] Section 276-11 states in part:

> Development projects may be periodically inspected for conformance to the approved site plan, including maintenance of the viability of the planting required as part of the site plan approval. If there is non-conformance, or if any conditions of [Site Plan Review] approval are not fulfilled, no certificate of occupancy or certificate of completion shall be issued. *Where a development reverts to nonconformance after the issuance of a certificate of occupancy or certificate of completion,* current owners shall be notified, in writing, and given the opportunity to correct the situation. If the Director of Planning and Development determines that the corrective measures are inadequate, *the city shall implement any necessary changes to the site to bring it into conformance,* the cost of which shall be charged to the property owner. . . . *Developments shall be inspected at least once two years after the issuance of a certificate of occupancy or certificate of completion.*[108]

As the quoted language indicates, the City has codified several enforcement mechanisms:

- periodic inspection of the project site during construction;
- prohibiting the issuance of certificates of occupancy and completion if the development does not conform to the approved site plan or if associated conditions were not satisfied;
- corrective action by either the owner of the site or the City if there are post-construction changes to the site or a failure to maintain certain features that amount to "nonconformance" with the approved site plan; and,
- at least one post-development inspection two years after construction is completed.[109]

In addition to the enforcement provisions in section 276-11, the Site Plan Review Ordinance authorizes the City to require "performance guarantees" from project sponsors: "[n]o certificate of occupancy or certificate of completion shall be issued until all improvements required by site plan approval, including any conditions placed on such approval, are installed, or until a sufficient guaranty, in the form of a performance bond, letter of credit or other security, is in place."[110] The Ordinance also requires replacement of dead or damaged plants, and other damaged or missing elements of the approved site plans, "including … fences, bollards, signs, shrubs, street furniture, etc.,"[111] and provides that "an approved site plan may not be modified without express written approval of the [Planning Board]."[112]

The Site Plan Approval Resolution included references to the specific drawings and plans that constituted the final approved project, along with brief descriptions of eight additional conditions (including the "No Idling" signs and the limited hours for tractor-trailer deliveries), thereby establishing the site plan requirements as the features represented on the drawings, plus the conditions.[113] These drawings presumably served as the basis of comparison for the site plan compliance inspections required under section 276-11[114] and also for the inspections required prior to the issuance of the certificate of occupancy.[115]

To date, there have not been any compliance problems with the four mitigation measures of interest.[116] Although the author did not conduct an in-depth "compliance inspection,"observations during a cursory site reconnaissance indicated that the development appears to be well maintained and in general conformance with the readily apparent aspects of the mitigation measures described in the Finding Statement.[117]

The various enforcement provisions described above seem to provide the City with sufficient authority and compliance monitoring procedures to ensure that the required mitigation measures, including the four mitigation measures of interest, will be complied with—at least until the "two-year" post-approval inspection required under section 276-11 of the Site Plan Review Ordinance is conducted in March 2006.[118] Once that inspection is completed, however, the City will have exhausted its formal procedures for monitoring compliance with the mitigation measures. The City will then be forced to rely on complaints by the public and other informal mechanisms to alert them to compliance problems at the Home Depot development.[119] This informal approach might not be effective for certain types of compliance issues which are not identifiable by casual observation, such as whether the storm water detention basins are being maintained properly or whether the specific requirements of the landscaping plans are being adhered to.

2. Town of Brighton Project: Rezoning for a Senior Citizen Residential Development

Project Summary

The Town Board of the Town of Brighton (hereinafter "Town Board") served as Lead Agency for SEQRA review of the project because the applicants needed a zoning change for the high-density residential development,[120] and pursuant to the state zoning enabling statute, zoning amendments require the approval of the Town Board.[121] The Final EIS for the development, which is referred to as "Mercy Park," was accepted as complete by the Town Board on September 5, 2001.[122] The Town Board issued the SEQRA Findings Statement on October 24, 2001,[123] and adopted the rezoning Resolution and Ordinance on December 12, 2001.[124] Site work for the development began in June 2004.[125] Construction was ongoing during the winter of 2004-2005.[126]

When construction is completed later in 2005,[127] the development will consist of 39 town home units[128] in ten buildings[129] and a single facility with separate wings for "independent living" apartments and "enhanced care" assisted-living quarters.[130] There will be 181 residential units in the combined apartment and assisted living facility.[131] Additional site improvements will include access roads and paved parking areas, utilities, landscaping, a storm water detention wetland, and approximately 16 acres of undeveloped land subject to a Conservation Easement.[132] The 31.6± acre project site[133] is adjacent to a Catholic high school (Our Lady of Mercy) and an office and residential facility for nuns (Sisters of Mercy Mother House).[134] The site is bordered by an interstate highway, an active Conrail railroad line, and a residential neighborhood.[135]

Mitigation Measures of Interest

The Findings Statement identifies numerous mitigation measures that were deemed necessary to minimize or eliminate the adverse environmental impacts of the development, including impacts to geology and soils, surface waters and drainage, ecology, traffic, community services, and visual resources.[136] In the Rezoning Resolution and Ordinance, the Town Board specified the mitigation measures that were conditions to the rezoning,[137] including mitigation measures involving ongoing, post-construction compliance by the project sponsor and unique, project-specific requirements.[138] Several of these mitigation measures are described below.

(i) Prior to conducting bedrock blasting (required for utility trenches and building foundations, due to shallow bedrock), the developer was required to perform a "pre-blast survey,"[139] submit a written report to the Town, notify nearby residents and maintain appropriate insurance coverage.[140] These measures were required to ensure that if the bedrock blasting caused damage to the foundations of nearby residences

there would be a mechanism in place which allowed the owners to recover the costs of such damage from the project developer or the blasting contractor.[141]

(ii) Conservation Easements were required to mitigate impacts to ecological resources by protecting the undeveloped portions of the project site, including 8.7 acres of undisturbed wooded area.[142] In addition, the project applicant had to prepare a Woodlot and Conservation Easement Protection Plan.[143] Preservation of the Conservation Easement areas and the landscaping required for the developed portion of the site were also intended to minimize impacts to visual resources.[144] To effectively mitigate impacts to ecological and visual resources, therefore, the Woodlot and Conservation Easement Protection Plan and landscaping plans must be implemented and adhered to.[145]

(iii) The developer was required to "enter into a contract and continue to enter into contracts with a private ambulance supplier" to provide ambulance service for the residents of the development, "unless the Town of Brighton waives this requirement."[146] This mitigation measure was required to address impacts to community services, specifically emergency medical services.[147]

Enforcement Authority and Mechanisms

As has been discussed, SEQRA provides Lead Agencies with the authority to impose, but not necessarily enforce, substantive mitigation measures.[148] In addition, the Town Board has considerable discretion in rezoning matters, and therefore, ample authority to impose mitigation measures as conditions to rezoning approvals.[149]

The state zoning enabling statute authorizes towns to enforce "any local [zoning] law, ordinance or other regulation made under authority" delegated by the statute.[150] (The enabling statute also authorizes taxpayers to bring actions on behalf of towns to compel third parties to comply with zoning laws, if towns are not proceeding with enforcement actions against the third parties.)[151] Consequently, the Town of Brighton has authority under the enabling statute to enforce compliance with its Comprehensive Development Regulation,[152] including the zoning amendment provisions,[153] and any other local zoning laws, ordinances and regulations, such as the rezoning Resolution and Ordinance for the Mercy Park development.[154]

The SEQRA Findings Statement and the rezoning Resolution and Ordinance were both conditioned on the project applicants' implementation of the required mitigation measures.[155] The Resolution and Ordinance states:

> [T]he . . . rezoning is subject to the conditions set forth in Exhibit F [Schedule of Conditions] hereto and made part hereof, each and every one of which conditions this Town deems to be of grave importance and without which this rezoning would not have been approved. If a court should strike down any such provision, this Rezoning shall be void ab initio and of no further force and effect.[156]
>
> . . .
>
> [T]he development of the proposed Mercy Park shall be in conformance with the concept shown on Zoning Maps SE6 and SE7 and the Findings Statement and no further development is allowed on the Site.[157]

The schedule of conditions incorporated as part of the Resolution and Ordinance includes sixteen items, covering the mitigation measures identified in the Findings Statement.[158] Regarding the "mitigation measures of interest" described above (and bracketed below), the schedule of conditions states:

> [(i) Blasting]
>
> 3. Prior to any permits and not greater than 90 days prior to blasting, [the developer] will conduct a pre-blast survey and provide a written report to the Town. . . . A Certificate of Insurance will be provided by [the developer] or its contractor evidencing current insurance. . . . Such insurance will be maintained during the period blasting is conducted.
>
> [(ii) Conservation Easements, Woodlot Protection and Visual Resources]
>
> 4. Prior to issuance of final site plan approval, [the developer] will provide a Woodlot and Conservation Easement Protection Plan for the Planning Board's review and acceptance.
>
> . . . .
>
> 6. [The project applicants] will provide the Town of Brighton [with] a Conservation Easement with respect to open space areas including portions of the wooded areas and federal wetlands and provide such Conservation Easement for public access. During Phase I, [the developer] will construct and maintain a public trail system in accordance with the terms of the Conservation Easement.
>
> . . . .

> 15. Following final site plan approval, [the project applicants] agree to enter into a new Conservation Easement, with the same terms and conditions as Conservation Easement B, to include the undeveloped portion of the site along Route I-590, south of Conservation Easement A.
>
> . . . .
>
> 11. [The developer] will maintain, to the maximum extent practicable, the existing vegetative visual buffer along Clover Street and along Route I-590 and, in addition to any landscaping or buffering which may be required during the site plan review process, [the developer] will establish a year-round vegetative visual buffer along the Clover Street frontage.
>
> 12. [The developer] will provide a year-round vegetative visual buffer in the island in the Clover Street entrance to avoid, minimize and mitigate visual impacts associated with the development of the Independent Living Apartments and Enhanced Care Building.
>
> . . . .
>
> [(iii) Contract with Private Ambulance Service]
>
> 7. Prior to the issuance of a building permit, [the developer] will enter into a contract and continue to enter into contracts with a private ambulance supplier for the provision of ambulance services for residents of Mercy Park unless the Town of Brighton waives this requirement. [The developer] agrees to be responsible for non-emergency medical transportation for the Mercy Park residents.[159]

The Town also executed a "Mitigation Agreement" with the project applicants to memorialize the applicants' responsibility "to implement all of the mitigation measures in the Findings Statement"[160] in a binding agreement, and thereby provide a contractual basis for enforcement.[161] The substantive requirements of the Mitigation Agreement, including those addressing the "mitigation measures of interest," are virtually identical to project applicants' obligations under the schedule of conditions.[162]

The land use and zoning provisions of the Town of Brighton Code include additional enforcement authority and mechanisms that are pertinent to the Mercy Park mitigation measures.[163] The General Provisions of the Comprehensive Zoning Regulation provide that "[n]o building shall be erected, . . . altered, . . . or enlarged, nor shall any land or building be used . . . for any purpose or in any manner except in conformity with all regulations, requirements and restrictions . . . for the district in which such building or land is located."[164] The site plan approval section of the Code explicitly states that construction and site development work must be "in accordance with all conditions of approval and approved plans."[165] The Code sections addressing Building Permits and Certificates of Occupancy include a prohibition on construction, renovation, occupancy or change in use of a building until the appropriate permits have been obtained,[166] provisions for inspections,[167] and authorization to revoke or suspend permits.[168] In addition, the landscaping and storm water management sections of the Code mandate that the Town obtain performance bonds or letters of credit from developers for projects, such as Mercy Park, involving landscaping and storm water management facilities.[169] The performance bonds and letters of credit provide the Town with the means to draw on the developers' funds to pay for the completion of the landscaping or drainage facilities in the event that the developers' work was not in conformance with approved plans and other applicable requirements.[170]

The Town Building and Planning Office has implemented several informal procedures intended to monitor and enforce compliance with mitigation measures, particularly during the construction period.[171] The Town Planner, who has primary responsibility for coordinating the Town's SEQRA review efforts, holds "Development Review" meetings prior to the issuance of any Building Permits or Certificates of Occupancy for projects that have gone through the SEQRA process.[172] All Town staff who may be involved with inspections of the projects are required to attend the meetings, where special conditions attached to approvals (such as a site plan) are discussed. The Town has recently instituted another procedural mandate for construction projects, requiring that a set of the approved plans and drawings be kept at the project site during construction.[173] This requirement will minimize the potential for site development and construction work that is inconsistent with the approved project plans.[174] In addition, the Town Planner personally inspects development sites during and after the construction period.[175]

The Town Planner did not report any significant compliance problems associated with the Mercy Park mitigation measures of interest.[176] (The author could not make a meaningful assessment of the compliance status of the observable elements of the required mitigation measures because construction of the development was still underway at the time of the site reconnaissance.) According to the Town Planner, the Blasting Survey and the blasting itself were completed during the summer of 2004, without significant complaints or problems.[177] The Town required the Conservation Easement, Woodlot and Conservation Easement Protection Plans, and Landscaping Plans as conditions to the approval of the Mercy Park site

plan.[178] These documents were prepared accordingly.[179] Adherence to the limitations and restrictions incorporated into the Woodlot and Conservation Easement Protection Plans were implemented through the provisions of a Clearing and Excavation Permit issued by the Town.[180] As indicated above, the Town required letter of credit for the landscaping and for several other site improvements.[181] Finally, the Town received a "Letter of Commitment" from a private ambulance service stating that they will provide services to the Mercy Park development.[182] The Town will require a copy of the contract between the developer and ambulance service prior to the issuance of a Certificate of Occupancy.[183]

As the preceding discussion demonstrates, the Town has a variety of mechanisms for enforcing SEQRA mitigation measures. What the Town apparently lacks, and therefore has in common with both the City of Ithaca[184] and the Village of Central Square,[185] are formal procedures for monitoring long-term compliance with mitigation measures. In other words, the Town has ample authority to *remedy* compliance problems, but it generally lacks formal mechanisms to *identify* compliance problems that arise after Certificates of Occupancy are issued and performance guarantees are canceled.

3. Village of Central Square Project: Site Plan Approval for a Wal-Mart Store

Project Summary

The Planning Board of the Village of Central Square (hereinafter "Planning Board") was an involved agency and had authority to serve as Lead Agency for the SEQRA review because the Wal-Mart development required site plan approval from the Planning Board.[186] The Planning Board accepted the Final EIS as complete on December 21, 2000.[187] On May 14, 2001, the Planning Board adopted the SEQRA Findings Statement[188] and the Resolution granting site plan approval to Wal-Mart.[189] Site development activities began in November 2001, after the Village issued Wal-Mart the necessary Building Permit.[190] Construction of the store was completed in June 2002,[191] and the Certificate of Occupancy was issued in August 2002.[192] Wal-Mart opened for business on August 14, 2002.[193]

The development includes the Wal-Mart Super-Center store (approximately 155,000 square feet), a gas station,[194] paved parking areas with a total of 784 parking spaces,[195] access roads, utilities, lighting, landscaping, storm water detention facilities and a 1.4-acre created wetland.[196] Prior to construction of the Wal-Mart, the 44-acre± project site was undeveloped,[197] with a 10.86-acre wooded area[198] and approximately 3.1 acres of wetlands.[199] Approximately 23 acres of the site have been developed,[200] but no construction occurred in the wooded area[201] and only 1.2 acres of wetlands were impacted.[202] The store is set back almost one quarter mile from New York State Route 49, with several acres of pre-existing natural and created wetlands located between the store and Route 49.[203] The site is located on Route 49, the main east-west road in the area,[204] just west of the Route 49 and Interstate Route 81 interchange,[205] and approximately one mile east of the Village center.[206]

Mitigation Measures of Interest

The Planning Board conditioned its approval of the site plan on a long list of mitigation measures described in the SEQRA Findings Statement.[207] The mitigation measures address impacts to traffic, aesthetic resources, surface water and wetlands, and community services.[208] Three of the mitigation measures include an explicit requirement for ongoing compliance with project plans:

(i) "Applicant shall at all times *remain in compliance with* the Landscaping Plans each dated October 4, 1999 last revised April 11, 2001, Sheet C4 and C4.2."[209] The Landscaping Plans depict the locations of the plantings, specify the types of plants, describe planting procedures to be used,[210] and require that a "[o]ne year guarantee shall be provided on all plant materials from date of final acceptance."[211]

(ii) "Grading and Drainage Plan, Drawings C2.1 and C2.2, last revised date April 4, 2001, shall be implemented *and maintained*."[212] In addition to showing the post-development site grading elevations, the drawings include specifications for the drainage structures (e.g., manholes, catchbasins, outlet pipes, etc.) and for the site work and construction associated with the drainage facilities.[213] Neither drawing references maintenance of the new drainage structures and facilities. However, the Draft EIS notes that "[m]aintenance of the new drainage facilities on the project site will be the responsibility of the applicant and property owner. . . . The detention areas and associated outlets will require periodic maintenance consisting primarily of removal of accumulated sediments and organic materials. The frequency of such maintenance cannot be predicted in advance, but it is estimated to be approximately once every ten years."[214]

(iii) "Applicant shall implement and *remain in compliance with* the Site Plans Sheet C1.1 and C1.2, last revised date of March 29, 2001 and April 10, 2001 respectively."[215] The Site Plans depict the post-development layout of the project features, including the Wal-Mart building, the access road, parking areas, the wetland mitigation area, easements, and rights-of-way.[216] The Plans also provide specifications for signs, pavement markings, pavement types, setbacks, and other details.[217]

Enforcement Authority and Mechanisms

In addition to SEQRA's grant of authority to impose substantive mitigation measures,[218] the zoning enabling statute delegates power to villages to impose "reasonable conditions" with the approval of site plans.[219] The site plan section of Central Square's Code[220] implements this authority, providing for the approval of site plans with conditions attached.[221]

The zoning enabling statute confers enforcement powers to villages, authorizing correction or abatement of violations of local zoning laws and regulations, including "unlawful . . . maintenance [and] use" of buildings and land.[222] Unlike Ithaca's Site Plan Review Ordinance, which includes an enforcement and inspection section specifically addressing compliance with site plan requirements,[223] there are no enforcement provisions in the site plan review section of Central Square's Code.[224] The Zoning Chapter of the Code[225] does, however, provide general enforcement provisions that are applicable to the entire chapter,[226] including the site plan review section[227] and requirements of the Planning Board pursuant to its site plan review authority.[228] Section 250-33 of the Village Code provides:

> A. It shall be unlawful for any person . . . who owns, permits, takes part or assists in or who maintains any premises in which a violation of this chapter shall exist, to violate any provisions of this chapter, or the requirements of the Building Inspector, the Board of Appeals, the Planning Commission or Board of Trustees pursuant to this chapter.
>
> . . . .
>
> D. No provision of this chapter shall be construed to deprive the Village . . . [of] any available remedy for the enforcement of this chapter or the punishment or abatement of violations thereof. . . . [229]

The Village Building Inspector has the authority to enforce the provisions of the Zoning Chapter,[230] and broader authority to enforce all provisions of the Code applicable to the "construction, alteration, repair, removal and demolition of buildings and structures . . . and the location, use, occupancy and maintenance thereof."[231]

The enforcement provisions of section 250-33 would seem to apply to the mitigation measures attached to the site plan approval since the conditions constitute "requirements of the . . . Planning [Board] . . . pursuant to [the Zoning] chapter."[232] The Planning Board's Site Plan Approval Resolution adopted the Findings Statement, and the required mitigation measures described in the Findings Statement were incorporated as conditions of the approval of the Wal-Mart site plan.[233] Section 250-33, therefore, provides the Building Inspector with the authority to enforce compliance with the mitigation measures attached to the Wal-Mart site plan approval, including the mitigation measures of interest discussed above.[234] However, despite language in the Findings Statement requiring that Wal-Mart "remain in compliance with" the Landscaping Plan and Site Plan, and "maintain" the Grading and Drainage Plan,[235] the Village Code does not provide for post-construction, post-certificate-of-occupancy follow-up compliance inspections.[236] There are no provisions in the Village Code requiring active enforcement by the Building Inspector *after* issuance of the Certificate of Occupancy. Consequently, there are no formal procedures for exercising the Village's authority to enforce ongoing compliance with the Plans.

The Chairperson of the Village Planning Board reported several compliance issues that have arisen in the two and one-half years since the Wal-Mart store opened, but none that involved serious problems with the mitigation measures of interest.[237] The results of the author's cursory site inspections on January 7 and February 4, 2005 indicate that the Wal-Mart development is well maintained and is generally in compliance with the readily observable aspects of the required mitigation measures.[238]

III. Findings and Recommendations

The following Findings and Recommendations are based on the results of the case studies summarized in Part II and the SEQRA mitigation measures issues discussed in Part I. The primary SEQRA enforcement weakness identified by the case study research, summarized below in Finding (5), is that the municipal Lead Agencies have not implemented formal procedures to ensure *long-term* compliance with mitigation measures. A closely related issue, discussed in Part I, is that SEQRA imposes a duty on Lead Agencies to ensure that the required mitigation measures are complied with, but paradoxically, does not provide any enforcement authority.[239] The Recommendations are intended to address both of these problems with the enforcement of mitigation measures under SEQRA.

A. Findings

1. Municipal Lead Agencies use their underlying zoning and land use control authority, in addition to authority under SEQRA, to impose conditions and mitigation measures.

2. Municipal Lead Agencies have been delegated broad enforcement powers in the zoning enabling statutes.

3. These delegated enforcement powers seem adequate, but unless they are effectively implemented by the municipalities, they may lack adequate enforcement mechanisms and procedures to ensure ongoing, post-construction compliance with mitigation measures.

4. The municipal Lead Agencies in the case study use a variety of mechanisms to enforce compliance with SEQRA mitigation measures:

   - codifying *specific* enforcement provisions in their zoning and land use control ordinances [Ithaca];[240]
   - providing for a post-approval compliance inspection two years after issuance of a Certificate of Occupancy for a development [Ithaca];[241]
   - codifying *general* enforcement provisions in their zoning and land use control ordinances [Brighton; Central Square];[242]
   - requiring performance bonds, letters of credit and other forms of guarantees from project sponsors to ensure that site improvements are installed and maintained [All];[243]
   - requiring, explicitly, *ongoing* compliance with mitigation measures in SEQRA Findings Statements and approval documents [All; but note especially Central Square];[244]
   - conditioning approval resolutions and ordinances themselves on implementation of and compliance with mitigation measures [All];[245]
   - conditioning subsequent permits (e.g., building permits and certificates of occupancy) and approvals on compliance with mitigation measures [All]; [246]
   - requiring project sponsors to enter into contractual arrangements that memorialize their responsibilities to implement and comply with mitigation measures [Brighton];[247] and
   - relying on informal procedures, such as complaints by the public and "unofficial" inspections by municipal staff involved with the SEQRA review of the projects [All].[248]

5. Except for Ithaca's "two-year" re-inspection provision,[249] the municipal Lead Agencies in the case study did not have formal inspection programs for monitoring long-term compliance with SEQRA mitigation measures.

B. Recommendations

1. The Part 617 regulations should be amended to eliminate ambiguity regarding Lead Agencies' duty to enforce compliance with mitigation measures. One solution would be to revise section 617.3(b) to include language such as the bold and italicized text:

   > SEQR provides all involved agencies w/ the authority . . . to impose substantive conditions upon an action to ensure that the requirements of this Part have been satisfied. The conditions imposed must be practicable and reasonably related to impacts identified in the EIS. . . . [add:] ***SEQR requires that the substantive conditions imposed by involved agencies are implemented and complied with. Involved agencies have a duty to enforce initial and ongoing compliance with conditions they impose on an action.***

2. Given the absence of enforcement authority under SEQRA, Lead Agencies should strengthen the mitigation measure enforcement provisions of their underlying jurisdiction. Municipal Lead Agencies should codify enforcement provisions in their zoning and land use control ordinances that specifically address conditions and mitigation measures. For example, the enforcement provisions in the Zoning Chapter of the Village of Central Square's Code[250] could be revised to include the following underlined, italicized language:

   > A. It shall be unlawful for any person . . . who owns, permits, takes part or assists in or who maintains any premises in which a violation of this chapter shall exist, to violate any provisions of this chapter [delete "or"], the requirements of the Building Inspector, the Board of Appeals, the Planning Commission or Board of Trustees pursuant to this chapter, ***or the limitations, conditions, and mitigation measures imposed pursuant to SEQRA and the Village Environmental Quality Review Law (Chapter 98 of the Code). Failure to implement or remain in compliance with any required limitations, conditions, and mitigation measures shall constitute a violation of this chapter.***

These new enforcement provisions for mitigation measures should:

- explicitly reference ongoing compliance with conditions imposed on approvals pursuant to the SEQRA process (similar to the amended Central Square enforcement provision);
- provide for periodic (e.g., every three years) post-construction, post-Certificate of Occupancy inspections[251] that continue for as long as the mitigation measures are still applicable or the developments are in active use; and
- provide mechanisms and procedures for remedying compliance problems identified during the periodic inspections described above.

3. Even if the Part 617 regulations are amended and Lead Agencies implement the enforcement procedures suggested above, complaints by the public and other informal compliance monitoring mechanisms will likely remain useful tools for identifying violations of SEQRA mitigation measures and project limitations. Accordingly, the public should be afforded better access to information about the mitigation measures that are required by Lead Agencies. One commentator has recommended that EISs, which must include discussion of mitigation measures,[252] should be made available on the Internet.[253] Another alternative would be to make SEQRA Findings Statements available on the Internet,[254] perhaps through the NYSDEC website and the electronic version of the Environmental Notice Bulletin. In addition to Internet access, the Findings Statements (or lists of required mitigation measures) could be posted for public display as developments that have gone through the SEQRA process.[255]

SEQRA Projects in NYSDEC Region 7 and Region 8 with FEISs Accepted between Nov. 1999 and Dec. 2002[1]

Table 1: Summary of Projects by Type of Lead Agency

Type of Lead Agency	Number of Projects (number of Lead Agencies)	Number of Projects Involving Applicants[2]
NYSDEC	5 (n/a)	5
Other State Agencies: NYSDOT Education Dept.[3]	1 (n/a) 4 (n/a)	0 4
Counties	4 (3)	0
Cities	**7 (3)**	**3**
Towns	**27 (16)**	**18**
Villages	**5 (5)**	**4**
Authorities (State, County, Local)	5 (5)	0
School Districts	3 (3)	0
Totals	61 (38)	34

1. Data in Tables 1 and 2 was gathered from review of N.Y. STATE DEP'T OF ENVTL. CONSERV., ENVIRONMENTAL NOTICE BULLETIN ARCHIVES, available through the NYSDEC's Internet web site *at* http://www.dec.state.ny.us/website/enb/archives.html.

   The data summarized in Tables 1 and 2 suggests that a comprehensive, statewide tabulation of the types of Lead Agencies requiring EISs and the types of projects involved might be revealing. At the very least, the research would identify the general categories of agencies that are serving as Lead Agencies and the types of development being subjected to the full EIS process.

2. The remaining projects and actions were undertaken directly by the Lead Agencies.

3. Before September 1, 2001, the N.Y. State Education Department automatically served as Lead Agency for all public school construction projects. After that date, local school districts assumed Lead Agency responsibilities for their projects. Telephone Interview with Carl T. Thurnau, P.E., Coordinator, Office of Facilities Planning, N.Y. State Education Department (December 28, 2004).

Table 2: Summary by Type of Project

Type of Project	Number of Projects[1]
Adoption or Amendment of Lead Agencies' Plans, Policies, Regulations, Ordinances	9
Construction or Renovation of Lead Agencies' Facilities (Not including schools)	5
Road, Highway and Bridge Projects	2
Water and Sewer Projects	3
School Facilities	7
University Facilities	3
Miscellaneous Public Sector Development	2
Industrial and Research Parks (Including projects sponsored by IDAs)	4
Mines and Quarries	2
"Big-Box" Stores and Retail Shopping Plazas	8
Gas Stations/Mini-Marts	4
Residential Developments or Subdivisions	7
Office Parks	2
Cell Towers	2
Miscellaneous Private Sector Development	4

1. The total "Number of Projects" is greater than 61, the number of accepted FEISs (see Table 1), because three projects included mixed use development (e.g., a gas station and an office park).

Endnotes

1. N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (McKinney 1997). SEQRA was enacted in 1975 and was patterned on the federal National Environmental Policy Act ("NEPA"), which was passed by Congress in 1969. *See* State Environmental Quality Review Act, ch. 12, 1975 N.Y. Laws 895; National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f (2001)); Neil Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128, 1129-1130 (1982) (discussing genesis of NEPA and state versions of legislation requiring environmental impact analysis, such as SEQRA). For general information about the various state legislative and executive enactments requiring analysis of environmental impacts, see 4 FRANK GRAD, TREATISE ON ENVIRONMENTAL LAW, § 9.08 (Matthew Bender 2002).
2. N.Y. ENVTL. CONSERV. LAW § 8-0109(2).
3. *Id.* § 8-0109(1); *see* 2 MICHAEL B. GERRARD, DANIEL A. RUZOW & PHILIP WEINBERG, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, § 6.01[1] (2004) (hereinafter "GERRARD, RUZOW & WEINBERG") (describing SEQRA's mandate, pursuant to section 8-0109(1), to minimize or avoid adverse environmental impacts).
4. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.1–617.20 (1995–2001).
5. N.Y. ENVTL. CONSERV. LAW § 8-0109(8) (describing the requirement to make "explicit findings" at the completion of the EIS process); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(c)-(d) (1995).
6. N.Y. ENVTL. CONSERV. LAW § 8-0109(8).
7. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(c)-(d) (1995); *see* 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.03 (discussing SEQRA findings, generally).
8. *See* 1 GERRARD, RUZOW & WEINBERG, *supra* note 3, §§ 1.03, 6.01[1] (describing, respectively, SEQRA's "basic mandates" and the "mitigation" requirement); *see also* John W. Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings, and Non-Enforcement of SEQRA's Substantive Mandate*, 65 ALB. L. REV. 393, 393-95 (2001) (summarizing, succinctly, SEQRA's "substantive reach").

   Note that this article does not address mitigation measures that can be required when Lead Agencies decide to issue "conditioned negative declarations" and approve unlisted actions without subjecting the proposed projects to the full EIS process. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (1995); 2. GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.04[1] (describing the authority agencies have to impose substantive conditions when issuing conditioned negative declarations); *see generally* 1 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 3.06 (discussing conditioned negative declarations).
9. *See* 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.03[5] ("DEC has noted that . . . neither SEQRA nor its regulations 'provide special enforcement powers to ensure that the SEQR conditions identified in the findings statements by involved agencies are actually implemented . . . ,'" quoting N.Y. STATE DEP'T OF ENVTL. CONSERV. FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT INCLUDING FINAL REGULATORY IMPACT STATEMENT AND FINAL REGULATORY FLEXIBILITY ANALYSIS FOR REVISIONS TO 6 N.Y.C.R.R. PART 617 (February 18, 1987) (hereinafter "NYSDEC, FGEIS for 1987 Revisions to Part 617"); Peter G. Crary, *Procedural Issues under SEQRA*, 46 ALB. L. REV. 1211, 1230 (1982) (noting that, "[a]lthough it may be New

York's most important environmental protection statute, SEQRA contains no [enforcement] provision[s]"); *see also* Boris Serebro, *SEQRA Mitigation: Purpose, Requirements and Implementation*, 18 *N.Y. Envtl. Lawyer*, No. 4 at 14, 20 ("SEQRA itself does not have provisions governing implementation of mitigation measures that are selected by a lead agency.").

10. Although this article focuses on SEQRA "lead agencies, "the discussion is generally applicable to SEQRA "involved agencies" that condition their approval of projects by requiring mitigation measures. *See* N.Y. ENVTL. CONSERV. LAW § 8-0109(8); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.3(b), 617.11(c)-(d) (1995).

    The Part 617 regulations define involved agencies and lead agencies as follows:

    > *Involved agency* means an agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or directly undertake an action, then it is an "involved agency" notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced. The lead agency is also an "involved agency."
    >
    > . . . .
    >
    > *Lead agency* means an involved agency **principally responsible** for undertaking, funding or approving an action, and therefore **responsible for determining whether an environmental impact statement is required** in connection with the action, and for the preparation and filing of the statement if one is required.

    N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.2(s), (u) (1995) (defining, respectively, "involved agencies" and "lead agencies") (emphasis—the bold text, not the italicized text—added).

11. *See infra* Part I.A–B.

12. As opposed to enforcement authority associated with an agency's underlying approval or permitting jurisdiction, such as the NYSDEC's authority to enforce permit conditions (pursuant to N.Y. COMP. CODES R. & REGS. tit. 6, § 621.14(a)(5) (1988)).

13. *See infra* Part I.C.

14. *See infra* Part II.B.1–3.

15. *See infra* Part II.B.1.

16. *See infra* Part II.B.2.

17. *See infra* Part II.B.3.

18. *See infra* Part III.A.

19. *See infra* Part III.B.

20. *See infra* Part III.B.

21. As will be discussed in this article, without some degree of active, post-approval enforcement, there is the possibility that mitigation measures will be ignored and project restrictions will be contravened once the SEQRA process has been completed. In order to fulfill SEQRA's substantive mitigation mandate, however, mitigation measures must be implemented and complied with on an ongoing basis.

22. *See infra* Part I.A.

23. *See infra* Part I.B.

24. *See infra* Part I.C.

25. As referenced in *Committee for Environmentally Sound Dev., Inc. v. City of New York*, there is a notable absence of case law addressing Lead Agencies' obligation to enforce compliance with mitigation measures. 737 N.Y.S.2d 792, 802 (Sup. Ct. 2001).

26. *See* 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.02[4] (discussing *Town of Henrietta v. Dep't of Envtl. Conserv.*, 430 N.Y.S.2d 440 (App. Div. 1980)).

27. 430 N.Y.S.2d 440 (App. Div. 1980).

28. *Id.* at 448.

29. *See* Caffry, *supra* note 8, at 396 (discussing *Town of Henrietta*).

30. 430 N.Y.S.2d 440 (App. Div. 1980).

31. *See* 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.02[4] & n. 54 (discussing *Town of Henrietta* and 1987 revision to N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b)).

32. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (1995).

33. DIV. OF REGULATORY AFFAIRS, N.Y. STATE DEP'T OF ENVTL. CONSERV., THE SEQR HANDBOOK 83 (1992) (hereinafter "THE SEQR HANDBOOK") (answering question 14 of Chapter 5, "[c]an conditions and mitigation measures outside the scope of an agency's jurisdiction be incorporated into that agency's SEQR findings").

    Note, however, that the SEQRA statute declares that it does not "change the jurisdiction between or among state agencies and public corporations" (N.Y. ENVTL. CONSERV. LAW § 8-0103(6)) and Part 617 states similarly that "SEQR[A] does not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b) (1995). These provisions have been interpreted to prohibit agencies from *imposing* conditions that might "infringe upon the jurisdiction" of other involved agencies. *See supra* THE SEQR HANDBOOK, at 83 (answering question 14 of Chapter 5); 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.02 n.52 (summarizing numerous pertinent cases and NYSDEC Commissioner Decisions); *see also* Caffry, *supra* note 8, at 396 (discussing THE SEQR HANDBOOK and NYSDEC's position that all Lead Agencies possess the authority to impose conditions "outside the scope of [their] statutory powers," but that the conditions "cannot infringe on the jurisdiction of other agencies").

    The "jurisdictional" restriction on *imposing* conditions discussed above is not directly relevant to the discussion of *enforcement* authority, except to note that an agency would not have authority—under SEQRA or otherwise—to enforce a condition it had no authority to impose in the first place (because it infringed on another agency's jurisdiction).

34. *See infra* Part I.C.

35. *See supra* note 9 and accompanying text.

36. 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.03[5] (quoting NYSDEC, FGEIS for 1987 Revisions to Part 617, *supra* note 9) (emphasis added).

37. *See supra* Part I.A.

38. 430 N.Y.S.2d 440 (App. Div. 1980).

39. This is not a significant issue for the NYSDEC when it serves as Lead Agency because of the broad authority it has to impose and enforce permit conditions pursuant to N.Y. ENVTL. CONSERV. LAW § 3-0301(1)(b) (McKinney 1997) (describing powers and duties of the NYSDEC Commissioner, including powers associated with making permit determinations) and N.Y. COMP. CODES R. & REGS. tit. 6, § 621.14(a)(5) (2002) (listing non-compliance with permit conditions as one of the grounds for modification, suspension or revocation of permits), respectively. *See Town of Henrietta v. Dep't. of Envtl. Conserv.*, 430 N.Y.S.2d 440, 447 (App. Div. 1980) (discussing NYSDEC authority under N.Y. ENVTL. CONSERV. LAW § 3-0301(1)(b) to "attach conditions to permits, so long as the conditions are reasonably related to the cumulative purposes of the Environmental Conservation Law"); 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.04[1] (discussing *Town of Henrietta*, SEQRA and § 3-0301(1)(b)); *see also* Serebro, *supra* note 9, at 19 (discussing NYSDEC authority under N.Y. COMP. CODES R. & REGS. tit. 6, § 621 to modify, suspend or revoke a permit for non-compliance with permit conditions).

Lack of enforcement authority does not present a problem for agencies serving as Lead Agency for the SEQRA review of their own proposed actions (as opposed to reviewing projects sponsored by applicants). The primary compliance issue related to these types of projects is "self-regulation" of the implementation of mitigation measures, not the lack of effective enforcement authority.

40. *See supra* Part I.C.

41. However, if created wetlands are also required by the NYSDEC or the U.S. Army Corps of Engineers (the agency responsible for the Federal wetlands protection program) as mitigation measures for impacts to natural wetland areas, the municipality's lack of enforcement authority will not be a factor. The enforcement authority problem will only arise in the absence of formal regulatory involvement by the NYSDEC or the U.S. Army Corps of Engineers (such as when a municipal Lead Agency without applicable code provisions nonetheless requires created wetlands as mitigation for drainage, surface water quality or visual resource impacts).

42. *See infra* notes 94-95, 144-145, 209-211 and accompanying text (describing Landscaping Plans required as mitigation measures by City of Ithaca, Town of Brighton, and Village of Central Square, respectively).

43. For example, Ithaca, Brighton and Central Square all have provisions in their zoning and land use control ordinances that address performance guarantees for landscaping.

44. *See, e.g., infra* notes 100-101 and accompanying text (describing authority of municipalities to attach "reasonable conditions" to site plan approvals).

45. *See* N.Y. ENVTL. CONSERV. LAW § 8-0109(1). The purposes and policies of SEQRA include the following:

> It is the purpose of this act . . . to promote efforts which will *prevent or eliminate damage to the environment* and enhance human and community resources. . . .
>
> *Id.* § 8-0101 (emphasis added).
>
> It is the intent of the legislature that to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article.
>
> *Id.* § 8-0103(6).
>
> It is the intent of the legislature that all agencies conduct their affairs with an awareness that *they . . . have an obligation to protect the environment for the use and enjoyment of this and all future generations*. *Id.* § 8-0103(8) (emphasis added).
>
> It is the intent of the legislature that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to *preventing environmental damage*.

Id. § 8-0103(9) (emphasis added).

46. *See id.* §§ 8-0101, 8-0103(9).

47. *Id.* § 8-0103(8).

48. *See Committee for Environmentally Sound Dev., Inc. v. City of New York*, 737 N.Y.S.2d 792, 803 (Sup. Ct. 2001) ("this Court concludes that the only way to fully implement the policies underlying SEQRA is to hold that a lead agency has a continuing duty to ensure that conditions derived through the SEQRA process are followed by the project developer .").

49. *Id.*

50. *See id.* (holding that Lead Agencies have a "continuing duty" to enforce compliance with project limitations that are conditions of their approval).

51. *See* 1 GERRARD, RUZOW & WEINBERG, *supra* note 3, §§ 1.02, 3.14 n.27, 6.04[1]; Philip Weinberg, *Practice Commentaries, in* 17½ MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ENVIRONMENTAL CONSERVATION LAW 45 (Supp. 2005); 55 N.Y. JUR. 2D *Envtl. Rights and Remedies* § 92, at 9 (Supp. 2004); all discussing significance of *Committee for Environmentally Sound Dev., Inc. v. City of New York*, 737 N.Y.S.2d 792 (Sup. Ct. 2001). *But see supra* note 9: 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.03[5] (quoting from NYSDEC, FGEIS for 1987 Revisions to Part 617).

52. *See supra* note 24 (referencing absence of case law addressing the duty of Lead Agencies to enforce compliance with mitigation measures as discussed in *Committee for Environmentally Sound Dev., Inc. v. City of New York*, 737 N.Y.S.2d 792 (Sup. Ct. 2001)); *see also* 1 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 3.14[2] (discussing the only "court case directly arising from an agency's attempt to enforce a SEQRA-derived condition" (*Flacke v. Pyramid Co. of Utica* (Sup. Ct. 1984))—an unreported decision which the author was unable to obtain).

53. *See, e.g., Fried v. Fox*, 373 N.Y.S.2d 197, 198 (App. Div. 1975) ("[T]he decision by [municipal] officials to enforce any of the myriad zoning violations existing in a given municipality [here the City of Yonkers] must, of necessity, be left to the discretion of these officials."); *Young v. Town of Huntington*, 503 N.Y.S.2d 657, 657-58 (App. Div. 1986) ("Regardless of whether certain conditions . . . may violate the zoning or building provision of the [T]own code, the decision to enforce rests in the discretion of the public officials charged with enforcement"); *Dyno v. Village of Johnson City*, 690 N.Y.S.2d 325, 326-27 (App. Div. 1999) (refusing to hear challenge "in the nature of mandamus" to compel the Village to enforce compliance with setback requirements of the Village zoning code because enforcement decision was a "discretionary function").

The author's contention that Lead Agencies have a duty to enforce compliance with mitigation measures required pursuant to SEQRA implies that this duty will supersede the enforcement discretion associated with their underlying jurisdiction. This "duty to enforce" under SEQRA could provide members of the public who suffer injuries as a result of a Lead Agency's non-enforcement with the leverage to compel the enforcement of mitigation measures and project limitations. *But see Manulli v. Hildenbrandt*, 534 N.Y.S.2d 763, 764 (App. Div. 1998) (addressing mandamus challenge, but not within the context of SEQRA: "the law is by now quite well settled that the decisions of local municipal officials on whether to enforce zoning codes are discretionary and not subject to judicial oversight in a civil suit or by way of mandamus"). Members of the public pursuing such mandamus challenges to non-enforcement of mitigation measures must, of course, meet the standing requirements under SEQRA. *See generally* 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 7.07 (discussing standing issues under SEQRA); *see also* Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement Under SEQRA*, 65 ALB. L. REV. 421 (2001) (discussing standing requirements under SEQRA, NEPA and the environmental impact review statutes of other states). In addition, there will be other legal difficulties facing plaintiffs considering these types of SEQRA mandamus challenges, such as statute of limitations problems and possible "fait accompli" situations. *See infra* note 251 (discussing statute of limitations and "fait accompli" issues in the context of post-construction monitoring of compliance with SEQRA mitigation measures by Lead Agencies).

54. *See Aldrich v. Pattison*, 486 N.Y.S.2d 23, 29 (App. Div. 1985) ("Not every conceivable . . . mitigation measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA."); 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.02[4] (emphasizing that the courts "give substantial deference to an agency's decision not to require mitigation"); *see also* THE SEQR HANDBOOK, *supra* note 33, at 67 (describing,

in answer to question 34 of Chapter 5, that not all identified significant environmental impacts need to be mitigated).

55. *See* 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 6.02[2] ("DEC has emphasized agencies' discretion in determining which mitigation measures to apply, stating 'Not every mitigating measure identified in an EAF [environmental assessment form] or EIS is appropriate to apply to a specific project and agencies should not have their discretion so limited,'" quoting NYSDEC, FGEIS for 1987 Revisions to Part 617, *supra* note 9); *see also Town of Henrietta v. Dep't. of Envtl. Conserv.* 430 N.Y.S.2d 440, 447 (App. Div. 1980) ("[T]he general substantive policy of [SEQRA] is a flexible one. It leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances."); *Jackson v. New York State Urban Dev. Corp.*, 494 N.E.2d 429, 436 (N.Y. 1986) ("[T]he Legislature in SEQRA has left the agencies considerable latitude in evaluating environmental effects and choosing among alternatives.").

56. Pursuant to N.Y. ENVTL. CONSERV. LAW § 8-0109(8) and N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(c)-(d) (1995).

57. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(d)(5) (1995).

58. N.Y. ENVTL. CONSERV. LAW § 8-0109(8).

59. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(d)(4) (1995).

60. *Id.* § 617.11(d)(5) (1995).

61. *See supra* notes 45-47 and accompanying text.

62. N.Y. ENVTL. CONSERV. LAW § 8-0109(1).

63. This research was suggested by Michael B. Gerrard, a respected SEQRA expert and the General Editor of ENVIRONMENTAL IMPACT REVIEW IN NEW YORK (*see supra* note 3). Mr. Gerrard underscored the lack of information about the implementation, effectiveness and enforcement of SEQRA mitigation measures and recommended empirical study in this area. Telephone interview with Michael B. Gerrard, Partner, Arnold & Porter, (Sept. 14, 2004). I regret that time constraints significantly narrowed the scope of this investigation, but hope that others will follow the research path laid out by Mr. Gerrard and conduct further empirical studies of SEQRA mitigation measures.

64. The author lives in Rochester, New York. Most of the research for this project, including the site inspections, was conducted during the winter of 2004-2005.

65. Within NYSDEC Region 7 (Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga, and Tompkins Counties) and Region 8 (Chemung, Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, and Yates Counties).

66. Available through the NYSDEC's Internet web site, *at* http://www.dec.state.ny.us/website/enb/archives.html.

67. Archived ENVIRONMENTAL NOTICE BULLETINS available through the NYSDEC's Internet web site cover the period from November 1999 to date.

68. More recent projects generally were not considered as candidates for the study because they are not as likely to be constructed or implemented at this time, thus rendering premature an assessment of the implementation and enforcement of required mitigation measures.

69. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12(c)(1) (2001) requires publication of numerous SEQRA notices, including notices of acceptance of EISs by Lead Agencies, in the NYSDEC's ENVIRONMENTAL NOTICE BULLETIN, which is available at the agency's Internet web site.

70. See Table 1 for a summary of the projects by type of Lead Agency. See Table 2 for a summary of the types of projects that were the subjects of the FEISs.

71. This evaluation included the following inquiries: (i) Did the subject projects involve physical construction or were they merely programmatic actions by agencies, such as a Town's proposal to adopt a new Comprehensive Plan or a City's proposal to adopt a new Zoning Code? (ii) Did the subject projects involve applicants who needed approval by the Lead Agencies, or were the Lead Agencies undertaking actions themselves (e.g., a County constructing a new Courthouse and serving as Lead Agency for the SEQRA review of the project)? (iii) What types of Lead Agencies were involved with the subject projects: state agencies (e.g., the NYSDEC, the NYSDOT, the NYS Dept. of Education, etc.), counties, cities, towns, villages, school districts, authorities (e.g., State University Construction Fund, industrial development authorities, water and sewer authorities, etc.)?

72. The goal of the initial research was to gather information about projects involving a variety of Lead Agencies.

73. Relevant commentary has been cited, where appropriate, throughout this article.

74. The author reviewed more than forty cases and NYSDEC administrative decisions dealing with a variety of SEQRA, zoning and land use control issues.

75. The preliminary research indicated that municipalities (used here to refer to cities, towns and villages) were the only Lead Agencies other than the NYSDEC (ignoring the State Education Department, which no longer serves as Lead Agency for local school district construction projects—*see* Table 1, *supra* note 70, at n. 3) to review actions involving project applicants. *See* Table 1, *supra* note 70. When Lead Agencies review their own proposed actions, the mitigation compliance issue is not enforcement, but self-regulation. Time constraints precluded further study of the projects involving review by Lead Agencies of their own actions and the attendant "self-regulation" problems. The NYSDEC projects were also excluded from further in-depth study, primarily because the NYSDEC's enforcement of mitigation measures through permit conditions has been thoroughly examined in the SEQRA commentary since 1980, when *Town of Henrietta v. Dep't. of Envtl. Conserv.*, 430 N.Y.S.2d 440, 447 (App. Div. 1980), was decided.

76. *See* 1 PATRICIA E. SALKIN, NEW YORK ZONING LAW AND PRACTICE, §§ 2:01, 2:03-2:12 (4th ed. 2002) (discussing the zoning and land use regulation powers that the state legislature has delegated to cities, towns and villages); *see also* N.Y. STATE DEP'T OF STATE, LOCAL GOV'T HANDBOOK, ch. XVI, at 1 (5th ed. 2000) (hereinafter "LOCAL GOV'T HANDBOOK") (noting that "[w]ith few exceptions, the police power to control land use is a city, town or village function in New York State[ ]").

77. *See infra* Part II.B.1. Ithaca is located at the south end of Cayuga Lake in Tompkins County, in the Finger Lakes Region of New York State. The City occupies an area of 6.07 square miles and had a population of 28,775 in the year 2000, based on U.S. Census data (demographic data about the City is available through the U.S. Census Bureau's Internet web site, *at* http://www.census.gov/census2000/states/ny.htm). Ithaca has professional staff in its planning and building departments who are responsible for implementing SEQRA (and the City's version of the Part 617 regulations—*see infra* note 80).

78. *See infra* Part II.B.2. Brighton is an inner-ring suburban town bordering the City of Rochester, in Monroe County. The Town occupies an area of 15.63 square miles and had a population of 35,588 in the year 2000, based on U.S. Census data (demographic data about the Town is available through the U.S. Census Bureau's Internet web site, *at* http://www.census.gov/census2000/states/ny.htm). Brighton, like the City of Ithaca, has professional staff in its Building and Planning Office who are responsible for implementing SEQRA.

79. *See infra* Part II.B.3. Central Square is located in Oswego County, approximately 15 miles north of Syracuse. The Village occupies an area of 1.85 square miles and had a population of 1,646 in the year 2000, based on U.S. Census data (demographic data about the Village is available through the U.S. Census Bureau's Internet web site *at* http://www.census.gov/census2000/states/ny.htm). The Village does not have a planning department. However, the Building Inspector serves as the Village's SEQRA

"clearinghouse," with responsibility for (i) assisting applicants with the identification of other involved agencies and (ii) making recommendations for the designation of a Lead Agency. *See* VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 98-8 (1983). Sections 98-1-98-13 of the VILLAGE OF CENTRAL SQUARE, N.Y., CODE comprise the "Environmental Quality Review Law of the Village of Central Square" (hereinafter "EQRL"). *See* VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 98-1 (1983). The EQRL primarily adopts the Part 617 implementing regulations (*see* VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 98-4 (1983)), but includes several unique provisions, such as § 98-8, which describes the "clearinghouse" role of the Building Inspector in the SEQRA process.

80. City of Ithaca Planning and Development Board, State Environmental Quality Review Act [and] City of Ithaca Environmental Quality Review Ordinance Findings Statement [for] Elmira Road Shopping Center, at 4 (adopted Dec. 27, 2001) (hereinafter "CITY OF ITHACA FINDINGS STATEMENT").

    The City has adopted an environmental quality review ordinance, patterned on the Part 617 regulations (N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.1–617.20 (1995–2001)), to implement SEQRA. The City Environmental Quality Review Ordinance (hereinafter "CEQRO"), CITY OF ITHACA, N.Y., CODE §§ 176-1-176-19 (2003), *available at* http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=94596&infobase=ithaca.nfo&softpage=Browse_Frame_Pg42. According to Betty Ann Hughes, NYSDEC Chief of SEQRA and Training, Ithaca is one of the few local and state agencies (along with the City of New York) to adopt and adequately maintain their own versions of SEQRA regulations. Telephone interview with Betty Ann Hughes, Chief, SEQR and Training, Division of Environmental Permits, NYSDEC (Dec. 29, 2004).

    The site plan review authority of the City "derive[s] from the state enabling statue" (*see* LOCAL GOV'T HANDBOOK, *supra* note 76, ch. XVI, at 5), N.Y. GEN. CITY LAW § 27-a (McKinney 2003), and is implemented through provisions of the City Code, CITY OF ITHACA, N.Y., CODE §§ 276-1-276-14 (1999), which also delegate the City's site plan review authority to the Planning Board. *See* CITY OF ITHACA, N.Y., CODE § 276-5 (1999), *available at* http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=94596&infobase=ithaca.nfo&softpage=Browse_Frame_Pg42.

    The enabling statute specifically authorizes cities to delegate site plan review powers to "planning board[s] or such other administrative body it shall so designate." N.Y. GEN. CITY LAW § 27-a(2) (McKinney 2003).

81. *See* e-mail from JoAnn Cornish, Deputy Director of Planning and Development, City of Ithaca, to author (Feb. 17, 2005, 17:15:22 EST) (on file with author) (describing four lawsuits initiated by opponents of the development and three actions by the project sponsor, none of which had more than a tangential relationship to the mitigation measures and enforcement issues discussed below).

82. *See* CITY OF ITHACA FINDINGS STATEMENT, *supra* note 80, at 1.

83. *See* City of Ithaca Planning and Development Board, Preliminary and Final Site Plan Resolution, at 1 (adopted Dec. 27, 2001) (hereinafter "CITY OF ITHACA SITE PLAN APPROVAL RESOLUTION").

84. E-mail from Thomas Nix, Senior Plan Examiner, City of Ithaca, to author (Feb. 18, 2005, 13:24:52 EST) (on file with author).

85. *Id.*

86. *See* CITY OF ITHACA FINDINGS STATEMENT, *supra* note 80, at 4. The author made direct observation of many of these features during a January 19, 2005 site inspection. The approved site plan also includes development of a small "out-parcel" that has yet to occur. *See* CITY OF ITHACA SITE PLAN APPROVAL RESOLUTION, *supra* note 83, at 1. Direct observations made during the author's January 19, 2005 site inspection indicate that the "out-parcel" has not been developed.

87. *See* CITY OF ITHACA FINDINGS STATEMENT, *supra* note 80, at 1, 4-5, 10-12 (discussing City of Ithaca's Southwest Area Land Use Plan (hereinafter "Land Use Plan"), the associated Generic Environmental Impact Statement (completed in 2000), and the subject project's general conformance with the development envisioned for the site area in the Land Use Plan).

88. *See id.* at 4; *see also* interview with JoAnn Cornish, Deputy Director of Planning and Development, City of Ithaca (Jan. 19, 2005) (discussing City-owned land along Cayuga Inlet creek).

89. *See* CITY OF ITHACA FINDINGS STATEMENT, *supra* note 80, at 4; *see also* Interview with JoAnn Cornish, Deputy Director of Planning and Development, City of Ithaca (Jan. 19, 2005) (discussing Cayuga Inlet creek and natural area, donation by project applicant and new City park).

90. *See* CITY OF ITHACA FINDINGS STATEMENT, *supra* note 80, at 9 (discussing visual impacts of project).

91. *See id.* at 6-10.

92. *See id.* at 7-9.

93. *See* CITY OF ITHACA, N.Y., CODE § 325-20(c)(1)(a) (1987-1996) (describing maintenance requirements for parking areas, including storm water drainage systems: "all parking areas and . . . drainage systems must be maintained to preserve their intended function and to prevent nuisances or hazards to people, surrounding properties and public ways").

94. CITY OF ITHACA FINDINGS STATEMENT, *supra* note 80, at 9.

95. *See id.*

96. *See id.* at 10.

97. *See id.*

98. *See supra* Part I.A (discussing *Town of Henrietta v. Dep't of Envtl. Conserv.*, 430 N.Y.S.2d 440 (App. Div. 1980) and N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(b)).

99. *See* CITY OF ITHACA, N.Y., CODE § 176-3(b) (2003).

100. Delegated by New York State through enabling statutes: N.Y. GEN. CITY LAW § 27-a (McKinney 2003); N.Y. TOWN LAW § 274-a (McKinney 2004); and N.Y. VILLAGE LAW § 7-725-a (McKinney 1996 & Supp. 2005).

101. N.Y. GEN. CITY LAW § 27-a(4) (McKinney 2003). The language in the town and village enabling statutes is identical. *See* N.Y. TOWN LAW § 274-a (McKinney 2004); N.Y. VILLAGE LAW § 7-725-a (McKinney 1996 & Supp. 2005).

    Municipalities have similar powers to attach conditions to special permits and zoning variances. *See* Michael B. Gerrard, *Municipal Powers Under SEQRA*, 69 N.Y.St.B.J. 6 & nn.5-7 (Dec. 1997) (discussing the authority of municipalities to impose conditions on the approval of site plans, special permits and zoning variances); N.Y. GEN. CITY LAW §§ 27-b(4), 81-b(5) (McKinney 2003) (describing, respectively, cities' authority to attach conditions to the approval of special permit and zoning variances); N.Y. TOWN LAW §§ 267-b(4), 274-b(4) (McKinney 2004) (describing, respectively, towns' authority to attach conditions to the approval of zoning variances and special permits); N.Y. VILLAGE LAW §§ 7-712-b(4), 7-725-b(4) (McKinney 1996 & Supp. 2005) (describing, respectively, villages' authority to attach conditions to the approval of zoning variances and special permits).

    In addition, the enabling statutes provide municipalities with other zoning and land use control powers, including traditional zoning regulation, subdivision review, cluster development, incentive zoning and transfer of development rights. *See* LOCAL GOV'T HANDBOOK, *supra* note 76, ch. XVI, at 3-7 (discussing "zoning and related regulatory controls"). Discussion of these other land use control powers, specifically whether or not they include the authority to impose conditions on approvals, is beyond the scope of this article.

102. *See* CITY OF ITHACA, N.Y., CODE §§ 276-1-276-14 (1999).

103. *See id.* §§ 276-6(8)(a)[2], (a)[4], (b)[2] (1999).

104. *See id.* § 276-6(8) (1999).

105. *See supra* Part I.B.

106. *See* CITY OF ITHACA, N.Y., CODE §§ 176-1-176-20 (2003).

107. *See id.* § 276-11 (1999) ("Enforcement; inspections; penalties for offences."). The enabling site plan review statute, N.Y. GEN. CITY LAW § 27-a (McKinney 2003), does not include enforcement provisions. Cities are granted general authority to enforce local laws and ordinances under § 20 (entitled "Grant of specific powers"), of N.Y. GEN. CITY LAW. *See* N.Y. GEN. CITY LAW § 20(22) (McKinney 2003) (". . . every city is empowered . . . [t]o regulate by ordinance or local law any matter within the powers of the city . . . and to maintain an action or special proceeding in a court of competent jurisdiction to compel compliance with or restrain by injunction the violation of any such ordinance or local law . . ."); *see also* 2 SALKIN, *supra* note 76, § 34:01 & n.7 (discussing zoning enforcement powers of villages, towns and cities and noting that, by comparison, cities' authority derives from "the more general provisions of the General City Law," and citing specifically to N.Y. GEN. CITY LAW § 20(22) in n.7).

108. CITY OF ITHACA, N.Y., CODE § 276-11 (1999) (emphasis added).

109. *See id.* § 276-11 (1999).

110. *Id.* § 276-9 (1999).

111. *Id.* § 276-7(B)(3) (1999).

112. *Id.* § 276-7(B)(4) (1999).

113. *See* CITY OF ITHACA SITE PLAN APPROVAL RESOLUTION, *supra* note 83, at 2 (listing "'Development Plans, Site and Pavement Marking Plan . . . Utility Plan . . . Grading and Erosion Control Plan[s] . . . Landscape Plan . . . Lighting Plan, Detail Sheets and Elevations'"); *see also* CITY OF ITHACA, N.Y., CODE § 276-2(B) (1999) (defining and describing "Site Plan").

114. *See* CITY OF ITHACA, N.Y., CODE § 276-11 (1999). According to the City of Ithaca Senior Plan Examiner, the site plan compliance inspections for large developments such as the Home Depot are typically conducted by the Deputy Director of Planning and Development and the City Engineer. E-mail from Thomas Nix, Senior Plan Examiner, City of Ithaca, to author (Feb.18, 2005, 13:24:52 EST) (on file with author).

115. *See* CITY OF ITHACA, N.Y., CODE §§ 146-7(I), (M) (1987-1992) (describing, respectively, specific inspection requirements for Certificates of Occupancy and general inspection provisions applicable to all Building Dept. permits). Note also that the City's Site Plan Review Ordinance, Code § 276-4, makes the approved site plan "binding on all further permits and approvals needed for the projects," including permits from the Building Department, such as Building Permits and Certificates of Occupancy. *Id.* § 276-4(A). *See id.* § 146-7(A), (I) (1987-1992) (discussing requirements for Building Permits and Certificate of Occupancy).

    The Deputy Director of Planning and Development conducts another site inspection prior to the issuance of the certificates of occupancy by the Building Department. Interview with JoAnn Cornish, Deputy Director of Planning and Development, City of Ithaca (Jan. 19, 2005).

116. *See* e-mail from JoAnn Cornish, Deputy Director of Planning and Development, City of Ithaca, to author (Feb. 17, 2005, 17:15:22 EST) (on file with author); e-mail from Thomas Nix, Senior Plan Examiner, City of Ithaca, to author (Feb. 18, 2005, 14:09:08 EST) (on file with author).

117. Author's observations during January 19, 2005 site inspection. *See* CITY OF ITHACA FINDINGS STATEMENT, *supra* note 80.

118. The two-year re-inspection is scheduled for March 2006, according to the City of Ithaca Senior Plan Examiner. E-mail from Thomas Nix, Senior Plan Examiner, City of Ithaca, to author (Feb.18, 2005, 14:09:08 EST) (on file with author).

119. *See* interview with JoAnn Cornish, Deputy Director of Planning and Development, City of Ithaca (Jan. 19, 2005) (discussing importance of complaints by the public and her own periodic monitoring of developments in the City's efforts to enforce post-approval compliance with mitigation measures).

120. Town Board of the Town of Brighton, State Environmental Quality Review Findings Statement [for Mercy Park], at 1 (Oct. 24, 2001) (hereinafter "TOWN OF BRIGHTON FINDINGS STATEMENT").

    Prior to the rezoning, the two parcels that comprise the project site were zoned Residential–Low Density ("RLB" and "RLC"). *See id.* at 8; TOWN OF BRIGHTON, N.Y., CODE §§ 203-9, 203-16 (1993) (listing permitted and conditional uses in RLB and RLC districts, respectively), *available at* http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=103803&infobase=brighton.nfo&softpage=Browse_Frame_Pg42.

    Rezoning to Residential–High Density ("RHD-2") was necessary for the site areas that were going to be developed. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra*, at 8; TOWN OF BRIGHTON, N.Y., CODE § 203-30 (1996) (listing permitted and conditional uses in the RHD-2 district, which include "townhouses and garden apartments").

121. *See* N.Y. TOWN LAW §§ 264, 265 (McKinney 2004) (mandating, in § 264, procedures for the adoption and amendment of zoning regulations by town boards, and in § 265, requiring that these zoning enactments be approved by the town board); TOWN OF BRIGHTON, N.Y., CODE § 225-5 (1993) (describing requirements of N.Y. TOWN LAW §§ 264 and 265, specifically as they apply to amendments to the Town of Brighton Comprehensive Development Regulation, TOWN OF BRIGHTON, N.Y., CODE, pt. III, chs. 201-227).

    New York State has delegated broad zoning power to towns, to be exercised by town boards. N.Y. TOWN LAW § 261 (McKinney 2004). *See* 1 SALKIN, *supra* note 76, § 2:12 (discussing zoning powers delegated to towns in various sections of the enabling statute, N.Y. TOWN LAW §§ 261-285). Cities and villages were granted similar zoning authority in enabling statutes. *See* N.Y. GEN. CITY LAW § 20 (McKinney 2003); N.Y. VILLAGE LAW § 7-700 (McKinney 1996 & Supp. 2005); 1 SALKIN, *supra* note 76, §§ 2:03, 2:10, 2:11 (discussing local zoning power generally, the zoning enabling act for cities, and the zoning enabling act for villages, respectively).

122. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 3.

123. *See id.* at 1.

124. *See* Town Board of the Town of Brighton, Resolution and Ordinance (adopted Dec. 12, 2001) (hereinafter "TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE").

125. The Town issued a "Clearing and Excavation Permit" (pursuant to TOWN OF BRIGHTON, N.Y., CODE, ch. 66 (1989-2003)) in June 2004. The first Building Permit (pursuant to TOWN OF BRIGHTON, N.Y., CODE § 73-11(A) (1985-1996), for foundation work, was issued in September 2004. Telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005).

126. Author's observation, January 31, 2005, site inspection.

127. Telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005).

128. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 1.

129. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, Proposed Rezoning Plan SU-2 ([Date illegible]) (hereinafter "Proposed Rezoning Plan SU-2"), annexed to EXHIBIT D: [AGREEMENT TO CREATE A] CONSERVATION EASEMENT, [between NewMark Development Co., Inc. [the developer] and The Sisters of Mercy of Rochester [property owner], applicants, and the Town of Brighton (Dec. 12, 2001)].

130. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 1.

131. *See id.*

132. *See generally id.*

133. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, at 1.

134. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 1.

135. *See* PROPOSED REZONING PLAN SU-2, *supra* note 129.

136. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 3-12.

137. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, at 3 (declaring that the "rezoning is subject to the conditions set forth in Exhibit F [Schedule of Conditions] hereto and made part hereof, *each and every one of which this Town deems to be of grave importance and without which the rezoning would not have been approved* . . ." (emphasis added), Exhibit F: [Schedule of Conditions].

138. *See generally* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120; TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS].

139. The purpose of the survey was to document the conditions of the foundations of the residences in the vicinity of the project site prior to the blasting, to provide a post-blasting basis of comparison. Telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005).

140. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 4; TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS], condition no. 3.

141. Telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005).

142. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 6 (discussing Conservation Easements and "8.7 acres of the existing woodlot [that] will remain undisturbed" as mitigation measures for impacts to ecological resources); *see* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS], conditions nos. 6 and 15 (describing requirement for Conservation Easements).

143. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS], condition no. 4 (discussing requirement for "Woodlot and Conservation Easement Protection Plan").

144. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 11-12 (discussing visual "buffer" that will be provided by maintenance of existing vegetation and by landscape designs); TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS], condition nos. 11 and 12.

145. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, at 2 (noting that the Findings Statement concluded that "all significant adverse environmental impacts will be avoided or mitigated to the maximum extent practicable with respect to the Proposal" by implementation of the proposed mitigation measures).

146. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS], condition no. 7 (describing requirement for contract with private ambulance service).

147. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 10 (discussing impacts to community services and mitigation measures).

148. *See supra* Part I.A-B.

149. *See, e.g., In re St. Onge v. Donovan*, 522 N.E.2d 1019, 522 N.E.2d 1019, 1022-23 (N.Y. 1988) (discussing discretionary nature of rezoning decisions generally and the authority of municipalities to impose conditions that "relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of [the rezoned] use," and noting that "[protecting] the surrounding area from a particular land use [is] consistent with the purposes of zoning. . . . "); *see also* interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Jan. 20, 2005) (discussing discretionary approval authority of Town Board when considering rezoning applications).

150. N.Y. TOWN LAW § 268(2) (McKinney 2004). Town Law § 268, subdivision 2 provides:

> In case any building or structure is erected, constructed, reconstructed, altered, converted or maintained, or any building, structure or land *is used*, or any land is divided into lots, blocks, or sites in violation of this article or of any local law, ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town . . . may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, *maintenance*, *use* or division of land, to restrain, correct or abate such violation, to prevent occupancy of said building, structure, or land or to prevent any illegal act, conduct, business or *use* in or about such premises. . . .

(emphasis added).

151. *See id.*; 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, § 7.03[4] (discussing the taxpayer-action provisions of § 268, including requirements that (i) the action be brought by three resident taxpayers who live in the zoning district where the violations occur; (ii) the taxpayers are jointly or severally aggrieved; and (iii) a resident taxpayer provided the town with a written request to remedy the subject zoning violations and the town failed to act within ten days).

This taxpayer-action provision is unique to the Town enabling statute; there are no analogous provisions in the enforcement sections of the City or Village zoning enabling statutes. *See* N.Y. GEN. CITY LAW § 20(22) (McKinney 2003); N.Y. VILLAGE LAW § 7-714 (McKinney 1996 & Supp. 2005); *see also supra* note 107 (noting absence of enforcement provisions in zoning enabling statute for cities, but discussing general enforcement provisions available in § 20(22) of the N.Y. GEN. CITY LAW); *infra* note 222 (describing how enforcement powers delegated in N.Y. VILLAGE LAW are identical to enforcement powers delegated in N.Y. TOWN LAW, except that the N.Y. VILLAGE LAW does not provide for taxpayer actions).

152. TOWN OF BRIGHTON, N.Y., CODE, PT. III, CHS. 201-227.

153. *Id.* §§ 225-5-225-11 (1993).

154. Since rezoning must be accomplished through an ordinance adopted by the Town Board (*see* N.Y. TOWN LAW § 265(2) (McKinney 2003)), it would seem that a resolution and ordinance adopting a zoning amendment, including the conditions attached to it, would have the force of a "local ordinance." Therefore, the powers conferred by the enabling statute may provide the Town with the authority to enforce compliance with the conditions attached to the Mercy Park rezoning, even if those conditions are site-specific and unrelated to the use restrictions under the new "RHD-2" zoning district designation.

155. *See* TOWN OF BRIGHTON FINDINGS STATEMENT, *supra* note 120, at 15-16 (stating that, "[t]he Findings certified in this Certification of Findings are conditioned upon the applicant's incorporation of all of the following elements into the proposed project: . . . [listing six specific requirements] . . . *[t]he Applicant shall incorporate all mitigation measures identified in this Findings Statement as elements of the project*") (emphasis added); TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, at 2-5 (describing mitigation measures outlined in the Findings Statement and the requirement for a "Mitigation Agreement" to ensure implementation of the mitigation measures, along with unambiguous language declaring that the rezoning is subject to the conditions described in "Exhibit F" [Schedule of Conditions]).

156. TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, art. II, at 3.

157. *Id.*, art. IV, at 4.

158. *Id.* at 3 ("the Findings Statement contained various conditions . . . which are set forth in the schedule annexed hereto as Exhibit F"), EXHIBIT F: [SCHEDULE OF CONDITIONS] (listing and describing all required mitigation measures).

159. *Id.*, EXHIBIT F: [SCHEDULE OF CONDITIONS], conditions nos. 3-4, 6-7, 11-12, 15.

160. *Id.* at 2.

161. *See id.*, EXHIBIT E: MITIGATION AGREEMENT [between NewMark Development Co., Inc. [the developer] and The Sisters of Mercy of Rochester [property owners], applicants, and the Town of Brighton (Dec. 2001)]; interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Jan. 20, 2005) (describing Town's use of mitigation agreements and other contractual enforcement mechanisms, such as an agreement addressing a project sponsor's responsibility for long-term monitoring and maintenance of wetlands and undeveloped areas of another development site).

162. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT E: MITIGATION AGREEMENT [between NewMark Development Co., Inc. [the developer] and The Sisters of Mercy of Rochester [property owners], applicants, and the Town of Brighton (Dec. 2001)], Schedule to the Mitigation Agreement.

163. *See infra* notes 165-170 and accompanying text.

164. TOWN OF BRIGHTON, N.Y., CODE § 201-10 (1993).

165. *Id.* § 217-15 (2002). Note that after the rezoning, the Mercy Park project still needed site plan approval from the Planning Board, and that the Town Board made issuance of the site plan approval contingent upon completion of a Sediment and Erosion Control Plan and the Woodlot and Conservation Easement Protection Plan. S*ee* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS], conditions nos. 2, 4.

166. *See* TOWN OF BRIGHTON, N.Y., CODE § 73-11 (1996).

167. *See id.* §§ 73-17, 73-19(A) (1985-1990) (describing inspection provisions generally and referencing "final inspection" prior to issuance of certificate of occupancy, respectively).

168. *See id.* § 73-11(A) (1985-1996) (outlining situations where revocation of permits would be warranted, including "where it is found that work is not in conformance with approved plans, specifications *or conditions,*" § 73-11(A)(4)) (emphasis added). Note also that the Mercy Park project required building permits, and the Town Board made issuance of the permits contingent upon the completion of certain actions by the project applicant. *See* TOWN OF BRIGHTON REZONING RESOLUTION AND ORDINANCE, *supra* note 124, EXHIBIT F: [SCHEDULE OF CONDITIONS], conditions nos. 7-8 (describing, respectively, requirements for a contract with a private ambulance service and a "Standby PILOT [Payment-in-Lieu-of-Taxes] Agreement" to be enforced if the development is transferred to a non-profit, tax exempt successor).

169. *See* TOWN OF BRIGHTON, N.Y., CODE §§ 207-21(E), 215-10 (1993) (describing requirement for performance bonds for landscaping and storm water management facilities, respectively). According to the Town Planner, letters of credit covering landscaping, roadways, utilities, storm water management facilities, and other site features were required for the Mercy Park project. Telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005).

170. *See id.*; *see also* interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Jan. 20, 2005) (discussing use of performance bonds as enforcement mechanism and noting that developers generally do not want the Town to draw on their funds, so they will likely perform work themselves).

171. *See* telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005).

172. *See id.*

173. *See id.*

174. *See id.*; *see also* interview with Dorraine Laudisi, Senior City Planner, Bureau of Buildings and Zoning, Department of Community Development, City of Rochester (Jan. 20, 2005) (discussing situation where City of Rochester staff inspected a building renovation project and noticed that the drawings used by the contractor were not the same as those approved by the City).

175. *See* telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005). In addition to overseeing Brighton's SEQRA review process, the Town Planner also has responsibility for the building inspection program. *See id.* It would seem that granting this dual responsibility to one person would minimize the potential for inspectors to overlook SEQRA mitigation measures during inspections prior to the issuance of Building Permits and Certificates of Occupancy.

176. *Id.*

177. *Id.*

178. *See id.*

179. *See id.*

180. *See id.* The Clearing and Excavation Permit was the first permit issued by the Building and Planning Department. The Permit included strict prohibitions on vegetation clearing and site work in the wooded areas and in the areas subject to the Conservation Easements. *See id.*

181. *See supra* note 169 and accompanying text.

182. *See* telephone interview with Ramsey A. Boehner, Town Planner, Town of Brighton (Feb. 15, 2005).

183. *See id.*

184. *See supra* notes 118-119 and accompanying text.

185. *See infra* notes 235-236 and accompanying text.

186. *See* Planning Board of the Village of Central Square, Site Plan Resolution In the Matter of the Application of Wal-Mart Stores, Inc. (adopted May 14, 2001) (hereinafter "VILLAGE OF CENTRAL SQUARE SITE PLAN RESOLUTION"); *see generally* VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 250-28 (1993-1996) (addressing Village's site plan review provisions).

    The Village's site plan review authority was delegated by the state in the village enabling statute, N.Y. VILLAGE LAW § 7-725-a (McKinney 1996 & Supp. 2005). *See* LOCAL GOV'T HANDBOOK, *supra* note 76, ch. XVI at 5. The site plan review powers are implemented by the Planning Board through section 250-28 of the Village Code. *See* VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 250-28 (1993-1996). The Village's designation of the Planning Board as the entity responsible for site plan approval is consistent with the provisions of the enabling statute. *See* N.Y. VILLAGE LAW § 7-725-a(2) (McKinney 1996 & Supp. 2005) (authorizing a village to delegate site plan review powers to a "planning board or other such administrative body that it shall so designate").

187. *See* Planning Board of the Village of Central Square, Resolution (Completion and Acceptance of Final EIS), Application of Wal-Mart Stores, Inc., at 1-2 (Dec. 21, 2000) (hereinafter "VILLAGE OF CENTRAL SQUARE FINAL EIS RESOLUTION").

188. *See* Planning Board of the Village of Central Square, SEQRA Resolution In the Matter of the Application of Wal-Mart Stores, Inc., at 1-2 (adopted May 14, 2001) (hereinafter "VILLAGE OF CENTRAL SQUARE SEQRA RESOLUTION") (adopting SEQRA and Site Plan Findings Statement); *see generally* Planning Board of the Village of Central Square, SEQRA and Site Plan Findings Statement In the Matter of the Application of Wal-Mart Stores, Inc. (May 14, 2001) (hereinafter "VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT").

189. *See* VILLAGE OF CENTRAL SQUARE SITE PLAN RESOLUTION, *supra* note 186.

190. Village of Central Square, Building Permit 01-159 [issued to A.R. Mack Construction Co. Inc. for] Wal-Mart Stores Inc. #2911 (Nov. 8, 2001).

191. A.R. Mack Construction Co. Inc., Contractor Coordinating Committee Meeting Minutes [for] Wal-Mart Central Square, NY #2911-00 (June 5, 2002) ("A.R. Mack and its subcontractors will be

complete with all building and site work upon turnover to date to Wal-Mart of June 28, 2002.").

192. Village of Central Square, Certificate of Occupancy [issued to] Wal-Mart Stores Inc. #2911 for Building Permit 01-159 (Aug. 8, 2002).

193. E-mail from Peg Battles, Chairperson, Planning Board of the Village of Central Square, to author (Feb. 14, 2005, 19:53:44 EST) (on file with author).

194. Author's observations during site inspections (Jan. 7 and Feb. 4, 2005). The SEQRA Findings Statement references this portion of the site as part of the 6.7± acres of out-parcel land intended "for future development." VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, at 1. According to the Chairperson of the Village Planning Board, the gas station opened for business in November 2002, about three months after the Wal-Mart store. E-mail from Peg Battles, Chairperson, Planning Board of the Village of Central Square, to author (Feb. 14, 2005, 19:53:44 EST) (on file with author).

195. F-E-S Assocs., APD Eng'g, et al., Draft Environmental Impact Statement: Wal-Mart Central Square, at 5 (Accepted on June 22, 2000) (hereinafter "DEIS").

196. *See* VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, at 1, 14, 18, 20-22.

197. *See id.* at 18 (discussing "Terrestrial Ecology" issues).

198. *See id.* at 14 (discussing "Aesthetic Resource" issues).

199. *See id.* at 7 (discussing storm water and wetland issues).

200. *See* DEIS *supra* note 195, at 4.

201. *See id.*

202. *See* VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, at 7 (discussing storm water and wetland issues).

203. *See* DEIS, *supra* note 195, at 4; author's observations during site inspections (Jan. 7 and Feb. 4, 2005); APD Eng'g, Wal-Mart Central Square Site Plans, Sheets C1.1, C1.2 (last revised March 29, 2001 and April 10, 2001, respectively) (hereinafter "Site Plans").

    In the author's opinion, the Wal-Mart development is a good example of effective site planning. Although pre-development features of the site (e.g., the narrow shape of the property, the topography, and the presence of wooded areas and wetlands), probably were significant factors driving the layout of the development, the site plan reflects an effort to fit the development into the existing natural features, rather than rework the existing features to fit the development.

204. Telephone interview with Peg Battles, Chairperson, Planning Board of the Village of Central Square (Jan. 13, 2005) (describing traffic patterns in and through the Village of Central Square).

205. *See* DEIS, *supra* note 195 (discussing proximity of Interstate Route 81); author's observations during site inspections (Jan. 7. and Feb. 4, 2005).

206. *See* DEIS, *supra* note 195, Fig. 1: U.S.G.S. Topographic Map of Proposed Project Site.

207. *See* VILLAGE OF CENTRAL SQUARE SITE PLAN RESOLUTION, *supra* note 186, at 2 (adopting and incorporating by reference "the findings and conditions set forth in the Planning Board's annexed SEQRA and Site Plan Findings Statement"); *see* VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, at 20-22 (listing sixteen (16) mitigation measures required by the Planning Board and noting that "all such mitigation shall be substantially complete before a Certificate of Occupancy for the project will be issued").

208. *See* VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, at 7-17, 20-22 (discussing issues, impacts and mitigation measures associated with, *inter alia*, "Storm Water/Wetlands," "Traffic and Transportation," "Aesthetic Resources," and "Community Services," and listing sixteen (16) required mitigation measures).

209. *Id.*; mitigation measure no. 10 at 22 (emphasis added).

210. APD Eng'g, Wal-Mart Central Square Landscaping Plans, Sheets C4.1, C4.2 (Oct. 4, 1999, last revised April 11, 2001) (hereinafter "Landscaping Plans").

211. *See id.* at Landscaping Notes no. 9.

212. VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, mitigation measure no. 14 at 22 (emphasis added).

213. APD Eng'g, Wal-Mart Central Square Grading and Drainage Plan, Sheets C2.1, C2.2 (last revised April 4, 2001) (hereinafter "Grading and Drainage Plans").

214. DEIS, *supra* note 195, at 13.

215. VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, mitigation measure no. 15 at 22 (emphasis added).

216. *See* Site Plans, *supra* note 203.

217. *See id.*

218. *See supra* Part I.A.

219. *See* N.Y. VILLAGE LAW § 7-725-a(4) (McKinney 1996 & Supp. 2005) (conferring authority to "impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan"); *see also supra* notes 100-101 and accompanying text (noting that provisions in enabling statutes for cities, towns and villages are identical).

220. VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 250-28 (1993-1996) (implementing the authority delegated by the enabling statute, N.Y. VILLAGE LAW § 7-725-a (McKinney 1996 & Supp. 2005).

221. *See* VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 250-28(A)(4) ("The Planning Board shall review and approve, *approve with conditions*, or disapprove site plan applications for all uses which require site plan review under this chapter" (emphasis added); *see also id.* § 250-28(A)(1) (1993) (declaring that, "[t]he purpose of the site plan review procedure is to allow the Planning Board to attach reasonable . . . conditions to those uses which might otherwise cause deleterious effects to the environment, neighborhood character, or the Village residents' health, safety and welfare.").

222. *See* N.Y. VILLAGE LAW § 7-714 (McKinney 1996 & Supp. 2005) (using language identical to town enabling statute, § 268, subdivision 2, quoted in note 150, but *not* including provision for taxpayer enforcement actions, discussed in note 151 and accompanying text).

223. *See supra* notes 107-109 and accompanying text (discussing CITY OF ITHACA, N.Y., CODE § 276-11); *see also* note 110 and accompanying text (discussing landscaping maintenance and performance guaranty provisions of Ithaca's Site Plan Review Ordinance, CITY OF ITHACA, N.Y., CODE §§ 276-7(B)(3), 276-9, respectively).

224. *See generally* VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 250-28 (1993-1996). However, the site plan review provisions of the Code condition the issuance of building permits and certificates of occupancy on conformance with approved site plans. *See id.* § 250-28(B)(1) ("No permit shall be issued by the Building Inspector except upon authorization by and conformity with an approved site plan."); *see also id.* §§ 229-12-229-25) (describing requirements for building permits and certificates of necessity).

225. *Id.* ch. 250, §§ 250-1-250-33.

226. *See id.* § 250-33 (1983).

227. *Id.* § 250-28 (1993-1996).

228. *See id.* § 250-33(A) (1983).

229. *Id.* §§ 250-33(A), (D) (1983). Note that references to the "Planning Commission" and "Planning Board" in the Code appear to be interchangeable. Villages were authorized to establish Planning *Commissions* pursuant to the N.Y. General Municipal Law § 234, which was enacted in 1913 and last amended in 1948. *See* N.Y. GEN. MUN. LAW § 234 (McKinney 1948). Planning *Boards* were established pursuant to N.Y. Village Law § 7-718, enacted in 1992. *See* N.Y. VILLAGE LAW § 7-718 (McKinney 1996 & Supp. 2005). Subdivision 7-718(15) of the Village Law provides that:

> In any village in which there is a planning commission created under article 12-A of the general municipal law [section 234], the board of trustees, instead of authorizing the appointment of a planning board under this article, may provide that the existing commission shall continue, the members thereof to be appointed in accordance with the provisions of such article twelve-A, and to have such powers and duties as specified for a planning board appointed under this article. . . .

N.Y. VILLAGE LAW § 7-718(15) (McKinney 1996 & Supp. 2005). Sections of the Village's Code referring to the Planning Commission, such as § 250-33, pre-date N.Y. Village Law § 7-718, while sections of the Code referring to the Planning Board, such as § 250-28, post-date § 7-718. *See* VILLAGE OF CENTRAL SQUARE, N.Y., CODE §§ 250-28, 33 (addressing site plan review (enacted in 1993) and penalties (enacted in 1983), respectively).

230. *See* VILLAGE OF CENTRAL SQUARE, N.Y., Code § 250-25 (1983) ("The Building Inspector shall administer and enforce the provisions of this chapter.").

231. *See id.* § 229-8(A) (1993) (describing, in the Uniform Code Enforcement Chapter, §§ 229-1-229-34, the "[p]owers and duties of [the] Building Inspector").

232. *Id.* § 250-33(A) (1983); *see supra* notes 225-229 and accompanying text; *see also supra* note 221 and accompanying text (discussing authority of Planning Board, under § 250-28 of Village Code, to attach conditions to site plan approvals).

233. *See supra* note 207 and accompanying text.

234. *See supra* notes 209-217 and accompanying text.

235. *See id.*

236. The site plan review provisions of the Village Code prohibit issuance of building permits and certificates of occupancy if as-built conditions are not in conformance with site plan approvals. *See supra* note 224 (discussing § 250-28, subdivision (B)(1), of the Village Code). In addition, the SEQRA Findings Statement states that "mitigation shall be substantially complete before a Certificate of Occupancy for the project will be issued." VILLAGE OF CENTRAL SQUARE FINDINGS STATEMENT, *supra* note 188, at 20.

237. E-mail from Peg Battles, Chairperson, Planning Board of the Village of Central Square, to author (Feb. 23, 2005 16:02:37 EST) (on file with author) (discussing, for example, a fence that needed to be repaired, a sign that needed to be repaired, and a drainage pipe that was not installed properly).

238. Author's observations during cursory site inspections (Jan. 7. and Feb. 4, 2005).

239. *See supra* Part I.B-C.

240. *See supra* notes 107-112 and accompanying text (discussing the enforcement provisions in City of Ithaca's Site Plan Review Ordinance).

241. *See supra* notes 108-109 and accompanying text.

242. *See supra* notes 164-168, 225-229 and accompanying text (describing general zoning and land use control enforcement provisions in the Town of Brighton and Village of Central Square codes, respectively).

243. *See, e.g., supra* notes 169-170 and accompanying text (discussing performance guaranty provisions in Town of Brighton code).

244. *See, e.g., supra* notes 209, 212, 215 and accompanying text (describing ongoing compliance language in Village of Central Square SEQRA Findings Statement).

245. *See, e.g., supra* notes 155-158 and accompanying text (describing language in Town of Brighton Rezoning Resolution and Ordinance).

246. *See, e.g., supra* notes 108-109, 115 and accompanying text (discussing City of Ithaca requirement that conditions attached to site plan approval must be satisfied before a certificate of occupancy will be issued).

247. *See supra* notes 160-162 and accompanying text (describing "Mitigation Agreement" required by Town of Brighton).

248. *See, e.g., supra* note 119 and accompanying text (describing informal procedures relied on by City of Ithaca).

249. *See supra* notes 108-109 and accompanying text.

250. VILLAGE OF CENTRAL SQUARE, N.Y., CODE § 250-33 (1983).

251. There is a risk of "fait accompli" situations if there is no post-construction compliance monitoring or only very infrequent monitoring. If a developer undertakes and completes unauthorized construction or significant site work that contravenes project limitations or conditions imposed pursuant to SEQRA and this activity goes undetected by the Lead Agency for a significant period of time, it seems unlikely, given the N.Y. Court of Appeals' dicta in *E.F.S. Ventures Corp. v. Foster*, that the Lead Agency would have any recourse. *See* 520 N.E.2d 1345, 1351-52 (1988). In *E.F.S. Ventures Corp.*, the Court of Appeals referenced the four-month Statute of Limitations (under N.Y. CPLR 217 (McKinney 2003) for Article 78 (N.Y. CPLR 7801-7806 (McKinney 1994 & Supp. 2005) challenges to SEQRA, and the "general rule [that] an injunction will not issue to prohibit a fait accompli [here, a substantially complete addition to a resort development]. . . . even though the development violated environmental protection statutes." *Id.; see generally* 2 GERRARD, RUZOW & WEINBERG, *supra* note 3, §§ 7.02[3], [4] (discussing mootness and statute of limitations issues in SEQRA litigation, respectively).

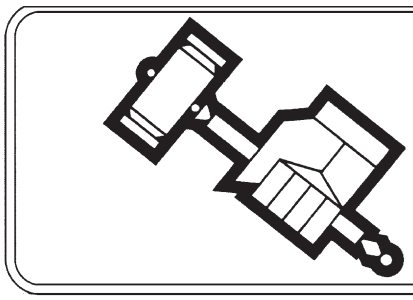
252. N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(f); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(iv) (1996).

253. *See* Patricia E. Salkin, *SEQRA's Silver Anniversary: Reviewing the Past, Considering the Present, and Charting the Future*, 65 ALB. LAW REV. 577, 584 (2001) (summarizing recommendation by Michael Gerrard, Esq., made at SEQRA 25th Anniversary Conference at the Albany Law School Government Law Center, March 16, 2001, from transcript of Conference (available from Government Law Center)); Michael B. Gerrard & Monica Jahan Bose, *Possible Ways to "Reform" SEQRA*, N.Y.L.J., Jan. 23, 1998, at 31.

254. Telephone interview with Michael B. Gerrard, Partner, Arnold & Porter (Sept. 14, 2004).

255. Interview with Janet Lindgren, Professor, University at Buffalo Law School, State University of New York (Feb. 23, 2005).

This article tied for first place in the 2005 Environmental Law Section Professor William R. Ginsberg Memorial Essay Contest.



Administrative Decisions Update

Prepared by Thomas F. Puchner and Peter J. Van Bortel

In re the Alleged Violations of Articles 27 and 71 of the Environmental Conservation Law ("ECL"), and 6 N.Y.C.R.R. Part 360.-by-

ROBERT LIERE, as owner and operator of LIERE FARM, and ROBERT LIERE d/b/a LIERE FARM, Respondent

Decision and Order of the Commissioner

April 17, 2006

I. Background

Respondent Robert Liere ("Liere") owns and operates the Liere Farm located on the North Service Road of the Long Island Expressway at Exit 66 in Yaphank (Town of Brookhaven, Suffolk County). The farm is 110 acres in size and has been in operation since the 1950s. In a verified complaint dated December 2, 2003, Staff of the New York State Department of Environmental Conservation ("DEC staff") alleged that respondent violated various provisions of ECL article 27 and 6 N.Y.C.R.R. part 360.

Each year, Liere cultivates and sells pumpkins, beans, rye and horticulture specialties. Since 1996, Liere has processed land clearing debris and yard waste into what he characterizes as mulch and top soil. He charges fees, in cash, for accepting land clearing debris and yard waste in loads from the size of a six-wheeler to a pickup truck.

As of 1996, Liere operated by DEC registration only, without the need for a permit under the exemption for land clearing debris processing facilities. At some point before October of 2003, DEC revoked the farm's registration, and it continued to operate without a permit or registration. Liere, however, believed he was operating under a valid order pursuant to a December 19, 2000 District Court decision that had dismissed criminal proceedings against Liere. *See People v. Liere*, No. 37571.99 et al. (Suffolk Dist., 1st Dist. Dec. 19, 2000) (Sgroi, J.).

During the summer of 2003, nearby residents complained to DEC about noxious odors. On two occasions DEC officials attempted to inspect the farm to determine if the odors complained of originated from the farm. Liere refused to allow the inspections. After obtaining an administrative search warrant and inspecting the farm, DEC officials determined that various materials stored at the site were from offsite sources, based on the amount and nature of the materials.

II. Administrative Hearing

Pursuant to 6 N.Y.C.R.R. part 622, a hearing was held before Administrative Law Judge ("ALJ") Daniel P. O'Connell. In his report, the ALJ concluded that Liere had committed 11 of the 13 violations alleged in DEC's complaint, and recommended a total civil penalty of $142,500. The ALJ also recommended that Liere be directed to either: (1) close the solid waste management facility at the farm by removing all solid waste; or (2) apply for a permit to operate a solid waste management facility.

III. The Commissioner's Decision and Order

The Commissioner found that:

> [t]he record demonstrates that respondent accepted and processed large amounts of land clearing debris and yard waste, which are regulated solid wastes, without any approvals from the Department. As a result, respondent violated the general provisions outlined in 6 N.Y.C.R.R. subpart 360-1, as well as regulatory requirements related to the operation of land application facilities (6 N.Y.C.R.R. subpart 360-4), composting facilities (6 N.Y.C.R.R. subpart 360-5), and construction and demolition ("C&D") debris processing facilities (6 N.Y.C.R.R. subpart 360-16). Due to this lack of regulatory compliance, respondent realized a significant economic benefit, as well as created a nuisance with potential adverse human health impacts. Commissioner Decision at 2.

The Commissioner adopted, concurred with, and incorporated the ALJ's hearing report, subject to certain additional comments outlined below.

The Commissioner rejected Liere's reliance—in an administrative enforcement proceeding—upon the District Court decision in *People v. Liere*, *supra*, as a defense to the administrative complaint. Specifically, the Commissioner held that the dismissal of a criminal charge or an acquittal in a prior criminal proceeding against a defendant is not proof of innocence and does not bar, and has no collateral estoppel effect in, a subsequent civil proceeding against

the same defendant arising out of the same incident. Thus, the District Court's dismissal of the prior criminal proceeding against Liere did not bar the subsequent civil administrative enforcement proceeding, in which the lower "preponderance of evidence" standard was applied, even assuming the latter proceeding arose at least in part out of the same incidents as the criminal proceeding.

The Commissioner also concurred with the ALJ's prior ruling that because the complaint was based on operations at the farm that post-dated the District Court decision, neither *res judicata* nor collateral estoppel barred the subsequent civil administrative proceeding. In addition, the Commissioner found no basis for deeming the DEC and the District Attorney as the same party for purposes of collateral estoppel.

Finally, the Commissioner found that nothing in the District Court decision indicated the judge's intent to issue a declaratory ruling or order authorizing operations at the farm pursuant to 6 N.Y.C.R.R. § 360-1.5(a)(2). In any case, even assuming the decision was an order in the nature of a permit, the record established that Liere's actions violated whatever approvals would have been provided in the order.

In re Renewal and Modification of a State Pollutant Discharge Elimination System ("SPDES") Permit Pursuant to Article 17 of the Environmental Conservation Law and 6 N.Y.C.R.R. Parts 704 and 705

-by-

Dynegy Northeast Generation, Inc.

Decision of the Deputy Commissioner[1]

May 24, 2006

I. Introduction

The Dynegy Northeast Generation, Inc. ("Dynegy") owns and operates the Danskammer Generating Station ("facility") in the Town of Newburgh, Orange County ("site"). This electric facility utilizes four single-cycle steam driven turbine units that burn coal, natural gas, or oil. With a total generating capacity of 491 megawatts, the turbines are cooled by fresh water drawn in from the adjacent Hudson River through an intake canal.

Staff of the New York State Department of Environmental Conservation ("DEC staff") originally issued a State Pollutant Discharge Elimination System ("SPDES") permit for the facility in 1987. At that time, Central Hudson Gas & Electric Co. ("Central Hudson") was the owner of the facility. They later sold the facility to Dynegy in 2001, who subsequently filed a SPDES renewal application with the DEC staff. During review of the application, DEC staff initiated a modification of the permit "that would require Dynegy to implement various technologies, separately or in combination, to reduce the mortality of fish and other aquatic biota related to entrainment and impingement."[2] Hearing Report at 1. This modification was initiated because the current technology used by Dynegy is only effective at reducing entrainment and impingement of larger fish and aquatic organisms; Dynegy currently has screens placed in front of the cooling pumps that are ineffective at preventing smaller aquatic organisms from entering the cooling system. DEC staff's proposed technologies would require Dynegy to use "a high-frequency, high-energy sonic fish deterrent device at the opening of the facility's intake canal," as well as implement a flow reduction program that would require the development of an evaluation model, named DATEM, to analyze the effectiveness of the flow reduction program at reducing entrainment and impingement.[3] Deputy Commissioner's Decision at 3.

II. The Proposed Closed-Cycle Cooling System

Riverkeeper, Inc., Scenic Hudson, Inc. and Natural Resources Defense Council, Inc. (collectively, "petitioners"), introduced a proposal that would require Dynegy to install a closed-cycle cooling system at the site in order to reduce the volume of Hudson River water drawn in to the system to cool the turbine generators. This reduced intake of water would consequently lead to a substantial reduction in the number of "aquatic organisms" entrained or impinged by the intake of river water—it is recognized that if a closed-cycle cooling system were fully installed, roughly 2% of the water necessary for the current system's functioning would be required under the proposed closed-cycle system. Petitioners' proposal included eight potential design configurations to fully retrofit the facility with a closed-cycle cooling system ("full retrofit configuration"), and four potential design configurations for the retrofit of turbines numbers 3 and 4 ("partial retrofit configurations"). Moreover, petitioners identified seven potential site locations for the construction of the proposed closed-cycle cooling towers.[4]

A. Adjudication of the Closed-Cycle Cooling System Issue

On May 13, 2005, DEC's Deputy Commissioner issued an interim decision that ordered Administrative Law Judge ("ALJ") adjudication of two issues:

(1) Whether a closed-cycle cooling system to reduce impingement and entrainment could be located on the site and, if so, whether the facility must be retrofitted with such a system to satisfy the "best technology available" requirement contained in § 316(b) of the federal Clean Water Act and 6 N.Y.C.R.R. § 704.5. The Deputy Commissioner's interim decision provided that the ALJ should not consider in its analysis any properties other than the site, or the use of piers or barges in the Hudson River; and

(2) Whether certain assumptions in DATEM, the model to be used for evaluation of the facility's flow

reduction and outage program, were reliable. *Id.* at 4–5.

Parties to ALJ Daniel P. O'Connell's adjudication of these two issues included: Petitioners Riverkeeper, Inc., Scenic Hudson, Inc. and Natural Resources Defense Council, Inc., as well as DEC staff and Dynegy.

1. The ALJ's Analysis

In addressing the feasibility of the proposed system, the main issue was whether the site had sufficient space for the facility to be outfitted with such a system. Other related issues regarding feasibility included:

(1) impact of the closed-cycle system on the facility's electric generating capacity;

(2) impact of the closed-cycle system on the air emissions from the facility; and

(3) whether the costs of implementing a closed-cycle system were disproportionate to the environmental benefit gained when compared to other alternative technologies that are available.

The ALJ concluded that "one or more components of each of the eight full and four partial retrofit configurations proposed by petitioners would not fit on the site and, accordingly, that none of the configurations were available for purposes of Department's best technology available analysis." *Id.* at 9. The ALJ dissected each proposed design configuration and site location and was able to illustrate the impracticality of requiring Dynegy to install a closed-cycle cooling system at the site—specifically pointing out petitioners' failure to take into consideration the physical site constraints and engineering limitations that frustrated each of the proposed configurations.

For example, the ALJ referenced petitioners' failure to take into consideration the physical site constraints and engineering limitation when developing a closed-cycle cooling system that would service turbine number 4. Petitioners' proposed cooling system for turbine number 4 was insufficient; because turbine output is directly related to the sufficiency of the cooling system, the proposed system would have led to significant output failure for the associated turbine. Testimonial evidence during the hearing showed that if the cooling system is insufficient, it would lead to unacceptably high turbine backpressure that would diminish electrical output and permanently damage the turbine itself. As a result of the inadequacies of the proposed cooling system for turbine number 4, a larger system than the one planned would have to be constructed. The problem, however, with installing a larger cooling system is that physical space restrictions at the site prevent its construction.

In conjunction with their failure to consider physical site constraints and engineering limitations, petitioners also failed to consider the adverse environmental impact that their proposed configurations would cause. Testimonial evidence showed that if the petitioners' configurations were installed, sulfur dioxide emissions would increase and Dynegy would consequently be subjected to increased governmental compliance with the federal Clean Air Act. This additional burden would consequently force Dynegy "to install additional air pollution control equipment, such as a flue gas desulfurization ("FGD") system." *Id.* at 11 (*citing* Hearing Report at 50–55). Petitioners recognized that Dynegy would probably be forced to install an FGD system. Petitioners, however, neglected to account for this fact when designing their configurations since an additional FGD system would reduce the available space on some proposed configurations and would "preclude" the construction of a closed-cycle cooling system at certain locations.

Moreover, even if petitioners were able to overcome the physical constraints of the project, Dynegy and the DEC staff presented credible evidence of physical obstacles that would make construction of the cooling system virtually impossible.[5] Also, evidence showed that operational difficulties existed that would hinder, if not preclude, the construction of the closed-cycle cooling system at the facility.[6]

B. Deputy Commissioner's Decision on the Issue of a Closed-Cooling System

The Deputy Commissioner adopted, concurred with, and incorporated the ALJ's hearing report, subject to certain additional comments. Based on his review of the record and the ALJ's report, the Deputy Commissioner held that "none of the full or partial configurations would fit on the site, nor have they been shown to been feasible for the purposes intended. Petitioners have failed to account for fundamental physical site constraints, and the facility's operational and design requirements, in their proposed configuration." *Id.* at 16.

III. Adjudication of the DATEM Issue

DATEM is Dynegy's computer program developed to assess the effectiveness and performance of the technologies and operating strategies presented by DEC staff in their modification of the SPDES permit. DATEM ensures that Dynegy is in compliance with DEC regulations concerning entrainment and impingement of aquatic organisms by analyzing various data associated with the cooling system and its water intake.

At issue in this decision was whether the analysis DATEM performs is reliable. Three sub-issues as to the reliability were raised in this adjudication:

(1) whether the use of full pumping capacity to calculate the baseline ("full-flow baseline"), even though the facility does not operate near capacity, is an accurate assumption;

(2) whether the assumption with respect to entrained organisms' survival when estimating actual mor-

tality, which is different from the assumption used for baseline mortality, is accurate; and

(3) whether the temperature data and assumptions used by DATEM are accurate. *Id.* at 17.

Reviewing these sub-issues, the ALJ concluded that there was no issue as to the reliability of the DATEM model. First, the ALJ noted that the full-flow baseline was the correct unit of measurement and that all other proposed baseline calculations were unable to provide results as unadulterated as those associated with the full-flow baseline calculation. Second, the ALJ pointed out that petitioners provided no evidence to refute the validity of DATEM's protocol that credits entrainment survival. Addressing the third sub-issue, the ALJ concluded that DATEM's temperature assumptions were accurate and that petitioners failed to provide any credible evidence to prove otherwise.

A. Deputy Commissioner's Decision on the DATEM Issue

The Deputy Commissioner concluded, based on his review of the record and the ALJ report, that the DATEM model provided a reliable estimate of entrainment and impingement mortality for the facility. As a result, the Deputy Commissioner concurred with the ALJ's report and adopted it as his own. He noted that the evidence clearly showed that DEC staff and Dynegy persuasively explained and justified the reliability of DATEM's calculation method. Moreover, the Deputy Commissioner held that "[p]etitioners failed to provide any support for their assertions . . . [and] failed to present anything at the adjudicatory hearing in support of their initial offer of proof with respect to this question." *Id.* at 19.

IV. Miscellaneous Issues

A. Best Technology Available ("BTA")

The Deputy Commissioner concurred with the ALJ's conclusion that DEC staff's proposed technologies upgrade to the Dynegy facility—installation of seasonal sonic deterrent equipment, and a flow reduction and outage program (DATEM)—met the BTA standard outlined in 6 N.Y.C.R.R. § 704.5. The BTA standard requires: (1) analysis of the availability of practicable alternative technologies; and (2) a cost/benefit analysis of the practicable alternative technologies in order to illustrate the disproportionate technology costs between technologies. This standard, however, was easily met. Neither of these two analyses needed to be performed in the present case because the only practicable alternative available for analysis was the installation of a closed-cycle cooling system. Since the ALJ had already determined that the closed-cycle cooling system was infeasible, it was a foregone conclusion that DEC staff's proposed technologies would meet the BTA standard.

B. Appeal by Central Hudson

Central Hudson filed a late petition for full-party status on the first day of adjudicatory hearing seeking to intervene. This was based on its argument that both DEC staff's and petitioners' proposed modifications to the facility would potentially "reduce the available electrical output from the Danskammer facility, thereby impacting electric reliability . . . [and] that this potential impact would necessitate investigation and possible modification of Central Hudson's mitigation system plan." *Id.* at 21–22.

The Deputy Commissioner concurred with the ALJ's conclusion that Central Hudson failed to meet the requirements set forth in 6 N.Y.C.R.R. § 624.5(b)(2) for the granting of full party status to a late filing petitioner. The Deputy Commissioner stated that: "consider[ing] Central Hudson's petition at the late stage . . . could have potentially led to further interim appeals and the re-opening of the SEQRA negative declaration . . . [and] would have resulted in significant delay and prejudice to the parties in a proceeding that had already reached the final stages of adjudication." *Id.* at 24.

Endnotes

1. On February 8, 2005, then Commissioner Denise M. Sheehan delegated authority over this issue to Deputy Commissioner Carl Johnson.
2. "Entrainment" is the process by which smaller organisms including larval fish and fish eggs are carried along with the intake water through any intended exclusion technology (such as screens) into the cooling system where they may be damaged or killed. "Impingement" occurs when larger organisms, such as fish, are trapped against intended exclusion technology (such as screens) by the force of the intake water flows, which may suffocate or injure the organisms. *Id.* at fn. 2 (citations omitted).
3. Danskammer Alternative Technology Evaluation Model ("DATEM") is Dynegy's proposed evaluation model that estimates entrainment and impingement mortality by analyzing various data gathered at the site. *Id.* at 16.
4. In developing these site locations with various design configurations, petitioners took into consideration "the cooling cell model, pipes and pining runs, the pumps and pumphouse, the surface condenser, obstacles in and above the ground, as well as a plan to operate the Facility's once through cooling system during the construction of the retrofits as major design elements." Hearing Report at 25.
5. DEC staff and Dynegy pointed out construction obstacles such as: the shallowness of underground electric cables; the depth of the on-site coal shed, and the difficulties inherent in tunneling under railroad tracks in the vicinity of certain locations. Deputy Commissioner's Decision at 14–15.
6. Evidence showed that there would be an "inability to withdraw service water from a closed-cycle cooling system" and that construction of the closed-cycle system would require the use of undesirable film fill. *Id.* at 15.

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***Ohio Valley Environmental Coalition v. Bulen*,** 429 F.3d 493 (4th Cir. 2005), 2005 U.S. App. LEXIS 25258

Facts

The discharging of any pollutant into the waters of the United States without a permit is prohibited by the Clean Water Act (hereinafter "CWA").[1] Pursuant to the CWA, the United States Army Corps of Engineers (hereinafter "Corps") issued several general permits, of which only one, Nationwide Permit 21 (hereinafter "NWP 21"), authorizes projects to proceed only after the Corps grants it an individualized authorization. NWP 21 authorizes discharges of dredged or fill material associated with surface coal mining and reclamation projects into the waters of the United States.[2]

In *Ohio Valley Environmental Coalition v. Bulen*,[3] plaintiffs, a coalition of environmental groups, challenged NWP 21 on various grounds. The district court found NWP 21 conflicted with the unambiguous meaning of section 404(e) of the CWA[4] for essentially four reasons.

Issue

The main issue before the court was whether the Corps exceeded its authority under the CWA when it issued NWP 21.

Reasoning

The United States Court of Appeals for the Fourth Circuit explained that while its review of the district court's construction of section 404 was *de novo*, its review of the Corps' construction was governed by *Chevron U.S.A. Inc. v. NRDC*,[5] under which if the statute's requirements are unambiguous, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[6] However, if the statute is ambiguous or silent regarding the questions at issue, the court "must defer, under *Chevron*, to [the Corps' interpretation of its governing statute], so long as that interpretation is permissible in light of the statutory text and reasonable."[7]

The court reviewed the district court's conclusion that NWP 21 conflicted with section 404(e) by evaluating the district court's reasons one by one. It disagreed with the district court's first reason, that NWP 21 defines a procedure instead of authorizing a category of activities, stating that the statute does not prohibit the use of procedural as well as substantive parameters to define a category.

The district court's second reason, that NWP 21 allows the Corps to make the statutorily required minimal-environmental impact determinations after rather than prior to the issuance of the permit, was also attacked by the court, which found that the Corps did make these determinations before issuing the permit.

The court held that the district court erred in finding the Corps violated section 404(e) by failing to provide an *ex ante* guarantee that the activities authorized by NWP 21 would have only a minimal impact. The court reasoned that section 404(e) does not require the Corps to issue general permits only for those activities that will have minimal effects on the environment. The court further disagreed with the district court's finding that by permitting the Corps to engage in *post hoc*, case-by-case evaluation of environmental impact, NWP 21 violates initial certainty explaining that section 404(e) does not even require initial certainty.

Deferring to the Corps' conclusion, the court found that section 404(e) "permits the Corps to rely in part on post-issuance procedures to make its pre-issuance minimal-impact determinations[.]"[8] The court emphasized that the Corps may not *completely* defer these determinations until after the permit is issued and found the Corps complied with the statute as it made these determinations prior to the issuance of NWP 21.

The court disagreed with the district court's third basis for invalidating NWP 21, that the permit violates section 404 by allowing projects to proceed only after a post-issuance individualized authorization by the Corps, and held that section 404 does not prohibit such an authorization. The court found the Corps' interpretation, "that general permits may contain requirements of individualized review or approval[,]"[9] a reasonable one. Accordingly, the court gave this interpretation *Chevron* deference because section 404 does not speak to this issue.

Finally, the court disagreed with the district court's fourth basis for invalidating NWP 21, that it impermissibly permits the Corps to issue individual authorizations without providing notice and opportunity for public hearing. The court explained that there "is no statutory requirement that notice and opportunity for public hearing be provided before individual projects can proceed under a general permit."[10] Section 404(e) merely requires that there be "notice and opportunity for public hearing before the general permit itself issues,"[11] and that requirement, the court found, was satisfied here.

The court held the district court did not abuse its discretion in refusing to join holders of NWP 21 authorizations as necessary parties under the Federal Rules of Civil Procedure because the interests of the current parties were identical to those of the authorization holders.

Conclusion

The Corps complied with section 404(e) of the CWA when it issued NWP 21. The Corps determined that the identified categories of activities would have only a minimal environmental impact and provided notice and opportunity for public hearing prior to issuing the permit. Accordingly, the Fourth Circuit concluded that the district court erred in holding the issuance of NWP 21 was in violation of section 404(e). It vacated the injunction against NWP 21 authorizations and remanded the case for further proceedings.

Lauren Schnitzer '07

Endnotes

1. *See* 33 U.S.C. § 1311(a) (2000).
2. *See* 67 Fed. Reg. 2020, 2081 (Jan. 15, 2002).
3. 429 F.3d 493, 497 (4th Cir. 2005).
4. 33 U.S.C. § 1344 (2000) (providing regulations concerning permits for dredged or fill material).
5. 467 U.S. 837 (1984).
6. *Id*. at 842-43.
7. 429 F.3d at 497 (quoting *Asika v. Ashcroft*, 362 F.3d 264, 267 (4th Cir. 2004) (per curiam)) (alteration in original).
8. 429 F.3d at 502.
9. *Id*.
10. *Id*. at 504.
11. *Id*.

* * *

San Remo Hotel v. City and County of San Francisco, California, 125 S.Ct. 2491 (2005).

Facts

Appellants were hotel owners who sued the respondent city, alleging that an ordinance requiring a fee to convert to a tourist hotel constituted a taking. Pursuant to the San Francisco Hotel Conversion Ordinance (HCO), a hotel owner could convert residential units into tourist units by receiving a conversion permit, which could be obtained by either (a) constructing new residential units, (b) rehabilitating old units, or (c) paying an "in lieu" fee to the city.

Appellants in the instant case sought to convert their hotel from a "residential hotel"—one that consisted entirely of residential units—into a "tourist hotel." After appellants applied to convert all of the rooms in the San Remo Hotel into tourist use, the City Planning Commission granted their request, but only after imposing, *inter alia*, a $567,000 "in lieu" fee. Appellants appealed to the City Board of Supervisors, who rejected the appeal. Appellants then filed suit.

Procedural Posture: Appellants filed a writ of administrative mandamus in California Superior Court. The action lay dormant for several years, and the parties ultimately agreed to stay the action after petitioners filed for relief in Federal District Court. Appellants' complaint in federal court alleged due process and takings (facial and as-applied) violations, the latter being the relevant complaint. The district court granted summary judgment in favor of the City, holding that the facial claim was untimely and that the as-applied takings claim was not yet ripe for adjudication. Appellants appealed to the Court of Appeals for the Ninth Circuit and took the unusual position of requesting that the Court abstain on the federal claims on grounds that a return to state court could moot the remaining federal questions. The court affirmed the district court's holding and obliged the request. Furthermore, the Court indicated that the petitioners would be free to raise their federal takings claim in state court, but that if they wanted to retain their right to return to federal court, they should refrain from raising the federal issues. In the state court proceeding, however, appellants phrased their state claims in terms established and refined by the U.S. Supreme Court. The state trial court dismissed the appellants' amended complaint. The appellate court reversed, applying a higher level of scrutiny. The California Supreme Court reversed, analyzing the claim under both state and federal law, citing congruent constructions of state and federal taking clause jurisprudence. The state high court rejected the notion that heightened scrutiny should apply and upheld the HCO. Rather than petitioning the Court for a writ of certiorari, appellants then returned to the federal forum. The district court held that appellants' claim was barred by the statute of limitations *and* by the general rule of issue preclusion. The Court of Appeals affirmed, rejecting appellants' contention that general preclusion principles should be cast aside whenever plaintiffs are forced to litigate in state court to ripen a case. Appellants then petitioned the Supreme Court for a writ of certiorari, which was granted.

Issue

Whether an exception should be created to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until entry of a final state judgment denying just compensation.

Holding

No exception should be granted. The federal full faith and credit statute requires that issues decided by state courts be respected by federal courts. The issue before the state court was decided on both federal and state grounds, collaterally estopping appellants from litigating the issue further, and no actions of Congress indicate any intent to allow exceptions for federal takings cases.

Rationale: The federal full faith and credit statute provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state,"[1] and the statute encompasses the doctrines of claim preclusion and issue preclusion. The thrust of appellants' argument is that, because they were required to litigate their claims in state court in order to ripen their federal claims, their federal takings claim should not be barred in federal court by the fact that the California Supreme Court decided the case construing both state and federal takings case law.

Citing *England v. Louisiana Bd. of Medical Examiners*,[2] the Court stated that "when a federal court abstains from deciding a federal constitutional issue to enable the state courts to address an antecedent state-law issue, the plaintiff may preserve his right to return to federal court for the disposition of his federal claims.[3] However, "effective reservation of a federal claim" for resolution in the federal courts depends "on the condition that plaintiffs take no action to broaden the scope of the state court's review beyond decision of the antecedent state-law issue."[4]

When appellants in the instant case brought their state-law claims in state court, they "phrased their state claims in language that sounded in the rules and standards established and refined by the [U.S. Supreme Court's] takings jurisprudence."[5] In addition, the California Supreme Court analyzed the takings claim under both state and federal law. The Court has previously held that "issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court," even when the plaintiff would have preferred to litigate solely in federal court.[6] The Court did not review the California decision that state and federal takings law were congruent; therefore, the question of whether appellants' claim was barred by the state high court decision depended on whether the state court actually decided an issue of fact or law that was necessary to its judgment. Finding that it did, the Court held that California's decision precluded appellants from attempting a "second bite at the apple."[7]

Regarding the issue of whether to make an exception to the full faith and credit statute, the Court held that "an exception to § 1738 will not be recognized unless a later statute contains an express or partial repeal"; however, Congress has not expressed any such intent to exempt federal takings claims.[8] Therefore, the Court held that appellants' petition to make an exception in this case to the federal full faith and credit statute should be denied.

Disposition: The U.S. Supreme Court affirmed the decision of the Court of Appeals.

Kana Yazawa '07

Endnotes

1. 28 U.S.C. § 1738. This statute extended the Full Faith and Credit Clause found in Article IV, § 1 of the United States Constitution to apply to the federal government.
2. 375 U.S. 411, 84 S.Ct. 461 (1964).
3. *San Remo Hotel*, 125 S.Ct. at 2502.
4. *Id.* at 2503.
5. *Id.* at 2498-98.
6. *Id.* at 2505 (citing *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 104 S.Ct. 894 (1984)).
7. *Id.* at 2506.
8. *Id.* at 2505.

* * *

Entergy Nuclear Indian Point 2, LLC v. New York State Department of Environmental Conservation, 2005 Slip Op. 8247, 805 N.Y.S.2d 429 (3d Dept. 2005).

Facts

In *Entergy Nuclear Indian Point 2, LLC v. New York State Dep't of Envtl. Conserv.*,[1] petitioners, owners and operators of nuclear power plants along the Hudson River, appealed a decision by the Albany Supreme Court of New York granting respondents, New York State Department of Environmental Conservation (hereinafter "DEC") and its Commissioner, summary judgment based on petitioners' failure to bring their claim within the statute of limitations.

Petitioners filed a CPLR Article 79 proceeding in Albany Supreme Court challenging DEC's Final Environmental Impact Statement (hereinafter "FEIS") issued in conjunction with DEC's review of petitioners' State Pollutant Discharge Elimination System (hereinafter "SPDES") permits. The permits had expired in 1992 and were up for renewal pursuant to the State Environmental Quality Review Act.[2]

In addition to their Article 78 proceeding, petitioners also sought a declaration to invalidate title 6, § 704.5 of the N.Y. Comp. Codes, R. & Regs. (N.Y.C.R.R.), which requires cooling-water structures to use the best technology available regarding their location, design, construction and capacity.[3] Petitioners claimed that DEC failed to promulgate 6 N.Y.C.R.R. § 704.5 correctly when it enacted the statute under Environmental Conservation Law ("ECL") articles 15 and 17, which in turn were enacted by the New York State Legislature in compliance with the Clear Water Act.[4] Under the Clean Water Act, particularly 33 U.S.C. §1326, the intake of water for industrial cooling must be performed using the best technology available to minimize environmental harm.[5]

Petitioners argued that DEC's promulgation was illegal because DEC (1) failed to hold a publicly noticed hearing upon enactment of 6 N.Y.C.R.R. § 704.5, and (2) failed to publish notice of the statute in either the *New York Times* or the *Albany Times Union.* Petitioners also argued that since 6 N.Y.C.R.R. § 704.5 was invalid, the statute of limitations was not triggered. Additionally, petitioners claimed that even if 6 N.Y.C.R.R. § 704.5 had been promulgated legally, the statute of limitations should have been triggered by the publication date of the FEIS as opposed to thirty days after filing with the Secretary of State pursuant to ECL article 3-0301(2)(a) and New York Executive Law § 102(4).[6]

Issues

The two main issues before the court were (1) whether 6 N.Y.C.R.R. § 704.5 had been promulgated legally at its inception, and (2) the point at which the statute of limitations began to run with respect to challenging the validity of 6 N.Y.C.R.R. § 704.5 and with respect to petitioners' filing of their Article 78 proceeding.

Reasoning

As for the first issue, the Appellate Division, Third Department held that 6 N.Y.C.R.R. §704.5 was promulgated legally.

Citing *In re Georgian Motel Corp. v. New York State Liq. Auth.*[7] and *Stringfellow's of N.Y. v. City of New York*,[8] the court first reiterated that administrative actions are cloaked with a presumption of regularity, and that these actions are presumed to be valid unless otherwise proven. Thus, the court held that the burden was on petitioners to show that DEC failed to legally promulgate 6 N.Y.C.R.R. § 704.5.

The court thereafter held that petitioners failed to meet the burden of proving invalidity. It first stated that there was no requirement that DEC had to publish notice of the statute in either the *New York Times* or the *Albany Times Union*. It then pointed out that the record from the lower court established that DEC held at least five public hearings in 1973, and that the statute was put into draft as early as 1974. The court further noted that 6 N.Y.C.R.R. § 704.5 was filed with the Secretary of State and notice of adoption was thereafter published.

As for the second issue dealing with the statute of limitations, the court again ruled in favor of the respondents. The court held that the statute of limitations for challenging the promulgation of 6 N.Y.C.R.R. § 704.5 commenced when the disputed administrative proceeding became final and binding. Since 6 N.Y.C.R.R. § 704.5 became final and binding thirty days after filing with the Secretary of State, the court held that the statute of limitations for challenging promulgation commenced on October 30, 1974. As a result, the court ruled that "whether this matter is styled a declaratory judgment action, with a six-year statute of limitations, or a CPLR Article 78 proceeding, which has a four-month statute of limitations, the present matter is time barred."[9] The court also added that petitioners' main argument—that an illegally promulgated statute never becomes effective—would undermine the purpose of the statute of limitations.

Conclusion

In conclusion, the court held that DEC's promulgation of 6 N.Y.C.R.R. § 704.5, which requires operators of plants to use the best technology available for cooling water, became final and binding on October 30, 1974, thirty days after DEC's filing with the Secretary of State. Thus on October 30, 1974, the statute of limitations commenced for challenging the statute's validity under either a declaratory judgment or an Article 78 proceeding. As a result, the lower court's order for summary judgment in favor of respondents, based on petitioners' failure to file their claim within the requisite period set forth by the statute of limitations, was affirmed.

Jon V. Finelli '07

Endnotes

1. 2005 slip op. 8247, 805 N.Y.S.2d 429 (3d Dept. 2005).
2. *See* N.Y. ENVTL. CONSERV. LAW art. 8.
3. *See* 6 N.Y. COMP. CODES. R. & REGS. § 704.5.
4. *Compare* 33 U.S.C. § 1326 (2000) *with* N.Y. ENVTL. CONSERV. LAW arts. 15 & 17 *and* 6 N.Y.C.R.R. § 704.5.
5. *See* 33 U.S.C. § 1326.
6. *See* N.Y. ENVTL. CONSERV. LAW art. 3-0301(2)(a); N.Y. EXEC. LAW § 102(4).
7. 206 A.D.2d 761, 762, 615 N.Y.S.2d 96 (3d Dep't 1994).
8. 91 N.Y.2d 382, 395–396, 671 N.Y.S.2d 406 (1998).
9. *Entergy Nuclear Indian Point 2, LLC v. N.Y. State Dep't of Envtl. Conserv.*, 2005 slip op. 8247, at *8.

* * *

State of Connecticut et al. v. American Electric Power Company, Inc., et al. and Open Space Institute, et al. v. American Electric Power Company, Inc., et al., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

Facts

In *Connecticut v. Am. Elec. Power Co.*,[1] the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin and the City of New York brought a federal common law public nuisance action against American Electric Power Company, Inc., American Electric Power Service Corporation, the Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corporation to abate what the Plaintiffs alleged to be the public nuisance of global warming.[2] Additionally, in *Open Space Inst. v. Am. Elec. Power Co.*, private plaintiffs, the Open Space Institute, Inc., the Open Space Conservancy, Inc., and the Audubon Society of New Hampshire brought suit against the same Defendants based on the Defendants' alleged contributions to global warming.[3]

The Plaintiffs' complaint alleged that the Defendants represented the five largest emitters of carbon dioxide in the United States and that their emission of approximately 650 million tons of carbon dioxide annually constituted approximately one-quarter of the U.S. electric power sector's carbon dioxide emissions.[4] Correspondingly, the Plaintiffs argued that because carbon dioxide is a primary greenhouse gas and greenhouse gases trap atmospheric heat and cause global warming, the Defendants' emissions caused irreparable harm by threatening the health, safety, and well-being of over 77 million people residing in their states and cities as well as their related environments, natural resources, and economies.[5]

The Plaintiffs, accordingly, sought "an order (i) holding each of the Defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) enjoining each of the Defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade."[6]

Defendants, by way of a variety of motions, moved to dismiss the complaints on several grounds. Specifically, the Defendants contended that Plaintiffs failed to state a claim upon which relief could be granted because (1) there was no recognized federal common law cause of action to abate greenhouse gas emissions, (2) separation of powers principles precluded the court from adjudicating these actions, and (3) Congress had displaced any federal common law cause of action to address the issue of global warming.[7] The Defendants also argued that the Court lacked jurisdiction.[8]

Issue

The Court, in determining whether to grant the Defendants' motion to dismiss, found that the threshold question in the case was whether the complaints filed by the Plaintiffs raised non-justiciable political questions beyond the limits of the Court's jurisdiction.[9]

Reasoning

The Court concluded that the Plaintiffs' complaints raised non-justiciable political questions.[10] The Court began its discussion by reiterating that federal courts are courts of limited jurisdiction.[11] The Court explained that jurisdiction was a threshold matter.[12] Accordingly, the Court found that it must resolve the issue of whether the Plaintiffs raised a non-justiciable political question prior to addressing any other issues raised by the Plaintiffs' complaints.[13]

In reaching this conclusion, the Court reasoned that the determination of whether "the case was justiciable in light of the separation of powers ordained by the Constitution" hinged on whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[14] The Court identified six situations that indicate the existence of a non-justiciable political question.[15]

Although the Court noted that several of the six situations formed the basis for its holding, the Court's opinion focused only on the idea that the case would have been impossible to decide "without an initial policy determination of a kind clearly for non-judicial discretion."[16] The Court, quoting the Defendants' memo, specified "a few of the initial policy determinations that would have to be made by the elected branches before any court could address these issues. . . ."[17]

> Given the numerous contributors of greenhouse gases, should the societal costs of reducing such emissions be borne by just a segment of the electricity-generating industry and their industrial and other consumers? Should those costs be spread across the entire electricity-generating industry (including in the plaintiff States) . . . ? What are the implications of these choices? What are the implications for the nations' energy independence and, by extension, its national security?[18]

Moreover, the Court rejected the Plaintiffs' contention that the cause of action seeking relief from the Defendants' contribution to the public nuisance of global warming was indistinguishable from other public nuisance cases dealing with pollution.[19] In particular, the Court reasoned that the scope and magnitude of the relief sought by Plaintiffs, a cap on carbon emissions and

percentage based reduction schedule, "reveal[ed] the transcendently legislative nature of th[e] litigation."[20] The Court further reasoned that the Plaintiffs' requested relief would require that the Court determine the appropriate level to cap the Defendants' carbon emissions at and the appropriate percentage reduction, identify and balance the effect of such relief on U.S. negotiations with the international community on issues concerning global warming, assess and measure the availability of alternative energy sources, and determine and balance the implications for U.S. energy independence and national security.[21] In somewhat circular fashion, the Court completed its dismissal of the Plaintiffs' contention by reiterating that the Court could not make these determinations without "an initial policy determination having been made by the elected branches."[22]

Thus, the Court found that any resolution of the issues presented by the Plaintiffs presupposed identification of economic, environmental, foreign policy, and national security interests that required "an initial policy determination of a kind clearly for non-judicial discretion."[23] Therefore, the Court concluded that the Plaintiffs' causes of action presented "non-justiciable political questions that are consigned to the political branches, not the judiciary."[24]

Conclusion

Thus, the Court granted the Defendants' motion to dismiss, because the issues presented by the Plaintiffs' causes of actions required initial policy determinations of the kind clearly for non-judicial discretion.

Matthew A. Ford '08

Endnotes

1. 406 F. Supp. 2d 265 (S.D.N.Y 2005).
2. *Id.* at 267.
3. *Id.*
4. *Id.* at 268.
5. *Id.*
6. *Id.* at 270.
7. *Id.*
8. *Id.*
9. *Id.* at 270.
10. *Id.* at 274.
11. *Id.* at 271 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).
12. *Am. Elec. Power Co.*, 406 at 271.
13. *Id.*
14. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186 (1962)).
15. *Am. Elec. Power Co.*, 406 at 271-72.
16. *Id.* at 272.
17. *Id.* at 273 (internal quotation marks omitted).
18. *Id.*
19. *Id.* at 272.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 274.
24. *Id.*

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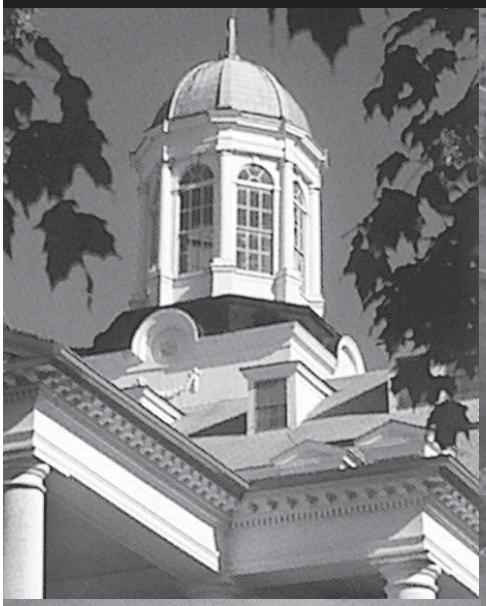

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Environmental Law Section
Fall Meeting

The Otesaga
Cooperstown, New York
October 13 - 15, 2006

THIS PROGRAM WILL PROVIDE YOU WITH UP TO **4**
MCLE CREDIT HOURS IN PRACTICE MANAGEMENT.

SCHEDULE OF EVENTS

Friday, October 13

3:00 p.m. - 6:00 p.m. **REGISTRATION** - MAIN LOBBY

6:00 p.m. **WELCOMING RECEPTION** - EAST VERANDA

7:00 p.m. - 9:00 p.m. **DINNER** - FENIMORE

Saturday, October 14

7:30 a.m. - 12:30 p.m. **REGISTRATION** - MAIN LOBBY

7:00 a.m. - 9:00 a.m. **BREAKFAST** (included in hotel room rate) - MAIN DINING ROOM

8:25 a.m. - 12:20 p.m. **GENERAL SESSION** - BALLROOM

NEW YORK'S ENERGY OUTLOOK

8:25 a.m. - 8:30 a.m. **OPENING REMARKS**

WALTER MUGDAN, ESQ.
Section Chair
U.S. Environmental Protection Agency
New York City

8:30 a.m. - 9:45 a.m. **ACHIEVING NEW YORK'S POLICY ON RENEWABLE ENERGY**

Moderator:

MAUREEN HELMER, ESQ.
Consultant and Counselor at Law
Delmar

Panelists:

CHARLES G. FOX
Deputy Secretary to the Governor for
Clean Energy Policy
New York City

GARRY A. BROWN
Vice President - External Affairs
New York Independent System Operator
Rensselaer

PROF. ELEANOR STEIN
Albany Law School
Albany

9:45 a.m. **REFRESHMENT BREAK**

10:00 a.m. - 12:00 p.m. **THE VIEW FROM HERE: THE FUTURE OF ENERGY DEVELOPMENT IN NEW YORK**

10:00 a.m. - 10:15 a.m. **POLICY INITIATIVES AND TECHNOLOGY DRIVERS (RGGI, SBC, NEW FEDERAL AND STATE REGULATIONS, ETC)**

Introduction:

PETER SMITH
President and CEO
New York State Energy Research
and Development Authority
Albany

SCHEDULE OF EVENTS

Saturday, October 14 *continued*

10:00 a.m. - 11:15 a.m. **WIND POWER: PROJECTS, OPPORTUNITIES AND CHALLENGES**

Moderator:
KEVIN M. BERNSTEIN, ESQ.
Bond Schoeneck & King
Syracuse

Speakers:
BILL MOORE
PPM Atlantic Renewable
Lowville

CHARLES HINCKLEY, CEO
Noble Environmental Power
Essex, CT

RICK BENAS
Saratoga Associates
Saratoga Springs

MATT ALLEN
Saratoga Associates
Saratoga Springs

11:15 a.m. - 12:05 p.m. **ENERGY DEVELOPMENT AND IMPACT REVIEW: WHERE ARE WE, AND WHERE ARE WE GOING?**

Moderator:
JENNIFER HAIRIE, ESQ.
NYS Department of Environmental Conservation
Albany

Speakers:
PAUL PABOR
Vice President, Renewable Energy
Waste Management, Inc.
Houston, TX

JACK NASCA
Chief, Bureau of Energy Projects & Management
Division of Environmental Permits
NYS Department of Environmental Conservation
Albany

GERARD L. CONWAY, JR., ESQ.
Plug Power
Latham

12:05 p.m. - 12:20 p.m. **QUESTIONS AND ANSWERS**

12:30 p.m. **LUNCH** (included in hotel room rate) - MAIN DINING ROOM

6:00 p.m. **COCKTAIL RECEPTION** - POOLSIDE PATIO

7:00 p.m. **DINNER** - FENIMORE

Sunday, October 15

8:00 a.m. - 9:00 a.m. **COMMITTEE MEETINGS** - TEMPLETON LOUNGE

9:00 a.m. - 12:00 p.m. **EXECUTIVE COMMITTEE MEETING** - KINGFISHER TOWER

1:00 p.m. **CHECK-OUT**

WHAT'S THERE TO DO IN COOPERSTOWN

The Farmers Museum

Step back in time and experience history at *The Farmers' Museum*, where skilled artisans rekindle the traditions of 19th-century rural New York: blacksmithing, spinning and weaving, broom making, woodworking, and printing. See 19th century furnishings, period botanical specimens, a working farmstead with heritage breeds of animals, an early 19th-century wallpaper manufactory, and the Cardiff Giant. New at the Museum this year is the Empire State Carousel, a unique, hand-crafted merry-go-round based entirely on the history and culture of New York State. The carousel was gifted to The Farmers' Museum in 2005 from the Board of Directors of The Empire State Carousel Museum. The museum offers hands-on activities, daily programs and special events throughout the year. ***(Hours: 10 am to 5 pm daily)***

Fenimore Art Museum

An elegant 1930s neo-Georgian mansion with terraced gardens overlooking Otsego Lake. Fenimore Art Museum is a showcase of premier collections of American art. The museum features changing exhibitions, with paintings by Edward Hicks, silver from Albany, and works by folk artist Eddie Lee Kendrick. Contemporary photography, James Fenimore Cooper memorabilia, Hudson River School paintings and more. Also enjoy the acclaimed Eugene and Clare Thaw Collection of American Indian Art in the state-of-the-art American Indian Wing. The museum offers gallery tours and multi-media programs daily, and special events throughout the year. ***Hours: 10 am to 5 pm daily.***

National Baseball Hall of Fame and Museum

Located on Main Street in the heart of picturesque Cooperstown, the *Hall of Fame* is one of the country's major tourist destinations and is surely the best-known sports shrine in the world. Opening its doors for the first time on June 12, 1939, the *Hall of Fame* has stood as the definitive repository of the game's treasures and as a symbol of the most profound individual honor bestowed on an athlete. It is every fan's "Field of Dreams" with its stories, legends, and magic to be passed on from generation to generation. ***Hours: 9 am to 9 pm daily***.

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Kevin Anthony Reilly
Editor

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