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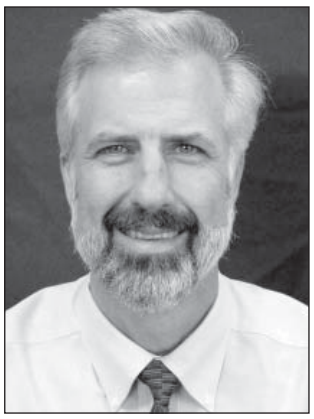
Message from the Chair



As I write this in late May, I am a few days away from turning over to Lou Alexander the figurative gavel of the Section Chair. (We probably should get a literal gavel . . . it would make meetings more entertaining.) I used my previous two "Message from the Chair" columns to inform you about the debates we have had about whether and when the Section should take positions on current legislative or regulatory proposals, and the process we should use to decide on such positions. I will continue with that theme in this, my last column.

SEQRA and Brownfields

After the 2006 election, then Governor-Elect Spitzer formed a Transition Team and established several Policy Advisory Committees, including one on Energy and Environmental issues. Several members of our Section, former Chair Jim Sevinsky among them, were members of that Committee. In December we took the opportunity to bring to that Committee's attention our Section's views on two important issues. (These were issues on which we had previously adopted a formal position.) The first is our recommendation that the Legislature amend SEQRA to "correct" a 1991 Court of Appeals ruling on standing to sue. As our memorandum on the issue explained, prior to that ruling plaintiffs who challenged state and local SEQRA decisions were only required to meet the traditional "injury in fact/zone of interests" test for standing. The Court's 1991 decision in *Society of the Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991) imposed a more stringent—indeed, frequently impossible—"special harm" test for standing, which requires a plaintiff to show that she or he has suffered harm different in kind and degree from the harm suffered by the general community.

The Section's reasons for seeking a legislative correction to bring us back to the pre-1991 test can be found on our web site under the tab labeled "Legislative/Regulatory Policy Submissions."

Under the same web site tab you will find our detailed comments of August 25, 2006 on the then-proposed Part 375 (Brownfield) regulations, since finalized by the New York State Department of Environmental Conservation (NYSDEC). Some of our comments were adopted, but some were not. From among our earlier comments we extracted and briefly summarized four specific suggestions for additional revisions to either the regulations, the accompanying guidance, or the underlying statute. We

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shared this summary with the transition team's Energy & Environment Policy Advisory Committee. We recommended that NYSDEC revise its eligibility guidelines to conform to the statute. At the same time we also urged that the legislature revise what we see as an overly generous tax credit formula for Brownfield redevelopments, so that developers do not receive unjustified windfalls for massive developments on lightly contaminated properties. We suggested that sites not qualifying for the Brownfield Cleanup Program, or one of NYSDEC's other existing programs, should nevertheless be subject to NYSDEC supervision if cleaned up voluntarily, and be eligible to receive a NYSDEC sign-off at the end. Finally, we advocated that the legislature enact a provision authorizing innocent landowners who clean up their properties to sue under the state's Superfund law for contribution from other responsible parties, thus plugging the hole left in federal Superfund law by the *Aviall* decision. (Our memorandum to the Policy Advisory Committee on the Brownfield program is also available on the Section's web site.)

Bottle Bill, Burn Barrels, and Backyard Boilers

Over the past half year I have asked the Co-Chairs of our Section Committees to consider whether there are other issues on which the Section might wish to take an advocacy position with the new administration and/or the legislature.

I asked the Solid Waste Committee to consider whether to recommend that the Section endorse a proposed expansion of New York State's "Bottle Bill." Enacted in 1982, the law requires a 5-cent returnable deposit on soda and beer containers. It has been very effective in reducing litter and increasing recycling rates. But in the quarter century since the law was passed, our "drinking habits" have changed considerably. The fastest growing segments of the convenience beverage industry are now bottled water, tea and sports drinks—none of which currently require a deposit.

In early April 2007 the Solid Waste Committee submitted a proposal recommending that the Section support a set of amendments to the Bottle Bill that were included in Governor Spitzer's proposed budget bill. Among other things, these amendments would have expanded the scope of the Bottle Bill to include all non-carbonated beverages (with the exception of milk and dairy products; infant formula; alcoholic beverages other than beer and malt beverages; nutritional supplements; syrups; concentrates; soups; powdered and frozen beverages; and liquid prescription or over-the-counter drugs). The amendments would also have redirected unclaimed deposits to the State Environmental Protection Fund.

Pursuant to our Advocacy Policy (also available on our web site—click on "Section Business"), the Solid Waste Committee's proposal was circulated electronically to all members of the Section's Executive Committee for a 10-day review-and-vote period. Thirty-six ExecComm members voted, with all but one endorsing the proposal. Before our Section position could be made public, however, the Bottle Bill amendments were dropped from the budget bill that eventually was passed by the legislature and signed by the governor. It was generally understood that another attempt would be made this session to pass such amendments. At the Executive Committee's April 18th meeting in Albany, the members in attendance agreed that the Section's views should be considered as applicable to any legislative proposal for comparable amendments to the Bottle Bill, not just to the specific proposal that had been dropped from the budget bill. Our official memorandum on the subject takes this "generic" approach, indicating that the Section recommends these changes be made regardless of the specific legislative vehicle used to effectuate them. This memorandum (available on our web site) has been shared with the relevant state legislative and Executive Branch leaders.

I also suggested to our Section's Air Quality and Solid Waste Committees that they might consider two important issues: (1) *The regulation of open burning of wastes* (also known as "barrel" burning). Open burning of household garbage and agricultural plastic is common in many rural areas. Today, this practice is the largest source of dioxin pollution in the country. Burning 10 pounds of garbage in a backyard "burn barrel" produces as much pollution as burning 400,000 pounds of garbage in a well-controlled municipal incinerator. (2) *The regulation of wood boilers*. These units, which have rapidly gained popularity in recent years, are typically installed outside a house and thus are sometimes called "backyard boilers." They burn wood to make hot water or steam for residential heating and/or domestic hot water. Their emissions—which are substantial—are currently unregulated at either the federal or state level. NESCAUM (Northeast States for Coordinated Air Use Management), an inter-state organization of which New York is a member, has developed a model rule to address this gap. Our Section may wish to consider endorsing that rule for adoption in New York.

Freshwater Wetlands

As I wrote in my previous "Message from the Chair" column, our Section's Executive Committee spent some time considering a proposal I made in early 2006 to endorse legislation that would expand New York State's freshwater wetlands jurisdiction from 12.4 acres down to one acre. The proposal was shared with all members of the Executive Committee in September 2006, along with two additional memoranda—one in opposition to the proposal, the other analyzing the arguments *pro* and *con*. The matter was put to a vote—actually, a series of three votes—at the October 2006 Executive Committee meeting in Cooperstown.

The first vote was on a motion to approve Section support of the particular Assembly bill that was the subject of my original proposal. This motion failed, with 6 in favor and 14 against. The second motion was to approve Section support for an expansion of State freshwater wetlands jurisdiction down to one acre (but not endorsing any specific bill), along with a direction to the Section's Coastal Resources and Wetlands Committee to address certain other legal and administrative issues raised during the discussion and report back to the ExecComm in January. This motion also failed, albeit narrowly, with 13 in favor and 9 opposed. (The Section's Advocacy policy requires a two-thirds majority.)

The third motion passed, with only one vote in opposition, directing the issue back to the Coastal Resources and Wetlands Committee to try to prepare a consensus proposal for further ExecComm consideration at the January 2007 meeting. That meeting was held on January 28 in Manhattan and, indeed, a compromise proposal was offered by the Wetlands Committee. Under the compromise, the Section would urge the State of New York to seek "assumption" of the federal wetlands program (similar to "delegation" or "authorization" in other programs). To assume the federal program, New York State would need to have jurisdiction at least co-extensive with that of the federal government. This would certainly require that freshwater wetlands much smaller than 12.4 acres be regulated by the state. It would not, however, guarantee that wetlands potentially excluded from federal jurisdiction as a consequence of the *SWANCC* or *Rapanos* decisions (cited in my previous column) would be regulated by the state, which was one of the objectives of my original proposal. I therefore exercised the prerogative of the Chair to reintroduce my original motion, with two additional provisos intended to address some of the concerns that had been voiced in Cooperstown. The proposal failed again, albeit by a narrower margin of 20 in favor to 24 against.

The Wetlands Committee's alternate, compromise proposal endorsing State assumption of the federal program was then put to a vote, and won handily with 36 in favor and one opposed. (There were a number of abstentions in each of the votes at both the Cooperstown and New York City meetings.) This successful proposal was subsequently set out in a formal Section memorandum (available on our web site), and has also been shared with the relevant state legislative and Executive Branch leaders.

Annual Meeting and Annual Legislative Forum

Our 2007 Annual Meeting was held in late January. The very interesting CLE program was developed by Co-Chairs Shannon Martin LaFrance, Dan Riesel and George Rusk, to whom I extend my great thanks. The program focused on a group of significant environmental regulations promulgated in recent years by the European Union, which go well beyond current requirements in the U.S. I am particularly pleased that we were able to present, as our keynote speaker for the meeting, Dr. Mary Kelly, Director of the Environmental Protection Agency of the Republic of Ireland. Ireland has lately been the economic *wunderkind* of Europe. With strong economic growth have come new environmental challenges, along with the obligation as an EU member country to adhere to all these new environmental rules. Dr. Kelly's perspectives were most interesting, and underscored the fact that Europe, rather than the U.S., is now leading the way in a number of important areas—regulation of greenhouse gases being chief among them.

Our annual Legislative Forum in Albany was held on April 18. My thanks to Phil Dixon and Mike Lesser, co-chairs of our Legislation Committee, for organizing a particularly timely and stimulating program. The speakers were State Senator Carl Marcellino; Judith Enck, Governor Spitzer's Deputy Secretary for the Environment; and Special Deputy Attorney General for Environmental Protection Katherine Kennedy. The Forum—one of the best attended ever—focused on the environmental initiatives of the new state administration. The program was followed by our annual Government Attorneys Luncheon, also very well attended, at which my colleague Eric Schaaf, Regional Counsel of U.S. EPA Region 2, was the featured speaker. He described the somewhat arcane but actually rather sensible approach used by EPA to select areas of focus for its enforcement program.

Over and Out

My five-year stint as a Section officer has been fun, stimulating, and occasionally exhausting. The best part has been the opportunity to work closely with the many exceptional attorneys whose volunteer efforts make our Section one of the premiere environmental bar associations in the nation. But now I am very happy to be able to say: "All yours, Lou!"

Walter Mugdan

From the Editor

With this issue the Section bids Walter Mugdan adieu (well, not exactly goodbye, but certainly many thanks) and welcomes Lou Alexander as the incoming Section Chair. The contributions of both members are too many to mention, except to note that both have consistently been active, as long-time Executive Committee members, in a variety of capacities over the years (who knew that Walter passed up a promising career in entertainment for the law?). Professionally, Walter, of course, has been a major actor in EPA Region Two activities over the years, presently as the Director of its Environmental Planning and Protection. Lou presently serves as Assistant Commissioner for the Department of Environmental Conservation's Office of Hearings and Mediation Services. Hence, both have brought to the Section not only their years of dedication to Section activities, but also substantial professional credentials.

Walter's concluding column nicely summarizes a particularly active year. The Section continued its advocacy (or not, as Walter's column ruefully notes) with respect to ongoing issues, but also undertook many initiatives that were ambitious in scope. A substantial number of the latter were accomplished. Walter modestly gives credit to many Section members for their contributions in this regard, but omits the obvious fact that his own contributions were likely central to the success of the annual meetings and various initiatives.

In this issue, Walter Mudgan provides another (and hopefully not final) contribution by submitting an article about the construction of, and permitting for, liquified natural gas facilities. The article is not only an excellent primer on a subject that has become important in these fraught times, when the urgency of diversifying our energy supply has become widely acknowledged, but also walks the reader through the licensing process.

Robert Kenney submits an article on recent developments in New York law regarding the use of scientific evidence. The discussion will have relevance to members who litigate toxic tort cases and other cases in New York and who will, at some point, have to grapple with the *Frye* standard for the admissibility of expert evidence. Douglas Zamelis submits an article that serves as a primer on PCBs. The toxicity of PCBs, and their consequential regulation under the Toxic Substances Control Act, has been known for some time. Improper disposal of PCBs has been the bane of many communities that are located along the Hudson River or adjacent to former industrial facilities. This article, though, examines a new arena for concern, the use of PCBs in building materials. Both Robert and Douglas often represent the defendant in civil cases. The cautions articulated in their articles provide valuable perspectives to members who represent industry and business owners.

David Johnson, noting some recent judicial erosion of the constitutional underpinnings of federal environmental statutes, which traditionally rested on the Commerce Clause, analyzes the Property Clause as a viable, if often underappreciated, constitutional predicate for the Endangered Species Act off of federal lands. This article placed second in the Section's Environmental Essay Competition.

James Denniston, of St. John's Law School, concludes his responsibilities as Student Editor with the current issue. The new student editor will be Jamie Thomas.

Let me conclude with a request to Section committees. One need look no further than the Section's agenda for each year to appreciate how significant a role committees play in Section activities. What may be little noted is the degree to which our committees, and committee chairs, play quietly influential roles in the formation of New York's public policy. This is typically accomplished when a committee, or particular members thereof, acts in an educational or advisory capacity, or even as a commentator on behalf of the Section (pursuant to the recently promulgated Section ground rules for such) for proposed legislation or regulations, or in furtherance of the need to amend legislation to address initially unanticipated glitches. On many occasions, committees or their members work with legislative committees. Walter's column informs our membership that Section members recently were tapped to offer perspectives to Governor Spitzer's administration as he took office. Walter's column also amply attests to the contributions made by many Section members and committees in these regards. Sometimes, quiet influence is entirely appropriate. However, many times it would serve the committees—and their efforts—better, for readers to know that the Section, acting through its committees, is not only alive and well but also useful in the formulation of environmental public policy. The Journal provides a vehicle for committees to inform our membership about Section activities, or even proposals that might require commentary or volunteers. I would ask the Section's committees to take advantage of the Journal to thus better advertise your contributions, but also to elicit new ideas and maybe even an enlarged membership. The Journal has always been fortunate in receiving well-written and informative articles by commentators on the many areas within the expansive and often very sophisticated field of environmental law. However, it goes without saying that the committees are very much the heart and the backbone of the Section; please let the Journal be your voice.

Kevin Anthony Reilly

Unfamiliar Terrain: Environmental Permitting for LNG Facilities Under the Deepwater Port Act

By Walter Mugdan[1]

Over the past several years, literally dozens of proposals have been made for the construction of liquified natural gas (LNG) off-loading terminals. Many of these would be built beyond the "territorial seas" of the U.S. Permitting of such facilities—including any and all environmental permits—is carried out under the regime of the Deepwater Port Act of 1974 (DPA), as amended several times since then.[2] Most environmental attorneys have had little or no exposure to this statute, and the environmental permitting provisions thereunder are likely to be unfamiliar to them. This article provides a brief introduction to LNG facilities and the DPA permitting process.

Description of LNG Terminal Facilities

Most Americans are familiar with natural gas. It is used widely in homes for cooking, heating, and domestic hot water. It is also used in many power plants to generate electricity, and in other industrial applications for heat or steam production. Compared with other fossil fuels like oil and coal, it burns cleaner and more efficiently; indeed, of all the fossil fuels commonly in use, natural gas generates the least amount of air pollution per unit of energy produced when burned.

Natural gas is found in geologic formations, often in association with petroleum. It is typically extracted in much the same way as oil, i.e., brought to the surface through drilled wells. For most of the time since it was first put to wide commercial use, natural gas has been transported from the wellhead to the customer through a continent-wide network of pipelines. Compared with oil or even coal, natural gas customers were consequently more likely to be consuming a domestic product rather than a foreign import. And where natural gas was imported in the past, it came from our near neighbors Canada or Mexico.

A limiting feature of natural gas is that, because it is a gas at ordinary temperatures and pressures, it occupies a very large volume per unit of available energy. Coal (as a solid) and oil (as a liquid) pack their energy content into a much smaller physical space. Cost-efficient transport of coal and oil by ship, barge or rail has therefore long been possible and customary. But transport of natural gas, in its gaseous form, would be prohibitively expensive because a very large volume of space would be occupied by a comparatively small amount of *energy*.

However, natural gas, like any other gaseous substance, can be liquified (or even solidified) by reducing its temperature. Natural gas—composed primarily of methane—turns to a liquid at about -260° F. (-162° C.). Liquified natural gas (LNG) occupies only about 0.17% of the space that it occupies as a gas, more than a *six hundred-fold* reduction in volume. Thus, if one can economically cool natural gas into a liquid, one can then ship it across the ocean just like oil. (Well, not exactly like oil: LNG tankers must be refrigerated to keep the natural gas in liquid form.[3])

Over the last decade the market for LNG has begun to boom as liquification and refrigeration costs have come down due to technological advances.[4] Leading exporters today include some countries familiar to us from the oil trade, as well as some perhaps unexpected locales. At present, Indonesia, Algeria, Malaysia, Qatar and Trinidad are the major exporters of LNG; Russia and Iran have the greatest potential to become industry leaders.[5] Not surprisingly, the U.S. is already a significant destination for LNG tankers, with five off-loading terminals built (plus one more in Puerto Rico) and 18 more approved (plus three approved in Canada and three in Mexico). And this is just the beginning—some 42 more terminals are proposed or under consideration. The existing and proposed terminals are clustered in the northeast, the Gulf of Mexico, southern Florida, southern California and the Pacific Northwest.[6]

Since the U.S. is a receiver rather than a shipper of LNG, environmental permitting concerns focus on the off-loading terminals. The role of the off-loading terminal is to receive the fuel in liquid form, re-gasify it, and pump it into the natural gas distribution pipeline system. Regasification, or vaporization, is accomplished by warming the LNG through one of two primary methods, known as "open loop" and "closed loop."

- In an open-loop system, sea water at its ambient temperature is used to vaporize the LNG. The sea water is continually pumped through a heat exchanger to warm up and regasify the LNG.
- In a closed-loop system, water is heated by a combustion unit to accomplish the regasification.

Both open- and closed-loop systems have environmental benefits and drawbacks. The primary benefit of an open-loop system is that one is not "wasting" fossil fuel (usually the natural gas itself) for the purpose of providing heat for vaporization; the heat comes from the ambient sea water, and the energy costs for pumping the water through the heat exchanger are comparatively modest. The drawbacks of the open-loop system include the threat

of impingement and entrainment of marine organisms as large amounts of water are pumped through the system. (This is a concern very similar to that applicable to most power plants that use a "once-through" cooling system.) Also, the discharge water is 10° to 15° F. colder than the ambient water, which may or may not present an environmental concern. The benefits and drawbacks of the closed-loop system are the flip side of the coin: impingement and entrainment concerns are minimal, but air pollution emissions and energy costs from heating the water must be taken into consideration.

Likewise, there are a variety of basic types of LNG terminals, which also have differing environmental and public safety attributes. Terminals can be built on shore or off-shore. If built off-shore, they can be grounded structures built into the water (artificial islands or concrete caissons or the like); platforms (like offshore oil rigs); floating terminals (mounted on huge, anchored barges); or mooring buoys where LNG tankers that have on-board regasification equipment simply connect to a pipeline access point that has relatively little other infrastructure associated with it. A wide variety of environmental concerns are associated with these different types of off-loading terminals. These include impacts from construction of onshore or grounded off-shore structures and the pipelines themselves; impacts from air emissions associated with the regasification equipment and the diesel engines of the tankers; concerns over impacts to marine biota; aesthetic (visual) impacts; and—probably of most intense concern to the average citizen—concerns over the safety of the tankers and terminals.[7]

In the author's Region of U.S. EPA,[8] there is one existing LNG terminal—an onshore facility in Peñuelas, Puerto Rico. It has been in operation since 2000. Tankers unload from the end of an 1,800-foot pier. The LNG is stored in two 1,000,000 barrel tanks. Regasification equipment is onshore; the gas is used at a nearby 461-megawatt co-generation electric power plant.[9] Three additional LNG facilities are, at this writing, proposed for the Region, which is geographically the smallest of EPA's ten regions. One, called *Crown Landing*, would be an onshore facility on the New Jersey side of the Delaware River. It was approved by the Federal Energy Regulatory Commission (FERC) in June, 2006.[10] A second, known as *Broadwater*, is proposed as a floating, barge-mounted terminal to be located in the Long Island Sound, close to the New York side of the boundary between New York and Connecticut.[11] The third, known as *Safe Harbor*, would be constructed on an artificial island of 50 acres or more, to be located some 13 miles off the south shore of Long Island, NY.[12]

The siting, licensing or permitting rules for these various kinds of off-loading terminals differ based on their proposed location. LNG facilities to be located on shore, or off-shore but within the "territorial seas" of the United States, are subject to the siting rules of FERC at the federal level.[13] But LNG facilities to be located off-shore and outside the U.S. territorial seas are subject to the more unfamiliar siting and licensing rules of the Deepwater Port Act, as amended by the Maritime Transportation Security Act of 2002.[14]

Siting and Licensing of LNG Facilities Under the Deepwater Port Act

DPA Jurisdiction

The DPA was originally enacted in 1974 in order to allow the new generation of deep-draft oil supertankers then being put into service to unload at deepwater terminals off-shore, because many U.S. ports were too shallow. In 2002 the law was amended to include natural gas (i.e., LNG) terminals. The law now defines deepwater ports as

> a fixed or floating man-made structure other than a vessel, or group of such structures, that are located beyond State seaward boundaries and that are used or intended for use as a port or terminal for the transportation, storage, or further handling of oil or natural gas for transportation to any State . . . and for other uses not inconsistent with the purposes of this chapter, including transportation of oil or natural gas from the United States outer continental shelf.[15]

The act goes on to clarify that for natural gas (LNG) facilities, the term "deepwater port" includes, and thus the law's obligations and responsibilities extend to—

> all components and equipment, including pipelines, pumping or compressor stations, service platforms, buoys, mooring lines, and similar facilities that are proposed or approved for construction and operation as part of a deepwater port, to the extent that they are located seaward of the high water mark and do not include interconnecting facilities.[16]

"State seaward boundaries" is an important term, since on the landward side of those boundaries the DPA is not applicable. It is not separately defined in the Act, and neither is the term "territorial seas," which is often used as a shorthand term to explain the extent of DPA jurisdiction. The terms are in common usage in international and maritime law, however, and are understood as follows. The extent of these areas is generally measured from the "baseline," a line drawn connecting points of land that protrude into the ocean (thus enclosing bays, coves, inlets, islands, etc.). In the U.S., state boundaries are generally considered to extend to 3 nautical miles from the "baseline," except for Texas and Florida which, for historical reasons, extend to 9

nautical miles. "Territorial seas" extend out to 12 nautical miles from the baseline; the "contiguous zone" extends from 12 to 24 nautical miles; and the "exclusive economic zone" extends out to 200 nautical miles. Beyond that lie the "high seas." The U.S. also claims certain sovereign authorities out to 200 miles from the baseline.[17]

Thus, the proposed *Safe Harbor* LNG terminal described above would be subject to DPA jurisdiction because it is more than 3 miles beyond the baseline along the south shore of Long Island, New York. (Although it is in fact more than 12 miles from the shore of Long Island, it is still within the territorial seas of the U.S. as they are mapped in this area.) By contrast, the *Broadwater* LNG terminal proposed for Long Island Sound, also described above, would *not* be subject to DPA jurisdiction. Although *Broadwater* would be situated more than three miles from both New York and Connecticut, the entire Long Island Sound is inside the "baseline," and thus none of the Sound is outside of "State boundaries" for the purposes of DPA jurisdiction.

DPA Licensing Authority

Whereas FERC is the federal licensing agency for proposed LNG terminals on-shore or within state boundaries, the Secretary of Transportation is designated as the federal licensing official for proposed facilities that fall under DPA jurisdiction. In June, 2003 the Secretary of Transportation delegated that authority to the Maritime Administrator, the head of the U.S. Maritime Administration (MARAD). The licensing process itself is shared jointly between MARAD and the U.S. Coast Guard (USCG). MARAD is primarily responsible for the financial reviews; USCG is responsible for project engineering, operations, safety, and environmental reviews, including compliance with the National Environmental Policy Act (NEPA). USCG serves as the lead federal agency in the preparation of any required NEPA documents, such as an Environmental Impact Statement (EIS). Other federal agencies with relevant expertise, such as the Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers, the Fish and Wildlife Service and the National Marine Fisheries Service, are brought into the process by MARAD and/or USCG.

Procedural Timetables

It is, arguably, with respect to the rigorous and rigid timetables established in the statute for the review process, that permitting under DPA differs most from the permitting programs with which environmental attorneys are likely to be more familiar. Under the DPA, the federal government (including all its participating agencies) has a total of only 26 calendar days from the date a license application is submitted to determine whether or not it is complete. If a determination is made that the application is not complete, the clock stops until an augmented application is submitted.

From the day a determination is made that an application is complete, the clock starts ticking again—and ticking fast. A Notice of Application must promptly be published in the *Federal Register*. From the date of that publication, a total of 240 calendar days are allotted for the entire NEPA process, including public scoping on the environmental review, public meetings, and preparation of the EIS or other required document(s). By Day 240 the last public meeting must have been held, and there begins a 45-day federal and state agency review period; Day 285 is the last day for agency and public comment; and by Day 330 the Record of Decision (ROD) on the DPA license application must be issued.[18]

These are undeniably ambitious and demanding schedules for such complex projects. In May, 2004 the Director of the White House Task Force on Energy Project Streamlining issued a "Memorandum of Understanding on Deepwater Port Licensing" signed by 11 federal agencies.[19] The intent of the MOU is to establish a process to facilitate the timely processing of DPA applications. The participating agencies agree to:

- work together with applicants and other stakeholders, both before and after complete applications are filed;
- attempt to build a consensus among the government agencies;
- identify and resolve any issues as quickly as possible; and
- expedite the environmental review required for licensing decisions associated with deepwater ports.

Licensing and Environmental Review Criteria

The DPA sets out criteria and conditions pursuant to which the Secretary of Transportation may issue a license.[20] These include (but are not limited to) the following:

- the applicant is financially responsible;
- construction of the proposed port is deemed to be in the national interest;
- best available technology will be used to prevent or minimize adverse impact to the marine environment;
- the EPA Administrator has *not* found that the proposed port will *not* conform to applicable provisions of the Clean Air Act, Clean Water Act, and Marine Protection, Research and Sanctuaries Act (also known as the Ocean Dumping Act)[21]; and
- the governor of any "adjacent coastal state"[22] approves, "or is presumed to approve" of the license.

This last criterion or condition invests adjacent state governors with considerable power over the fate of a pro-

posed deepwater port. In a related section of the DPA the matter is stated very bluntly: "The Secretary [of Transportation] shall not issue a license without the approval of the Governor of each adjacent coastal State."[23]

The Act further requires the Secretary of Transportation, in consultation with the other most directly affected federal agencies, to promulgate regulations setting forth "environmental review criteria," consistent with NEPA, which will be used to evaluate potential impacts of deepwater ports,[24] including (but not limited to):

- impacts on the marine environment;
- effects on oceanographic currents and wave patterns;
- effects on other, alternate uses of the oceans and navigable waters (such as scientific study, fishing and other resource exploitation);
- potential dangers to the port from waves, winds, weather and geological conditions, and steps that can minimize such dangers;
- effects of associated land-based developments; and
- effects on human health and welfare.

The regulations called for by the DPA have been promulgated and are codified at 33 CFR Part 148. Related regulations governing deepwater port equipment requirements and safety are codified at Parts 149 and 150.

Enforcement

Provisions for suspension or revocation of licenses, and enforcement provisions, are included in the DPA. As to the former, the Act provides that if a licensee fails to comply with an applicable provision of the law or regulations, a civil judicial action can be filed in U.S. District Court seeking to suspend the license or—if the failure to comply is "knowing" and continues for more than 30 days after notification thereof—to revoke the license.[25] The Secretary of Transportation is also given administrative enforcement authority to take quick action pending completion of such a judicial proceeding:

> If the Secretary determines that immediate suspension of the construction or operation of a deepwater port or any component thereof is necessary to protect public health or safety or to eliminate imminent and substantial danger to the environment, he shall order the licensee to cease or alter such construction or operation pending the completion of a judicial proceeding pursuant to subsection (a) of this section.[26]

A suite of enforcement authorities—administrative, civil judicial and criminal—is also provided by the Act:[27]

- The Secretary of Transportation can issue unilateral administrative orders requiring compliance with any statutory or regulatory provision, and establishing a schedule for coming into compliance.
- A civil judicial action can be filed, seeking penalties of up to $25,000 per day per violation, and/or seeking appropriate equitable relief "to redress a violation."
- Willful violations can be prosecuted criminally as a misdemeanor.
- Under specified circumstances, vessels used in violation of the Act and regulations can be held liable *in rem* for any civil penalty or criminal fine.

Conclusion

Because relatively few deepwater ports have in fact as yet been licensed under the Deepwater Port Act, many environmental lawyers—as suggested at the start of this article—are likely to be unfamiliar with its provisions. As it turns out, most of the substantive provisions of the law are not much different from the usual environmental permitting programs that practitioners are accustomed to deal with on a regular basis. Greater dissimilarities may be found in the procedural aspects of the DPA, including the stringent and ambitious time schedules for review of and decision about an application, and some novelty in the cast of characters, with MARAD in the lead and the U.S. Coast Guard in a primary supporting role. Another interesting difference is that the states have no actual permitting authority, but nevertheless have very considerable power over the process.

If the current boom in LNG terminal proposals is sustained, and if even a fraction of the proposals move into the application and licensing phase, many environmental lawyers who a few years ago did not know the law existed will find themselves fast becoming experts on the subject.

Endnotes

1. Any opinions expressed herein are the author's own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency (EPA). The author gratefully acknowledges the invaluable assistance he received in compiling much of the information set out in this article from his colleague Grace Musumecci and her staff in the Environmental Review Section of EPA Region 2.
2. 33 U.S.C. §§ 1501–1524, January 3, 1975, as amended 1984, 1990, 1995, 1996 and 2002.
3. *LNG Overview*, Federal Energy Regulatory Commission (FERC), <http://www.ferc.gov/for-citizens/lng.asp>.
4. *Liquified Natural Gas (LNG)*, <http://www.naturalgas.org/lng/lng.asp> There was an earlier, tentative "boomlet" in LNG commerce in the late 1970s and early 1980s. The economics proved to be less favorable than expected, however, and two of the nation's four LNG terminals dating from that era were actually mothballed for many years during which domestic production of natural gas

was high and prices low. *A Big Bet on Natural Gas*, by Clifford Kraus, New York Times, October 4, 2006, <http://www.nytimes.com/2006/10/04/business/04gas.html?ei=5087%0A&em=&en=a2c193c8f682052e&ex=1160107200&pagewanted=all>.

5. *Id.* Note, however, that the U.S. is by no means the world's largest importer of LNG (at least not yet). Currently, the U.S. is in sixth place behind Japan, South Korea, France, Taiwan and the U.K. Wikipedia, <http://en.wikipedia.org/wiki/LNG>.

6. *Existing and Proposed North American LNG Terminals*, FERC, <http://www.ferc.gov/industries/lng/indus-act/terminals/exist-prop-lng.pdf>.

7. LNG is safer than a layperson might assume, because it is not explosive in its liquid state. When regasified, it is also not explosive if it is unconfined. For more information on LNG safety see: <http://www.ferc.gov/for-citizens/lng.asp>.

8. Region 2, which includes New York, New Jersey, Puerto Rico and the U.S. Virgin Islands.

9. <http://www.ferc.gov/industries/lng/indus-act/terminals/exist-term/penuelas.asp>.

10. <http://www.bpcrownlanding.com/posted/569/2006_06_15_Newsrel_FERC_approval.120536.pdf> There is an arcane legal dispute between the states of New Jersey and Delaware over which state has jurisdiction of that portion of the Delaware River in which the off-loading pier would be located. Delaware asserts that its jurisdiction, at the particular location of the proposed Crown Landing facility, extends essentially across the entire river to the New Jersey shoreline. New Jersey disputes this assertion. The matter was presented to the Supreme Court, which appointed a Special Master to review the facts and provide a report. The Special Master's report was submitted to the Court on April 12, 2007, recommending a decision generally in favor of Delaware. *See:* http://www.pierceatwood.com/files/301_PLD%20Report%20of%20Special%20Master%20PDF%20(W0725778).PDF.

11. <http://www.broadwaterenergy.com/>.

12. *Man-Made Island in Ocean Proposed as Terminal for Natural Gas*, Bruce Lambert, New York Times, 1/27/06, Section B, page 2.

13. <http://www.ferc.gov/for-citizens/about-ferc.asp> Under the Natural Gas Act, 15 USC §§ 717 *et seq*, FERC is the licensing authority for LNG terminals constructed on shore, or off-shore within the territorial seas. (In 2005 Congress amended the Act to streamline the licensing approval process.) The Act gives FERC exclusive authority to approve or deny an application to site, construct, expand or operate an LNG terminal. Nevertheless, other federal agencies such as the Army Corps of Engineers and the EPA, and/or states with delegated programs under the Clean Water Act (CWA), Clean Air Act (CAA) or Coastal Zone Management Act (CZMA), retain their authority to issue federally-required permits.

    - With respect to the CZMA, the LNG project proponent must certify that the proposed activity in a designated coastal zone complies with the enforceable policies of the affected state's coastal zone management program. If the state does not concur with the certification, no FERC approval to construct may be granted. A finding of inconsistency can be appealed to the Secretary of Commerce.
    - With respect to the CWA, a § 401 certification of compliance with the state's water quality standards is required from the responsible state agency for any activity (including construction and operation of LNG import facilities) that may result in a discharge into navigable waters. If the certification is denied, the LNG facility cannot be constructed. A § 404 permit is required from the U.S. Army Corps of Engineers for discharge of dredged and fill material. The Corps permit also requires applicants to obtain § 401 certification, which can be blocked as stated above.
    - With respect to the CAA, a pre-construction permit is necessary for any major new source of air pollution, and a Title V operating permit is required for any major source of air pollution. If the responsible state agency (or EPA, if the state is not authorized or delegated) does not issue the permit, the project cannot go forward.

    An affected state also has the ability to be a cooperating agency with FERC during the review of a project under the National Environmental Policy Act (NEPA), and can contribute to the complete environmental review of the proposal.

14. The Maritime Transportation Security Act is at 116 Stat. 2086, Public Law 107–295, Nov. 25, 2002.

15. 33 U.S.C. § 1502(9)(a).

16. 33 U.S.C. § 1502(9)(c).

17. *See*, *e.g.*, *Primer on Ocean Jurisdiction—Drawing Lines in the Water*, published by the (now defunct) U.S. Commission on Ocean Policy, <http://www.oceancommission.gov/documents/full_color_rpt/03a_primer.pdf#search=%22200%20mile%20limit%20%2B%20US%22>. *See* also: Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, <http://fletcher.tufts.edu/multi/texts/BH363.txt>.

18. 33 U.S.C. § 1504.

19. These are the Departments of the Army, Commerce, Defense, Energy, Homeland Security, Interior, State and Transportation, the EPA, FERC and the White House Council on Environmental Quality (CEQ). The MOU itself can be found at: <http://www.etf.energy.gov/pdfs/DPA_MOU.pdf#search=%22Memorandum%20of%20Understanding%20Related%20to%20the%20Licensing%20of%20Deepwater%20Ports%22>.

20. 33 U.S.C. § 1503(c).

21. The Clean Air Act is at 42 U.S.C. §§ 7401 *et seq*. The Clean Water Act is at 33 U.S.C. §§ 1251 *et seq.* The Ocean Dumping Act is at 33 U.S.C. §§ 1401 *et seq.*

22. Defined as a coastal state that would be directly connected by pipeline to a deepwater port, or is located within 15 miles of such a port, or is otherwise so designated by the Secretary of Transportation. 33 U.S.C. § 1502(1).

23. 33 U.S.C. § 1508. If the governor fails to transmit his approval or disapproval to the Secretary within 45 days after the last public hearing on the application, then "such approval shall be conclusively presumed."

24. 33 U.S.C. § 1505.

25. 33 U.S.C. § 1511(a).

26. 33 U.S.C. § 1511(b).

27. 33 U.S.C. § 1514.

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Parker Continues a Long Tradition: How *People v. Wesley* Affected a Toxic Tort Case Twelve Years Later

By Robert Kenney

The recent New York Court of Appeals decision in *Parker v. Mobil Oil Corp*.[1] seems to have caught many off guard. After bracing for affirmation of a seemingly higher *Frye* standard,[2] the legal community was surprised with the Court's broad strokes. At first blush, the *Parker* decision appears to open the gate and cinch it closed at the same time. As a result, *Parker* continues to be the subject of wide debate. But, one thing is certain: New York remains a *Frye* state.

Focusing on causation of alleged disease from exposure to a toxic substance, the Court of Appeals made three pronouncements. First, experts may rely on means other than the precise quantification of the dose response relationship to demonstrate causation. Second, where a case meets the general liability test under *Frye*, the admissibility of expert testimony will turn on specific reliability—or foundation. Third, the Court observed in a footnote that the principles behind *Daubert* are "instructive" for the foundation analysis.

Speculation abounds that *Parker* has opened a fresh chapter in the New York *Frye* saga. This, however, may be an overstatement. While it is true that the Court of Appeals has now crystallized various principles, the standards themselves are not new. For instance, New York courts have long considered methodologies other than dose response as viable methods to establish causation. Well established are forms of extrapolation such as differential diagnosis, comparison to studies and mathematical modeling. So, the *Parker* Court has not opened the gate as perhaps it may first seem.

That a foundation inquiry naturally springs from the *Frye* test likewise is not a new idea. Indeed, as the Court of Appeals proclaimed in its 1994 *People v. Wesley* decision,[3] foundation has always been a prerequisite for admission of any evidence. *Wesley* is most often cited as the seminal case that—with a footnote—established New York as a "post-*Daubert" Frye* state.[4] But, the case goes deeper than that.

The *Wesley* Court addressed DNA profiling in the context of criminal trials. The prosecution presented witnesses at trial to testify that DNA tests showed blood on the defendant's t-shirt belonged to a murder victim. DNA testing was a relatively new science at the time of trial—1988—so the trial court conducted a *Frye* hearing on the technique. The trial court then admitted the testimony, finding that DNA testing had become a generally accepted science.[5] When the trial concluded, the jury convicted the defendant of murder.

The Supreme Court of the State of New York, Appellate Division, Third Department affirmed the conviction[6] and the Court of Appeals granted the defendant's request for review.[7] The Court of Appeals' majority affirmed, finding that DNA evidence was generally accepted as reliable in the scientific community. Without analysis, the majority found also that the prosecution had laid a proper foundation for admission of the DNA tests at trial.[8]

Chief Judge Kaye, joined by Judge Ciparik, concurred in affirming the guilty verdict because the prosecution presented enough evidence of guilt at trial without the DNA evidence. But, the concurring judges split with the majority on the admissibility of DNA evidence at trial. Their difference with the majority was focused on two key findings: First, that DNA testing had been accepted by the scientific community as reliable at the time of trial in 1988; and second, that the prosecution had laid a sufficient foundation to admit the evidence.[9]

Addressing *Frye*, the concurring judges agreed with the majority that the issue was "whether . . . the accepted techniques, when performed as they should be, generate results generally accepted as reliable in the scientific community."[10] They then focused on various publications that discussed the difficulties of DNA fingerprinting compared with simply identifying the DNA structure within a particular sample. The concurring judges also accepted one defense expert's testimony that the procedures were too new for science to validate. In the end, they found that forensic DNA analysis was still in its infancy and had not yet been generally accepted by the scientific community. [11] So, they believed, the trial Court erred in admitting the DNA evidence at trial. The concurring judges next turned to the foundation inquiry.

The *Wesley* majority had stated that the "issues of a proper foundation and of the adequacy of laboratory procedures here are not before us, though some of the arguments made by the parties appear not to make this distinction." But the concurring opinion pointed out that the trial court had not properly considered the foundation element, "relegating" it instead "for weighing by the jury." Thus, the trial court did not consider whether the "methodology and procedures were adequate to assure the reliability and accuracy of the results."[12]

The concurring judges recognized that the foundation element, like the *Frye* determination, "goes to admissibility of the evidence, not simply its weight." They then stated that "in each case, the court must determine that the laboratory actually employed the accepted techniques."[13] As

a result, a case can turn, not on whether the theory and methodology are generally accepted, but on whether the experts carried them out properly.

The concurring judges found that the prosecution did not establish the proper foundation because its experts did not follow proper methodologies and procedures for DNA testing. The concurring opinion concluded that the DNA evidence should not have been admitted at trial for this reason as well.[14]

The Court of Appeals embraced this reasoning some 12 years later in the unanimous *Parker* decision. In *Parker*, the plaintiff intended to call experts to testify that his 16-year exposure to gasoline containing benzene caused him to develop acute myelogenus leukemia ("AML"). The plaintiff's experts stated that his illness was caused by "extensive" exposure to gasoline and that he had an "abundant opportunity for exposure to benzene." The plaintiff's experts then linked these general statements to a study of oil refinery workers that found a relationship between increased levels of benzene exposure and leukemia. In doing so, the experts concluded that the plaintiff had "far more exposure to benzene" than the oil workers.

The defendants moved to preclude the experts under *Frye* and for summary judgment. The trial court denied the motions and the defendants appealed. The Supreme Court of the State of New York, Appellate Division, Second Department reversed the trial court and dismissed the case.[15] The Second Department first established that to prove causation in a toxic tort case, a plaintiff must set forth his exposure level to the toxic substance, that the substance can cause the disease (general causation) and that plaintiff's exposure likely caused the disease (specific causation). The Second Department then found that the proposed experts' opinions were speculative and did not meet the test. Specifically, the experts did not articulate with any specificity the plaintiff's benzene exposure level, did not quantify the dose response relationship between benzene and AML, and did not address specific causation in any fashion.[16]

The Court of Appeals affirmed on different grounds.[17] In the opinion, which Judge Ciparik authored, the Court agreed that a three-step analysis—showing plaintiff's exposure to a toxin, general causation and specific causation—was necessary to show causation.[18] But, the Court overruled portions of the Second Department decision in finding that *Frye* does not always require experts to "quantify exposure levels precisely" and that dose response is not the only means to meet the test. According to the *Parker* Court, experts can establish toxic tort causation in many ways, "provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community."[19] The Court sustained the use of extrapolation methods such as differential diagnosis, mathematical modeling, and qualitative reasoning for causation opinions. The Court also found that comparative studies would be appropriate—so long as the proponent could show how the plaintiff's exposure related to the subjects in the studies.[20]

When the Court turned to the facts in *Parker*, it carried the analysis beyond *Frye*. Citing *Wesley*, the Court confirmed that proponents of expert testimony must show not only general reliability, but specific reliability—or foundation—as well.[21] The *Parker* Court did not conduct a *Frye* analysis because the experts did not use novel techniques.[22] Instead, the Court looked to whether the methodologies that the experts used provided "a reliable causation opinion without using a dose-response relationship and without quantifying [plaintiff's] exposure."[23]

The *Parker* Court found that the Second Department properly excluded the opinion of plaintiff's first expert, a toxicologist and epidemiologist, because his citation to an epidemiological study of refinery workers was insufficient to establish causation. While the expert claimed that plaintiff had "far more exposure to benzene" than the refinery workers, he did not establish the workers' exposure level or how plaintiff exceeded it. Thus, plaintiff's first expert failed to support his conclusory statement as necessary for a proper foundation.[24]

Likewise, plaintiff's second expert, a medical doctor specializing in occupational medicine and epidemiology, failed to back up his claims that plaintiff's frequent exposure to excessive quantities of both liquid and vapor gasoline caused his AML. The Court found that even though "an expert is not required to pinpoint exposure with complete precision," the expert's statement could not "be characterized as a scientific expression of plaintiff's exposure level."[25] Thus, the Second Department's exclusion of plaintiff's second expert's testimony also was proper.

Neither expert cited studies or otherwise established a causal relationship between AML and benzene as a component of gasoline. While the Court found the experts' theories and methodologies did not require a *Frye* analysis, the Court nevertheless found that plaintiff's experts did not properly employ the accepted methodologies. Thus, their opinions lacked foundation and the Second Department was right to exclude them. On this basis, the Court of Appeals affirmed the Second Department's decision.

Speculation has it that *Parker* may signal a transition to the *Daubert* standard or a hybrid analysis in New York because of the Court's statement in a footnote that *Daubert* cases are "instructive."[26] But, that is unlikely. The *Parker* Court pointed to *Daubert* decisions only in its analysis of the reliability of experts' methodologies. The general acceptance of methodologies—although one prong of the *Daubert* test—also is part of the *Frye* analysis in toxic exposure cases. As the *Parker* decision suggests, New York remains a *Frye* state.[27] So, it does not appear that the Court of Appeals will allow *Daubert* principles to creep into the *Frye* analysis.

The October 2006 *Parker* decision already has been cited three times. Just a week after it was published, the Second Department referred to *Parker* in another toxic exposure case, *Edelson v. Placeway Construction Corp.*[28] In *Edelson,* the Second Department relied on *Parker* to preclude the plaintiffs' experts. The Court found that the experts' conclusory affidavit failed to establish that the plaintiffs' alleged toxic chemical exposure caused their injuries. In doing so, the Second Department further refined the foundation issue discussed in both the *Wesley* concurring opinion and the unanimous *Parker* decision. The *Edelstein* Court states that "[a] plaintiff alleging injuries from a toxic chemical exposure must provide *objective evidence* that the exposure caused the injury."[29] While the Court did not define "objective evidence," the language seems to narrow the findings of *Parker*. As a result, *Edelson* could be ripe for Court of Appeals review.

Two trial-level courts also have used *Parker* as a guide in their decisions. In the first case, *Adams v. Rizzo*,[30] the court cited *Parker* to define plaintiffs' burden as the three-step analysis for toxic exposure cases: exposure, general causation and specific causation. The Court reasoned that the plaintiffs did not meet the burden simply by asserting that "lead poisoning is *associated* with and *has*, *can* or *may* cause various neurodevelopmental inquiries in other children."[31] In the second case, *People v. Williams*,[32] the Court cited to *Parker*, along with *Wesley*, for the general principles and applicability of *Frye* in New York.

Aside from *Edelson*, *Parker* has not yet been tested. But, the Court of Appeals may soon get the opportunity to further define the *Parker* standards. Another case that is destined for the Court of Appeals is *Nonnon v. City of New York*, which the Supreme Court of the State of New York, Appellate Division, First Department decided in June 2006.[33] The *Nonnon* plaintiffs alleged that their 16-year exposure to toxic chemicals from a nearby landfill caused leukemia and other diseases. The defendants moved to dismiss certain claims, arguing that the scientific methodologies the experts used were insufficient to establish causation. In the alternative, the defendants asked for a *Frye* hearing. The plaintiffs, on the other hand, argued that their experts' methodologies—epidemiology and toxically—were generally accepted by the scientific community.

The First Department majority agreed with the plaintiffs. The Court found that because epidemiology and toxicology were not novel methodologies, a *Frye* determination was not warranted. The Court did not address whether the methodologies, as used by the plaintiffs' experts, sufficiently established causation. Reminiscent of *Wesley*, the Court simply stated that the experts had laid a proper foundation and, therefore, denied the defendants' motion.

The dissenting judges, looking to the *Wesley* concurring opinion, wrote that plaintiffs' experts failed both the *Frye* test and the foundation inquiry. The dissent argued that the *Frye* issue in *Nonnon* is not whether epidemiology and toxicology are accepted practices. Instead, the dissent saw the issue to be whether the scientific community accepted the experts' theories, based on those disciplines, that the landfill could cause plaintiffs' injuries.

The dissent found that the plaintiffs' experts had "failed to use generally accepted scientific methodology." Sounding a lot like the Court of Appeals in the *Parker* decision to come, the dissent found the expert's conclusions to be speculative "given the absence of any data, any reference to scientific authority or treatises, or other corroborating evidence."[34] Thus, the *Nonnon* dissent reasoned that the experts failed the foundation inquiry.

Nonnon appears to be a logical next step in the *Wesley-Parker* chronicle. *Edelson* may not be far behind. As these cases illustrate, *Parker* is not the final word in this field. Courts now will grapple with *Parker's* application. Experts will continue to present novel theories. And, *Frye* will continue to evolve. But, as the recent cases demonstrate, this evolution contemplates *Frye*'s survival in New York.

Endnotes

1. 7 N.Y.3d 434 (N.Y. Oct. 17, 2006).
2. *Frye v. United States*, 54 App.D.C. 46 (1923).
3. 83 N.Y.2d 417 (N.Y. 1994).
4. *Id*. at 424, n. 2.
5. *People v. Wesley,* 140 Misc.2d 306 (Albany Co. 1988).
6. *People v. Wesley*, 183 A.D.2d 75 (3d Dep't 1992).
7. *People v. Wesley*, 81 N.Y.2d 978 (N.Y. 1993).
8. *People v. Wesley*, 83 N.Y.2d at 424–425.
9. *Id*. at 436–438.
10. *Id*. at 436.
11. *Id*. at 444.
12. *People v. Wesley*, 83 N.Y.2d *Id*. at 437.
13. *Id*. at 436.
14. *Id*. at 437–444.
15. *Parker v. Mobil Oil Corp.,* 16 A.D.3d 648, 651 (2d Dep't 2005).
16. *Id*.
17. *Parker v. Mobil Oil Corp.*, 7 N.Y.2d 434.
18. *Id*. at 448.
19. *Id*.
20. *Id*. at 449.
21. *Parker*, 7 N.Y.3d at 447.
22. *Id*.
23. *Id*.
24. *Id*. at 449.
25. *Parker*, 7 N.Y.3d at 445.
26. *Id*. at 448, n. 4.
27. *Id*. at 446–447.
28. __ A.D.3d __, 2006 WL 3028238 (2d Dep't Oct. 24, 2006).
29. *Id*. (emphasis added).
30. 13 Misc. 3d 1235 (A), 2006 WL 3298303 (Onondaga Co. Nov. 13, 2006).
31. *Id*. at **13 (emphasis added).
32. 2006 WL 3431886 (Kings Co. Nov. 29, 2006).
33. 32 A.D.3d 91 (1st Dep't 2006).
34. *Id*. at 124.

PCBs in Building Materials: An Emerging Issue

By Douglas H. Zamelis

The three-letter abbreviation for the infamous polychlorinated biphenyl molecule, or "PCB," is well known to the general public. In 1981, former New York Governor Hugh Carey offered to swallow a glassful of PCBs following the cleanup of the Binghamton State Office Building.[1] General Electric legally discharged tons of PCBs into the Hudson River requiring dredging of the river bottom.[2] But what the general public does not know—and industry insiders and regulators are beginning to recognize and acknowledge—is that many buildings constructed prior to 1978, including schools, were constructed with certain building materials manufactured with PCBs before the federal government banned their manufacture and distribution.[3] Surprising to many is that unless a particular building material is to be removed or otherwise disturbed by demolition or renovation, there is no legal requirement to test for PCBs. As a result, PCBs continue to leach out of these building materials resulting in their release to the environment, thereby increasing the potential for exposure to the public.

In 2004, the Harvard School of Public Health published a study of PCBs in building materials.[4] Twenty-four buildings in the Greater Boston area were tested and eight were found to be constructed with such building materials as caulk, sealants, and gaskets containing more than 50 parts per million or "ppm" PCBs. The Harvard study concluded that the problem of PCBs in building materials could be widespread, and recommended routine testing of caulk and other building materials.

Dr. Daniel Lefkowitz, the parent of a child attending French Hill Elementary School in Yorktown Heights, Westchester County, read the Harvard study.[5] He determined his son's elementary school was built in 1969, and that the windows had been replaced in 2003. It was not difficult to find pieces of old window caulk on the ground outside the school as no special care had been taken with the caulk during the window replacement project two years earlier. A sample of the caulk and some surrounding surface soil were sent to an environmental laboratory for analysis. Imagine Dr. Lefkowitz's surprise when the laboratory reported that the caulk contained 38,000 ppm PCBs, which is 760 times the hazardous waste threshold under New York State Department of Environmental Conservation regulations.[6] The soil from his son's school grounds was likewise found to contain greater than one ppm PCBs, well above the soil cleanup objective for unrestricted use at New York Inactive Hazardous Waste Disposal Sites.[7]

Dr. Lefkowitz's discovery resulted in the excavation and removal of substantial quantities of contaminated soil from the school grounds. His findings echoed the conclusion of the Harvard study that many buildings constructed prior to 1978 contain building materials with PCBs which were legally manufactured and incorporated into the building materials before the federal government prohibited the manufacture and distribution of PCBs in 1977. It is when these building materials are disturbed by other than properly trained workers that there is the greatest potential for release of PCBs to the environment. The standard contractor method for caulk removal has been to remove as much as possible with a hand tool, and then to mechanically grind off any remaining caulk, as modern silicone-based caulks require a clean substrate to adhere to.[8] Once released to the environment, exposure pathways for humans include inhalation, digestion, and dermal absorption.

"[W]hat the general public does not know . . . is that many buildings constructed prior to 1978, including schools, were constructed with certain building materials manufactured with PCBs before the federal government banned their manufacture and distribution."

The PCB is a family of synthetic chemicals formed by the addition of chlorine to the biphenyl molecule.[9] The biphenyl molecule is composed of two carbon-based benzene rings linked by a single carbon bond, leaving ten remaining positions on the coupled benzene rings for either a hydrogen atom, or the substitution of a chlorine atom. Chlorine, a chemical bully, steals electrons from other atoms in a chemically disruptive reaction called oxidation. Benzene is a Group A known human carcinogen.[10] The substitution of one chlorine for one hydrogen creates a monochlorinated biphenyl, two chlorines creates a dichlorinated biphenyl, three chlorines a trichlorinated biphenyl, and so on. "Poly," from the Greek meaning "many," is the name given to the collective family of chlorinated biphenyl molecules.

Monsanto, the only domestic industrial manufacturer of PCBs, manufactured more than 1.5 billion pounds of PCBs from 1929 to 1977.[11] PCBs, which are clear to yellowish in color and range from liquid to waxy solid, were marketed under many names, most common of which

was the "Aroclor" series. PCBs were also sold under about 100 other trade names, including Therminol, Clophen, Pydraul, and Solvol.[12]

The PCB was the shining example of better living through chemistry. PCBs are non-flammable, chemically very stable, have a very high boiling point, and conduct heat very effectively.[13] PCBs were thus useful in hundreds of commercial and industrial applications including electrical equipment containing dielectric fluids such as transformers and capacitors. PCBs were also used in heat-transfer media, hydraulic equipment, fluorescent light fixtures, plasticizers, rubber products, carbonless copy paper, pigments, dyes, paints, and caulk.

Medical and environmental science soon caught up with the PCB, much as they did with mercury, lead, asbestos, and chlorinated solvents. A potent combination of benzene rings and chlorine, PCBs are a confirmed animal carcinogen and are a probable human carcinogen.[14] PCBs have very low solubility in water, are highly soluble in fat, and bioaccumulate in the fatty tissues of living organisms.[15] The consumption of many smaller organisms with concentrations of PCBs by larger organisms results in biomagnification up the food chain. PCBs are highly mobile in the environment and are very persistent.[16] Concentrations of PCBs have been detected in Antarctica.[17] Exposure to PCBs suppresses human immune system response and can have reproductive system effects, including reduced conception rate and reduced birth weight.[18] PCBs are an endocrine disruptor, and exposure suppresses neurological development.[19]

In light of the adverse environmental and health effects, Congress enacted in 1976 the Toxic Substances Control Act, or TSCA.[20] TSCA eventually prohibited the further manufacture, processing, and distribution of PCBs in commerce.[21] The manufacture of PCBs ceased in the U.S. in 1977.[22] The United States Environmental Protection Agency regulations authorize the use of PCBs in limited circumstances[23] and characterize other existing applications which contain greater than 50 ppm PCBs as an unauthorized use.[24] Any person who violates the requirements of TSCA or its regulations faces civil penalties of up to $32,500 per day, and any knowing and willful violation can result in imprisonment and other criminal penalties.[25]

Given the adverse health effects of PCBs, and the recognition that many buildings, including schools, built before 1978 contain building materials with PCBs which can leach and spread into and onto the outside of buildings, one might expect the federal and state governments to move swiftly to address the concern. That has not been the case. The New York State Education Department became aware of the Harvard study in 2004[26] and inquired of architectural and engineering design firms throughout New York State as to whether certain school building materials such as window caulking were being tested for PCBs as part of demolition and renovation projects.[27] The responses indicated that few design firms were testing for PCBs.[28] The New York State Education Department indicated it would be addressing the issue in consultation with the New York State Departments of Health and Environmental Conservation.[29] The New York State Department of Health and the State Education Department are presently preparing applicable guidance for school buildings.[30] However, no regulations, guidance, or instructions have been forthcoming.

Similarly, the federal government has been slow to react. USEPA is understandably unsure of how to address the potential threat to human health and the environment created by the release of PCBs from materials which may exist in millions of buildings throughout the United States. While building materials which contain greater than 50 ppm PCBs are technically an unauthorized use under TSCA, USEPA does not possess the funding or personnel to undertake an enforcement initiative of such enormous scope and magnitude.

Public and private building owners, design professionals, and contractors are on their own when it comes to compliance with the myriad laws and regulations applicable to PCBs. Until the issue is eventually addressed in legislation, regulations, or guidance, building owners, design professionals, and contractors should address this issue head on and all must accept the fact that the proper identification and management of building materials containing PCBs may substantially increase the cost of certain demolition and renovation projects. Improper management of PCB building materials could cause the release of PCBs and create the potential for human exposure inside and outside such buildings. Failure to strictly comply with all laws and regulations applicable to PCBs may subject building owners, design professionals, and contractors to substantial civil and criminal enforcement by governmental regulators and create exposure to civil liability from third parties.

Endnotes

1. Robin Herman, *Carey Would Sip A Glass of PCB's*, N.Y. Times, March 5, 1981, at B2.
2. www.epa.gov/hudson/consent_decree/2005factsheet.htm.
3. 15 U.S.C. §§ 2601 *et seq.*
4. Robert F. Herrick, et al., *An Unrecognized Source of PCB Contamination in Schools and Other Buildings*, Environ. Health Perspect. 112(10), 1051-53 (2004), http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1247375.
5. www.pcbinschools.org/How%20this%20started%20760.htm.
6. In New York, solid wastes that contain greater than 50 ppm PCB are a listed hazardous waste pursuant to 6 N.Y.C.R.R. subdivision 371.4(e) and are designated hazardous waste codes B001 through B009.

7. The "unrestricted use" soil cleanup objective for PCB is .1 ppm pursuant to 6 N.Y.C.R.R. subdivision 375-6.8(a). "Restricted use" soil cleanup objectives are set forth at 6 N.Y.C.R.R. subdivision 375-6.8(b).
8. Various personal communications with abatement contractors, 2006–present.
9. For a quick primer on PCB chemistry, see http://environmental chemistry.com/yogi/chemistry/pcb.html.
10. www.epa.gov/ttn/atw/hlthef/benzene.html.
11. www.epa.gov/pcb.
12. For a list of names of products which contained PCBs, see www.epa.gov/toxteam/pcbid/defs.htm.
13. www.epa.gov/pcb.
14. www.epa.gov/pcb/pubs/effects.html.
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Saving the Endangered Species Act

By David Johnson

> To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.[1]
>
> **Oliver Wendell Holmes**

Recently, the Endangered Species Act has come under attack in Congress[2] and is potentially in danger in the courts.[3] With the limitation of the Commerce Clause[4] as a constitutional grant of authority in *United States v. Lopez*,[5] *United States v. Morrison*,[6] and recently *SWANCC*,[7] the Endangered Species Act could be the next piece of legislation to be rejected under this limited interpretation of the Commerce Clause. But there is hope yet for the Endangered Species Act. The Property Clause, a lesser known and much less used power of Congress, could provide the constitutional authority needed to save the Endangered Species Act.

The Property Clause of the United States Constitution[8] gives broad powers to the federal government to regulate activities on its own property. These powers have also been used to regulate activities off federal lands when those activities have or could have affected the federal lands.[9] External applications of the Property Clause have been successfully upheld on inholdings surrounded by federal land,[10] as well as on state or private land adjacent to the federal land.[11]

Even though federal agencies occasionally rely on this power, the extent to which this extraterritoriality application of the Property Clause can regulate activities off federal lands has never been tested. Rather it has only been applied in limited circumstances. Perhaps this is because of an unwillingness to see that power, which is currently vague and potentially unrestricted, limited by courts. This unwillingness is only compounded by divisive opinion in scholarly circles. While some commentators believe that this power could be used expansively,[12] others argue that the power only extends to regulating, "closely adjacent, nuisance-like activities."[13]

While the extent to which the Property Clause's extraterritorial application is unknown, it is not the purpose of this article to determine the Clause's limits. Rather this article will attempt to apply current jurisprudence to a widely supported and also widely reviled piece of environmental legislation: the Endangered Species Act of 1973. In Part I of the article, I will trace the historical development of the extraterritorial application of the Property Clause from *Camfield*[14] to the present in order to provide a current understanding of the Clause. Part II will attempt to address some recent criticisms of the "without limitations" ruling in *Kleppe*.[15] Finally, Part III will apply the current state of the law specifically to the preservation of the Endangered Species Act.

I. The Evolution of the Property Clause

A. Early Applications

The language of the Property Clause as it relates to Congress' regulation, occupation, and use of lands owned by the United States government is both inclusive and unconditional: that Congress has the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[16] While there are some "Classical" Property Clause theorists who argue that Property Clause jurisprudence has been misinterpreted and that the Clause does not even authorize federal retention of public lands, a thorough opposing analysis of the "Classical" Property Clause theory has already been discussed.[17] Instead, it is this author's view that even the narrowest reading of the Clause grants to the federal government the power to regulate all those activities that occur on its own lands. The Supremacy Clause further guarantees that any lawfully enacted Property Clause authority will trump conflicting state authority.[18]

This uncompromising language seems to leave no room for exceptions on federal property and in reality, case law decided on the application of the Property Clause has repeatedly supported this broad definition. Courts have held that the United States "can prohibit absolutely or fix the terms upon which its property may be used. As it can withhold or reserve the land it can do so indefinitely."[19] Moreover, when describing the extent of this power, the Supreme Court has repeatedly stated that "power over

the public lands thus entrusted to Congress is without limitations."[20] The United States need not fear adverse possession or prescription on its lands[21] and its lands remain free from any state action of eminent domain.[22] Even early case law on the matter allowed the federal government to violate conflicting state law on its own property.[23]

But while the use of federal power on federal lands is unquestioned, it is the use of the Property Clause on non-federal lands where the extent of Congress' power is unknown. In a trio of cases decided since 1897, courts have held that Congress has the power to regulate private activities which occur on private lands located within a state when those activities impact federal lands or the purpose for which federal land is reserved.

In the first of these cases, *Camfield v. United States*,[24] the United States applied a statute prohibiting the enclosure of public lands to force the removal of fences which were located on adjacent private land. The Supreme Court compared the fences to a private nuisance and states that the federal government has "the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers."[25] In the case of an established nuisance, "legislation was necessary to vindicate the rights of the government as a landed proprietor."[26]

The Supreme Court further states that the government's rights go beyond that of an ordinary proprietor. It is also the sovereign of such lands. The government is the legislator and can enact laws to maintain their absolute possession. The Court compares this right to the state police power when it held that, like a state, the federal government may enact legislation against the erection of injurious fences which did not qualify as nuisances.

The Court found that when the United States enacted legislation preventing the enclosure of their lands in 1885, that legislation was enacted prohibiting "all enclosures of public lands, by whatever means."[27] This statute was able to withstand constitutional scrutiny in regards to the defendants because of the application of the Property Clause's sovereign power over adjacent private property. With the statute in place, the federal government was authorized to enter upon the lands of a private individual and remove any nuisance restricting entry onto public lands. Any other result, the Court reasoned, would place "the public domain of the United States completely at the mercy of state legislation."[28]

A similar result was reached in 1927 when the United State prosecuted an individual for leaving a fire unattended near the public domain.[29] The Court found that even though the fire was left on adjacent public lands, the "purpose of the act depends on the nearness of the fire [to the public lands], not upon the ownership of the land where it is built."[30] It should be noted in Justice Holmes' tersely worded opinion, that unlike in *Camfield*, there is no discussion of whether this result could be reached on a claim of nuisance.

One further early opinion on this matter was decided by the Fourth Circuit.[31] In that case, the Back Bay Waterfowl Refuge was created by the federal government in order to offer sanctuary as a feeding and resting area for migrating waterfowl. The protection was designed to restore waterfowl populations, "whose numbers had plummeted during a century of mismanagement."[32] But the protection of the sanctuary was offset by the existence of a private hunting club just outside the refuge, where hunters shot the waterfowl as they arrived. Consequently, the federal government banned all hunting on 5,000 acres of surrounding state and private land, including the hunting club.

After the owner of the hunting club filed suit, the Fourth Circuit held in favor of the government, holding that even though the United States claimed no title to the lands, the ban was necessary to support the refuge. The government was thus able to prohibit all hunting within that 5,000-acre area surrounding the refuge. Moreover, the Court reversed the holding of the lower court that granted compensation for the taking, stating that allowing the collection of compensation in cases where the government has not acquired any proprietary interest "would lead to unfortunate limitations on the power of the Secretary."[33]

B. *Kleppe* and Its Progeny

While early case law discussed the protection of federal land itself or for the purpose of that land, the most important recent case in this field seemingly expanded Congress' Property Clause power by allowing the regulation of wildlife associated with that federal land. In *Kleppe v. New Mexico*,[34] the Court discussed the authority of federal agencies to regulate wildlife on both federal and non-federal lands. Under the suit, the state of New Mexico challenged the constitutionality of the Wild Free-Roaming Horses and Burros Act of 1971, which protects feral horses and burros on public lands.[35] In order to effectuate the statute, the Act authorized the federal government to round up any animals which strayed off federal property and bring them back to the federal lands.[36]

In the case, a group of burros were spotted near a water source on federal lands. Stephenson, a cattle grazer with a grazing permit complained to the Bureau of Land Management, which refused to remove the burros from the water source. Stephenson then complained to the Livestock Board of New Mexico, which then rounded up and removed 19 burros pursuant to the New Mexico Estray Law. Each burro was seized on federal property and sold at auction off federal lands. After this sale, the state of New Mexico filed suit claiming that the Burros Act was unconstitutional.

The State claimed that Congress possessed only two types of power under the Property Clause: (1) the power to protect federal property; and (2) the power to dispose of and make all rules regulating the use of federal property.[37]

The Court rejected both of these arguments, finding that while the Court had previously recognized Congress' power to prevent damage to federal property as in *Alford*,[38] it had never limited Congress' Property Clause power to only those situations.[39] Rather, the Court expanded the ruling in *Camfield* by stating that it is up to Congress to determine what are "'needful' rules 'respecting' the public lands."[40]

One of the effects of *Kleppe* can be seen in its expansive application of federal Property Clause jurisdiction to more than just the land itself. New Mexico unsuccessfully argued that the Property Clause was designed to protect only the public lands.[41] They contended that because the burros were causing no damage to the federal lands, as the deer were in *Hunt*,[42] the federal government had no jurisdiction over the burros. But rather than limiting extraterritoriality to the land itself, the Court in *Kleppe* examined the Congressional findings that went into the making of the Inclosures Act.[43] One of these deemed horses and burros to be "an integral part of the natural system of public lands."[44] Conceding that "determinations under the Property Clause are entrusted primarily to the judgment of Congress,"[45] the Court held that wild animals were part of the public lands.

In so holding, the Court reaffirmed the long-standing holding of *Camfield* that the "power over the federal lands thus entrusted to Congress is without limitation."[46] Under the Property Clause, the United States may make whatever laws it deems necessary to care for public lands, and that these laws override any conflicting state law under the Supremacy Clause.[47] The Court also held that "the power granted by the Property Clause is broad enough to reach beyond territorial limits."[48]

The Court ended its holding with a discussion of the impact of the Supremacy Clause on New Mexico's position as the trustee of all wild animals within state jurisdiction. While the Court recognized that each state owned the animals in trust and had a duty to protect the burros for the benefit of its citizens, the state's duties can only exist, "in so far as [their] exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution."[49] Clearly, even a duty that is as important as the public trust can be trumped by the application of the Property Clause when it concerns federal lands.

While the facts in *Kleppe* did apply to activities that took place entirely on federal lands, the challenge to the constitutionality of the Burros Act dealt with broader issues of the extent of Congress' power to regulate off federal lands. The language of the Court shows the sweeping nature of the constitutionality of the Burros Act as a "valid exercise of the federal government's power under the Property Clause."[50]

The Court's unanimous approval of the Wild Free-Roaming Horses and Burros Act in *Kleppe* was a significant expansion of Property Clause jurisprudence.[51] *Camfield* and *Alford* involved statutes which were directly related to the protection of public land or protection for the purpose of the land. Unlike those cases, "the nexus between the legislation in *Kleppe* and the federal lands themselves is relatively indirect."[52] By authorizing Congress to act as both the proprietor and legislator of federal land, the Court's holding resembles the evolution of the federal police power that was first discussed in *Camfield*.

Since the *Kleppe* case, a number of decisions have been decided in the Eighth and Ninth Circuits involving the extraterritoriality of the Property Clause off federal lands.[53] These courts have upheld hunting prohibitions,[54] camping restrictions,[55] boating regulations,[56] interference with public officers,[57] and commercial enterprise regulations.[58] In these cases, the holding of *Kleppe* was reiterated, stating that the Property Clause reaches beyond federal territory.[59]

Perhaps the leading case on point is *Minnesota v. Block*.[60] Congress had outlawed all mechanized transportation of all federal, state and private lands within the boundaries of a federal wilderness area. The state of Minnesota and others challenged the constitutionality of this statute on the grounds that it applied to lands which the federal government did not own. The Court rejected these claims, stating that forbidding uses on state or private land which are potentially injurious to adjacent federal land is a "necessary incident" of Congress' Property Clause Power.[61] The Court then held that a two-part test applied to these cases, that "if Congress enacted the . . . restrictions to protect the fundamental purpose for which the [federal area] had been reserved, and if the restrictions are reasonably related to that end, we must conclude that Congress acted within its constitutional prerogative."[62]

II. Criticism of the Scope of the Property Clause

One recent commentator has argued that the decisions in *Camfield*, *Alford,* and *Kleppe* were, rather than expansive, limited only to "nuisance-like activities on non-federal lands that directly threaten the existence of, or access to, federal lands."[63] While Professor Eid's assertion that the Court in *Camfield* did discuss the applicability of nuisance, this was not really about nuisance or trespass. Rather, this was a case about applicable state law directly conflicting with the Unlawful Inclosures of Publics Lands Act of 1885 ("Inclosures Act").[64] The Court did not decide this case based on the nuisance afflicted upon the United States. Instead, the Court decided this case based on the application of the Inclosures Act to the defendant's private property. While the discussion of nuisance suggests that common law is what this case was decided on, the Court's conclusion that "Congress exercise[ing] its constitutional right of protecting the public lands from nuisances erected on adjoining property"[65] directly addresses Congress' Property Clause power to make all "needful rules and regulations."[66]

Further, the Court held that if the federal government so chose, it could forbid all enclosures of public lands, even "though the alternate sections of private lands are thereby rendered less available for pasturage."[67] This indicates that the federal government's right to restrict activities burdening federal land is not bound by the harm done to private property and that any harm is not weighed against the regulation, so long as the regulation is reasonable.

Even so, the statute in *Camfield* was not even originally enacted to protect the federal lands from damage; it was to encourage further public use of those federal lands by preventing the unlawful enclosure of those lands.[68] The Court discusses this by examining the history of the Inclosures Act and finding that before the statute was in place, "the government had suffered serious abuses at the hands of private individuals occupying the odd-numbered checkerboard sections, who had repeatedly succeeded in enclosing tracts of government land for their private use."[69] The Court held that the real purpose of the Act was not to protect the land from any harm, but rather to prevent this type of exclusive fencing which prevented the settling of unoccupied federal lands.[70]

The holding in *Camfield* can be stated simply: So long as the purpose claimed by the federal government is lawful, it may burden public land, no matter how burdensome the restriction. Clearly the Court is reaching this decision based on more than just a nuisance claim by a proprietor of land.

In *Alford*, the Court does predicate the statute upon a claim of nuisance when it states that "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."[71] But when the Court makes this declaration, it is referencing *Camfield* and the federal government's power to restrict any act on private land that interferes with the government's regulation of federal lands.

Further, it should be noted in *Bailey v. Holland* that the federal government was allowed to burden adjacent private land under the Property Clause application without paying just compensation.[72] In that case, the government's designation of 5,000 acres of adjacent property as non-hunting land extinguished the value of the owner's land and all of its improvements, but the Court denied payment of compensation for this burden.[73]

Perhaps Professor Eid also overreaches when she argues that the subsequent decision in *Kansas v. Colorado*[74] strips *Camfield* of much of its power. She reads the case as a limit on Congress' Property Clause power to override conflicting state law which burdens federal land. But rather than being a case about the application of Property Clause extraterritoriality, *Kansas v. Colorado* stands for the proposition that the Property Clause "does not grant to Congress any *legislative control* over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."[75] *Kansas v. Colorado* is not about limiting Congress' power under the Property Clause, but is about Congress' inability to force a particular type of water law on a state. It is well settled that Congress cannot dictate to the states how to govern their own territory, but that is exactly what Congress was trying to do in this instance. It is for that reason, and not a limit on the Property Clause, that the Court rejects the argument of the United States.

The assertion of Professor Eid that the holding in *Camfield* is limited by *Kansas v. Colorado* is tempered by the Court's emphasis in *Kansas* that its decision did not erode any earlier precedent. The Court states that it has "no disposition to limit or qualify the [holdings] which have heretofore fallen from this court" regarding the Property Clause.[76] Clearly, the ruling in *Camfield* is not affect by *Kansas v. Colorado*.

In addition, subsequent jurisprudence on this issue has stated that the ruling in *Kansas v. Colorado* "has been greatly limited by the Supreme Court."[77] This ruling reaffirms that the holding in *Kansas v. Colorado* only establishes that "Congress has no plenary authority over conduct on non-federal land; rather, Congress must demonstrate a nexus between the regulated conduct and the federal land, establishing that the regulations are necessary to protect federal property."[78]

Finally, Professor Eid correctly argues that an almost limitless extraterritorial reach of the Property Clause would stand in opposition to the principles of New Federalism.[79] New Federalism is a principle which argues that constitutional principles which impact federalism must have some inherent limits.[80] But, as Professor Eid argues, those limits are "also about signaling Congress to base its regulations in the appropriate enumerated power."[81] That is why Professor Eid's requirement for a nuisance-based limit on the Property Clause doesn't make sense. If Congress were basing a regulation on the correctly enumerated power and were applying it correctly, then the application of that power would, in effect, be limitless. In the case of the Property Clause, if Congress passes legislation that touches non-federal land in order to somehow protect federal land, then Congress' ability to do so would not threaten New Federalism because of the appropriateness of the power.

Professor Eid's belief that a nuisance-based limitation on Property Clause applications would be an appropriate basis for its implementation would also doom the Property Clause from the start.[82] As she mentions, nuisance is, "a notoriously slippery subject,"[83] as one man's nuisance is another man's windfall. For this reason, applying the concept of nuisance to the limits of the Property Clause would prove to be unwieldy. How can one determine what is a nuisance to a government agency? What if there were conflicting interests between two applicable agencies? In addition, if nuisance were used as the yardstick for Property

Clause application, the ruling in *Kleppe*—which relied not on a theory of nuisance, but rather on the conflict between state and federal law—would be invalidated.

III. Property Clause Applications to the Endangered Species Act

If Commerce Clause protection for the Endangered Species Act is unable to protect those species which may only be found on state or private lands, but whose existence preserves biodiversity on federal lands, then perhaps an alternative source of congressional authority might be found in the Property Clause. While the ruling in *Kleppe* showed that the Court would defer to Congress' recognition that the preservation of wild animals is "an integral part of the natural system of public lands,"[84] that holding applied to wild animals that generally lived on or near federal lands.

However, there are many endangered species which are not to be found on federal lands. Protection for these species must be found not by looking at the federal lands themselves, but at how courts have construed the term "property" that appears in the Property Clause. As was seen in *Kleppe*, wild horses and burros are considered property of the federal land. In a Tenth Circuit decision decided the same year,[85] the Court considered another case under the Inclosures Act, where the holding in *Camfield* was extended to "include wildlife conservation among the objectives that Congress could promote."[86]

Lawrence was a case which dealt with restricted access to federal lands in almost the same way as the Court did in *Camfield*. There were two notable differences. In this case, the landowner erected a fence on his own private lands, which fenced in over 20,000 acres, of which 9,600 of them were federal lands. The first difference was that unlike in *Camfield*, where the defendants had no claim to the federal property, the defendant here had an exclusive grazing permit to those federal lands. So while *Lawrence* is in violation of the Inclosures Act, the justification for applying the Act off federal lands in *Camfield*[87]did not necessarily apply here because he was already the only person able to settle or use those lands. Here is where the second difference between *Camfield* and Lawrence appears. Rather than discussing a restriction on access to people, the Court held that the Property Clause power, "is not diminished where Congress acts to protect antelope rather than people. *Camfield*'s characterization of the federal property power was recently reaffirmed with regard to wildlife by the Supreme Court."[88] The Act, the c\Court concluded, "preserves access to federal lands for 'lawful purposes,' including forage by wildlife."[89]

In a subsequent case, a district court held that the United States could prohibit a state from spraying pesticides in order to kill black flies, even when the federal government owned only 6,000 acres of the 60,000 acre New River Gorge National Basin.[90] The Court noted that even though black flies were pesky and annoying, they "are clearly 'wildlife'"[91] and that "the power of the United States to regulate and protect the wildlife living on the federally controlled property cannot be questioned."[92] And in order to effectuate the applicable regulation in *Moore*, that power of the United States needed to be extended to non-federal lands when it affected the federal lands.[93]

These rulings do much to justify protection for wildlife as "property" under the Property Clause. Even though the Court recognized that the black fly itself was a nuisance and lived much of its life off federal lands, its status as wildlife guaranteed it protection under the Clause. There is no reason to believe that these protections could not be extended to include the "full range of biological diversity located on the public lands."[94] Given the substantial interdependence of all organisms, there is no reason to suspect that Congress' power to regulate wildlife protection off federal lands would be limited, if the biological diversity of wildlife on federal lands becomes threatened.

In addition, by applying the Property Clause to the Endangered Species Act, it would overcome any judicial challenges to the "takings" clause of the Act. This could prevent constitutional Commerce Clause challenges and courts requiring compensatory payments for any land that is burdened by species preservation. While claiming that the ESA is authorized by the Property Clause would not prevent Congressional changes to the ESA, it does provide the basic grant of authority to sustain the current Act's constitutionality. As Professor Goble has argued, this same Property Clause power could provide to the major federal land-management agencies the authority to follow through on their mandates to conserve biodiversity.[95] By using the Property Clause as a grant of authority to their actions, they could permissibly extend their regulations to activities occurring off federal land when biodiversity on federal land is threatened.

Finally, application to this specific Act is by no means exclusive. The extraterritorial application of the Property Clause could be extended to other legislation affecting the federal lands.[96]

IV. Conclusion

By the early Twentieth Century, a broad view of the power of Congress under the Property Clause had been upheld by the rulings of the Supreme Court. These holdings have repeatedly affirmed the preemptive use of the Property Clause power to override conflicting state law, even when the conduct regulated is off federal lands.

By applying the Property Clause's ability to regulate off federal lands with the Endangered Species Act's stated goal of recovering endangered species in order to conserve biodiversity, any challenge to the constitutionality of the Act under the Commerce Clause could be prevented.

Endnotes

1. *Missouri v. Holland*, 252 U.S. 416, 434–435 (1920).
2. Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (2005). This bill would have stripped the law of some of its toughest enforcement provisions and would have created a costly new government program which would have required the government to pay large sums of money to property owners whose land was affected by the protection of an endangered species. Zachary Coile, *House Votes Major Changes to Endangered Species Act*, THE SAN FRANCISCO CHRONICLE, September 30, 2005, at A3.
3. Julie Hilden, *Supreme Court Nominee John Roberts' Controversial Environmental Law Dissent: It Reveals Him as an Extreme Proponent of "State's Rights" Federalism, to the Detriment of Endangered Species*, FINDLAW, August 1, 2005, http://writ.corporate.findlaw.com/hilden/20050801.html (last visited Dec. 16, 2005); Jud Matthews, *Turning the Endangered Species Act Inside Out?*, 113 YALE L. J. 947 (2004).
4. "To regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.
5. 514 U.S. 549 (1995) (the Court held that Congress exceeded their authority under the Commerce Clause in regulating the possession of guns near schools under the Gun-Free School Zones Act of 1990).
6. 529 U.S. 598 (2000) (the Court held that Congress exceeded its authority in establishing civil remedy provisions in the Violence Against Women Act).
7. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (the Court held that isolated wetlands, which were protected under the Migratory Bird Rule, could not be protected under the Clean Water Act).
8. U.S. CONST. art. IV, § 3, cl. 2.
9. *See infra* notes 25–63 (discussing the application of the Property Clause on non-federal lands).
10. *Minnesota v. Block*, 660 F.2d 1240 (8th. Cir 1981), *cert denied*, 455 U.S. 1007 (1982); *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977); *Bailey v. Holland*, 126 F.2d 317 (4th Cir. 1942).
11. *Kleppe v. United States*, 426 U.S. 529 (1976); *United States v. Alford*, 274 U.S. 264 (1927); *Camfield v. United States*, 167 U.S. 518 (1897); *Free Enter. Canoe Renters Ass'n v. Peters*, 711 F.2d 852 (8th Cir. 1983); *United States v. Arbo*, 691 F.2d 862 (9th Cir. 1982).
12. William J. Lochhart, *External Threats to Our National Parks: An Argument for Substantive Protection*, 16 STAN. ENVTL. L. J. 3, 45–51 (1997); Dale D. Goble, *Constitutional Conflicts on Public Lands: The Property Clause: As If Biodiversity Mattered*, 75 U. COLO. L. REV. 1195 (2004).
13. George Cameron Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 17-18 (1985); Allison H. Eid, *Constitutional Conflicts on Public Lands: The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241 (2004).
14. *Camfield v. United States*, 167 U.S. 518 (1897).
15. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).
16. U.S. CONST. art. IV., § 3, cl. 2.
17. Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985) (refuting Classical Property Clause theorists in a discussion of Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of Public Lands*, 12 PAC. L. J. 693, 696 (1981); David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 296 (1976); C. Perry Patteron, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 43 (1949); Robert E. Hardwicke, et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 423–24, 429–32 (1946). "Classical" Property Clause theorists point to dicta in *Fort Leavenworth R. Co. v. Lowe*, 113 U.S. 525 (1885) as support for this contention. Their argument was the basis for the short-lived Sagebrush rebellion of the later 1970s. Courts have consistently rejected the 'Classical' theory for a century and a half. George Cameron Coggins & Robert L. Glickman, MODERN PUBLIC LAND LAW 41–23 (1ST rep. 2004).
18. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. U.S. CONST. art. VI, cl. 2.
19. *Light v. United States*, 220 U.S. 523, 536 (1911).
20. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); *United States v. San Francisco*, 310 U.S. 16, 29 (1940); *Light v. United States*, 220 U.S. 523, 532 (1911); *United States v. Gratiot*, 39 U.S. (14th Pet.) 526, 537 (1840).
21. *See United States v. California*, 332 U.S. 19, 40 (1947).
22. *See Minnesota v. United States*, 305 U.S. 382, 384–387 (1939).
23. *Hunt v. United States*, 278 U.S. 96, 100 (1928). While the District Court allowed the United States to cull deer herds on its property, it did bar the federal government from licensing private hunters to cull the herds. The Supreme Court limited the federal government even further, requiring federal agents to specially tag all deer carcasses. These exceptions to the power of the Property Clause do not truly limit the clause, but were interpreted as specific exceptions to this case.
24. 167 U.S. 518 (1897).
25. *Id.* at 524.
26. *Id.*
27. *Id.* at 525.
28. *Id.* at 526.
29. *United States v. Alford*, 274 U.S. 264 (1927)
30. *Id.*
31. *Bailey v. Holland*, 126 F.2d 317 (4th Cir. 1942).
32. Harry R. Bader, *Potential Legal Standards for Resolving the R.D. 2477 Right of Way Crisis*, 11 PACE ENVTL. L. REV. 485, 499 (1994).
33. *Bailey*, 126 F.2d at 324.
34. 426 U.S. 529 (1976).
35. 16 U.S.C. §§ 1331–1340 (1982).
36. The Act provides that, "if wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshal or agent of the Secretary, who shall arrange to have the animals removed. In no event shall such wild free-roaming horses and burros be destroyed except by agents of the Secretary." *Id.* at § 1334.
37. Blake Shepard, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. ENVTL. AFF. L. REV. 479, 500 (1984).
38. *United States v. Alford*, 274 U.S. 264 (1927).
39. *Kleppe*, 426 U.S. at 539.
40. *Id.*
41. *Id.* at 536.
42. *Hunt v. United States*, 278 U.S. 96 (1928) (The Supreme Court affirmed a permanent injunction against the State of Arizona enjoining them from arresting or prosecuting federal officers who killed deer in violation of Arizona state law. The Court found that the federal officers were killing the deer under orders from the Secretary of Agriculture in order to prevent over-foraging and damage to federal lands).
43. *Kleppe*, 426 U.S. at 535–36.
44. *Id.* at 535.
45. *Id.* at 536.

46. *Id.* at 539 (citing *United States v. San Francisco*, 332 U.S. 19, 40 (1947)).
47. Peter Morrisette, *Is There Room for Free-Roaming Bison in Greater Yellowstone?*, 27 ECOLOGY L. Q. 467, 507 (2000).
48. *Kleppe*, 426 U.S. at 538.
49. *Id.* at 54 (quoting *Geer v. Connecticut*, 161 U.S. 519, 528 (1896)).
50. Peter A. Appel, *The Power of Congress"Without Limitation": The Property Clause and federal Regulation of Private Property*, 86 MINN. L. REV. 1, 75 (2001).
51. Shepard, *supra* note 37 at 501.
52. *Id.*
53. Barry Holt, *Property Clause Regulation Off Federal Lands: An Analysis, and Possible Application to Indian Treaty Rights,* 19 ENVTL. L. 295, 299 (1988).
54. *United States v. Brown*, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977). "In light of these general standards [interpreted in *Camfield* and *Kleppe*], we view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands." *Id.* at 822.
55. *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979). "It is well established that this clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." *Id.* at 6.
56. *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). The Court in *Block* found that Congress could permissibly restrict the use of motorboats on navigable waters which were not owned by the federal government.
57. *United States v. Arbo*, 691 F.2d 862 (9th Cir. 1982) "We conclude that the officer's compliance inspection was reasonably necessary to ensure that practices on Arbo's claim did not pose a fire or health risk to adjacent federal land, regardless of whether the claim was on state land. Thus, under Lindsey, Arbo's interference with the officers is not beyond the jurisdiction of the United States." *Id.* at 865.
58. *Free Enter. Canoe Renters Ass'n v. Peters*, 711 F.2d 852 (8th Cir. 1983). "Under this authority to protect public land, Congress' power must extend to regulation of conduct on or off public land that would threaten the designated purpose of federal lands." *Id*. at 856. *Wilkerson v. Department of the Interior*, 634 F. Supp. 1265 (D. Colo. 1986).
59. *Lindsey*, 595 F.2d at 6.
60. *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied,* 455 U.S. 1007 (1982).
61. *Id.* at 1249.
62. *Id.* at 1250.
63. Eid, *supra* note 13 at 1247.
64. *Camfield v. United States*, 167 U.S. 518 (1897).
65. *Id.* at 528.
66. U.S. CONST. art. IV, § 3, cl. 2.
67. *Camfield v. United States*, 167 U.S. 518, 525 (1897).
68. Gaetke, *supra*, note 17 at 654. "The 1885 Act was enacted to secure open access to public lands for pasturage and settlement. It was the congressional response to a number of fencing schemes that took advantage of the checkerboard land ownership created by the grants of land to railroads for the construction of the transcontinental railroad." *Id.* at 238 (discussing The Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-1066 (2005)).
69. Shepard, *supra* note 37 at 496.
70. *Camfield v. United States*, 167 U.S. 525 (1897).
71. *United States v. Alford*, 274 U.S. 264 (1927).
72. *Bailey v. Holland*, 126 F. 2d 317, 324 (4th Cir. 1942).
73. *Id.*
74. 206 U.S. 46 (1907).
75. *Id.* at 89 (emphasis added).
76. *Id.*
77. *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981), *cert denied*, 455 U.S. 1007 (1982).
78. *Id.*
79. Eid, *supra* note 13 at 1257.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Kleppe v. New Mexico*, 426 U.S. 529, 535 (1976).
85. *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir. 1988).
86. Goble, *supra* note 12 at 1216.
87. The Court has held that the purpose of the Inclosures Act was not to protect the land from harm, but rather to stop fencing which prevented the settlement of unoccupied federal lands. As stated by the court in *Camfield*, "If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so." *Camfield v. United States*, 167 U.S. 518, 525 (1897).
88. *United States ex rel. Bergen v Lawrence*, 848 F.2d 1502 (10th Cir. 1988) (discussing the ruling in *Kleppe v. New Mexico*, 426 U.S. 529 (1976)).
89. *United States ex rel. Bergen v. Lawrence*, 858 F.2d 1502, 1509 (10th Cir. 1988).
90. *United States v. Moore*, 640 F. Supp. 164 (S.D. W. Va. 1986).
91. *Id.* at 167.
92. *Id.* at 166.
93. *Id.*
94. Goble, *supra* note 12 at 1217.
95. *Id.* at 1240.
96. For examples of this sort of application, see Appel, *supra* note 50 at 80–82 (Professor Appel discusses the Property Clause power's grant of extraterritorial application to various other hypothetical regulations, such as the Gun-Free Building Zones Act which, like the School Zones Act rejected in *United States v. Lopez*, applies to people who carry a firearm or explosive within 1,000 feet of a federal building. A hypothetical statute that is more on point with this article might be his National Parks Clean Air Act which regulates the emission of sulfur dioxide and nitrogen oxides based on their affect on creating acid rain, which harms the national parks. In that case, Congress could seek to regulate pollution both within and outside federal lands because of the substantial effects they have on the federal lands.

Recent Decisions in Environmental Law

Student Editor: James Denniston

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

***Eadie v. Town Bd. of Town of N. Greenbush*,**
7 N.Y.3d 306, 2006 N.Y. Slip Op. 0523 6

Facts

Petitioners, seeking to annul the rezoning of a large area of land to permit retail development, filed a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment. The petition alleged that the Generic Environmental Impact Statement (GEIS) was inadequate because the proposed mitigation efforts within the access management plan were "vague and discretionary" and that its "proposed changes to the transportation infrastructure" required preparation of a supplemental GEIS and that the rezoning was not lawfully enacted because it required a supermajority vote under Town Law § 265(1)(b).

Pursuant to the State Environmental Quality Review Act (SEQRA), the Town released a Draft Generic Environmental Impact Statement (DGEIS) addressing the proposed rezoning. The DGEIS included a section discussing traffic impacts that stated that an "access management plan"[1] would be needed, but describing only generally what the plan would contain. After public hearings and written comments, on March 25, 2004 the Town adopted a final GEIS that included an access management plan proposing to construct several access roads and other improvements and discussing budgetary aspects of the construction. The plan, however, did not provide a schedule for the construction of the proposed improvements. After another comment period, the Town adopted a findings statement on April 28, 2004, approving the proposed rezoning and completing the SEQRA process. The findings statement also did not provide a schedule for implementing the mitigation measures contained in the access management plan but stated that "the timing of the improvements is beyond the scope of this GEIS," explaining that "the Town cannot logistically or accurately determine at this time which parcels will be developed and when."

On May 4, 2004, the Town Board held a public hearing on the proposed zoning change at which petitioners presented a protest petition which, if effective, would require a three-quarters vote of the Town Board to approve the zoning change rather than the usual simple majority vote needed, pursuant to Town Law § 265(1). The protest petition was signed by owners of more than 20 percent of the land located within 100 feet of the parcels affected by the rezoning. The Town determined that the petition was ineffective because the petitioners did not own 20 percent of the land within 100 feet from the rezoned area, within the affected parcels, as they interpreted the law to require, and they passed the rezoning by a vote of three-to-two on May 13, 2004.

On September 10, 2004, more than four months after the issuing of the findings statement that marked the completion of the SEQRA process but less than four months after the Town Board's vote to enact the rezoning, petitioners filed the underlying action. The Supreme Court, Rensselaer County, granted petitioner's application and annulled the rezoning, siding with the petitioner's interpretation of Town Law § 265(1) as requiring a supermajority vote to enact the ordinance in this case. The Appellate Division reversed and dismissed the petition, holding that the protest petition was insufficient under Town Law § 265(1)(b) and therefore the approval of the rezoning was valid. Additionally, the Appellate Division held that petitioners' SEQRA claims were barred by the statute of limitations and that their SEQRA claims at any rate lacked merit.

Issues

Three questions are presented by this case. The first is whether under Town Law § 265(1)(b), which requires a supermajority vote where the zoning change is the subject of a written protest by "the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom," the one hundred feet is to be measured from the property line of the property containing the rezoned area or from the portion of the area subject to the zoning change. Second, at what point in time does the statute of limitations begin to run on a challenge to rezoning under SEQRA? The issue here is whether petitioners

suffered "concrete injury" at the time the SEQRA process culminated in the issuing of a final statement or when the Town Board enacted the rezoning. The third issue is whether the Town's failure to include a firm schedule of specific mitigating measures to be taken pursuant to its access management plan or to prepare a Supplemental Environmental Impact Statement (SEIS) constituted a violation of SEQRA.

Reasoning

The Court held that under Town Law § 265(1)(b), the one-hundred-foot zone that determines who may petition to force a supermajority vote is measured from the boundary of the rezoned area, not from the property line of the parcel of which the rezoned area is a part. The Court relied on the language of the statute, principles of fairness and predictability, and on prior precedent.[2] The Court stated that the language "'land included in such change' can hardly be read to refer to land to which the proposed zoning change is inapplicable," holding that the one-hundred-foot zone cannot therefore include portions of parcels for which the zoning has not changed. This interpretation is fair because it ensures that power to compel a supermajority vote lies with those who will actually be affected by the rezoning. This result allows landowners who obtain rezoning to insulate themselves against protest petitions by "buffer zoning," or leaving the zoning of a strip of property unchanged such that neighbors beyond the buffer zone are not entitled to force a supermajority vote. This interpretation also makes the operation of the statute more predictable because it relies on a constant measurement, distance, rather than boundaries of parcels which may change through merging or subdivision. Moreover, under this interpretation, property lines cannot be reconfigured to invalidate a protest petition by creating a small unaffected parcel in between the rezoned property and nearby landowners.

Regarding the statute of limitations, the Court held that the statute did not begin to run in this case until the rezoning ordinance was passed by the Town Board. An article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner."[3] In *In re City of New York (Grand Lafayette Props. LLC)*,[4] the Court held that this means that the statute begins to run when the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action."[5] In the case at bar, the issue was whether the petitioners suffered a "concrete injury" at the time of the completion of the SEQRA process with the issuing of the final statement or only later when the rezoning was finally enacted. The Court looked to its decision in *Save the Pine Bush v. City of Albany*[6] and reaffirmed its prior holding "that a proceeding alleging SEQRA violations in the enactment of legislation must be commenced within four months of the date of enactment of the ordinance." The Court reasoned that until the ordinance was passed, the petitioners' injury was only contingent and could be avoided had they brought an effective protest petition or persuaded members of the Town Board to vote against rezoning. The Court distinguished *Stop-the-Barge v. Cahill*,[7] a case holding that the statute runs from the end of the SEQRA process, on the basis that in that case the completion of the SEQRA process was the last action taken by the agency whose determination petitioners challenged, the effectiveness of which did not depend on the future passage of legislation and it was not subject to review or corrective action by the DEP.

Affirming the Appellate Division's holding with regard to petitioners' SEQRA claims, the Court held the Town had complied with SEQRA, taking a hard look at the traffic problems that could result from rezoning, and the Town's decision that its final GEIS was adequate, was not arbitrary and capricious. Since "[g]eneric EISs may be broader, and more general than site or project specific EISs,"[8] the Town Board did not have to present a plan with greater specificity, providing details of its implementation, to comply with SEQRA. The Court held that there was "nothing unreasonable about the Town's comment, in its finding statement, that a more precise plan for traffic mitigation was impractical until the Town could know 'which parcels will be developed and when.'" The Town was also not required to prepare a supplemental EIS under SEQRA. A SEIS must be prepared when there is a "subsequent proposed action" that was "not addressed or was not adequately addressed" in the GEIS.[9] However, the regulations do not require that a SEIS be prepared in connection to every subsequent action. Rather, it was at the discretion of the Town to decide, subject to a rule of reason, how detailed an analysis to perform before rezoning was enacted.

Conclusion

The Court of Appeals affirmed the Appellate Division's order dismissing the case. Although the Court reversed the appellate court's holding with respect to the statute of limitations, finding that the action was timely brought within four months from the enactment of the ordinance, the Court found that the petitioners' claims otherwise lacked merit. The petitioners' written protest was insufficient to compel a supermajority vote requirement to approve the rezoning and therefore the rezoning was valid. Finally, the Court held that the Town complied with SEQRA and the Town's decision that its GEIS was adequate was not arbitrary and capricious.

Miri M. Silberstein, 2008

Endnotes

1. "Access management," as the Court defined it, "involves planning for the entry and exit of traffic on major roads in such a way as to keep interference with traffic flow to a minimum."
2. The Court cited several cases upholding "buffer zoning," including *Ryan Homes, Inc. v. Town Rd. of Town of Mendon*, 7 Misc. 3d 709, 712–714 (Sup. Ct., Monroe Co. 2005) and decisions from other states. The Court also distinguished *Herrington v. County of Peoria* (11 Ill. App. 3d 7, 295 N.E.2d 729 [1973]), the case on which petitioners relied, on the grounds that that case did not involve a statute requiring the measurement of distance from land subject to a zoning change.
3. CPLR 217(1).
4. 6 N.Y.3d 540, 548 (2006).
5. *Id.*
6. 70 N.Y.2d. 193, 200 (1987).
7. 1 N.Y.3d 218 (2003).
8. 6 N.Y.C.R.R. 617.10(a).
9. 6 N.Y.C.R.R. 617.10(d)(4).

* * *

Islander East Pipeline Company, LLC v. State of Connecticut Department of Environmental Protection, 2006 U.S. App. LEXIS 25111 (2d Cir. 2006)

Facts

Petitioner, Islander East Pipeline, is a natural gas company, formed under the law of Delaware with its principal place of business in Houston, Texas. On June 15, 2001, Petitioner filed an application with the Federal Energy Regulatory Commission (FERC) under § 7(c) of the Natural Gas Act (NGA)[1] for a certificate of public convenience and necessity to construct, own and operate a new interstate pipeline to transport gas in Connecticut and New York.[2] The proposed interstate natural gas pipeline would originate in North Haven, Connecticut, cross over the Long Island Sound, and terminate in Brookhaven, Long Island.[3] Concurrent with the FERC's review of a natural gas project application, the project must also comply with the requirements of the relevant federal laws, including the National Environmental Policy Act (NEPA),[4] the Coastal Zone Management Act (CZMA)[5] and the Clean Water Act (CWA).[6] FERC issued a final order on September 19, 2002, granting Petitioner's request for authorization to construct and operate its proposed interstate natural gas pipeline, conditioned on its compliance with various environmental requirements prior to beginning construction on the pipeline.[7]

Pursuant to the CZMA and the CWA, Petitioner filed applications with the States of Connecticut and New York seeking the following state authorizations under federal law: (1) certificate of consistency with the state's Coastal Zone Management Plan (CZMP),[8] and (2) a Water Quality Certificate (WQC) indicating consistency with the state's Water Quality Standards.[9] New York granted both of the necessary authorizations. Connecticut Department of Environmental Protection (CTDEP) however, denied both the CZMP and WQC authorizations. Petitioner sought review of an order of Respondent, CTDEP, denying Petitioner's WQC application pursuant to a recent amendment to the NGA, 15 U.S.C. § 717 (2000), in particular § 19 which provided for an expedited direct cause of action in the federal appellate courts to challenge a state administrative agency's order, action or failure to act with respect to a permit application required under federal law in order to proceed with a natural gas facility project subject to § 5 or 7 of the NGA.[10] The consideration of 19(d) of the NGA was a matter of first impression for the Second Circuit.

Issue

The issues, addressed by the United States Court of Appeals for the Second Circuit, was whether: (1) the court had subject matter jurisdiction to review this petition, (2) § 19(d) of the NGA applied retroactively, and (3) the CTDEP denial was inconsistent with federal law.

Reasoning

As per the Eleventh Amendment, United States courts may not consider "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or another State. . . ."[11] Respondent argued that § 19(d) of the NGA violates the Eleventh Amendment because it permits a private company to bring suit in federal court to challenge a decision by a state action and thus entitled it to immunity.[12] In addition, Respondent argued that while they accepted a role as deputized regulator under the CWA,[13] they never waived their Eleventh Amendment immunity from suit under § 19(d) of the NGA because this provision was passed into law after they denied Petitioner's WQC application. The Court of Appeals however found a fatal omission in Respondent's argument by noting that Respondent never asserted that Connecticut ever withdrew its participation from the CWA and NGA regulatory scheme following the enactment of the EPACT. Therefore, by going forward with its federally deputized role even after the EPACT's enactment, Connecticut had knowingly waived its immunity from suit in order to receive benefits of participating in the NGA and CWA regulator scheme.[14] Furthermore the court stated that the principles underlying state sovereign immunity do not justify applying Connecticut's waiver only for new CWA determinations, especially where the state's decisions continue to serve as a bar to proceeding with a federally approved natural gas project. The court found this conclusion to be especially warranted, as in this case, after the state becomes aware that it is subject to federal jurisdiction, it continues actively to litigate in defense of its earlier decision and elects not to relinquish its deputized authority back to the federal government.

With respect to Respondent's Tenth Amendment immunity claim, the court found that granting Petitioner's request for review would not interfere with Connecticut's control over its sovereign lands because Petitioner's authorization to exercise power of eminent domain to obtain right of way for the natural gas pipeline comes from the FERC in accordance with its authority under NGA. At most, such review would infringe upon the state's authority to establish whether the anticipated federally approved construction on the land at issue would satisfy state water quality standards. The exercise of this authority is not a sovereign state right under the Tenth Amendment. Instead, Congress has the authority to regulate discharges into navigable waters under the Commerce Clause, and the state exercises only such authority as delegated by Congress. Respondent's ability to issue WQCs was conferred by the federal government, which has exclusive control over navigable waterways. Respondent thus lacks independent rights in its WQC determinations. Furthermore, even if Respondent did have property or contract rights under the CWA, § 19(d) would not affect its exercise of its rights. Respondent is still entitled to make WQC determinations; these determinations, however, are reviewed in federal court instead of state court. Therefore, the court concluded that § 19(d) applies retroactively, and its provisions of exclusive jurisdiction to this court control this petition.

The Court of Appeals then applied the traditional arbitrary and capricious standard for review of Respondent's denial of Petitioner's application.[15] After reviewing Respondent's brief denial documentation, the court concluded that Respondent's denial of Petitioner's application for a WQC was arbitrary and capricious because Respondent did not sufficiently examine the evidence. Additionally, Respondent failed to express rational connections between the facts and the bases for its WQC denial in regard to water quality impacts and habitat modification.

Conclusion

The court held that that Respondent, in order to receive the benefits of participating in a regulatory scheme, knowingly waived its Eleventh Amendment immunity from suit under the NGA § 19(d) by not asserting that it withdrew its participation from the CWA and NGA regulatory scheme following the enactment of the EPACT, by going forward with its federally deputized role even after the EPACT's enactment. Furthermore the court concluded that there was no basis for Respondent's Tenth Amendment challenge because it could only regulate the powers granted by Congress. Additionally, the NGA § 19(d) applied retroactively because Respondent's contractual rights were unaffected. Finally the court ruled that Respondent's denial of Petitioner's application was arbitrary and capricious. The court drew no conclusions whether Respondent was obligated to grant Petitioner's application, but required only that Respondent conduct a complete and reasoned review contemplated by federal law within seventy-five days of issuance of the court's opinion, or if Respondent is unwilling or unable to do so, to abandon its authority to issue a WQC in this case.

Jamie M. Thomas, 2008

Endnotes

1. The NGA provides comprehensive federal regulation for the transportation or sale of natural gas in interstate commerce. 15 U.S.C. § 7 17(b); *see also Schneidenwind v. ANR Pipeline Co*., 485 U.S. 293, 300–01, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988).
2. The FERC is required to issue such a certificate if it finds the company "is able and willing" to comply with the federal regulatory scheme and the proposed project "is or will be required by the present or future public convenience and necessity," but the FERC may attach "to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).
3. In pertinent part, Islander East proposed to construct: (1) approximately 44.8 miles of 24-inch pipeline from an interconnection with an existing pipeline near North Haven, Connecticut, across the Long Island Sound to Brookhaven, New York on Long Island; and (2) approximately 5.6 miles of 24-inch pipeline from the proposed Islander East mainline near Wading River, New York, to a power plant in Calverton, New York. *See Islander East Pipeline Co.*, 97 F.E.R.C. P61,363 at 62,685 (2001).
4. The NEPA requires the FERC to prepare an Environmental Impact Statement prior to taking "major Federal actions" that significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C).
5. The CZMA requires that "any applicant for a required federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456(c)(3)(A).
6. Pursuant to § 401 of the CWA, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into navigable waters," is required to "provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of 1311, 1312, 1313, 1316, and 1317 of the title." 33 U.S.C. § 1341(a)(1). State certification is deemed waived if a state refuses to act on a request for certification within one year of such request. *Id*.
7. *Islander East Pipeline Co*., 100 F.E.R.C. at P62,102.
8. Pursuant to § 307(c)(3)(A) of the CZMA, 16 U.S.C. § 1456(c)(3)(A).
9. Pursuant to § 401(a) of the CWA, 33 U.S.C. § 1341(a).
10. In part, § 19 of the NGA was amended by the Energy Policy Act of 2005 (EPACT), Pub. L. No. 109–58 § 3 13(b), 119 Stat. 594, 689–90 (2005). *See* 15 U.S.C. § 717r(d) (West Supp. 2006).
11. U.S. Constitution amend. XI.
12. Respondent took note of two instances where private citizens may sue state agencies in federal court: (1) when Congress unequivocally expresses its intent to abolish state sovereign immunity pursuant to a valid grant of constitutional authority,

see Fitzpatrick v Bitzer, 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976); and (2) when a state voluntarily waives its Eleventh Amendment immunity, *see Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87, 144 L. Ed. 2d 575 (1999).

13. A state agrees to waive its immunity from suit under § 19(d) of the NGA once it accepts a role as a deputized regulator under the CWA.

14. *See Lapides v. Bd. of Regents*, 535 U.S. 613, 619, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002).

15. The statute did not prescribe an applicable standard of review. Both parties suggested that the applicable standard of review for this question be the traditional arbitrary and capricious standard for review of federal decisions under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 706(2)(A).

* * *

No Preliminary Injunction Preventing the Removal of Trees at the New Yankee Stadium Site

***Save Our Parks v. City of New York*,** N.Y.L.J., Aug. 21, 2006, p. 22, col. 1 (Sup. Ct., N.Y. Co.), 2006 N.Y. Misc. LEXIS 2365 (August 15, 2006)

Facts

Under a CPLR Article 78 proceeding alleging violations of the State Environmental Quality Review Act ("SEQRA") regarding approvals for the City of New York and the New York Yankees Partnership ("Yankees") (collectively the "Respondents") to construct a new Yankee Stadium (the "Project"), Save Our Parks, an association of local residents, along with other similar associations and local community entities (collectively the "Petitioners") moved for a preliminary injunction under CPLR 6301 enjoining the Respondents from removing any mature trees in the proposed new stadium site. Petitioners sought to preserve the status quo before the commencement of the construction and demolition on August 17, 2006 and until full judicial review of their claims.

The existing Yankee Stadium was originally built in 1923 and was subsequently renovated in the mid-1970s. With current operations being severely constrained and the current stadium not complying with the Americans with Disabilities Act of 1990 (the "ADA"), the Yankees have sought the construction of a new stadium on adjacent community parkland. The new state-of-the-art stadium, and three of four new parking garages, are to be constructed to the north of the existing stadium, across 161st Street, on portions of Macomb's Dam and John Mullaly Parks. The project will replace 22.42 acres of unencumbered parkland with 24.56 acres of replacement parkland; a net increase of 2.14 acres of parkland and new public waterfront access.

Petitioners asserted that the Parks Department, as the lead agency under SEQRA and the City's Environmental Quality Review ("CEQRA") regulations for weighing the environmental consequences of the new stadium project, the New York City Planning Commission, and the New York City Council all violated the SEQRA in three ways: (1) the Final Environmental Impact Statement ("FEIS") did not engage in an honest exploration of the new stadium's impact on the neighboring community parkland and open space, natural and visual resources, specifically with regard to the value of the parks to the local community and an assessment of the number of schools in the area; (2) the FEIS's discussion of alternatives to proposed stadium project was "superficial and disingenuous," and did not provide the information necessary to make a rational choice among other options; (3) the FEIS did not properly assess and consider the removal of 377 mature shade trees and the impact of the loss of those trees on the local environment and community.

Respondents argued that City agencies properly and in great detail analyzed the project and the objections presented. The Yankees, in particular, argued that a delay would cause serious harm where the project may have to be abandoned. Delay would jeopardize the sale of bonds, the source of the project's funding; and jeopardize the Yankees' agreement with the federal government regarding the resolution of the current stadium's ADA non-compliance.

Issue

The issue, addressed by the Honorable Herman Cahn, was whether the Petitioners were entitled to a preliminary injunction delaying the new Yankee Stadium Project in order to prevent the removal of mature shade trees on the site.

Reasoning

The Court noted that in order to be entitled to a preliminary injunction, Petitioners must demonstrate: (1) a likelihood of success on their claims that SEQRA was violated; (2) irreparable injury absent granting of the preliminary injunction; and (3) a balancing of the equities in their favor.[1] In reviewing SEQRA determinations, as presented in this matter, the Court noted that it must apply a deferential standard of review, i.e., "whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'"[2] Indeed, "SEQRA allows an administrative agency or governmental body considerable latitude in evaluating the environmental impacts and alternatives discussed in an environmental impact statement to reach a determination concerning a proposed project."[3] In assessing an agency's compliance with the substantive mandates of SEQRA, courts review the administrative record to determine if the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination."[4]

The court's role is not to conduct a *de novo* review of the agency's decision-making process,[5] or substitute its judgment for that of the governmental decision-makers.[6] The Court further noted that it cannot review a determination on environmental matters based upon evidence or arguments not presented during the proceeding before the lead agency.[7]

As to Petitioners' demonstration of the likelihood of success on the merits of their claims that SEQRA was violated, the Court found that Petitioners have failed. The Court reasoned that the Petitioners are barred from raising objections regarding the Project's impact on the local schools and schoolchildren because they failed to raise this argument during the administrative review process. According to the Court, neither the CEQR nor the SEQRA required an environmental impact statement to assess the potential impact of a temporary reduction in open space on any particular sector of the population.[8] The Court stated that the Project's FEIS contained a thorough analysis of the potential impact to the community as a whole, which necessarily included schoolchildren; and that the failure to quantify the number of affected schools and schoolchildren did not render the Parks Department's analysis legally deficient.

The Court further reasoned that in reviewing the sufficiency of analysis of alternatives under SEQRA, the standard to be applied is the "rule of reason," where "not every conceivable alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA."[9] The Court noted that only a "reasonable range of alternatives to the specific project" must be analyzed.[10] The court's role is not to choose among alternatives, or substitute its judgment for that of the governmental decision-makers.[11] Provided the lead agency considers a reasonable range of alternatives, the "judicial inquiry is at an end."[12] The Court then noted the discussion of Project alternatives that were addressed and rejected by the Parks Department in the FEIS and concluded that the Petitioners had not demonstrated a likelihood of success on their claim that the FEIS's discussion of alternatives was "superficial and disingenuous," or failed to provide information necessary to make a rational choice among other options.

The Court then addressed the issues of whether the FEIS properly assessed and considered the removal of 377 mature shade trees and the impact of the loss of those trees on the local environment and community. The Court noted that not only did the FEIS examine the impact of the tree removal, but also that the SEQRA merely requires state and local governments to promote efforts which will prevent or eliminate damage to the environment and did not prohibit the cutting down of mature trees.[13] Further, the Parks Department had plans to plant 500 to 800 trees in the same area. Accordingly, the Court stated that trees themselves have no legal protection and there is no bar to removing them to permit a project deemed beneficial to the City. The trees, for the Court, were owed no more deference than the City community as a whole.

As to irreparable injury absent granting of the preliminary injunction, the Court noted Respondents' argument that the Project presented no irreparable harm because the loss of parkland was only temporary, there would be a net gain of 2.14 acres of parkland, and the lost trees would be replaced by the planting of many more trees in the area. The Court recalled, however, that Respondents would be irreparably harmed by a preliminary injunction delaying the commencement of the Project's construction.

As to the balancing of the equities, the Court stated that the balancing clearly favors the Respondents. Among other reasons, a delay in the project would present a "real and significant" possibility of harm for the Yankees, the City, and the residents of the South Bronx. The Court noted that it would be "reckless at the very least" to disregard the Yankees' statements that a delay may terminate the project and force the Yankees to find an alternative home in another city.

Conclusion

Because of Petitioners' failure to meet the requirements necessary for the granting of a preliminary injunction and the absence of legal protection for trees over the needs of the community as a whole, the Court denied Petitioners' motion to prevent the removal of trees in the proposed new stadium site.

Brian P. Mitchell, 2007

Endnotes

1. *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44 (1988); *Olympic Tower Condominium v. Cocoziello*, 306 A.D.2d 159, 160, 761 N.Y.S.2d 179 (1st Dep't 2003).
2. *Akpan v. Koch*, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16 (1990).
3. *Aldrich v. Pattison*, 107 A.D.2d 258, 267, 486 N.Y.S.2d 23 (2d Dep't 1985); *see also Real Estate Board of New York, Inc. v. City of New York*, 157 A.D.2d 361, 363, 556 N.Y.S.2d 853 (1st Dep't 1990).
4. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986).
5. *Id.* at 418
6. *Akpan* at 570.
7. *Aldrich* at 267–68; *see also Miller v. Kozakiewicz*, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524 (2d Dep't 2002).
8. *Jackson* at 420 (rejecting challenge that FEIS did not address particular impacts on the elderly).
9. *Id.* at 417.
10. *Town of Dryden v. Tompkins County Bd. of Representatives*, 78 N.Y.2d 331, 334, 574 N.Y.S.2d 930 (1991).
11. *Akpan* at 570.
12. *Dryden* at 334.
13. Environmental Control Law §§ 8-0101, 0109.

* * *

S.D. Warren Co. v. Maine Board of Environmental Protection, et al, 126 S.Ct. 1843 (2006)

Facts

Petitioner, S.D. Warren Company (Warren) operates several hydropower dams along the Presumpscot River in southern Maine. The purpose of the dams is to generate electricity for the company's paper mill. Each dam collects water which runs through a turbine and eventually is returned to the riverbed after passing around a section of the river.

In order to operate the dams, Warren needed to renew its license from the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. Section 401 of the Clean Water Act required state certification that "discharge" will not violate state water quality standards. In order to renew its licenses, Warren had to apply for certification from the Maine Department of Environmental Protection, which they did under protest because they did not believe their dams result in any "discharge" into the river and therefore do not trigger § 401. The certifications were issued as long as Warren maintained a minimum stream flow in the bypassed part of the river and allowed some passage of certain fish and eels. FERC then licensed the dams, subject to the Maine conditions, but Warren kept denying the need for any § 401 certification. Warren appealed to the Board of Environmental Protection, but was unsuccessful. Next, Warren filed suit in the State's Cumberland County Superior Court where their argument was rejected. The Supreme Judicial Court of Maine affirmed. The United States Supreme Court granted *certiorari* and affirmed.

Issue

The issue at bar is whether operating a dam to produce hydroelectricity "may result in any discharge into the navigable waters" of the United States, therefore, requiring state certification under § 401 of the Clean Water Act.

Reasoning

In determining the issue the Court first considered how to define the meaning of "discharge" within § 401. The Court cites *FDIC v. Meyer*,[1] stating that since "discharge" is not defined in the act or is it a term of art, it must be construed "in accordance with its ordinary or natural meaning." According to *Webster's New International Dictionary*, this common meaning in relation to water is a "flowing or issuing out." The Court stated that this is how the term has been defined in past water cases, and most importantly, this meaning was accepted by all of the Court members in the only other case dealing with § 401 of the Clean Water Act. Finally, both the EPA and FERC have read "discharge" in its ordinary meaning.

The Court then addressed Warren's three arguments regarding why the term "discharge" should not be interpreted according to its common meaning. The first argument was that the Court should apply the interpretive canon of *noscitur a sociis*. Warren claimed that this canon applies to § 502(16) of the Clean Water Act which gives the term discharge without qualification the meaning of "a discharge of a pollutant and a discharge of pollutants." Warren argued that "discharge" standing alone must require something foreign to be added to the water where the "discharge" flows into. Because the water that Warren released into the river did not add anything foreign, the water flowing from the turbines was not "discharge" into the river. The Court stated Warren was incorrect in applying this interpretative canon.

Next, Warren argued that the word discharge should be interpreted as the Court did in *South Fla. Water Management Dist. v. Miccosukee Tribe*.[2] Here, the Court addressed § 402, which is not interchangeable with § 401. Warren determined that in order to implicate § 402, something must be added to the water, but the Court explained that what constituted a discharge in § 402 was not the same as what it must be under § 401, as the two sections served different purposes and used different language to reach them. The Court went on to note that the triggering statutory term in § 402 was "discharge of a pollutant" and not the word "discharge" alone as in § 401.

Warren's final argument regarding its interpretation of the term "discharge" centered on the Act's legislative history. Congress initially had included "thermal discharges" in the provision. Eventually, an amendment was offered to exclude thermal discharges from § 402 but to have them remain in § 401, the definition being "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, a discharge of pollutants, and a thermal discharge." The final definition omitted any reference to a "thermal discharge" and we now have the current definition. Warren argued that when Congress took out the term "thermal discharge" they carelessly left the word "includes," and therefore there is no reason to assume that describing "discharge" as including certain acts was meant to extend the reach of § 401 beyond those acts specifically mentioned. The Court, said that Warren's argument was complete speculation and that if Congress did decide to leave "thermal discharge" as a subclass of "discharge" under § 502(16) Warren would have a stronger argument for *noscitur a sociis*, because this would have provided the statute with a short list of terms with the common feature of an addition. However, the legislative history only shows Congress rejecting a term that would have created this short series of terms based on an addition. The Court finally mentioned that Warren's argument highlighted the point that Congress uses statutory language with an intent. Warren

thus showed that Congress was most likely deliberate in distinguishing "discharge" and "discharge of pollutants" so they could be used to reach separate ends in separate places in the Act.

The Court finally looked to the broad purpose of the Clean Water Act which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[3] and its "national goal" of achieving water quality that would provide protection for aquatic animal life and provide recreation on the water. To achieve this, the Court stated that the Act must not only deal with the "addition of pollutants" but with "pollution" in general, defined as any alteration to water. Warren admitted the dams caused changes in the water's movement resulting in less absorption of oxygen and making the water less passable to fish and boaters. Several amici also brought up similar points. Finally, the findings of the Maine Department of Environmental Protection support the claims that Warren's dams have had an adverse impact on the river. The Court held that these changes fall within the state's legislative power and § 401 certifications are necessary to preserve state authority to address overall pollution.

Conclusion

By giving "discharge" its common meaning, the purpose of the Clean Water Act and the state authority it intended is left intact. The judgment of the Supreme Court of Maine was accordingly affirmed.

Alexis Agnew, 2009

Endnotes

1. 114 S. Ct. 996 (1994).
2. 124 S. Ct. 1537 (2004).
3. 33 U.S.C. § 1251(a).

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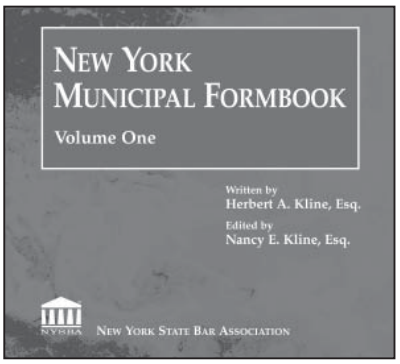

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