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The New York Environmental Lawyer

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A Message from the Chair

One of the difficult issues facing the Environmental Law Section is how to involve younger environmental law practitioners in the Section's work. In the long run, the Section will expand and thrive only if we are able to attract more junior attorneys into active participation in our committees and into leadership positions within the Section.

Having said that, however, I recognize that one of the primary strengths of the Section is the extremely knowledgeable and deeply experienced New York State environmental lawyers who have led and continue to lead the Section. In a field as relatively young as environmental law and in a Section which is itself barely 20 years old, the attorneys who have served as chairs of the Section's committees and as officers of the Section are among the best environmental lawyers in the state and the country and, I am happy to say, people who will continue to practice environmental law for one, two or more decades to come.

So, what is the problem? Clearly, attracting younger attorneys into the Section and retaining and benefiting from the expertise and leadership of more experienced attorneys are not mutually exclusive concepts. But, in practice, they are proving to be for, among others, the following reasons:

- All law offices will want to ensure that their attorneys are dedicating time to their offices' work first and foremost and that New York State Bar Association activities are undertaken in the context of their primary obligations;
- Law firms which pay the Bar Association and Section dues of their attorneys will, for financial reasons, want to limit participation by their environmental lawyers; and
- Law offices will also want to see that their attorneys' "non-billable"/"outside activities" time is diversified so that not everyone is doing the same thing.

To the extent that choices have to be made among attorneys, law offices will generally select their more senior attorneys to participate in Bar Association work, particularly if those more experienced practitioners have invested their time in the Section over the course of many years. Such decisions could preclude participation by younger attorneys.

I also fear that younger attorneys might feel some reluctance to become actively involved in the Section. If they perceive that the Section is populated by more experienced attorneys who will dominate its activities

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for years to come, will they feel it is worth the investment of their time? Will they perceive us as ingrown and overly "clubby"? The younger environmental attorneys may attend CLE programs, but will they join and contribute to committees?

By no means and in no way do I or the Section want to discourage, or in any way limit, the active participation of the environmental lawyers who have developed the Section into absolutely the best source for environmental knowledge, wisdom and leadership. Their combination of energy, enthusiasm and experience is what makes the Section special. We do not want to lose the professional (and personal) qualities that these individuals have brought to our work.

In a sense, it is an attractive problem to have—having a Section of loyal, deeply involved and committed senior attorneys, the leaders of the environmental bar. Too often, it is the other way around—the best lawyers are too busy to devote time and effort to Bar Association work.

But, at the same time we need to ensure that we make room for the beginning attorneys. Law offices should encourage them to participate by:

- allowing them to have time to do it;
- if possible, defraying some of the cost of participation; and
- making them feel welcome by having senior attorneys in those offices introduce them to Section activities which they will enjoy and feel rewarded doing.

And, the Section itself needs to do a better job of reaching out to younger attorneys—and law students—so that they will enthusiastically want to participate even if they have to bear the dues themselves by:

- emphasizing, through one-on-one outreach efforts, the value of developing a breadth of knowledge through attendance at our programs and a depth of knowledge in a particular aspect of environmental law through active committee involvement;
- stressing the importance of networking and the unparalleled opportunities for it within the Section;
- in the case of law school students, speaking with them about Bar Association and Section membership while they are involved in their environmental law society at law school and using the good auspices of the many distinguished professors involved in Section work to "talk us up"; and
- inviting some young attorneys and students to attend the Annual Meeting as our guests to demonstrate first-hand how valuable and how much fun it is.

The Section's ad hoc Committee on Diversity is working on the issue of attracting younger environmental lawyers in order to make our Section more heterogeneous. Your suggestions to assist and enhance their work—and, ultimately, your Section—are invited and deeply appreciated.

John L. Greenthal

From the Editor

Our Chair, John Greenthal, aptly notes the Section's need for participation by younger attorneys. The benefits go both ways. Newer attorneys can draw on the Section's many resources, mix with many leading attorneys in the environmental field, and enhance their education from our many activities. As with all things, though, younger attorneys become older attorneys, and newer attorneys become more experienced attorneys, and they will have many contributions to make at present and in the future. Hence, I join in John's invitation, and also emphasize that support in this regard by their employers is important. But I also, again, want to indicate the Section's—and especially the *Journal*'s—interest in another important professional niche, government attorneys. Being a government attorney myself, I know that there is a perspective and a mission unique to the many specialists that work in government, and I also know that they often remain apart from the private sector and, all-too-often, from professional organizations. The many former government attorneys who have migrated to private practice and who fill the Section's ranks can attest to these same observations. Many government attorneys are specialists by training, and are often policy makers as a consequence of their achievements within government. The experience can be a rarified one. They are relatively free from the need to mollify clients, or to maintain a revenue flow, or to espouse particular viewpoints, excepting, of course, commentary that interferes with their agency's mission. As has been indicated in the past, the Section recognizes the need to be informed by their viewpoints as well as the value of being updated on agency or departmental policies, and we welcome their contributions. I particularly welcome article submissions from agency attorneys, either on their own behalf or on behalf of the respective agency, that are written to inform our readers of relevant viewpoints on current issues, or to keep readers advised of developing policy, or that seek a response in order to better structure policy. An appropriate flow of information works to everyone's benefit and, not to make too fine a point of it, the author becomes more of a known quantity among readers.

It naturally follows that I remind readers that the Section's restructuring is providing inducements to committees to initiate projects, and to publish articles in the *Journal* either in that connection or independent of ongoing initiatives. The goal is to provide greater scope for Section activities, greater information to members about environmental developments, and to encourage a more robust discussion of the issues that interest all of us. As such, we encourage not only committee productivity, but also encourage readers to seek out and join committees that interest them. The *Journal* has also expanded the Editorial Board, specifically with the goal of providing channels for readers to explore publication of articles in areas of interest to them. I strongly encourage readers to contact me, or Editorial Board members, to discuss publishing opportunities.

I also want to remind readers that the Transportation Committee, co-chaired by Phil Weinberg and Bill Fahey, is actively looking for new members. As I noted in a prior column, the critical importance of the transportation field is often underappreciated, and there is significant potential for the development of new ideas that will impact on economic, political, social and demographic variables that influence how population centers will function in the future. The New York City metropolitan area, with its matrix of waterways, bridges and tunnels, trains and subways, interstates, highways, street traffic, neighborhoods, and differing jurisdictions divided among several municipalities and three states, in a region that is a major economic engine for the country and even the world, is a prime example of a set of problems waiting for creative new solutions. If transportation deteriorates, much of the economic and social life of the metropolitan area deteriorates with it; conversely, the greater the degree of regional integration of commuting and commercial shipping, the more cohesive, convenient, and economically viable and livable the region becomes. All of these factors have environmental ramifications.

Michael Diederich submits an article on flow control ordinances and the effect of the commerce clause. Mike submitted an article to the *Journal* shortly after the Supreme Court's landmark *Carbone* ruling. He has also published elsewhere, including a treatise chapter, on solid waste management and disposal. He provides an update, with a twist, by asking some pertinent questions. Janet Kealy writes about urban sprawl in the Hudson Valley. As anyone who drives through the region, let alone lives in the small towns nestled amidst farmland in this broad and long valley can observe, this unfortunate process is accelerating. Sprawl also is accelerating faster than thoughtful controls can appropriately channel growth in many formerly rural counties that are astride lifelines and transportation links to increasingly connected municipalities. If, and when, regional transportation improves, it will be an interesting counterpoint that sprawl may well follow. Hence, the need for careful planning, the evaluation of local and regional priorities, and the protection of the very resources that attract many people to rural and suburban areas in the

first place, become ever more important. Janet's article was a finalist in the Section's essay competition. She joined us for the Fall 2002 Section meeting at Cooperstown. Between her article and her participation in the weekend's activities, she is sure to be recognized in the future.

Marla Rubin submits another article for "The Minefield," her regular column on environmental legal ethics. The present article addresses aspects of multi-disciplinary practice. This topic has been the subject of much recent commentary which, doubtless, will continue. Jason Capizzi, the student editor from St. John's Law School, again has shepherded the student case summaries under Phil Weinberg's guidance.

This is also an opportune moment to mention that St. John's Law School's Environmental Law Society, which last year recognized Phil Weinberg with its annual award, this year selected the Honorable Jack Weinstein for its award. Judge Weinstein needs little introduction, but it's worth reminding readers, and informing younger lawyers, that he presided over the landmark Agent Orange and asbestos lawsuits and has written extensively in the environmental law field.

Finally, in connection with the Section's Annual Meeting this January, we continued the relatively new tradition of providing a cocktail party to Section members. In view of some budgetary streamlining, we had considered a range of alternatives, including the no-action alternative of canceling the event. However, several individuals and law firms stepped up to ensure that the event could be held. As a result, the expenses are being defrayed by contributions from: Arnold & Porter; Nixon Peabody LLP; Sidley Austin Brown & Wood, LLP; Sive, Paget & Riesel, P.C.; Windels Marx Lane & Mittendorf, LLP; Young, Sommer, LLC; Farrell Fritz, PC; Jaeckle Fleischmann & Mugel, LLP; and Robert J. Kafin. These firms, their members who secured the funding for us, and, of course, Bob Kafin, deserve our thanks and merit recognition for their generosity.

As I look out my window, what to my wondering eyes should appear, but *snow*. For an avid skier, this is like candy to a child. I hope this momentary quirk amidst a recent history of global warming excites many of our readers as much as it does me. *Adieu*.

Kevin Anthony Reilly

Expression of Appreciation

To Our Readers:

For the first time this year, the cost of the cocktail reception for the Executive Committee of the Environmental Law Section, held the evening before the Section's Annual Meeting on January 24, 2003, was underwritten by private contributions rather than taken out of the Section budget.

On behalf of the Executive Committee, I would like to express my appreciation to those contributors for their generosity and their expression of commitment to the Section. We established two levels of contribution, gold and silver, and the contributors in each category are:

Gold

Arnold & Porter

Nixon Peabody LLP

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Silver

Farrell Fritz, PC

Jaeckle Fleischmann & Mugel, LLP

Robert J. Kafin

Thank you very much to each of these contributors.

John L. Greenthal
Chair
Environmental Law Section

"Flow Control" Revisited— The Local Government *Can* Control Its Citizens' Trash

By Michael D. Diederich, Jr.

This article is intended to place into context the recent Second Circuit decision, *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority,*[1] where the court held that regulatory "flow control" can permissibly be used by local government to direct solid waste to publicly owned facilities without running afoul of the Commerce Clause to the United States Constitution. This is a precedent of national importance, because it provides a sound legal rationale for municipal control of local citizens' trash—a traditional power which many observers had regarded as lost when, in *C&A Carbone v. Town of Clarkstown,*[2] the Supreme Court invalidated flow control to a municipally preferred local entrepreneur.

I. Background

A battle has been waged in the courts and in Washington as to whether the waste industry or local government should have the right to control municipal solid waste—commonly referred to as garbage or trash. To the waste industry, garbage is seen as a profitable "article of commerce." To municipalities, garbage is a public health problem and noisome pollutant which requires costly and often complex solutions.

One method used by municipalities to manage their garbage has been waste "flow control," whereby solid waste is directed by ordinance to designated facilities, commonly to waste-to-energy incinerators. Broadly speaking, there are several types of flow control:

- municipal collection—a city's garbage trucks collect trash and dispose of it at, for example, its municipal landfill;
- economic—"free" or subsidized disposal services offered by local government (e.g., free household hazardous waste collection/disposal) causes waste to "flow" by force of economics;
- franchise/contractual—waste flows per the conditions of governmental franchise or contract;
- regulatory—where local law directs waste to designated facilities. This species of flow control has been the most common subject of legal challenge.

II. *C&A Carbone v. Town of Clarkstown*

In *Carbone,* the United States Supreme Court invalidated a town flow control ordinance, holding that the regulation impermissibly discriminated in favor of the town's preferred local vendor in waste management services. After the town dump closed, the Town of Clarkstown, New York, enacted its ordinance directing all "acceptable waste" (essentially ordinary trash) found within its borders to a town-sponsored waste transfer station owned by a private company.

"To municipalities, garbage is a public health problem and noisome pollutant which requires costly and often complex solutions."

The *Carbone* case involved a Town of Clarkstown ordinance which basically required that all ordinary garbage found within the town, even imported garbage, be delivered to a privately run transfer station for ultimate disposal elsewhere. The town guaranteed this transfer station a minimum volume of waste and thus, an assured profit amortizing the cost of the facility which the town could eventually purchase for $1. The town's promise of waste delivery was backed by its flow control ordinance which, in this case, required that the non-recycled waste from plaintiff C&A Carbone's recycling facility be brought to the town-designated facility. Thus, plaintiff C&A Carbone's (non-recycled) garbage, both locally generated and imported, was effectively co-opted by the town by requiring delivery to its preferred vendor. The ordinance forced C&A Carbone to lose control over its stock-in-trade, the local and interstate garbage it was processing, by requiring it to deposit its garbage with the town's higher-priced vendor.

In effect, Clarkstown created one point of exit for all garbage generated or coming into the town, with a private toll gate attached. Only the town's preferred vendor could "package" the garbage for export, and exact any toll it wished. Under its arrangement with its preferred local vendor, Clarkstown was assured the presence of a transfer station to service the town (certainly a legitimate waste management purpose), and would eventually receive title to the facility, all without the political burden of directly levying taxes to pay for this assurance.

The justices in *Carbone* debated over whether the monopoly which the town created in favor of the local vendor should be viewed in Commerce Clause terms, and whether the preferred vendor should be viewed as

acting as a "quasi-public" agent for the town. Ultimately, the Court determined that the town's ordinance impermissibly discriminated against interstate commerce in favor of the local entrepreneur.

A. Carbone's "Local Grab" Benefiting Private Sector *Ratio Decidendi*

The Supreme Court, in a 6-3 decision, found the town's ordinance unconstitutional as protectionist discrimination. The Court viewed the town's flow control ordinance as imposing a "local grab" (local processing) requirement, a type of favoritism historically found to violate the Constitution's Commerce Clause.[3]

"[A]s the cases unfolded in the appellate courts, public systems which did not discriminate in favor of locally preferred business have survived judicial scrutiny."

The legal argument centered around the Constitution's Commerce Clause. Basically, the Commerce Clause has been interpreted to prohibit state or local governmental impediments to trade between states. The issue framed by the parties in *Carbone* was whether the Clarkstown ordinance directing all acceptable waste to the preferred private transfer station imposed an unconstitutional restriction on interstate commerce. The Supreme Court's invalidation of the town's flow control ordinance made sense. If every community attempted to grab and tax trash already being managed by the interstate solid waste industry, the interstate solid waste marketplace would be impaired and commercial transactions (not to mention public outsourcing) severely disrupted.[4]

Simply put, local government cannot permissibly "grab" for a local business's profit commerce which is properly moving in interstate channels. The Court has a tradition of invalidating such parochialism.[5]

B. The Disposal Service, Not the Trash, Is the "Article of Commerce"

In addition to a local grab constitutional analysis, the other aspect of *Carbone* of particular significance to the *United Haulers* decision is its re-characterization of the "article of commerce" as the waste processing service, not the trash itself.

Because both endemic and out-of-state garbage was affected by the Clarkstown ordinance, neither the parties nor the Court in *Carbone* focused on whether locally generated municipal waste, as such, is an "article of commerce" subject to constitutional protection. Nevertheless, Justice Kennedy, in his majority opinion, specifically characterized the "article of commerce" involved in *Carbone* as "not so much the waste itself, but rather the service of processing and disposing of it."[6]

This is an important distinction, for many reasons. If solid waste is itself a commodity, then what is the propriety of governmental policies seeking its elimination, reduction, recycling, and proper disposal? If solid waste is a commodity, are other wastes, such as air and water emissions, also commodities? If wastes are commodities, should we adjust international law? For example, if Canada self-manages all its solid waste locally, is this an act of trade aggression by depriving American or Mexican landfills of that country's trash? Do we favor international "pollution havens" because they most cheaply accommodate the byproducts of human activities? To classify locally managed garbage as, in itself, an article of commerce has no principled basis in law or logic, and is unlike the situation where waste has already been placed into and is moving within the channels of commerce.[7] Common sense dictates that individuals, alone or collectively, should be allowed to reduce and eliminate waste; that waste is not some type of sacrosanct object. After all, what right does an interstate waste disposal firm have to lay claim to a community's trash, whether sitting in the home, curbside, or in a garbage truck destined for a public waste facility?

There is a widespread perception that waste itself is protected commerce—a perception nurtured by those in the solid waste industry who stand to profit in trash management. However, this theory was argued to the Supreme Court in *Carbone*, citing several lower court rulings holding that trash is an "article of commerce."[8] The Supreme Court did not adopt this rationale.

The fact that the Supreme Court did not rely on the "waste is commerce" argument, but instead, as discussed above, relied upon traditional "local grab" Commerce Clause jurisprudence, is of immense significance. If the Supreme Court had not employed its traditional, and narrow, local grab analysis in *Carbone,* but instead used a "waste is commerce" rationale, this may have defeated state and local government in subsequent Commerce Clause challenges. Instead, as the cases unfolded in the appellate courts, public systems which did not discriminate in favor of locally preferred business have survived judicial scrutiny.

III. Post-*Carbone* Cases

Nevertheless, in the immediate wake of *Carbone*, there was wide concern amongst municipal officials that regulatory flow control was unconstitutional. The federal Environmental Protection Agency was asked to prepare, and did prepare, an extensive report on the subject.[9] Several "fixes" were proposed in Congress,

since Congress is the final arbiter under the Commerce Clause as set forth in Article I, § 8.

Nevertheless, the dire predictions were overblown. Appellate courts found ways to allow the public to manage its trash, such as where "open and competitive" procurement was employed (so as not to discriminate against out-of-state firms).[10] Similarly, municipalities could use the so-called "market participant exception" to the Commerce Clause to contract for services.[11]

On the other hand, where New Jersey drew preferential waste management lines at its state border, the Third Circuit regarded this as discrimination in violation of the Commerce Clause.[12]

IV. Permissibility of Public Self-Management of Local Trash

Notwithstanding that *some* means were available for local government to take a modicum of control over local trash, none of the above cases addressed whether a local community has the fundamental democratic right to publicly self-manage its own trash. Legislative solutions were sought. In the New York State legislature there was a proposal, drafted by the author, to allow municipalities to "take title" to their own trash, to allow proper trash self-management. Basically, the concept was that the people own their own trash, and can collectively allow their own government to manage it (notwithstanding the desires of outside waste vendors).

In Washington, D.C., far less attractive solutions were proposed. In reality, the "solutions" being proposed in Congress would be a "cure" which would cause the patient's demise, by permitting some existing flow control, but eventually eliminating this local community right forever. Moreover, at the same time, "waste transport" legislation was proposed which would impede the flow of waste legitimately placed into commerce by municipalities needing such solution. Both these proposed Congressional "solutions" were contrary to the spirit and intent of the Commerce Clause, both would promote waste management "balkanization," and both remain (undesirable) legislative possibilities.

Thus, through these post-*Carbone* years, there remained no answer to the fundamental question of whether the public could democratically self-manage its own garbage. This question was finally answered, thoughtfully and positively, in the Second Circuit's *United Haulers* decision.

V. Importance of *United Haulers* Case

In *United Haulers*, the Second Circuit accepted the arguments of the *amicus* New York State Association of Solid Waste Management in holding that flow control to a public entity is not impermissible discrimination under the Commerce Clause. The Court saw the debate between the justices in *Carbone* about whether or not the preferred local vendor was "quasi-public" or "private" as an indication that this was a distinction of constitutional dimension. The Second Circuit did not stop there, but rather went on to explain how the Supreme Court's local grab analysis caused the inescapable conclusion that government preferring its own *public* facilities does not constitute discrimination against interstate commerce, because it is not discrimination in favor of local business.

If the public were not permitted to self-manage the traditionally local function of waste management (a form of sanitation), one might ask whether other traditional local activities of government—police or fire protection—might be subject to Commerce Clause challenge by a potential private service provider.

While the Second Circuit felt constrained, as a matter of legal formality based upon the procedural posture of the case, to remand *United Haulers* to the district court, it appears that victory for the public's waste management system is virtually assured. The district court must undertake a "Pike balancing test," to determine whether the comprehensive waste management system of Oneida and Herkimer counties creates an undue burden on interstate commerce. However, "Pike balancing" generally means municipal win, and here the Second Circuit made expressly clear its view that the traditional power of local government to manage its own citizen's waste must be considered.

The principle challenge now is to overcome eight years of indoctrination that "flow control is unconstitutional." Public waste officials should be educated with *United Haulers*, and informed that public self-management of trash is not perilous. Rather, especially when combined with fair, open, competitive and geographically non-discriminatory outsourcing of service providers, municipal flow control can be a viable means of managing the public's waste.

VI. Concluding Thoughts

Local democratic rule over waste should not be a revolutionary idea. Local government can manage crime, fire and education without Commerce Clause scrutiny. Garbage, a form of pollution, should be viewed no differently. It is a traditional local activity for purposes of the Tenth Amendment and of federalism. Moreover, Congress has stated its policy regarding garbage management, in Subtitle D of the federal Resource Conservation and Recovery Act (RCRA), where it expressly states that "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies."[13]

United Haulers is a crucial precedent of national, and perhaps international, importance. Depriving local government of the ability to control its own citizens' wastes could have had far-reaching consequences. If garbage were held to be a protected "article of commerce" even before its movement into the interstate waste stream, then local government would have lost a means to control sanitation. Localities would be forced to rely on free market economics, which can result in garbage flowing to "pollution havens"—the cheapest available waste repositories (where long-term costs and environmental consequences are not considered). The profitable segments of the waste disposal and recycling business would flow to the waste industry, while the less profitable segments (the wastes posing the greatest public health dangers) would be left for municipalities to manage at taxpayer expense.

"Depriving local government of the ability to control its own citizens' wastes could have had far-reaching consequences."

By permitting local government to self-manage its own citizens' trash, by allowing solid waste to be directed to public facilities, the Second Circuit in *United Haulers* has created a sound precedent for municipal solid waste management, fully consistent with the dictates of federal environmental law and the Constitution.

Endnotes

1. 261 F.3d 245 (2d Cir. 2001), *cert denied*, __ U.S. __ (2002).
2. 511 U.S. 383 (1994).
3. *See generally*, Tribe, American Constitutional Law §§ 6-9 (2d ed. 1988) (discussing "local grab" cases).
4. *Cf., Oregon Waste Systems v. Department of Environmental Quality of Oregon*, 114 S. Ct. 1345 (1994) (Oregon's surcharge on waste entering the state violated the Commerce Clause).
5. *See, e.g., Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951).
6. 511 U.S. at 393; s*ee also, Diederich, Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 Pace Envt'l L. Rev. 157, 198-201, 208-215 (Fall 1993).
7. *Cf., Philadelphia v. New Jersey,* 437 U.S. 617 (1978).
8. *See Waste System Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *DeVito v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, *aff'd*, 947 F.2d 1004 (1st Cir. 1991); *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority,* 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd sub nom. Waste Recycling v. SE AI Solid*, 29 F.3d 641 (11th Cir. 1994).
9. *See* United States Environmental Protection Agency, Report to Congress: Flow Controls and Municipal Solid Waste (Mar. 1995).
10. S*ee, e.g., Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999); *Harvey & Harvey v. Delaware Solid Waste Authority*, 68 F.3d 788 (3d Cir. 1995).
11. *See SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995).
12. *See Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995).
13. *See* RCRA § 1002(a)(4); 42 U.S.C. § 6901(a)(4).

This is a reprint of an article found in the September/October *Municipal Lawyer*.

Mr. Diederich's law practice includes environmental law. He wrote Rockland County's *amicus curiae* brief for the County of Rockland in the *Carbone* case. He submitted, for the N.Y.S. Association for Solid Waste Management (NYSASWM), an *amicus curiae* brief in the *Smithtown* case. He submitted *amicus curiae* briefs and presented oral argument in the *United Haulers* case, which persuaded the Court.

The Hudson River Valley: A Natural Resource Threatened by Sprawl

By Janet Kealy

I. Introduction

The Hudson River Valley is truly one of New Yorkq State's great natural resources. The region's abundance of natural beauty and American history led Congress to name it a National Heritage Area in 1996.[1] But the valley is at a critical crossroads; its exquisite landscapes, indigenous farms, and vital community centers are at stake.[2] The American Farmland Trust reports that the Valley is part of the tenth most threatened agricultural region in the nation.[3] And The National Trust for Historic Preservation, named the Hudson River Valley as one of America's Eleven Most Endangered Historic Places in 2000 because "industrialization and sprawl threaten scenic areas rich in historic landmarks."[4]

This article will address the danger that sprawl[5] presents to this natural resource, and will review potential solutions proposed by leaders in the valley and throughout the state.

Part II will review why the Hudson River Valley is a natural resource of New York State. Part III will review the region's strategic location and its capacity for growth. Part IV will explore the phenomenon of sprawl—how and why it threatens the valley. Part V will address land use planning and how it can be used to manage growth; it will also address Home Rule and the tension between regionalism and localism. Part VI will address the concept of smart growth and how it is being used in New York State and the Hudson Valley. Part VII will present a conclusion to the facts presented.

II. The Hudson River Valley Is a Natural Resource of New York State

New York's Hudson River Valley is a region of startling natural wonder. It led the Victorians, who viewed nature with a near religious fervor, to make the valley's mountains and river views an international tourist destination. Famous writers have written classic American stories portraying the region's valley as dramatically as human characters.[6] The first American art movement, The Hudson River School,[7] was founded along the banks of the river.[8] Today the valley's landscape still boasts open farmland framed by rolling hills bathed in the glow of otherworldly sunsets. Quaint cottages and centuries-old mansions known as "America's Castles"[9] grace the countryside, drawing millions of tourists annually. The physical splendor of the Hudson River Valley is matched by its claim as an American heritage area, where much of the early history of our country took place, and where there remains today a visible legacy of these achievements. A guidebook to the area describes the valley well:

> Most American places do not feel haunted . . . they do not play upon the imagination in such a way as to produce near-tangible impression of people and places long gone. . . . The Hudson River Valley is a great exception to this American rule. The windows on all its eras are nearly always open, so that despite whatever modern progress communities may make, it is never difficult for a visitor to conjure up the faces and voices of the Valley's past. This is the river of Franklin Roosevelt, of Frederic Church and Benedict Arnold and 'Gentleman' Johnny Burgoyne. Washington Irving owns it still, and Hendrick Hudson forever sails upstream toward its hidden heart.[10]

Presidents grew up here; Franklin Delano Roosevelt was raised in Hyde Park,[11] Dutchess County and Martin Van Buren[12] grew up in Columbia County. Art movements were founded here;[13] great fortunes were made and memorialized here.[14] Battles in the Revolutionary War were planned and fought here, and Washington had his headquarters here.[15]

"The physical splendor of the Hudson River Valley is matched by its claim as an American heritage area, where much of the early history of our country took place, and where there remains today a visible legacy of these achievements."

III. The Location of the Valley Encourages Growth

The valley's strategic location, in addition to its beautiful countryside, make it an attractive destination for both tourists and commerce, resulting in growth, and potentially, in sprawl.[16]

A. Location

The Hudson River Valley National Heritage Area, as designated by Congress,[17] lies between Yonkers in

the south and Troy in the north, along the Hudson River and covers eleven counties in New York State.[18] This area includes "over 250 communities and over three million acres of Hudson Highlands, Catskill Mountains, towns, villages, hamlets and farmland," extending from the meeting of the Mohawk and Hudson Rivers south, to the northern border of New York City.[19] The valley contains cities like Poughkeepsie, Newburgh, Yonkers, and Albany, towns like Hyde Park, villages like Catskill, and hamlets like Ghent.

"Because of the Hudson River Valley's attractive location for both residential purposes and for commerce, the region is experiencing a growth in population; which begets a growth in housing, transportation and infrastructure."

The Hudson River Valley not only offers one of our nation's most beautiful landscapes, it also possesses a strategic location, between New York City and Albany. This location, and the quality of life, cost, labor force, and infrastructure surrounding the valley, attract both tourists and commerce.[20] Ten percent of Americans now live within a two-hour drive of the Hudson River Valley.[21] The region possesses one of the strongest economic engines in the country, and is experiencing development.[22] The region is located in the path of sprawl moving up from New York City and down from Albany.[23]

B. Growth

Because of the Hudson River Valley's attractive location for both residential purposes and for commerce, the region is experiencing a growth in population; which begets a growth in housing, transportation and infrastructure.

1. Population Trends

The Hudson Valley is experiencing a wave of in-migration of New Yorkers. In 1995, the most recent data year available, 74,000 people moved into the region.[24]

> While 15% moved from other places in the Northeast and 17% came from the South, West and Midwest, by far the majority of the people migrated into the region from within the state—27% from New York City, 24% from within the region, and 17% from other places in New York State.[25]

According to the 2000 Census, population changes between 1990 and 2000 in the counties of the Hudson Valley are as follows: Albany +0.6%, Columbia + 0.2%, Dutchess +8.0%, Greene +7.7%, Orange +11.0%, Putnam +14.1%, Rensselaer -1.2%, Rockland +8.0%, Saratoga +10.7%, Ulster +7.5%, Westchester +5.6%.[26] Projections indicate that the current population of 2 million will increase by 11% to reach 2.22 million in 2010.[27]

2. Land Use Trends

In 1994, President Clinton's Council on Sustainable Development asked the Land Use Law Center at Pace University School of Law "to project current land use trends (in the Hudson River Valley) 50 years forward, to determine whether they were sustainable, and, if not, to try to identify the key obstacles to sustainability and the most effective strategies to remove those obstacles."[28] The Land Use Law Center assembled an Advisory Committee on Sustainable Development in the Hudson River Valley, and conducted several studies.[29] One study was on parcelization, a term referring to the rate at which large parcels of land become subdivided for development.[30]

> Projecting the rate of parcelization forward revealed that the amount of open land in the region would decline from just under 60% today to around 30% in the year 2050, that there would be a 400% increase in what transportation planners call vehicle hours of delay, and that for every 1% of population added, we would urbanize 7% more land.[31]

Pace used the zoning maps of 242 local governments in the Hudson Valley as blueprints for the future, calling the build out of the blueprints the "phantom region." The study determined that the phantom region would not be sustainable.[32] The results of this study infer that if the citizens of the Hudson Valley want a sustainable future, then the citizens must actively plan for one.

"Growth is inevitable," stated Ed McMahon of The Conservation Foundation.[33] "The ugliness and destruction of community character that so often accompanies growth is not. Communities can grow without destroying the things people love."[34] Since local governments create the zoning maps of their municipalities, it follows that local governments can create zoning that plans for growth that is sustainable and will not result in sprawl.

IV. Sprawl

Sprawl refers to a type of suburban peripheral growth where development expands in an unlimited and noncontiguous way outward from the well-developed core of a metropolitan area.[35] In terms of land use type, sprawl includes both residential and nonresiden-

tial development.[36] Residential development that contains primarily single-family housing also includes significant numbers of distant units scattered in outlying areas.[37] Nonresidential development includes shopping centers, strip retail outlets along arterial roads, industrial and office parks, and free-standing industrial and office buildings, in addition to school and other public buildings.[38]

Sprawl has been described as a phenomenon that has sucked the economic and social vitality out of many traditional communities, filling millions of acres of farmland and open space with formless structures connected to each other by their dependence on the automobile.[39]

The Sierra Club defines sprawl as "low-density development beyond the edge of service and employment, which separates where people live from where they shop, work, recreate, and educate—thus requiring cars to move between zones."[40] The Sierra Club reports that "sprawl contributes to the increasing costs for public services, the declining health of central cities, environmental degradation, loss of farmland, and the degraded quality of life.[41]" In many metropolitan areas, mayors, property taxpayers, and environmentalists agree with this general observation.[42] In 1998 alone, 11 governors addressed land use issues in their state of the state addresses.[43] Over 500 studies on the issue of sprawl have been written since the 1970s, with a significant number published in the last decade.[44]

A. Why We Have Sprawl

Americans always seem to be on the move.[45] Throughout the nineteenth century westward expansion took hold until the entire continent was occupied.[46] During the twentieth century we continued our westward movement, but we also began to move shorter distances, moving from farm to city, and from city to suburb.[47] Americans like to fill in previously unoccupied locales.[48]

"Many of our newer communities have been minimally planned, in order to provide the dream house on a large green lot, far removed from interaction with schools, stores, and other community centers."[49] Frequently, the public spaces of new communities are filled with large discount stores or strip malls on wide highways.[50] The design of some communities is "largely determined by highway engineers and superstore developers, who have stepped into the void left by public officials who are either resigned to, if not eager for, this kind of 'progress,' and by citizens who are either complacent or who believe they are powerless."[51] Developers are rewarded financially for building generic housing on inexpensive land. Public subsidies permit and encourage this kind of development and have given developers impetus to attract people to these locations.[52]

The National Association of Home Builders (NAHB) argues that

> most Americans would prefer to live in detached single family houses on the urban fringe; that population growth will increase demand for housing on the fringe because new residential development in cities can only accommodate 10% of housing needs; and that there is plenty of land left for development, noting that only 5% of the land mass in the U.S. is urbanized.[53]

NAHB further emphasizes that "home-builders are building houses and subdivisions in suburban and semi-rural communities that conform to the standards of local land use regulations. In most metropolitan areas, this observation is correct."[54]

Communities are overcome by sprawl as the result of a series of steps, each one seemingly logical or innocuous in itself.[55] We have sprawl because it is profitable, it is easy, and because we allow it.

". . . central cities are neglected and impoverished; suburban communities are losing their identity; roads are gridlocked for hours on end; farmland is being gobbled up; and public revenues are insufficient to pay for services."

B. The Problem With Sprawl

The migration of the American population has created a tangled variety of land use problems for both officials and residents in cities and suburbs. These problems make up a familiar list: central cities are neglected and impoverished; suburban communities are losing their identity; roads are gridlocked for hours on end; farmland is being gobbled up; and public revenues are insufficient to pay for services.[56]

The worst statistic in the negative data regarding sprawl is that "in most metropolitan areas of the country, as the population grows, the amount of land that is developed to meet that demand increases by five to ten times the rate of population growth."[57] This means "the surface area covered by development in metropolitan areas increases by about 70% to 100% in order to accommodate a 10% increase in population."[58] In addition to using up open space and farmland, sprawl may also have an appetite for devouring historic sites.

"Buildings comprise a place, and architecture, it's been said, is the art of place making."[59] In the latter part of the last century, many of the significant buildings that once gave our downtowns their identity were destroyed.[60] By tearing down an old single-family structure, a developer can put up multiple units, creating a potentially stronger revenue stream.

Alternatively, developers put up new housing instead of repairing and reusing older housing stock. This often results in an over-supply of housing, a decay of older buildings, the elimination of open space, and a need for additional infrastructure.[61] Americans "have abandoned and then neglected traditional residential neighborhoods that gave the people who lived there a sense of belonging."[62] Many of our smaller towns have dissolved into roadside disarray.[63] As Jane Jacobs wrote over 40 years ago, "every place becomes more like every other place, all adding up to Noplace."[64]

V. Land Use Planning

A. How Modern Are Our Local Land Use Statutes?

In trying to solve problems like sprawl and urban decay with land use planning, community leaders often refer to their state planning laws. But many discover their state has not updated its planning laws. Some states have planning enabling legislation that is based on the 1928 Standard City Planning Enabling Act (SCPEA) which was drafted by an advisory committee of the U.S. Department of Commerce. According to the American Planning Association, New York State's planning enabling legislation has been rated as only "slightly updated" from the 1920s statute.[65]

B. Municipal Planning Principles

New York State law provides municipalities with many planning tools to use in designating growth and conservation areas.[66] The principal tool is the Comprehensive Plan, without which, the Court of Appeals has said, there can be no rational allocation of land use.[67] New York statutes suggest that local comprehensive plans include a statement of goals and objectives concerning the community's physical development and describe specific actions that will provide for the locality's long-range growth and development.[68]

Local governments also have authority to formulate a Local Waterfront Revitalzation Plan (LWRP) when the community is located in the state's extensive coastal areas, as is much of the Hudson River Valley.[69] Once a growth area has been designated, local governments can choose from a list of techniques to direct development into such areas.[70] Choices include: Higher Density Districts; Bulk Area Requirements; Incentive Zoning; Special Permits; Floating Zones; Generic Environmental Impact Statements; Transfer of Development Rights; and Intermunicipal Agreements.[71]

C. The Hudson River Valley Heritage Area's Local Land Use Tools

Based on data from a 1999 survey by the New York State Legislative Committee on Rural Resources, land use planning and regulations for the 11 counties in the Hudson River Valley National Heritage Area breaks out as shown below:[72]

County	Number of Municipalities	Written Comprehensive Plan	Zoning	Subdivision	Site Plan	Planning Board
Albany*	19	5	19	16	13	17
Columbia**	23	14	21	22	17	23
Dutchess*	30	30	29	29	29	30
Greene	19	17	10	17	14	19
Orange	40	40	40	40	40	40
Putnam	9	8	9	7	8	9
Rensselaer	21	8	16	16	15	18
Rockland	24	17	24	22	22	24
Saratoga	30	26	23	26	22	26
Ulster	24	20	24	24	23	24
Westchester	48	44	46	43	45	46

*Data based on 1994 survey results—update unavailable
**Data based on 1992 survey results—update unavailable

This data reveals that most Hudson Valley municipalities do have written comprehensive plans and some system of zoning and planning. But municipal planning tools alone will not stop sprawl. It's how these tools are created and implemented that will protect the valley.

William A. Johnson, Jr., Mayor of the City of Rochester, N.Y., and Co-Chair of the U.S. Conference of Mayors' Regionalism and Smart Growth Task Force, commented on the inherent problem with individual municipal planning that is not put into a larger, more regional context:

> In Greater Rochester, all of our towns have comprehensive master plans, yet planning is uncoordinated. There's no mechanism for measuring the cumulative effects of local decisions. Each municipality acts independently. But local decisions have no relation to a broader program of transportation, environmental protection, job location, or economic development. This is a very inefficient and costly way to do business. Home rule is, without a doubt, the toughest nut to crack.[73]

D. Home Rule

Home rule is the right of self-government as to local affairs. Its origin is ancient. Even before the Magna Carta, some cities, boroughs and towns enjoyed customs and liberties which had been granted by the crown, and among them was the right to elect certain local officers from their own citizens, and with some restrictions, to manage their own purely local affairs.[74]

Contemporary American home rule consists of two basic principles: (1) the state has granted to local governments the power to manage their affairs; (2) the state is restricted from intruding upon matters that are of local concern, rather than state concern.[75] Home rule also provides a limited authority for local governments to supersede state statutes.[76]

In the United States local sovereignty in land use matters has been established and reinforced consistently since *Village of Euclid v. Ambler Realty Co.*, 1926, when the Supreme Court declared local zoning constitutional. The Court recognized the principle of local self-determinism in land use control when it wrote: "the village [of Euclid], though physically a suburb of Cleveland, is politically a separate municipality with powers of its own."[77]

1. Home Rule in New York State

In New York State planning and zoning authority rests with the legislative bodies of cities, town, and villages.[78] The authority to regulate land use is based in the Statute of Local Governments and also within the Municipal Home Rule Law.[79] However, beginning in the 1970s, New York local governments began to witness an intrusion by the state into what had traditionally been considered matters of local concern.[80]

The Court of Appeals took a strong position regarding the need for regional mechanisms to make sense out of "insular" land use decisions.[81] In *Golden v. Planning Board of the Town of Ramapo*, the court upheld the town of Ramapo's novel growth management legislation, recognizing the constraints for planning a region, one community at a time.[82]

The court called for a system of statewide or regional control of land use planning to "insure that interests broader than that of the municipality underlie various land use policies."[83]

By the late 1980s, the federal government had intruded on local governments in New York and municipalities across the country, further eroding the concept that all land use control is local in nature.[84]

Courts now assess cases based on the premise that only land control issues of "purely local concern" should be governed at the municipal level. By applying this premise, courts have held that an increasing number of situations, which might have been viewed as "local concerns" in the past, are now matters of regional or statewide concern. State concerns have been found to exist in many significant land use cases[85] such as the future of the forests in the Adirondack region,[86] affordable housing needs in the town of New Castle,[87] and the need to protect the drinking water supply in the town of Islip.[88]

Because of the erosion of the cherished ideal of home rule, local elected officials, as well as ordinary citizens, often react strongly to any perceived threat to this ideal. The following account of the evolution of the Hudson River Valley National Heritage Area Act illustrates this point.

2. Home Rule Backlash to the Hudson River Valley National Heritage Area

In 1996, United States Congressman Gerald Solomon excluded his own district from inclusion in the newly designated Hudson River Valley National Heritage Area, despite having voted for it.[89] This deprived Columbia and Greene Counties, as well as any portions of Rensselaer and Dutchess Counties located entirely within the 22nd Congressional District,[90] from receiving up to $10 million in federal aid to help restore historic treasures such as Olana and Lindenwald.[91] The purpose of the Act was to "recognize the importance of the history and the resources of the Hudson River Valley to the Nation."[92] While supporters of the Act viewed the heritage designation as a means to market the Hudson Valley region's rich history and character to the world,

home rule proponents believed the designation would invite federal authority over local decision making. Solomon was concerned about what would happen when the federal funds expired.[93] ''If you accept the money, what kind of strings are still attached? Does the government still have a role?" said Bill Teator, a spokesman for Solomon.[94]

Although Solomon had local supporters,[95] his stand provoked public outcry.[96] The following year Solomon crafted an amendment to the legislation to allow the communities in his district to join the Heritage Area if they so resolved.[97] To date, 31 communities in the 22nd Congressional District have joined the Hudson River Valley National Heritage Area.[98]

E. Regionalism v. Localism

New York State land use control is a continuous tug-of-war between localism and regionalism, local government and state-created regional agencies[99] going back to the adoption of the first local comprehensive zoning ordinance in the United States in New York City in 1916, followed shortly after by the formation of the Regional Plan Association in the tri-state New York metropolitan area. These are polar opposites: one in the direction of localism, and the other in the direction of regionalism.[100]

"Now, 11 years after it was begun, the Greenway is enjoying some success. Over 152 of 242 communities have become participating members."

Since that time every New York governor has made some statement about the importance of having a clear state policy on land use to guide local decisions. Governor Franklin Roosevelt wrote to the legislature in 1931, "we in this state have progressed to the point where we should formulate a definite, far-reaching land policy for the state."[101] Governor Herbert Lehman commissioned a 1934 report calling for the creation of a permanent state planning office.[102] In 1961, Governor Rockefeller proposed the creation of an Office for Urban Development and received its 1964 report, which was intended to serve as a guide for future planning in the state.[103]

In 1970, the New York legislature was presented with the Statewide Comprehensive Planning Act providing for the creation of state, regional, county, and local plans. At the time this was the nation's most far-reaching attempt to guide and constrain local land use decision making. It was a classic top-down approach. The perceived threat to local control was clear and the political reaction was immediate. The bill was withdrawn and the agency that proposed it, the New York Office of Planning Coordination, was voted out of existence by the state legislature.[104]

1. The Greenway

Twenty years later the state legislature adopted the Hudson River Greenway Act of 1991, creating the Hudson River Greenway Communities Council.[105] The Act's legislative intent states that the Hudson River Valley region, "possesses unique scenic, beauty, natural and cultural resources of state and national significance." The region "is replete with history and deserves protection from urban sprawl and other environmental affronts—the clear intent of this statute."[106] The goal of the council is to encourage cooperative planning among localities in the ten-county region that lines the Hudson River from Yonkers to Albany, fostering appropriate economic development consistent with conservation objectives.[107] Now, 11 years after it was begun, the Greenway is enjoying some success. Over 152 of 242 communities have become participating members.[108]

Participation in the council's planning program is voluntary on the part of individual localities.[109] Matching grants are available to interested municipalities, along with technical assistance, to help them develop an appropriate plan.[110] Once a locality has adopted a plan that is part of a sub-regional plan, and is consistent with the council's principles, it is deemed to be a "participating community." Under state law participating communities are eligible for several benefits, including matching grants for certain projects, a 5% advantage for funding from state agencies, and state indemnification from legal liability.[111] In addition, such communities benefit from the ability to exempt conforming projects from the State Environmental Quality Review Act and expedite their approval and development.[112] Communities also receive ongoing assistance from the council, including help with mediating local land use controversies, and the ability to make state agencies operating within the locality consider the local plan and cooperate with it.[113]

The Greenway is a bottom-up regional planning mechanism; when a local government adopts a plan and is accepted as a participating Greenway community, the law gives the council no authority over the locality's actions.[114]

2. Home Rule and the Greenway

Despite its statutory restriction of state interference in local matters, distrust of regionalism still makes the Greenway a hard sell in many communities. For example, in 2001 the Columbia County Planning Department Director, Roland Vosburgh, wrote a letter to an undisclosed party in which he stated, "I am afraid that some local government officials and public might view even generic county plans as unwanted and hostile and part

of a push for regionalization."[115] Vosburgh continued, "I have long been concerned that a narrow interpretation of economic development constrained to be compatible with Greenway principles, might impede the development of a diversified and balanced economy in the Hudson River Valley."[116] Vosburgh also noted that the Greenway economic development thrust emphasizes agriculture, tourism and downtown revitalization, which could block projects that might benefit the county economically. Columbia County is the proposed site for the largest cement plant in the United States.[117]

Even in neighboring Dutchess County, where all 30 Dutchess county municipalities had approved Greenway principles and 20 municipalities had joined the county's compact program, there is resistance. At a recent Town of Milan Board Meeting, Ed Haas, the past president of the Northern Dutchess Alliance, spoke out against the compact, emphasizing threats to home rule.[118] He pointed out that Dutchess County would have as few as one representative of the 27-member Greenway Council and that representatives could well be from East Fishkill or other Dutchess County communities that have little in common with Milan.[119]

VI. Smart Growth

In attempting to manage growth, while remaining sensitive to both local concerns and to regional needs, many community leaders are embracing the concept of "Smart Growth," a term coined by Maryland Governor Parris Glendening in his land use reform law enacted in 1997.[120] "Smart Growth" has replaced "Growth Management" as the new prescription to cure the problems associated with sprawl.[121] Smart growth encourages citizens and governmental bodies to use public resources and legal authority more intelligently, in order to create sustainable communities by encouraging development in growth areas, and limiting new development in conservation areas.[122]

According to Governor Glendening's description:

> Smart Growth has three straightforward goals: 1) to save our most valuable remaining natural resources before they are forever lost, 2) to support existing communities and neighborhoods by targeting state resources to support development in areas where the infrastructure is already in place or planned to support it, and 3) to save taxpayers millions of dollars in the unnecessary cost of building the infrastructure required to support sprawl.[123]

The idea of smart growth has been articulated in different terms for nearly a half century. Public discussion on the issue reached a high point in the early 1970s, when policymakers and scholars warned the nation that unchecked development patterns and the continuous flight of resources from cities would result in negative consequences.[124] During the last decade, for the first time in 80 years, state and local governments clearly began to move away from the strictures of traditional Euclidean zoning[125] and toward more innovative land use planning and control techniques to meet the individual needs of diverse communities.[126]

The concept of smart growth has taken hold across the United States. Even the media has spread the word, with a fivefold increase from 23 articles on the subject in 1996, to 149 in 1997.[127] *USA Today*, *The New York Times*, and the *Nation's Cities Weekly* have featured smart growth stories on an almost weekly basis in recent years.[128] In 2001, 27 governors (fifteen Republicans, ten Democrats, and two Independents) made planning and smart growth proposals.[129]

Across the country "there has been much debate as to which level of government should be responsible for drawing the boundaries of designated growth districts. In Oregon, it is the state. In Maryland, it is the county. In New York and most other states, it is the municipality."[130] Although municipalities can control growth with zoning and planning, many municipalities only have part-time or volunteer planning and zoning boards. Thus, personnel might not have the benefit of professional training. Some planning or zoning boards look to the state for land use guidelines.

A. Smart Growth Proposals in New York State

A number of smart growth proposals have been introduced in the New York legislature, although none have been enacted during the last two years. Recent proposals include: the establishment of a Smart Growth and Economic Competitiveness Task Force and a Smart Growth Local Assistance Office within the Department of State (A.B. 6807 Hoyt 2001); the establishment of the New York State Smart Growth Compact, including the creation of a Smart Growth Compact Council and criteria to be included in the inter-municipal compact plans (A.B. 1710A Brodsky 2001); the creation of local Smart Growth Commissions to develop joint smart growth plans (A.B. 423 Hoyt 2001); the Smart Growth for a New Century Act that would establish a smart growth review board for the purpose of reviewing and certifying proposed smart growth plans, and would create the New York State smart revolving loan fund (S.B. 5575/A. 8800 LaValle/DiNapoli, 2001); the Quality Communities Planning Act (S.B. 5527 Rath 2001); and the Governor's program bill, the Quality Communities Act of 2001 (S.B. 5560 2001—introduced by Sen. Rath at the request of the governor).[131]

On January 21, 2000, Governor Pataki created the Quality Communities Interagency Task Force, which

called for local governments to designate growth areas for smart growth planning purposes.[132] The Task Force, chaired by Lt. Governor Mary Donohue, issued its final report in January 2001, offering more than 40 recommendations.[133] The Task Force was asked to "undertake a multifaceted and interdisciplinary study of issues which might impact the creation of community visions."[134] It was also asked to inventory local, state, and federal programs affecting community development, preservation, and revitalization goals of urban, suburban and rural communities.[135]

"Deciding to take responsibility for creating the type of community they want to live in, residents can take the initiative by actively participating in how their communities are planned."

During the course of ten roundtables held across the state, the Task Force

> consistently heard that the demands of daily living have caused New Yorkers to place an increasingly greater value on the quality of life in their own communities. Further, there is widespread recognition that the quality of our lives is intimately connected to land use patterns and governmental decision-making at the local, State and federal levels.[136]

To date, many of the 41 recommendations of the task force have not been addressed.[137]

B. Smart Growth at Work in the Hudson Valley

Deciding to take responsibility for creating the type of community they want to live in, residents can take the initiative by actively participating in how their communities are planned. Two Hudson Valley municipalities where citizens took responsibility for managing growth are Pawling and Hyde Park, both in Dutchess county. In Pawling, local zoning was amended to include the quality-of-life enhancements that residents wanted, such as open space and trails. In historic Hyde Park, community members and civic leaders banded together to ensure that open space, and not a new big box store, would face visitors leaving Springwood, the location of the F.D.R. Home, Library and Museum. Both the Pawling and Hyde Park initiatives are examples of smart growth at work in the Hudson River Valley.

1. Pawling

Local zoning can combat sprawl while also fostering development patterns that limit the land consumed by development demands fueled by population growth and shifts. The village of Pawling, New York used conventional techniques as well as an optional set of regulations adopted by the same village to encourage a smart growth pattern of land use.[138]

Pawling is a village of 2,000 residents located in the southeastern corner of Dutchess County on the Connecticut border in a vast watershed area known as the Great Swamp. The community is intersected by the north-south Route 22 transportation corridor and the Appalachian Trail, which runs east and west along its northern border. In 1990, the village began a planning process that led to the adoption of a new comprehensive plan and a zoning ordinance plan that was developed with input from all interest groups in the village communities.[139] The plan and ordinance contain conventional zoning provisions, as well as incentives and other provisions enacted to concentrate future development in carefully designed, compact neighborhoods. The differences between these conventional and innovative mechanisms represent two competing models of local land use regulation. The village's conventional approach induces sprawl, and its innovative devices demonstrate how local governments can regulate land use in line with smart growth principles.[140]

Pawling's village board of trustees enacted a zoning ordinance and map separating the community into seven zoning districts: four residential, two business, and one industrial; it is supplemented by a conventional approach to regulating the subdivision of land for residential development.[141]

The zoning provisions in the 70% of the village zoned R1, provide that single-family residences are to be built on lots at least one acre in size with minimum front lots 150 feet wide and 50 feet deep, with rear yards of at least 50 feet, and side yards of at least 70 feet. The subdivision regulations provide additional "design" standards for residential developments in the village.[142] These requirements give the planning board, the village board, and land developers little leeway in design or layout.

Such rigid regulations segregate retail from commercial so that distances are not walkable; provide wide streets for the fast moving of cars, discourage walking and bicycling; create relatively high-cost homes on expensive tracts of land; and spread the development allowed over the entire land area contained in a proposed subdivision. It is the blueprint for sprawl.[143]

To enable its neighborhoods to offer greater quality to their residents, the Village of Pawling began by amending its comprehensive plan to require more con-

centrated land patterns with dedicated open space, a network of trails, a regional green space network, and residential developments that fitted around a revitalized central business district.[144] The plan also identifies four large tracts of property located in R1 zones and contains conceptual development plans for those tracts calling for an increase in the number of residential units allowed on each tract, placing greater space to the public, linking this open space to trails and other open spaces and parks, and avoiding development of the wetlands and steep slopes on the sites.[145]

To make these conceptual plans meaningful, the zoning law of the village was amended in 1995 with the adoption of a new zoning code, containing a schedule of "urban regulations" which provide for six building types allowed in designated zoning districts.[146] The urban regulations are fundamentally different from conventional zoning in that they use detailed illustrations for alternative lot layouts, building designs, setbacks, and parking; giving the planning board the type of control over the design of development that is not present in conventional zoning subdivision, and site plan laws.[147]

2. Wal-Mart and Hyde Park

As commercial and residential development pressures escalate throughout the Hudson Valley Region, more citizens are realizing that they can have a voice in resisting sprawl.[148] A growing number of communities have concluded that their future goes beyond numbers at the bottom line.[149] Hyde Park, in Dutchess County, is such a community.[150]

Although much of Hyde Park's appeal to visitors comes from its past, this Dutchess County town is also displaying the potential to be a window on the future, a case study for sustainable growth.[151] Gateway to the Hudson Valley's Great Estates Region and home to attractions such as the Franklin D. Roosevelt Home, Library and Museum; Val-Kill, Eleanor Roosevelt's cottage retreat; The Vanderbilt Mansion; and the Culinary Institute of America, the town draws more than 1.2 million tourists annually.[152]

Like many municipalities in the valley, Hyde Park has divergent views about the extent that investment in its heritage tourism sites will yield a healthy economy and an enhanced quality of life.[153] After creating a comprehensive plan in 1998, the town conformed its zoning to the plan with the ultimate objective of establishing a solid framework to ensure that new development is appropriate in scale and character, complementary to the town's economic assets, and aligned with the broad-based needs of its citizens.[154]

In the midst of this initiative, Wal-Mart was eyeing 29 acres along Route 9 opposite the F.D.R. Home, Library, and Museum. It was the second time in a decade that the discount chain had expressed interest in the site.[155] Responding to public concern about a big box store in this sensitive location, Scenic Hudson,[156] the environmental group that is widely regarded for having launched the modern environmental movement,[157] purchased the site and an adjoining 15 acres through its land trust by raising $3.1 million for the purchase of this prime real estate.[158] "In the spirit of our founders' battle over Storm King Mountain,[159] we were determined not to let a major commercial project sully a defining piece of our heritage," is how Scenic Hudson described its involvement.[160]

As a result of the Wal-Mart threat, Scenic Hudson emerged as a major community stakeholder and joined the National Park Service, Roosevelt Institute, and town leaders in launching a visioning process for the hub of the historic F.D.R. corridor along Route 9.[161] Scenic Hudson also engaged other preservationists, tourism and economic development officials as well as developers, to help create a conceptual blueprint for Hyde Park to capitalize on its heritage assets.[162]

Initial local resistance to removing this valuable land from the tax rolls diminished, as it became known that Hyde Park had only about 170 parcels out of slightly more than 7,400 parcels of land, off the tax rolls. [163] Additionally, keeping the Roosevelt site free of sprawl helps retain the unique quality of the Hyde Park area, which is what draws tourists to the area.[164] Tourism is the second largest industry in Dutchess county and a vital component of the local economy.[165] In 1999, the most recent year for which tourism statistics are available, 3.5 million visitors spent more than $431 million vacationing in Dutchess County, which translates into 10,000 jobs and $173 million in payroll.[166]

3. The Future of Smart Growth in the Valley

Community members, educators, business and government leaders in the Hudson Valley have become increasingly aware of the smart growth message.[167] The Pace Land Use Center received congressional funding for the Community Leadership Alliance Training Program, a four-day curriculum to train local leaders in land use strategies, intermunicipal cooperation, and community-based decision making.[168] By the end of 2001, Pace had trained 350 leaders from 150 communities; and created three intermunicipal councils. The program involved over 30 communities.[169] It also placed an aggressive technological assistance program to support the program's graduates and their fellow local leaders. A recent opinion survey of graduates regarding the results of their training indicates satisfaction and success rates of over 90%. The program now has over 40 municipal co-sponsors that are local governments whose legislatures have adopted resolutions officially co-sponsoring the program.[170]

Almost two dozen organizations joined together in sponsorship of a statewide smart growth conference at the Empire State Plaza in the Capital, in March 1999.[171] From this gathering, a number of organizations have formed an ad hoc Smart Growth Committee, meeting regularly to discuss the issues and options for reform.[172] New organizations like the Northern Dutchess Alliance, the Southern Ulster Alliance, and the Historic River Towns of Westchester are proving the power of partnership among municipalities and diverse interests to promote economic goals through the preservation of regional assets.[173] In Irvington, Sleepy Hollow and Beacon, citizens and elected officials are working to ensure that open space, viewsheds and public access to the river are protected, even as riverfront development occurs.[174] In November 2001, The Hudson Valley Smart Growth Alliance held its first workshop.[175] The conference focused on a six-county region of the Hudson Valley, including Columbia, Dutchess, Putnam, Greene, Ulster and Orange counties; five of the six counties are among the ten fastest-growing counties in the state outside New York City, the alliance said in a statement. [176]

As Mayor Johnson observed, at the Hudson Valley Smart Growth Alliance, "Here in the Hudson Valley, you have the total package—historic treasures . . . beautiful landscapes . . . talented and committed people . . . and one of the most famous rivers in the entire world. You are truly blessed."[177]

VII. Conclusion

Cities, towns and villages can either react to burgeoning sprawl or become proactive. The partnering successes in Hyde Park and the novel zoning provisions of Pawling reveal approaches toward smart growth and away from sprawl that could be replicated throughout the Hudson Valley. But it will take willpower, supported by cooperation and participation from all levels of government, as well as the private and non-profit arenas. When future generations look back at the turn of our now-new century, will the Hudson River Valley still be blessed? We have the power to make the answer resoundingly affirmative.

Endnotes

1. *Hudson River Valley National Heritage Area*, Pub. L. No. 104-333, § 902, 110 Stat. 4275, 4275 (1996). The Hudson River Valley National Heritage Area Act was passed by Congress "[t]o recognize the importance of the history and the resources of the Hudson River Valley to the Nation." The title was meant "[t]o authorize Federal financial and technical assistance to serve these purposes." 110 Stat. at 4276.
2. Scenic Hudson, *Annual Report* at 1 <http://www.scenichudson.org/about/ar/index.html> "Looking out over the 21st century, we are standing at a crossroads between past and future, between protecting our treasured assets or seeing them slip away." *Id*. *See infra* n. 156.
3. Quality Communities Interagency Task Force*: State and Local Governments Partnering for a Better New York* at 1, January 2001. <http://www.state.ny.us/ltgovdoc/cover.html> (pt. IV); *see also* American Farmland Trust, *The State of N.Y.'s Agric. Lands* <http://www.farmland.org/regions/ne/ny.htm> (last visited Apr. 14, 2002) (noting that American Farmland Trust's Northeast Regional Office serves New England and New York, assisting state and local governments, conservation organizations and consumers with local land use initiatives, policy development, public education and farmland protection projects). The Trust recently completed an agricultural and farmland protection plan for Rensselaer County, to help protect 100,000 acres of remaining farmland in the county; s*ee also* American Farmland Trust, *AFT Develops Agricultural Protection Plan for Rensselaer County* <http://www.farmland.org/news_2001/090601_ny.htm> (last visited Apr. 14, 2002).
4. *See* National Trust for Historic Preservation, *Save it Now or Lose it Forever* <http://www.Natl.trust.org/news/docs/20000626_endangered_list.html> (last visited Apr. 14, 2002). National Trust for Historic Preservation is a private non-profit organization with over a quarter million members. "'America's irreplaceable heritage is always at risk,' said National Trust President Richard Moe. 'We must ring the alarm to save these places through awareness, education, funding, and policy changes.'" *Id*.
5. Industrialization also presents a significant threat to the valley. *See* Winnie Hu, *Industrial Growth Threatens Scenic Hudson River Valley, Group Warns*, N. Y. Times B6 (June 27, 2000) (noting that "[o]ver the last year, the Hudson Valley has been swept up in a rush to build power plants throughout the Northeast, fueled by the deregulation of electrical utilities and a growing demand for power plants"); s*ee also* Steve Breyman, *Environment 101: A Lesson on Growth Without all the Conflicts*, The Times Union (Albany, N.Y.) B1 (July 16, 2000) (commenting on the fact that "[o]nly six months after the end of the chip fab struggle in North Greenbush, and about the same time the state approved PG&E's power plant in Athens, the largest in the country, along comes another proposal . . . Besicorp, an Ulster County energy development company, proposes to build a newsprint recycling and cogeneration power plant on the BASF site in the city of Rensselaer"); *Morning Edition*, Natl. Pub. Radio (Jan. 22. 2001) (discussing the fact that "[t]he St. Lawrence Cement Company now wants to build a factory here [Hudson, N.Y.]. . . . Enormous conveyor belts would carry the milled cement to a barge-loading facility on the waterfront").
6. Washington Irving, *The Legend of Sleepy Hollow & Other Tales* 45, (Core Knowledge Found. 1999).

   > Whoever has made a voyage up the Hudson River must remember the Catskill mountains. They are a branch of the great Appalachians, and are seen away to the west swelling up to noble height and lording it over the surrounding country. Every change of season, every change of weather, indeed every hour of the day, produces some change in the magical hues and shapes of these mountains. When the weather is fair and settled, they are clothed in blue and purple and print their bold outlines on the clear evening sky. But sometimes, when the rest of the landscape is cloudless, they gather a hood of grey vapors about their summits, which, in the last rays of the setting sun, light up like a crown of glory.

   Id.
7. *See* The Thomas Cole National Historic Site, Cedar Grove, *Thomas Cole Biography* <http://www.thomascole.org/> (last vis-

ited Apr. 13, 2002) (noting that in 1825, the landscape painter Thomas Cole discovered the haunting beauty of the Catskills' wilderness, and featured the landscape in his paintings, which received wide acclaim. Cole later tutored Frederic Edwin Church in his studio in Catskill, Greene County, NY. Cole is regarded as the father of the Hudson River School of Art). Frederic Church became the most famous Hudson River School painter. Church, originally from Hartford, Connecticut, liked the Hudson Valley area, and built a home he designed with Calvert Vaux, in Hudson, Columbia County, east of his mentor, Cole. Church's unique architectural vision, Olana, is a Moorish Victorian mansion set on 250 acres with magnificent views of the river and mountains. Olana State Historic Site, *History of Olana* <http://www.olana.org> (last visited Apr. 13, 2002).

8. The Hudson River was designated an American Heritage River by President Clinton in 1997. *See* Exec. Or. 13061, 1153-1155, 62 Fed. Reg. 48445 (Sept. 15, 1997). "The American Heritage Rivers initiative has three objectives: natural resource and environmental protection, economic revitalization, and historic and cultural preservation." *Id.*; *see also* Envtl. Conserv. L. § 44-0101 (McKinney 2000) (noting in the practice commentaries the renowned German traveler Baedeker's description of the Hudson as "finer than the Rhine").

9. *See* A&E, *On TV: America's Castles* <http://www.aande.com/tv/shows/castles> (last visited Apr. 13, 2002) (television series that "takes you inside the grand homes built by another generation of American's 'royal' families, including the Vanderbilts [and] Rockefellers . . . "). *Id.*

10. H.R. Subcomm. on Natl. Parks, Forests and Pub. Lands, *The Hudson River Valley American Heritage Area: Hearings on H.R. 4720*, 103rd Cong. 29-30 (July 28, 1994) (testimony of David Sampson, Exec. Dir. Hudson River Valley Greenway Community Council, citing William G. Scheller, *The Hudson River Valley* (New York Geographic Series, No. 2), Farcountry Pr., 1988. During hearings on the Hudson River Valley National Heritage Area Act, David Sampson, then Executive Director of the Hudson River Valley Greenway Communities Council, testified before the House Subcommittee on National Parks, Forests and Public Lands and quoted the above material from Scheller's book. Sampson prefaced the quotation by saying, "[t]here is a quote that we have often used in our Greenway talks that speaks to both the unique importance of the Hudson River Valley and the enormous potential that this legislation has"). *Id.*

11. Hallie Arnold, *Estates of the Hudson Valley* <http://www.hudsonriver.com/estates.htm> (last visited Apr. 13, 2002) (noting the elegant home of the 32nd president, Franklin D. Roosevelt, is located in Hyde Park, NY. Roosevelt was born at Springwood, and spent much of his presidency there; he and his wife Eleanor are buried at Springwood); *see also* National Park Service, *Home of Franklin D. Roosevelt* <http://www.nps.gov/hofr> (last visited Apr. 13, 2002).

12. Lindenwald, in Kinderhook, NY, was the home of the 8th president of the United States, Martin Van Buren. *See* National Park Service, *Martin Van Buren National Historic Site* <http://www.nps.gov/mava> (last visited Apr. 13, 2002) (noting that Van Buren was born in Kinderhook and practiced law in the nearby city of Hudson, NY before beginning his career in politics).

13. *See* 110 Stat. at 4275 (finding that the Hudson River Valley "gave birth to important movements in American art and architecture through the work of Andrew Jackson Downing, Alexander Jackson Davis, Thomas Cole, and their associates").

14. *See id*. (finding the Hudson River Valley to possess "important historical, cultural, and natural resources, representing themes of settlement and migration, transportation, and commerce"); *see id*. at 4275 (finding that the "Hudson River Valley played an important role in the development of the iron, textile, and collar and cuff industries in the 19th century"); Kykuit, one of the Rockefeller family homes <http://www.hudsonvalley.org/web/kyku-main.html>; The Mills Mansion, a monument to the Gilded Age, was the autumn residence of Ogden Mills and Ruth Livingston Mills; it is located in Staatsburg, NY <http://www.pojonews.com/enjoy/stories/0912962.htm>. The Vanderbilt Mansion, completed in 1899 for Frederick Vanderbilt, is another Gilded Age extravaganza, located in Hyde Park; *see also* National Park Service, *Vanderbilt Mansion* <http://www.nps.gov/vama> (last visited Apr. 14, 2002).

15. *See* 110 Stat. at 4275 (noting that the Valley played "an important role in the military history of the American Revolution"); *see also* <http://www.Natl.trust.org/save%20america's%treasures/profiles/washington.htm> (last visited Apr. 15, 2002). During the Revolution, George Washington maintained his longest residency at Newburgh, where he also founded the Order of the Purple Heart. *Id*.

16. *Hudson River Valley Natl. Heritage Area*, Pub. L. No. 104-333, § 902, 110 Stat. 4275, 4275 (1996). the Hudson River Valley Natl. Heritage Area Act was passed by Congress "[t]o recognize the importance of the history and the resources of the Hudson River Valley to the Nation." The title was meant "[t]o authorize Federal financial and technical assistance to serve these purposes." 110 Stat. at 4276.

17. 110 Stat. at 4275. Congressman Maurice Hinchey of New York's 26th Congressional District introduced the Hudson River Valley National Heritage Area Act in 1994. The Heritage Area, as enacted in 1996, consisted of Albany, Rensselaer, Ulster, Dutchess, Orange, Putnam, Westchester, Rockland, New York counties and the Village of Waterford in Saratoga County. *See* 110 Stat. at 4276. Excluded from the Heritage Area were Columbia and Greene counties, as well as any portions of Rensselaer and Dutchess counties located entirely within the 22nd Congressional District. *Id.* However, the legislation was amended in 1997 to allow these communities to join the Heritage Area if they so resolved. *Dept. of the Inter. Appropriation Act*, Pub. L. No. 105-83, § 324, 111 Stat. 1597, 1597 (1997).

18. *See supra* n. 17; *see also* U.S. House of Representatives, *Hudson River Valley Heritage Area* <http://www.house.gov/hinchey/heritage_map.htm> (last visited Apr. 14, 2002).

19. *See* U.S. House of Representatives, *supra* n. 18.

20. John R. Nolon, *Well Grounded: Using Local Land Use Authority to Achieve Smart Growth*, at 2 (Envtl. L. Inst. 2001); *see also* Pattern-for-Progress, *Regional Housing Trends*, <http://www.pattern-for-progress.org/reports/regionalhousing.htm> (last visited Feb. 24, 2002) (noting "[l]arge-scale new residential development in southern Dutchess and explosive retail growth throughout the region demonstrate recent expansion which has been geared to serve a commuting population to Westchester and New York City. Transportation also directs growth patterns, creating an even greater demand for housing around commuter rail stops, as well as commuter highways"); Mid-Hudson Pattern-for-Progress is a non-profit that "works with county planning and economic development offices to provide technical expertise and market/demographic data for strategic planning. Pattern maintains a comprehensive regional research base and data library on the Hudson Valley. Pattern-for-Progress, *About Mid-Hudson Pattern-for-Progress*, <http://www.pattern-for-progress.org/about_pfp.htm> (last visited Apr. 14, 2002).

21. Monica Michael Willis, *Save Our Countryside; Scenic Hudson Conservation Groups Helps Protect the Hudson Valley*, 19 Country Living at 19 (1996) (commenting that because of urban sprawl and

the sheer number of people who reside in the region, it is an ecosystem at constant risk.) *Id.*

22. *See* Pattern-for-Progress, Progress Report <http://www.pattern-for-progress.org/newsletter_2001_2.htm> (commenting "[i]t's a natural progression to see the high tech, emerging technology, new economy type activities being developed, cultivated, matured and of course prospering in the Hudson Valley region").
23. Nolon, *supra* n. 20, at 2.
24. *See* Pattern-for-Progress, *supra* n. 22.
25. *Id.*
26. Mid-Hudson Pattern-for-Progress, *Total Population Change for New York: Local Govt. Areas, 1990-2000: Census 2000: Pub. L. 94-171 Data* (N.Y.S. Dept. of Econ. Dev., St. Data Ctr. 2001) *see* <http://www.pattern-for-progress.org/reports/Population%20Change%20for%20New%20York%202000.pdf> (last visited Apr. 14, 2002).
27. *See* Pattern-for-Progress, *supra* n. 20.
28. Nolon, *supra* n. 20, at 2.
29 *Id*. (noting the Advisory Committee on Sustainable Development in the Hudson River Valley "included a leading scholar on suburbanization, a nationally known expert on neighborhood and community design, a former EPA regional administrator, a Fortune 500 CEO, key environmental leaders" and other experts). *Id. See also,* Pace U. Sch. of L., Land Use L. Ctr. <http://www.pace.edu/lawschool/landuse/mission.htm> (last visited on Apr. 9, 2002).
30. Nolon, *supra* n. 20, at 2.
31. *Id*.
32. *Id*.
33. *See* The Conservation Foundation <http://www.theconservationfoundation.org/aboutus/about.htm> (last visited Mar. 23. 2002) The Conservation Foundation is a non-profit land and watershed protection organization, established in 1972. *Id*.
34. Deborah Meyer DeWan, *Hudson Valley Communities at a Crossroads*, Scenic Hudson News at 23 (Spring 2000).
35. *See* Quality Communities Interagency Task Force: *State and Local Govts. Partnering for a Better N. Y.* <http://www.state.ny.us/ltgovdoc/conclusion_113_115.html> (pt. IV) n. 10 (last visited Mar. 30, 2002) (citing *The Costs of Sprawl-Revisited*, TCRP Report 39, Transp. Research Bd., Natl. Research Council at 6 (1998)).
36. *Id*.
37. *Id.*
38. *Id.*
39. Richard Moe & Carter Wilkie, *Changing Places: Rebuilding Community in the Age of Sprawl*, at x (Henry Holt 1999) (commenting further that "[t]here is a diminished sense of connections, social as well as spatial, in the pedestrian-unfriendly places where residents spend more time driving from one place to another and less time with one another"). *Id.*
40. Nolon, *supra* n. 20, at 1. (citing the Sierra Club report, *Sprawl: The Dark Side of the American Dream* (1998) <http://www. sierraclub.org/sprawl/report98/index.asp> (last visited Mar. 30, 2002); *See also Solving Sprawl: 1999 Sierra Club Report* (1999) <http:www.sierraclub.org/sprawl/report99/transportation.asp> (last visited Apr. 9, 2002).
41. Nolon, *supra* n. 20, at 1.
42. *Id.*
43. Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 Urb. Law. 601, 602 (1999) (citing Neal Pierce, *Sprawl Rises as Issue: But Will Anything Change?* County News 25 (Oct. 12, 1998)).
44. Salkin, *supra* n. 43, at 602 (citing a study by Robert Burchell et al., *Transportation Research Board, The Costs of Sprawl—Revisited* (1998)).
45. Moe & Wilkie, *supra* n. 39, at xi.
46. *Id.*
47. *Id.*
48. *Id*. (noting that today people are also moving because their communities are being gradually destroyed by insensitive development or by the arrival of the urban ills that caused them to flee the cities in the first place). *Id*.
49. *Id*. at ix.
50. *Id*. at x.
51. Richard Moe & Carter Wilkie, *Changing Places: Rebuilding Community in the Age of Sprawl*, at x (Henry Holt 1999).
52. *Id*. at xi.
53. Nolon, *supra* n. 20, at 1-2.
54. *Id.*
55. Moe & Wilkie, *supra* n. 39, at ix -x.
56. Rodney L. Cobb, *Toward Modern Statutes: A Survey of State Laws on Local Land-Use Planning*, in *Planning Communities for the 21st Century*, II, at 7 (Am. Plan. Assn. 1999).
57. Nolon, *supra* n. 20, at 1.
58. *Id.*
59. Moe & Wilkie, *supra* n. 39, at ix.
60. *Id*.
61. William A. Johnson, Jr., Mayor, City of Rochester, NY, Address, *Hudson Valley Smart Growth Alliance Conference* at 10 (Marist College, Poughkeepsie, NY, Nov. 10, 2001) (copy of transcript on file with author) (commenting that foreclosures and vacancies are at record levels in Monroe County, NY, yet, according to the Rochester Home Builders Association, nearly 20,000 new homes were built between 1990 and 2000. The Census Bureau data indicates that about 10,000 new households were created in the County during those same years. Supply increased at twice the demand. Town property tax levies have increased almost 90% over the past ten year to meet demand for new services.) As mayor of Rochester, Johnson is the Co-Chair of the U.S. Conference of Mayors' Regionalism and Smart Growth Task Force. *Id*.
62. Moe & Wilkie, *supra* n. 39, at ix.
63. *Id*.
64. *Id.* at ix-x, (citing Jane Jacobs, *The Death and Life of Great American Cities* (Random House 1961).
65. Nolon, *supra* n. 20, at 22; *see also* Am. Plan. Assoc., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* at xxx (Stuart Meck, FAIP, ed. 2002) (the American Planning Association's *Growing Smart Legislative Guidebook* contains model planning statutes that can be adapted by states to fit their needs). *Id.*
66. Nolon, *supra* n. 20, at 26.
67. *Id; see also Udell v. Haas*, 21 N.Y.2d 463, 476, 288 N.Y.S.2d 888, 905 (1968).
68. Nolon, *supra* n. 20, at 26; *See* N.Y. Town L. § 272-a (McKinney 1987); N.Y. Village L. § 7-722 (McKinney 1996); N.Y. Gen. City L. § 28-a (McKinney 1989).

69. Nolon, *supra* n. 20, at 27. (harbor development districts, riverfront revitalization areas, and waterfront redevelopment zones have been established under LWRP's, all of which may be designated growth areas). *Id; See* N.Y. Exec. L. §§ 910, 911 (McKinney 1996 & Supp. 2000).

70. Nolon *supra* n. 20, at 27.

71. *Id*. at 27-29.

72. N.Y.S. Leg. Comm. on Rural Resources, *Land Use Planning & Regulations in New York State Municipalities: A Survey*, app. A at A3, A14-15, A17-18, A23-24, A40-42, A45-47, A49-50, A58-59, A62-63. (Fall 1999). (Methodology used in this survey: "The Commission staff mailed a copy of 1994 survey data to each county planning department outside New York City. County planners were asked to verify or update the list of basic land use tools being used by each municipality within the county. Eight counties out of 57 did not provide updated survey results.") *Id*. at 3; <http://www.senate.state.ny.us/Docs/rurfal99.pdf> (visited Apr. 6, 2002).

73. Johnson, *supra* n. 61, at 10.

74. John R. Nolon, *The Erosion of Home Rule Through the Emergence of State Interests In Land Use Control,* 10 Pace Envtl. L. Rev. 497, 506 (Spring 1993).

75. Patricia E. Salkin, *The Politics of Land Use Reform in New York: Challenges and Opportunities*, 73 St. John's L. Rev. 1041, at 1043-1044.

76. *Id*.

77. Nolon, *supra* n. 20, at 4; *See Village of Euclid v. Ambler Realty Co*., 272 U.S. 365, 389, 47 S. Ct. 114, 119, 71 L. Ed. 303, 311 (1926).

78. Salkin, *supra* n. 75, at 1043; *see* N.Y. Gen. City L. § 20 (McKinney 1989 & Supp. 1999); N.Y. Town L. § 261 (McKinney 1987 & Supp. 1999); N.Y. Village L. § 7-700 (McKinney 1996).

79. Salkin, *supra* n. 75, at 1043*; see* N.Y. Mun. Home Rule L. § 10 (McKinney 1994).

80. Salkin, *supra* n. 75, at 1044.

81. Nolon, *supra* n. 20, at 4.

82. Nolon, *supra* n. 20, at 27; *See Golden v. Planning Bd. of the Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1972) (holding that "where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential Services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth'.") 30 N.Y.2d at 383, 285 N.E.2d at 304-305.

83. Nolon, *supra* n. 20, at 4. *See Golden v. Ramapo*, 30 N.Y.2d at 376.

84. Salkin, *supra n.* 75, at 1044.

85. *Id.* at 1044-1045.

86. *See Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 491, 393 N.Y.S. 2d 949, 950 (1977) (holding that to categorize as a matter of purely local concern the future of the forests, open spaces, and natural resources of the vast Adirondack Park region would doubtless offend aesthetic, ecological, and conservational principles). *Id*.

87. *See Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110, 242, 378 N.Y.S. 2d 672, 681 (1975) (holding that although the traditional views that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality). *Id.*

88. *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 52, 484 N.Y.S.2d 528, 529 (deciding the statute's principal purpose to protect the sole source aquifer for Nassau, Suffolk and part of Queens from pollution, is a matter of State concern). *Id.*

89. Bruce A. Scruton and Michael Lopez, *Solomon Forgoes Funds for District*, The Times Union (Albany, N.Y.) A1 (Oct. 5, 1996); *see* Pub. L. No. 104-333, § 904(b)(1) Title IX (1996).

90. Pub. L. No. 104-333, at §§ 904(b)(2)(A), 904 (b)(2)(B); *see also* n. 17, *supra*.

91. *See supra* notes 7 and 12.

92. Pub. L. No. 104-333, § 903 (1), (2), (3). The Act was meant "to assist the State of New York and the communities of the Hudson River Valley in preserving, protecting, and interpreting these resources for the benefit of the Nation" and "to authorize Federal financial and technical assistance to serve these purposes." *See also* Scruton, *supra* n. 89.

93. Bruce A. Scruton and Michael Lopez, *Solomon Forgoes Funds for District*, *supra* n. 89, A1.

94. *Id.* ("The staff of Rep. Maurice Hinchey, D-Saugerties, who sponsored the heritage area legislation, and other proponents had a vastly different interpretation of what the designation means. 'There is nothing in this law that allows federal government to preempt local authority,' said Chris Arthur, a Hinchey spokesman.") *Id.*

95. *Id.* ("'We felt we should know more about it before we were automatically included,' said Gerry Simons, chairman of the Columbia County Board of Supervisors. The New York Farm Bureau, with 26,000 members also issued a prepared statement supporting Solomon.") *Id*.

96. *See* Edward K. Kiernan, *Solomon Proves He's Really Not a Friend to Taxpayers*, The Times Union (Albany, N.Y.) A10 (Oct. 17, 1996) ("I was appalled to read of the recent action taken by Congressman Solomon regarding the Hudson River Valley National Heritage Area. If he was so much against the bill, then why did he vote for it in the first place.") *Id*.

97. *See* Pub. L. No. 105-83 § 324 (1997); *see also* Mike Hurewitz, *Federal Funding to Boost Olana Museum Project,* The Times Union (Albany, N.Y.) B5 (Jun. 9, 1998) (In 1998 U.S. Rep. Solomon further placated preservationists by tacking $1 million onto the Federal Transportation bill, in order to help fund a new museum and visitor center at Olana. "[Solomon's] leadership role in securing additional funding for Olana demonstrates the commitment he has had all along to developing eco-tourism in the region," a spokesman for Solomon said.) *Id*. *See* n. 7 *supra*.

98. E-mail from Richard Harris, Senior Planner, Hudson River Valley Greenway, to author, *Hudson River Valley Community List* (Apr. 29, 2002). (To date eleven communities in Columbia Co. have joined (Ancram, Austerlitz, Canaan, Greenport, Hudson, Town of Kinderhook, Village of Kinderhook, New Lebanon, Philmont, Stockport, and Stuyvesant); nine communities in Dutchess Co. have joined (Clinton, Hyde Park, LaGrange, Milan, Town of Red Hook, Village of Red Hook, Town of Rhinebeck, Village of Rhinebeck, and Tivoli); four communities in Greene Co. have joined (Town of Hunter, Village of Hunter, Jewett, and Tannersville); and seven communities in Rensselaer Co. have joined (Brunswick, Castleton, Hoosick, Hoosick Falls, Petersburgh, Town of Schaghticoke, and Village of Schaghticoke). *Id. See* Hudson River Valley Greenway <http://www.hudsongreenway.state.ny.us/heritage/overview.htm> (last visited Feb. 17, 2002) (noting that the Hudson River Valley National Heritage Area is managed by the Greenway Conservancy for the Hudson River Valley, a public benefit corporation, and the Hudson River Valley Greenway Communities Council, a state agency.) *Id*. *See also* n. 105 *infra*.

99. Nolon, *supra* n. 20, at 2-3.

100. *Id.* at 3; *see also* Patricia E. Salkin, *New York Zoning Law and Practice*, 9-4, 9-5 (4th ed., West 2001).

101. Nolon, *supra* n. 20, at 3.

102. *Id.;* Salkin, *supra* n. 100, at 9-4, 9-5.

103. Nolon, *supra* n. 20, at 3.

104. *Id*.

105. *See* N.Y. Envtl. Conserv. L. § 44-0101 (McKinney 2001); *see also* The Hudson River Valley Greenway, <http://www.hudsongreenway.state.ny.us/legisla.htm.> (visited Apr. 1, 2002).

106. *Id.* N.Y. Evtl. Conserv. L. §44-0101 (McKinney 2001), s*ee* Legislative Intent, Historical; *see also* Statutory Notes. *Id*.

107. Nolon, *supra* n. 20, at 269; *see* N.Y. Envtl. Conserv. L. §§ 44-0103, 44-0109.

108. This number reflects the number of Greenway communities as of Feb. 20, 2002; *see* The Hudson Valley Greenway, <http://www.hudsongreenway.state.ny.us/legisla.htm> (visited Apr. 12, 2002). *Id.*

109. Nolon, *supra* n. 20, at 269; s*ee also* N.Y. Envtl. Conserv. L. § 44-0119(1) (McKinney 2001). ("The council shall guide and support a cooperative planning process to establish a voluntary regional compact amount the counties, cities, towns, and villages of the greenway.") *Id*.

120. Nolon, *supra* n. 20, at 269; s*ee* N.Y. Envtl Conserv. L. § 44-0119(2) (McKinney 2001).

111. Nolon, *supra* n. 20, at 269; s*ee* N.Y. Envtl. Conserv. L. §§ 44-0113, 44-0119(2) (McKinney 2001), "Powers and Duties of the Conservancy" and "Greenway Compact."

112. Nolon, *supra* n. 20, at 269; N.Y. Envtl. Conserv. L. §8-0113(1) (McKinney 1975) (requiring that the impact of all development projects on the environment be considered at the planning stage and that local agencies act effectively to avoid any possible adverse environmental impacts.) *Id*. *See* N.Y. Envtl. Conserv. L. § 44-0119(5) (McKinney 2001).

113. Nolon, *supra* n. 20, at 269; *see* N.Y. Envtl. Conserv. L. §§ 44-01134, 4-0119 (McKinney 2001).

114. Nolon, *supra* n. 20, at 269; s*ee* N.Y. Envtl. Conserv. L. § 44-0119 (McKinney 2001).

115. Peter Duveen, *Greenway Could Hurt Local Economy: County*, Register-Star (Hudson, N.Y.) A11, (Sept. 27, 2001).

116. *Id.*

117. *Id.*

118. Mike Mickler, *Pair Works to Garner Support for Greenway*, Register Star, (Hudson, NY) A3 (Mar. 13. 2002) (raising the specter of revisions to the Greenway compact, imposed by the Council, which then would become part of local zoning, thereby undermining home rule). *Id*.

119. *Id.*

120. Salkin, *supra* n. 75, at 1043, n.7 (1999); s*ee also* Md. State Fin. & Proc. Code Ann. § 5-701 (1997); Smart Growth in Maryland <http://www.op.state.md.us/smartgrowth> (last visited Apr. 4, 2002); *see also,* Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 Urb. Law. 601, at 616 (noting that the Maryland General Assembly enacted Gov. Glendening's Neighborhood Conservation and Smart Growth initiatives when they were faced with the prospect of an unexpected population increase of 1 million people by the year 2020 and continuing urban and suburban flight). *Id.*

121. Nolon, *supra* n. 20, at 1; *see also* Salkin *supra* n. 75, at 1043, n. 7. (commenting that the term "Smart Growth" has become so well know that "the Environmental Protection Agency partnered with the ICMA [International City/County Management Association] and the Urban Land Institute to launch the Smart Growth Network in 1998.") *Id*.

122. Nolon, *supra* n. 20, at 1. *See* n. 82, *supra*; *see also* Robert H. Freilich, *From Sprawl to Smart Growth* at 33 (Sec. of St. and Loc. Govt. L., ABA, 1999). (Book in which Freilich explores his theory that Smart Growth evolved from *Ramapo*). *Id*.

123. Smart Growth in Maryland, *supra* n. 120 (last visited Apr. 4, 2002).

124. Nolon, *supra* n. 20, at 1.

125. Am. Plan. Assn., *A Glossary of Zoning, Development, and Planning Terms*, 94 (Michael Davidson & Fay Dolnick, eds, Am. Plan. Assoc. 1999). (Euclidean zoning is "[a] convenient nickname for traditional as-of-right or self-executing zoning in which: district regulations are explicit; residential, commercial, and industrial uses are segregated; districts are cumulative; and bulk and height controls are imposed"). The term Euclidean zoning is derived from the village of *Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926), the U.S. Supreme Court decision to uphold the validity of comprehensive zoning. *See* n. 77, *supra*.

126. Salkin, *supra* n. 43, at 601.

127. *Id.* at 605 (citing Smart Growth Network, *Smart Growth Network Progress Report: Moving Smart Growth From Theory to Policy & Practice* 12 (Dec. 1998)).

128. *Id*.

129. Karen Finucan, Denny Johnson, Jason Jordan & Patricia E. Salkin, *Planning for Smart Growth: 2002 State of the States*, at 6 (Denny Johnson ed., Am. Plan. Assoc. 2002). *Also see* <http://cl.planning.org/growingsmart/pdf/statetocexecs/umm.pdf> (last visited Apr. 4, 2002).

130. Nolon, *supra* n. 20, at 26.

131. Finucan, Johnson, Jordan & Salkin, *supra* n. 129 at 94.

132. *Establishing The Quality Communities Interagency Task Force,* N.Y. Exec. Or. 102, (Jan. 21, 2000) (available at NYS Dep't of State, Quality Communities Task Force, <http://www.dos.state.ny.us/qcp/qcp2.html> (last visited Apr. 26, 2002)).

133. Quality Communities Interagency Task Force, *State and Local Govts. Partnering for a Better N.Y.* <http://www.state.ny.us/ltgovdoc/cover.html> (last visited Apr. 7, 2002) (indicating that part II lists a summary of all 41 recommendations). *Id*.

134. *Id*. at Part I. The Task Force was also to "obtain broad public comment; to consider balanced growth and the need for economic development, to consider housing and other community services needs, and to develop recommendations to strengthen local capacity for change." *Id*.

135. *Id*.

136. *Id*. (stating that "[a] quality community is a place we want to call home. Time and again, we heard that communities needed to, and desired to, create visions for their communities. These visions serve as portraits of what their communities could and should be at their best").

137. Finucan, Johnson, Jordan & Salkin, *supra* n. 129, at 94.

138. Nolon, *supra* n. 20, at 29. (These zoning techniques are fairly typical of techniques used on the urban fringe. Pawling is about two hours north of New York City by train.) *Id*.

139. *Id.*

140. Nolon, *supra* n. 20, at 30.

141. *Id*. ("The primary purposes of such subdivision regulations are to insure adequate provisions for vehicular circulation and adequate provision of utilities and other services, and to prevent damage or peril to surrounding properties.") *Id.*

142. *Id*. ("Collector roads must have 60 foot wide rights of way and 32 feet of pavement, and minor roads must have 50 foot rights of way and 20 feet of pavement. These regulations add that the side lines of each lot must be at right angles to the street lines.") *Id.*

143. *Id.*

144. Nolon, *supra* n. 20, at 31.

145. *Id.* at 31. "The plans also call for through streets rather than the dead-end cul de sacs typical of new subdivision development in the area. The specific purpose of interconnected streets is to encourage pedestrian and bicycle traffic in the residential neighborhoods created. Only one of the four conceptual plans, with frontage on Route 22, contains any commercial land uses." *Id.*

146. *See* Nolon, *supra* n. 20, at 31-32; Pawling Zoning L. § 98-13 at 12-13, and Schedule B at 62.

147. Nolon, *supra* n. 20, at 32.

148. Editorial, *Hyde Park on Track with Planning Initiatives*, Poughkeepsie Journal, 10A (May 13, 2001). ("Like it or not, development is coming to your community. But your local officials have a choice as to the best way to handle it: They can wait until someone submits plans and then try to mitigate any negative effects by citing zoning laws and through careful negotiation. Or they can be visionary, charting a course for how their community should grow—before developers begin taking a vested interest. The latter way is the better way, and one municipality where it is being seriously pursued is Hyde Park. That is good not only for local residents, but because it sets a positive tone for other communities to emulate.") *Id.*

149. Moe & Wilkie *supra* n. 39, at 149 (Al Norman, who organized his neighbors to defeat a Wal-Mart store in Greenfield, Massachusetts, now organizes citizens in other communities through a nationwide network of self described Sprawl Busters. "'There's one thing you can't buy at a Wal-Mart', Norman says, 'and that's small-town quality of life.'" Norman and his band of Sprawl Busters see themselves as "citizens responsible for the vitality of the places they call home. 'Life is more than cheap underwear,' Norman says.") *Id*.

150. Editorial, Poughkeepsie Journal*, supra* n. 148 at 10A.

151. Steven Rosenberg and Deborah Meyer DeWan*, Land Preservation and Riverfront Communities: Planning Preservation Along Historic Hyde Park Corridor*, 22 Scenic Hudson News at 4 (Summer 2001).

152. *Id.*

153. *Id*.

154. *Id*.

155. Steven Rosenberg and Deborah Meyer DeWan, *supra* n. 151, at 5; s*ee also* Scenic Hudson, *Annual Report* 2001 *supra* n. 2, at 2.

156. *See* Scenic Hudson Inc., <http://www.scenic.hudson.org> ("Scenic Hudson is a 38-year-old nonprofit environmental organization and separately incorporated land trust dedicated to protecting and enhancing the scenic, natural, historic, agricultural and recreational treasures of the majestic 315-mile-long Hudson River and its valley. . . . To date, our work has protected 17,500 acres of land in 10 counties between Albany and Manhattan and created or enhanced 28 parks and preserves for public enjoyment." *Id*.

157. *See Scenic Hudson Inc.,* <http://www.scenic.hudson.org/about/history.htm> (visited Apr. 1, 2002); s*ee Scenic Hudson Preservation Conference v. Federal Power Comm'n,* 354 F.2d 608 (1965)*; see also,* H.R. Subcomm. on Natl. Parks, Forests and Pub. Lands, *supra* n. 10 (testimony of David S. Sampson, Exec. Dir. Hudson River Valley Greenway Communities Council: "I think the paintings of Frederic Church and Thomas Cole showed to the American people for the first time as something that was beautiful to be preserved as the Scenic Hudson/Storm King Mountain case created more than environmental law in this country and led to concepts now contained in environmental decision-making and in practice. In the 1960's and 1970's, Nelson Rockefeller working with Congress began the first program in the Nation aimed at cleaning up the state's water system. That program returned the Hudson from an open sewer to one of the Nation's richest estuaries which is what it is now, and I also think that well conceived governmental partnerships and initiatives can and do work.") *Id.*

158. Scenic Hudson, *Annual Report 2001, supra* n. 2, at 2. (noting that support for funding of the land purchase was provided by The Lila Acheson and DeWitt Wallace Fund for the Hudson Highlands, established by the founders of The Reader's Digest Association, Inc., the Franklin and Eleanor Roosevelt Institute; McCann Foundation, Inc; Gannett Foundation; Newman's Own Foundation, Inc., and an anonymous supporter). *Id.*

159. *Id; see Scenic Hudson Preservation Conference v. Fed. Power Comm'n supra* n. 157, 354 F2d 608 at 625 (granting petitioners' application to admit additional evidence concerning alternatives to the Storm King project and the cost and practicality of underground transmission facilities.) *Id.* This landmark case was the first time a conservation group had been permitted to sue to protect the public interest; *see* Natural Resources Defense Council <http://www.nrdc.org/legislation/helaw.asp> (visited Mar. 20, 2002). *Id*.

160. Scenic Hudson*, supra* n. 2, at 2.

161. *Id*.

162. *Id.*

163. Editorial, *supra* n. 148, at10A.

164. Rosenberg & DeWan, *supra* n. 151, at 5.

165. Dutchess County Economic Development Corporation, *Annual Report 2000*, at 29. (Tourism industry jobs underwrite food, clothing, shelter, education, and other services for those who work in the industry and in tourism related businesses. Such spending sustains the local economy, which, in turn, feeds the tourism industry.) *Id*.

166. *Id.* at 29; *see also* <http://www.Natl.trust.org/heritage_tourism/index.html>(visited Apr. 1, 2002). Heritage tourism, one of the fastest growing segments of the travel industry, is travel that allows visitors to experience the places and activities that authentically represent the stories and people of the past. *Id.*

167. Nolon, *supra* n. 20, at 29.

168. *Id.* at 6.

169. *Id.*

170. *Id.*

171. Salkin, *supra* n. 75, at 1062.

172. *Id.*

173. DeWan, *supra* n. 34, at 10.

174. *Id.*

175. Peter Duveen, *Groups Unite to Combat Sprawl*, Register-Star, (Hudson, N.Y.) A1 (Nov. 5, 2001).

176. *Id.*

177. Johnson, *supra* n. 61, at 11.

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THE MINEFIELD
Too Broad, Too Vague, Too Much: The Sarbanes-Oxley Act § 307 Proposed Regulations

Part II

By Marla B. Rubin

Depending on your level of cynicism, you can describe the Securities and Exchange Commission's Nov. 21, 2002, publication on its Web site[1] as (1) draft regulations to implement section 307 of the Sarbanes-Oxley Act ("SOX 307" or the "Act"),[2] (2) a request for assistance from the Bar in formulating the aforementioned regulations, or (3) a desperate cry for help in accomplishing the unworkable task Congress set it to in SOX 307. However you categorize the effort, there is no question that this federal agency's foray into the regulation of attorney conduct is an unprecedented incursion on the traditional role of the states.

Introduction

As previously discussed,[3] Congress passed the Sarbanes-Oxley Act in response at least to the popular outcry over corporate practices that resulted in a rash of bankruptcies for many large companies like Enron and Worldcom. The Sarbanes-Oxley Act amended the Securities and Exchange Act, whose reach previously did not extend to the discipline of members of the Bar.[4] Passed in almost record time, and almost unanimously by both the Senate and the House, the Act was signed into law on July 30, 2002. The Act applies to publicly traded companies.

SOX 307 requires the Securities and Exchange Commission (SEC or "the Commission") to promulgate (1) rules setting forth minimum standards for attorneys practicing before the SEC and (2) a rule requiring attorneys to disclose to a company's chief legal officer or chief executive officer evidence of a "material violation of the securities laws, a breach of fiduciary duty, or other similar SEC violations." If there is no "appropriate response" to the attorney's report, the statute requires that an attorney report the evidence to an audit or similar committee of a company's Board of Directors, which committee is mandated by the Act, or to the Board of Directors itself.

The SEC was instructed to draft regulations within six months of the Act's effective date, or January 26, 2003. The November 21 publication, far ahead of schedule, should have given the regulated Bar plenty of time to educate the SEC about the nature of the attorney-client relationship. But no one expected the draft regulations to alter fundamental aspects of the practice of law. After the December 2, 2002, publication in the *Federal Register*, the 16-day comment period, ending on December 18, 2002, was hardly enough time to review with the Commission the gravity and impact of its proposals.[5]

Under this unprecedented regulation, the SEC redefines the traditional understanding of areas of law practice, attorney-client communications, and even attorney work product. In fact, the regulation substantially alters and interferes with the attorney-client relationship. In some states, compliance with these new federal regulations may require attorneys to violate various state ethics rules.

"The Sarbanes-Oxley Act amended the Securities and Exchange Act, whose reach previously did not extend to the discipline of members of the Bar."

Naturally, the Bar is deeply concerned about the draft regulation, 17 C.F.R. Part 205. Thirty pages of comments were sent to the Commission on behalf of three New York State Bar Association committees on December 18 in just one submission.[6] The American Bar Association (ABA) quickly organized a Task Force to address the draft. The Task Force's comments, together with a cover letter by ABA President Alfred P. Carlton, constituted a 44-page submission. In a simultaneous press release, Mr. Carlton "urged the SEC to ensure that the rules are consistent with existing state regulations and ethics rules to the fullest extent possible."[7] The Commission also heard from the International Bar Association,[8] over whose members the Commission may exercise jurisdiction, regardless of the location of practice.[9] Thirty leading securities lawyers from across the country sent a letter to the Commission that "excori-

ated" several fundamental aspects of the proposed regulations.[10]

The Major Issues

As discussed in detail below, the most controversial issues surrounding the draft regulations are, first, the fact that a federal agency is prescribing in detail how attorneys should represent their clients, a function previously left to state authorities. Second, among those details is the requirement of "noisy withdrawal" which, under certain circumstances set forth in the regulations, constitutes a mandated violation of the attorney-client relationship. Less controversial, but of paramount importance here, is the regulations' reach to environmental attorneys working for companies regulated by the SEC.

Anticipating such criticism, in the introductory remarks, the Commission assures the Bar that some of the proposed regulations, like the "noisy withdrawal" requirements, are not original ideas. We are assured that "these provisions embody ethical principles that legal commentators and the ABA have been considering for years."[11] The Commission fails to mention that the ABA and other legal ethics rulemakers repeatedly have rejected the "noisy withdrawal" option of disassociation with client wrongdoing as being contrary to fundamental aspects of the attorney-client relationship. The Commission also pronounces that it "does not intend to supplant state ethics laws unnecessarily, particularly in areas (e.g., safeguarding of client assets, escrow procedures, advertising) where the Commission lacks expertise."[12] This intention provides little comfort to those attorneys finding some of the new regulations in direct conflict with state ethics rules.[13] Finally, the Commission assures the soon-to-be-federally regulated Bar that it "does not want [the new regulations] to impair zealous advocacy. . . ."[14] Unfortunately, anyone who has practiced zealous "wordsmithing" in preparation of or with respect to a securities report—something environmental attorneys do regularly—may find his or her style a little cramped by the new regulations and the sanctions applied to their violation.

"Clarifying" The Statutory Language

Like most hastily enacted legislation (anyone remember CERCLA?), the Sarbanes-Oxley Act is fraught with unclear terms whose definition most likely will be resolved in court. (Unfortunately, while attorneys are guessing how to interpret their duties under the statute, the price of an incorrect guess could be administrative sanctions and/or heavy fines.) For example, attorneys must make an "up-the-ladder" disclosure within their client's hierarchy if they are in possession of "evidence" of a "material" violation of securities laws.[15] If they do not receive an "appropriate" response on the first rung, they must elevate the reporting.[16]

The statute does not define "evidence," "material," or "appropriate." Even more confusing is the duty to report breaches of fiduciary duty. Which duty? Does the breach have to be material? Why is disclosure required for "material" breaches of SEC rules, and, seemingly, any breach of fiduciary duty? What standards or definitions should an attorney apply—the federal standards or definitions, or those of the attorney's state of admission?

"In effect, rendering any legal advice to an entity regulated by the SEC on any subject addressed in a public filing makes an attorney subject to SEC discipline and/or the serious sanctions of the Sarbanes-Oxley Act."

It is ironic that the regulations attempting to define these terms, proposed section 205.2, lend new meaning to the words "broad" and "overreaching." As feared, the first definition—"appearing and practicing before the Commission"—directly asserts jurisdiction over environmental attorneys working for SEC-regulated companies. An environmental attorney is now, effectively, a securities lawyer subject to the discipline of the SEC when the environmental attorney prepares or participates

> in the process of preparing, any statement, opinion, or other writing which the attorney has reason to believe will be filed with or incorporated into any registration statement, notification, application, report, communication or other document filed with or submitted to the Commissioners, the Commission, or its staff. . . . [17]

The Commission also wants to make it "clear that an attorney who advises an issuer *not* to make a filing or submission to the Commission is also appearing and practicing before the Commission."[18] (emphasis added) In effect, rendering any legal advice to an entity regulated by the SEC on any subject addressed in a public filing makes an attorney subject to SEC discipline and/or the serious sanctions of the Sarbanes-Oxley Act.

The proposed definition of the SOX 307 term "breach of fiduciary duty" is sufficiently detailed to give an attorney notice of what problems to look for, that, if not addressed, could result in personal sanctions, not for participation in the breach, but for failure to report it, as discussed below. This breach is any "breach of fiduciary duty recognized at common law, including, but not limited to, misfeasance, nonfeasance,

abdication of duty, abuse of trust, and approval of unlawful transactions."[19] The definition is helpful, if it embodies what Congress meant. It is not that different from the definition of fiduciary duty under various state laws. It is also as broad and given to interpretation as state law. The Commission assures us that this definition "is not intended to change the law."[20] Nevertheless, the Commission's administrative interpretation of breach of fiduciary duty may do just that. Obviously, any term may be interpreted by an agency—or court—more expansively than its authors intended.

Similarly, the possibility of a stricter or more liberal interpretation from one court or agency to another is inherent where language is not clearly defined. The problem is that the reporting obligation is triggered by an attorney's understanding or interpretation of "breach of fiduciary duty." An attorney's judgment may be based on the law of his or her state of admission. If that state law's interpretation differs from the Commission's, the attorney's judgment comes into question. If the judgment not to report is considered wrong by the Commission, the attorney is subject to sanctions.

"To make matters worse, the Commission asks the viewing public for help in explaining itself. . . .The Commission's obvious confusion does not inspire confidence in its ability to accomplish Congress's goals."

Another major uncertainty in the statutory language comes from questions about the "material violation" imposing compliance with the new regulations. Under the proposed regulations, attorneys must respond to "evidence of a material violation." The draft definition of evidence, "information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur,"[21] is less than illuminating. To make matters worse, the Commission asks the viewing public for help in explaining itself. The introductory remarks pose the following question: "If reasonable belief is the appropriate standard, what should be reasonably believed: that a material violation has occurred, is occurring, or is about to occur, or that a material violation may have occurred, may be occurring, or may be about to occur, or something else?"[22]

The Commission's obvious confusion does not inspire confidence in its ability to accomplish Congress's goals. Nevertheless, a draft definition of "reasonable" is also offered—the same definition found in ABA Model Rule 1.0 (h), i.e., "the conduct of a reasonably prudent and competent lawyer."[23] Then the Commission makes the following offer, demonstrating its discomfort with its mandate: "Interested persons are invited to comment on whether this definition is sufficiently clear and whether alternative language would be an improvement and, if so, what alternative language interested persons would propose."[24] The most troubling—and broad—definition, is that of "material violation"—"a material violation of the securities law, a material breach of fiduciary duty, or a similar material violation."[25]

Thus, while the Commission struggles with the ongoing problem of determining reasonableness, it reminds us that the new regulations "obligate an attorney to report information he or she has become aware of that would lead an attorney, acting reasonably, to believe that a material violation has occurred, is occurring, or is about to occur."[26] (Okay, now I know what to do and when to do it.) It is also comforting to know that "(a)ttorneys are not necessarily expected to identify issues they are not equipped to see."[27] It is hoped, then, that environmental attorneys cannot be held responsible for problematic balance sheets.

We are also assured that, although the new regulations are "not intended to impose upon an attorney, whether employed or retained by the (company), a duty to investigate evidence of a material violation or to determine whether in fact there is a material violation, . . . nothing in the proposed rule is intended to discourage any such inquiry."[28] And just in case you are still not clear about your duty, you are reminded that "an attorney cannot ignore evidence of a material violation of which he or she is aware."[29]

Overall, rather than clarifying statutory language to effect the statutory purpose, the draft definitions provide uncertainties and a framework of conduct for the regulated Bar that may be inadequate to give it clear notice of liability.

Redefining the Attorney-Client Relationship

The greatest consternation over the draft regulations comes from the proposed disclosure obligations set forth in section 205.3. Close review of the proposed obligations indicates that "noisy withdrawal" is the one most likely to redefine the attorney-client relationship by imposing what effectively is a disclosure exception to the duty of confidentiality for every representation covered by the regulations.

In the proposed Rule's scheme, the attorney's disclosure obligations are successive. The first disclosure obligation is within the corporate organization. Initially, reports of "evidence of a material violation" must be made to the client's chief legal officer, or chief executive officer, or to a "qualified legal compliance committee" set up within the entity to receive and investigate such reports.[30] A next step might be a report to the Board of

Directors or an audit committee set up by the Board to receive and investigate such reports. Since all jurisdictions recognize that the corporate entity, not corporate personnel, is the client, the disclosure to various components of the corporate entity is internal—the attorney-client confidentiality privilege is not breached by such disclosure. This is not a required disclosure of client confidences to third parties (like the Commission).

In the case of a client with a qualified legal compliance committee, the report to the committee ends the attorney's obligation under the SEC rules.[31] As far as the Commission is concerned, the existence of the legal compliance committee protects the attorney—"the reporting attorney would not have to worry whether the client's response was "appropriate" and would be relieved of the "noisy withdrawal" obligation. Note that there is an exception to this relief—if the chief legal officer (CLO) finds that the response of the qualified legal compliance committee meets the standards of elevating the report, he or she must "notify the Commission that a material violation has occurred, is occurring or is about to occur and shall disaffirm in writing any documents submitted to or filed with the Commission by the [company] that the chief legal officer reasonably believes are false or materially misleading."[32] This obligation of the CLO to disclose wrongdoing directly to the SEC is the most dramatic and controversial of the disclosure obligations.

Where an outside attorney represents a client without a qualified legal compliance committee, an additional disclosure obligation looms outside the client's hierarchy, if, in the attorney's judgment, the entity's response to the internal report is not "appropriate."[33] Then the "noisy withdrawal" is required, by which the attorney alerts the Commission that he or she is withdrawing from representation of the client "for professional considerations."[34] This proposal is being greeted with the usual set of arguments between confidentiality absolutists and the duty balancers. Putting aside those arguments, how could such an act now, after these regulations are promulgated, be anything but notice of client wrongdoing? Under these circumstances, a noisy withdrawal to the Commission is a direct breach of, or exception to, the duty of client confidentiality. This also holds true for the obligation on in-house counsel to disaffirm filings with the Commission or his or her work submitted with filings "that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading. . . ."[35] With this, the in-house attorney is disclosing to the Commission that its client has or may have committed certain offenses by the submission of the disaffirmed document(s).

While it is unprecedented for a federal agency to fashion such an exception to the client confidentiality requirement found in every set of state ethics rules, the exception itself should not be shocking. Only the state of California has no exception to the duty of confidentiality.[36]

"This obligation of the CLO to disclose wrongdoing directly to the SEC is the most dramatic and controversial of the disclosure obligations."

Withdrawal from client representation in the face of client wrongdoing is not a new concept.[37] But the noisy withdrawal requirement and the CLO disclosure requirement alter the traditional attorney-client relationship in which client confidentiality is absolute. While some exceptions have been made within individual states' rules, this incursion of a federal agency into an area of traditional state rulemaking, and particularly into the attorney-client relationship, is extremely troubling.

State-Federal Conflict

At first, the Commission takes the preemption gorilla out of the closet—"a Commission rule permitting disclosure would appear to preempt a state's rule forbidding disclosure."[38] Then the Commission itself wonders whether the proposed regulations should "occupy the field" or preempt only particular conflicting state rules.[39] Once again, the Commission is confused about its mandate, asking for assistance in determining this critical issue.[40] While preemption might be a mitigating factor in a state disciplinary proceeding, the proposed regulations still impose conflicts and considerations that create a minefield of potential ethical errors.

The proposed disclosure requirements are those most likely to put an attorney in direct conflict with the state ethics rules. For example, the "material violation" that is reported and not addressed "appropriately" that spurs the "noisy withdrawal" is not only a criminal violation of securities law, but also a civil violation of securities law, "a material breach of fiduciary duty, or a similar material violation."[41] State codes have made exceptions to the duty of confidentiality, under specific circumstances, for some crimes, fraud, and for injury to property. No state's ethics rules allow or mandate disclosure of "a material breach of fiduciary duty, or a similar violation." Thus, disclosure under the federal regulations of such a breach or violation, whatever it might be, likely would result in violation of state ethics rules against disclosure.

For example, the *New York Code of Professional Conduct* prohibits attorneys from disclosing client confidences—"information protected by the attorney-client privilege under applicable law"[42]—and client secrets—other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.[43]

Among the exceptions to New York's broad cloak of client confidentiality are disclosure of a client's intent to commit a crime, including "information necessary to prevent the crime"[44] and of confidences or secrets to effect the withdrawal of the attorney's opinion or representation that the attorney believes is being relied upon by a third person when the attorney "has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."[45] These disclosures are permissive.

"Notification to the Commission, it admits, is not required by the Sarbanes-Oxley Act. Nevertheless, the Commission takes it upon itself to 'set a higher standard. . . .'"

The proposed Rule would make such disclosures mandatory—not a direct conflict with New York rules with respect to crime and fraud, since such disclosures are allowed at an attorney's discretion. The conflict will arise with the proposed regulations' duties of disclosure of deeds or intentions that are not criminal or fraudulent. The proposed regulations' "material violation" includes not only crimes and fraud, but breaches of fiduciary duty and "similar material violations." Whatever these last two items are, they clearly are not crimes and fraud. Disclosures of client confidences or secrets concerning breaches of fiduciary duty and "similar material violations" are not permissive disclosures in the *New York Code*. New York attorneys should be wondering whether disclosures relating to client crimes and fraud that lead to disclosure relating to breaches of fiduciary duty and "similar material violations" would subject them to discipline. If the federal regulations "occupy the field," the answer probably would be no. The answer might not be the same if the federal regulations preempt only specific rules.

The requirement in proposed section 205.3(b)(8) to maintain records to incriminate our clients also creates the potential for conflict with state ethics rules. The draft regulation requires the creation of a paper trail if an attorney makes an internal report of misfeasance or malfeasance. We must "take steps reasonable under the circumstances to document the report and the response thereto. . . ." [46] We must also "retain such documentation for a reasonable time."[47] In the introductory remarks, the Commission explains that "reasonable" is as at least as long as the statute of limitations that would apply to the material violation documented.[48] We are assured that we can use these records in self-defense. The *New York Code* does permit disclosure or client confidences or secrets to defend against "an accusation of wrongful conduct." [49] However, purposely accumulating evidence against a client might be a violation of DR 1-101(A)(4), prohibiting conduct "involving dishonesty, fraud, deceit or misrepresentation."

Disclosure Requirements for In-House and Outside Counsel

Section 205.3(d) distinguishes between the "disclosure" requirements for in-house attorneys and the corresponding duty of the outside counsel. Outside counsel must withdraw from representation of the corporate entity if he or she has made an internal report of evidence of a material violation, and does not receive an "appropriate" response or a response within a "reasonable time." Then, the withdrawing attorney must provide the "noisy withdrawal" to the Commission "within one business day of withdrawing. . . ."[50] Finally, the attorney has to go back over his or her work and disaffirm any work filed with, submitted to, or incorporated into a document filed with or submitted to the Commission "that the attorney has prepared or assisted in preparing and that the attorney believes is or may be materially false or misleading. . . ."[51] Withdrawal from representation in light of certain client wrongdoing is permitted under most state ethics rules, but this withdrawal is mandatory and far broader in application and effect on the client.

The in-house attorney also has a one-day deadline after not receiving an "appropriate" response to a report—to notify the Commission that he or she plans to disaffirm some filing such as that described above. In-house counsel are not required to leave their employment altogether, although after the disaffirmance the decision might not be theirs, despite the Commission's assurance that most of the required disclosures—those within the organization—would be protected as "whistleblowing" under 18 U.S.C. § 1514A, specifically addressing employee notification of certain wrongdoing in publicly traded companies. Notification to the Commission, however, would not be protected under that statute.

Notification to the Commission, it admits, is not required by the Sarbanes-Oxley Act. Nevertheless, the Commission takes it upon itself to "set a higher standard. . . ." [52] The Commission says it is not really requiring "disclosure," just "noisy withdrawal."[53] The Commission deems the noisy withdrawal necessary—"a silent withdrawal would be likely to assist the

[client] in carrying out an ongoing or intended violation."[54] However, as previously stated, how could such an act now, after these rules are promulgated, be anything but notice of client wrongdoing? We are assured in the introductory remarks that we are not breaching confidences because we do not have to disclose facts—we merely state that we are withdrawing for "professional considerations." There is no mention here of the CLO's obligation to disclose a material violation directly to the Commission, clearly a factual disclosure that the Commission should investigate and find client wrongdoing.

To add the proverbial insult to injury, the unfortunate chief legal officer or other person within a client organization to whom a withdrawn attorney reported must inform a replacement attorney that the "previous attorney's withdrawal was based on professional considerations."[55] The purpose of this requirement is "to avoid a situation in which successor attorneys are unaware that the previous attorney waved a red flag in withdrawing."[56] Without this requirement, the Commission fears that the client "engaged in fraud may shift work previously done by outside attorneys to its own in-house legal staff over which it has more control. . . ."[57] This requirement is an incursion not only on the attorney-client relationship, by causing an attorney to relate what the client may want to be considered a client confidence,[58] but on the company's operations as well.

Not surprisingly, the disclosure obligations extend even to past material violations that are not likely to be causing current harm, except that the disclosure obligations are permissive rather than mandatory. That is, an attorney may submit a noisy withdrawal or disaffirm a document, but is not required to do so.

Incomprehensibly, the Commission compares the proposed noisy withdrawal requirement to the permissive disclosure of client confidences to prevent a criminal or fraudulent act or to rectify such an act that used the attorney's services commonly found in state ethics rules. This is disingenuous, as the Rule has obligatory disclosure requirements and because the obligations apply to more than crimes and fraud. Finally, the new Rule contains regulations pertaining to the duties of supervisory attorneys and of subordinate attorneys, mirroring similar provisions in state rules meant to obviate defense based on ignorance and defense based on following orders. It is also no defense if the supervisory attorney does not do the same work as the subordinate attorney. The rules provide that "the supervisory attorney of a subordinate attorney who appears and practices before the Commission also appears and practices before the Commission." This imposes the disclosure obligations on attorneys that are totally unaware of the reportable events, and subjects them to serious sanctions. This "guilt by association" is constitutionally suspect.

Sanctions

Congress clearly intended in the Act that violation of its provisions would result in imposition of the same penalties as for violation of any other provision of the Securities and Exchange Act.[59] Section 205.6 of the proposed regulations reiterates this warning. Congress used the Act to increase penalties at every level of violation.[60] This created the expectation that violation of the attorney rules of conduct would carry similar consequences.

"This imposes the disclosure obligations on attorneys that are totally unaware of the reportable events, and subjects them to serious sanctions. This 'guilt by association' is constitutionally suspect."

In the introductory remarks, however, the Commission announced its intention to use civil actions for injunctive and other equitable relief and for civil money penalties, as well as the administrative cease-and-desist remedy.[61] Happily for the regulated Bar, the "Commission does not believe, however, that violations of the proposed rule would, without more, meet the standard prescribed in Section 32 (a) of the Exchange Act (15 U.S.C. 78ff), which provides for the imposition of criminal penalties."[62] Further, "the Commission will not proceed against attorneys when conduct that amounts to no more than simple negligence results in a failure to comply with a provision of Rule 205."[63] This is good news, particularly for the supervisory attorneys who might be found in violation of the proposed Rule because a subordinate attorney violated the Rule.[64]

Unfortunately, relief from fear of criminal prosecution may be premature. The Commission is also asking for assistance in determining "state-of-mind requirements" for imposing sanctions.[65] Based on the statutory language, could an attorney found to have knowingly decided not to report evidence of a material breach of securities law escape otherwise applicable criminal prosecution? This is the most frightening area of the Commission's confessed confusion.

Conclusion

The most obvious conclusion to be drawn from the review of the proposed regulations is that they need more review. The intention of Congress and the Commission to discourage the legal profession from participating in, and in fact from allowing, the kind of malfeasance that resulted in such major financial harm is laudable. The proposed regulations may alter funda-

mental aspects of the attorney-client relationship. They also establish a federal presence in the traditional state rulemaking role. For the most part, they are overbroad and ill-defined—they may not give the regulated Bar enough notice of potential liability. That liability could result in severe sanctions. The regulated Bar should make every effort to get the comment period extended or find other ways to participate in this rulemaking. Consensus may be impossible, but there has not been enough opportunity to make that determination.

Endnotes

1. <http://www.sec.gov/rules/proposed/33-8150.htm>.
2. Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. ("Sarbanes-Oxley Act").
3. Marla B. Rubin, "The Sarbanes-Oxley Act and Multijurisdictional Practice: Two New Concepts in Lawyer Regulation and Their Implications for Environmental Lawyers," *The New York Environmental Lawyer*, Fall 2002, p. 28.
4. Regulations enacted in 1995 did set forth rules of practice for attorneys actively practicing securities law and representing clients before the Securities and Exchange Commission. *See* 17 C.F.R. § 201.102. Those regulations, however, unlike the November 21 proposals, did not require or even address specific practices for the legal representative of SEC-regulated entities.
5. 67 Fed. Reg. 71670, Dec. 2, 2002.
6. The comments are posted on <http://www.nysba.org>.
7. The comments and the press release are posted on <http://www.abanet.org>.
8. *ABA/BNA Lawyers Manual on Professional Conduct*, Dec. 4, 2002, p. 725.
9. *Id.*; Since this material was prepared before the Federal Register publication, all references to the introductory remarks are to the Web site publication on November 21, 2002, (see *supra* note 1), referred to hereafter as "Introduction to Proposed Rules." Introduction to Proposed Rules, p.13.
10. *ABA/BNA Lawyers Manual on Professional Conduct*, Dec. 4, 2002, p. 724.
11. Introduction to Proposed Rules, p. 7.
12. Introduction to Proposed Rules, p. 8.
13. See below for examples.
14. Introduction to Proposed Rules, p. 8.
15. Sarbanes-Oxley Act, § 307 (1).
16. *Id.*; § 307(2).
17. Proposed Rule § 205.2 (a) (4).
18. Introduction to Proposed Rules, p. 12 (emphasis added).
19. Proposed Rule § 205.2 (d).
20. Introduction to Proposed Rules, p. 17.
21. Proposed Rule § 205.2 (e).
22. Introduction to Proposed Rules, p. 18.
23. American Bar Association *Model Rules of Professional Conduct*, 2002.
24. Introduction to Proposed Rules, p. 22.
25. Proposed Rule § 205.2 (i).
26. Introduction to Proposed Rules, p. 26.
27. Introduction to Proposed Rules, p. 27.
28. *Id.*
29. *Id.*
30. Proposed Rule § 205.2 (j).
31. Proposed Rule § 205.3 (c).
32. Proposed Rule § 205.3 (b) (3).
33. Proposed Rule § 205.3 (b) (4).
34. Proposed Rule § 205.3 (d) (i) (b).
35. Proposed Rule § 205.3 (d) (ii).
36. California Business and Professions Code § 6068(e).
37. *See, e.g., New York Code of Professional Responsibility ("N. Y. Code")*, DR 2-110, under which an attorney may withdraw from representation of a client that "(p)ersists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."
38. Introduction to Proposed Rules, p. 48.
39. If a federal regulation conflicts squarely with a state or local provision, the federal measure controls under Article VI of the Constitution, the Supremacy Clause.
40. Introduction to Proposed Rules, p. 58.
41. Proposed Rule § 205.2 (i).
42. *N.Y. Code* DR 4-101 (A).
43. *Id.*
44. *N.Y. Code* DR 4-101(c) (3).
45. *N.Y. Code* DR 4-101(c) (5).
46. Proposed Rule § 205.3 (b) (2).
47. *Id.*
48. Introduction to Proposed Rules, p. 31 .
49. *N.Y Code* DR 4-101(c) (4).
50. Proposed Rule § 205.3 (d) (i) (B).
51. Proposed Rule § 205.3 (d) (i) (D).
52. Introduction to Proposed Rules, p. 40.
53. *Id.*
54. Introduction to Proposed Rules, p. 41.
55. Proposed Rule § 205.3 (d) (1) (iii).
56. Introduction to Proposed Rules, p. 42.
57. *Id.*
58. Marla B. Rubin, "Can You Disclose Clients' Confidences to New Counsel?", *Law Firm Partnership and Benefits Report*, Oct. 1997 at 10.
59. *See* Sarbanes-Oxley Act, Titles VIII, IX, and XI.
60. *Id.*
61. Introduction to Proposed Rules, p. 56.
62. *Id.*
63. Introduction to Proposed Rules, p. 56.
64. *See* Proposed Rule § 205.4 and Introduction to Proposed Rules, pp. 51-53.
65. Introduction to Proposed Rules, p. 57.

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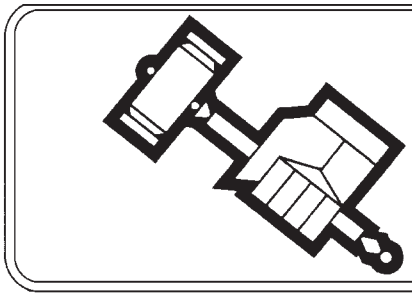

Administrative Decisions Update

Prepared by Peter M. Casper

CASE: ***In re Application for a State facility permit for air pollution control; a State Pollution Discharge Elimination System (SPDES) permit; protections of Waters permit; Water Quality Certification; a Mined Land Reclamation permit modification; and a Freshwater Wetlands permit by St. Lawrence Cement Company, LLC.***

AUTHORITIES:

ECL Article 15 (Protection of Waters Permit)

ECL Article 17 (State Pollution Discharge Elimination System Permit) (SPDES)

ECL Article 19 (Air Pollution Control Permit)

ECL Article 23 (Mined Land Reclamation Law Permit) (MLRP)

ECL Article 24 (Freshwater Wetland Permit)

6 N.Y.C.R.R. Part 608 (Water Quality Certification)

6 N.Y.C.R.R. Parts 750-758 (SPDES)

6 N.Y.C.R.R. Parts 201 *et seq*. (Air Pollution Control)

6 N.Y.C.R.R. Parts 420-426 (MLRP)

6 N.Y.C.R.R. Part 663 (Freshwater Wetlands Permit)

DECISION: On December 6, 2002, New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (the "Commissioner") issued the first of two interim decisions addressing appeals from rulings issued by Administrative Law Judges (ALJs) Helene G. Goldberger and Maria E. Villa with respect to St. Lawrence Cement Company's (SLC or "Applicant") permit applications to construct and operate a new cement factory in Columbia County. Several intervenor groups participated in the issues conference and have appealed various rulings by the ALJs; these groups include the Olana Partnership (TOP), the National Resource Defense Council (NRDC), the Hudson Valley Preservation Coalition (HVPC), Friends of Hudson (FOH), the Massachusetts Department of Environmental Protection (MA DEP), the Preservation League of New York State (League) and the National Trust of Historic Preservation (NTHP). Issues on appeal range from air matters, such as the use of off-site National Weather Service data in air modeling impacts over simple terrain to whether local noise ordinances preempt the use of the DEC's Noise Policy in assessing potential noise impacts. A review of the DEC standards of adjudication, as well as a detailed summary of all the issues presented in the Commissioner's decision, are provided below.

A. Facts

St. Lawrence Cement Company, LLC owns several large parcels consisting of approximately 1,750 acres located in Columbia County, in which SLC currently conducts a permitted rock mining operation. The mining operation supports SLC's current cement manufacturing plant in the Town of Catskill, Greene County, New York.

SLC proposes to construct and operate a dry process cement manufacturing plant within the bounds of the mine site in Columbia County (the "Project"). The Project would include a raw mill site, kiln feed blending silo, preheater tower, rotary kiln, clinker cooler, and finish mill system. SLC proposes to construct a flexible conveyor between the new plant and its presently inactive loading dock on the east banks of the Hudson River to transport cement, solid fuel and materials. SLC also plans to construct maintenance facilities, access roads, parking areas, a new docking facility and a public park.

SLC has agreed to close down the kiln system for the manufacturing of clinker[1] at the Catskill facility and remove the bunker silos if SLC is granted the proper permits to construct and operate the new plant in Columbia County. Although clinker would no longer be manufactured at the Catskill facility, approximately 50,000 metric tons of clinker per year could be trucked

to Catskill for further processing. Under the current proposed project, the Catskill mine would no longer be used in the manufacturing process but would continue to be actively worked under lease to others or by SLC for other purposes; these purposes were not identified in the Decision.

The project requires an air pollution control permit, a SPDES permit, protection of waters permit and water quality certification, a mining permit modification, and a freshwater wetlands permit. The DEC was designated Lead Agency pursuant to the State Environmental Quality Review Act (SEQRA) and determined that the proposed project was a Type I action that "may have a significant impact on the environment." After a Draft Environmental Impact Statement (DEIS) scoping process, SLC submitted a DEIS and the DEC accepted it as complete and made it available for public review on May 2, 2001. Written comments were accepted and an issues conference was held on July 18, 2001, with respect to the draft permits and SEQRA DEIS.

B. Review of DEC Standards for Adjudication

Pursuant to DEC hearing procedures, an issue is adjudicable only if it is proposed by a potential party and is both "substantive" and "significant."[2] To decide if an issue is "substantive" an ALJ must determine whether there exists sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In making this determination an ALJ must consider the proposed issue in light of the application and related documents, draft permits, contents of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by an ALJ. An issue is "significant" if adjudication of the issue could result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permits.

An agreement by DEC Staff and an applicant over the terms and conditions of proposed permit(s) drafted by DEC is *prima facie* evidence that a project will meet all of the relevant statutory and regulatory criteria, placing the burden of persuasion on the party proposing the issue for adjudication. In a frequently cited Decision, the Commissioner states the following about DEC adjudications and the intervenor's burden: "the purpose of adjudication is not simply to develop or refine information concerning the project but rather to aid in decision making."[3] As such, intervenors proposing issues for adjudication must offer more than mere assertions or conclusions.

C. Decision

Applying the criteria discussed above, the ALJs determined that several issues were adjudicable. These issues include air impacts and analysis, mitigation of visual impacts and the weighing of economic benefits and adverse environmental impacts as required by SEQRA.

1. Air Issues

Several issues related to air impacts were decided by the Commissioner in this First Interim Decision. These include, among others, the use of off-site versus on-site meteorological data used in air modeling and the need for supplementing the DEIS with respect to air impacts on Olana,[4] a nearby National Historic Landmark and former home of painter Frederick Church.

a. Meteorological Data Used in Air Modeling

Any applicant applying for a New York State facility air permit and a federal Prevention of Significant Deterioration Permit is required to undertake air quality analysis through computer modeling to support the air permit application. The modeling establishes compliance with ambient standards and PSD increments and estimates health effects such as risk from toxic pollutants. Proper protocol calls for the use of two EPA-approved models. One model simulates the worst-case impacts over complex terrain (elevations above stack height) and the other model stimulates worst-case impacts over simple terrain (below stack height). The below stack height modeling does not simulate meteorological conditions and therefore the applicant must provide meteorological data compiled over a period of time. The question at hand is whether SLC is permitted to use National Weather Service data from the Albany airport instead of on-site data.

The DEC Staff and SLC argued the use of off-site data from Albany airport is supported by EPA's and DEC's guidelines on air quality monitoring. These guidelines state in part that meteorological data may be collected either on-site or at the nearest National Weather Service (NWS) station. SLC also argued that there is no legal basis to adjudicate this issue and along with DEC Staff, criticized FOH's offer of proof based upon unvalidated data. Conversely, FOH claimed that its consultant demonstrated that there existed considerable differences in the speed and direction of the wind patterns revealed in the on-site data collected by FOH, versus the off-site data supplied by SLC. FOH argued that SLC's modeling using off-site data could result in the underestimation of the impacts of pollutants from the proposed facility.

In making her decision the Commissioner cited to the guidelines which expressly state that "on-site data is preferred *only if* on-site data is available"; in the

absence of available on-site data the guidelines direct that five years of representative meteorological data be used from the nearest NWS station. The Commissioner stated that the guidelines are applied at the time the modeling protocol is approved by DEC. In the instant case, on-site data was not available at the time the protocol was approved and according to the Commissioner, SLC appropriately relied upon the Albany NWS meteorological data. Forcing SLC to re-model the impacts using on-site data collected after the modeling protocol was approved and put into effect would simply not be practical, opined the Commissioner.

The Commissioner also determined that FOH's offer of on-site data collected and analyzed by its consultant failed to sufficiently challenge the validity of SLC's modeling using the DEC-approved models discussed above. As such the Commissioner determined that adjudication of the air modeling issue is not required.

b. Air Pollution Impacts to Historic Resource

Intervenors argued that pollutants from the proposed Project could cause damage to the structures and vegetation at Olana, a state historic site and National Historic Landmark, which is located approximately three miles northwest of the proposed plant. The intervenor group TOP retained a chemist who claimed that the sulfur dioxide and nitrogen oxide from the proposed plant could erode the masonry, copper roofing and lead materials of Olana. The ALJs ruled that SLC's omission in analyzing these potential impacts must be addressed by supplementing the record and the Commissioner concurred, provided the record is supplemented during the adjudicatory process and not at separate issues conference.

2. Ungrandfathering of the Mine

In the instant case, SLC, with support of DEC Staff, claimed that the mining aspects of the project were not subject to SEQRA review because the mining operations on the project site have been continuously ongoing for many years prior to the implementation of SEQRA in November 1978, and are therefore grandfathered pursuant to ECL § 8-0111(5)(a) and 6 N.Y.C.R.R. § 617.5(c)(34). SLC also argued that a 1990 DEC Stipulation and Order on Consent ("Consent Order") and the provisions set forth in 6 N.Y.C.R.R. § 617.5(c)(29) exempt the proposed timing activity from SEQRA review.

The issue of "ungrandfathering" an action grandfathered from SEQRA requirements revolves around the interpretation of ECL § 8-0111(5)(a)(i), which under certain circumstances, provides the Commissioner with the authority to require an environmental impact statement for an action otherwise grandfathered from SEQRA.

The ALJs determined that SLC's mining activities were subject to SEQRA review and therefore were no longer subject to grandfathering protection. In support of their ruling the ALJs relied upon the "ungrandfathering" provision mentioned above. They determined that SLC's planned increase in extraction rate of approximately 4.7 million tons per year constituted a substantial change in the level of operations at the mine so as to remove the mine from grandfathering protections. The ALJs also rejected SLC's argument that the 1990 Consent Order exempted the project from SEQRA, stating that the consent order specifically states the possible application of SEQRA to the project by virtue of the "ungrandfathering" provisions set forth in ECL § 8-0111(5)(a)(i). SLC appealed the ALJs' ruling.

The Commissioner determined that the record was insufficient to establish whether there existed a "substantial change" in the level of operation to warrant her using the "ungrandfathering" provision in the ECL. She stated that the ALJs' Ruling and the appeals and replies both legally and factually focused on the 1990 Consent Order and failed to provide sufficient information to determine how the mining operation has changed since the adoption of SEQRA in November 1978. As such, the Commissioner directed the ALJs to hold an adjudicatory hearing to address this issue of substantial change in the level of operation of the mine from pre-SEQRA operations to proposed operations. The Commissioner reserved making a decision as to whether she should exercise her authority to ungrandfather the mining aspect of the Project until the record is developed to provide her with sufficient information to make such a determination.

The Commissioner also concluded that the ALJs do not have the authority to make a determination as to whether a project should be ungrandfathered pursuant to ECL § 8-0111(5)(a)(i), since the authority to do so rests solely in the discretion of the Commissioner. She also stated that future cases regarding the ungrandfathering of an action should be referred directly to the Commissioner.

3. Noise Matters

The ALJs ruled that the intervenors raised a substantive and significant issue with respect to noise. SLC maintained that the Town of Greenport ("Town") and the City of Hudson ("City") both have in effect noise ordinances with numerical limits that would apply to the project and these ordinances preempt application of any other statutory or regulatory standards, including adherence to DEC's Noise Policy. Intervenors argued that the City and Town's noise limit standards of 70 dB at the property line are not reflective of existing ambient conditions in surrounding residential areas and are not a substitution for a determination of whether

adverse noise impacts have been fully mitigated under SEQRA.

Intervenors also argued that SLC's use of time-weighted noise measurements in the form of Leq readings is inappropriate because it would mask events that exceed the 70 dB(A) level imposed by the Town and City. SLC and DEC Staff countered, maintaining that DEC's Noise Policy expresses no preference for a method of describing the noise level.

SLC argued that draft permit conditions would not allow it to exceed ambient sound levels by 10 dBA during daytime operation and 5 dBA during nighttime operation. Intervenors countered by stating that SLC improperly conducted ambient noise monitoring by incorrectly placing the noise receptors and selecting a Saturday instead of Sunday to take the readings. Intervenors also commented that even assuming the ambient noise readings were properly made, the draft permit allows for increases in dBA that, according to DEC Noise Policy, is "intrusive" and as such "deserves consideration of avoidance and mitigation measures."

The Commissioner agreed with the ALJs that noise issues are substantive and significant and therefore need to be adjudicated. She also opined that noise is an aspect of the environment subject to review under SEQRA and that substantial increases in existing noise levels are indicative of a significant adverse impact on the environment. In reaching her determination, the Commissioner disagreed with the SLC's contention that adherence to a local standard such as the City's and Town's 70 dB(A) property line limitation is preemptive of compliance with other applicable statutory or regulatory criteria "including, and especially, SEQRA." The Commissioner stated that identification and mitigation of potential noise impacts is a duty of an applicant under SEQRA, which is independent of its duty to comply with any local standards.

4. Traffic

The ALJs ruled that traffic impacts need not be adjudicated. They based their determination on the fact the SLC's traffic analysis was performed in accordance with the Highway Capacity Manual (HCM) published by the Transportation Research Board and that the methodology utilized by SLC demonstrated there would not be significant change in traffic service. Nevertheless, the ALJs directed Staff to include a permit condition in the SLC's permit limiting truck traffic from the project site to 120 truck trips per day. This was apparently done to address concerns raised by intervenors regarding a lack of a contingency plan to move SLC's product and materials in the event the conveyor system malfunctioned or ice prevented the passage of barges on the Hudson River.

SLC objected to the imposition of the permit condition, arguing that the DEC does not have jurisdiction over traffic matters and therefore lacks the authority to impose permit conditions. SLC alternately argued that even if the DEC maintained such authority, the intervenors failed to show any adverse environmental conditions regarding traffic.

The Commissioner stated that the DEC has routinely adjudicated traffic issues where traffic conditions resulted in environmental impacts—indicating that noise and other impacts associated with truck traffic clearly present issues going beyond concerns of traffic design and efficiency. The Commissioner further stated that as Lead Agency for this action, the DEC clearly has a responsibility to address these impacts. Therefore, the Commissioner concluded that the DEC does have jurisdiction over traffic matters.

However, the Commissioner did not agree with the ALJs that imposing permit restrictions on the amount of truck traffic permitted per day is the proper way to address the concerns raised by the intervenors. The Commissioner stated that adjudication must take place, if an agreement cannot be reached with respect to the appropriate permit language to resolve the contingency plan and truck traffic issue.

5. Economic Impacts

The intervenors argued that the issue of economic benefits and drawbacks of the project should be adjudicated as they believe that it is unlikely that adverse environmental impacts will be fully avoided or mitigated, and it is therefore likely that such impacts will need to be weighed against "social, economic and other essential considerations."

SLC countered by arguing that economic issues should only be considered where "there is a significant net adverse environmental impact which can be weighted against countervailing socio-economic factors" or where a project applicant argues that the project's benefits justify less than full mitigation. SLC contended that since adverse environmental impacts have been mitigated or offset to the maximum extent practicable, leaving no significant net residual impact, economics should not be taken into consideration. In the alternative SLC argued that if economic impacts are considered under SEQRA, the DEIS contains sufficient information to allow the balancing of environmental impacts with social and economic considerations. SLC also stated that the intervenors' offer of proof is conclusory and without foundation or analysis and as such, fails to meet the standards for adjudication discussed above.

The Commissioner rejected SLC's arguments that socio-economic issues may not be considered as part of the adjudication of environmental issues. The Commis-

sioner stated that the need and the benefits of the project may be a proper issue for adjudication. However, this issue is unlike other issues that are generally reviewed and determined to be adjudicable at the issues' conference stage since the necessity of adjudicating project need and benefits will not be made until later in the project decision-making process when it is determined that unmitigated impacts remain, if any. In the interest of judicial economy, the Commissioner stated that it is appropriate to defer the adjudication of need and benefits, if such are otherwise determined to be adjudicable in accordance with the substantive and significant requirements of Part 624, until the determination is made that the balancing of need and unmitigated adverse impacts is required.

In the instant case, the Commissioner determined that the intervenors failed to offer any proof sufficient to warrant adjudication of the need and benefits of the project. The intervenors simply provided conclusory statements generally contending that the economic benefits touted by SLC are overstated or that there will be negative economic impacts resulting from the project. The Commissioner found the record, such as the market for the product to be produced by SLC, together with the comments of the intervenors and the required Responsiveness Summary, will provide her with sufficient information to undertake the balancing required by SEQRA, should it be determined at some point in the future that unmitigated impacts remain. As such, the Commissioner reversed the ALJs' determination that the need and benefits of the project be adjudicated.

6. Other Issues

The Commissioner also determined that SLC's provided sufficient information in the DEIS regarding project alternatives, including the possible use of the current plant in Catskill, New York. As such, the Commissioner determined that SLC need not provide any further information regarding alternatives and the issue will not be adjudicated.

The intervenors also raised issues regarding SLC's record of compliance at the Catskill facility as well as SLC's relationship with Holnam Cement, which allegedly has a history of noncompliance. DEC's Record of Compliance Enforcement Guidance Memorandum (ROCEGM), first issued in 1991 and revised in 1993, sets forth DEC's policy and guidance to be used to evaluate an applicant's compliance history before a permit is issued or renewed. Depending upon the applicant's compliance history, permit denial or special conditions may be warranted. Moreover, information about related corporate entities may be required where there is evidence of a degree of control which the parent or related entity exercises over the applicant (i.e., does the related entity hold a "substantial interest" in the applicant or has the related entity acted as a "high managerial agent or director" in the applicant and if so, substantially influences the management of the applicant's site).[5]

In the present case, the Commissioner stated that FOH's evidence was insufficient to prove a connection between Holnam's operations and SLC's New York operations to have this entity and its facilities incorporated in a record of compliance analysis. Furthermore, the Commissioner stated that the Catskill facility had some violations, but the violations did not raise sufficient doubt about SLC's ability to comply with the applicable statutory or regulatory criteria with respect to the project. The Commissioner determined that nothing further needs to be added to the record on the topic of compliance and accordingly the issue will not be adjudicated.

D. Conclusion

Based upon the foregoing determinations, the Commissioner remanded the matter to the ALJs for further proceedings consistent with her First Interim Decision. The Commissioner indicated that matter should be advanced to the extent possible during the period prior to the release of her Second Interim Decision.

Endnotes

1. Clinker is a "pebbly rock-like substance that is made by heating limestone and other raw materials to a very high temperature in a kiln."
2. 6 N.Y.C.R.R. § 624.4(c) (1)(iii).
3. *In re Sithe/Independence Power Partners, L.P.*, Interim Decision of the Commissioner, Nov. 9, 1992.
4. Olana is the name that the famous painter, Fredrick Church, gave to the Hudson River Valley estate and Moorish-style castle that he built in the late 1800s.
5. ROCEGM at 3.

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Recent Decisions in Environmental Law

Student Editor: Jason P. Capizzi

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

AGG Enters. v. Washington County, 281 F.3d 1324 (9th Cir. 2002)

Facts: Plaintiff-appellee AGG Enterprises, Inc. (AGG) operates a waste removal service that contracts with customers of various commercial, industrial, and construction sites to collect and dispose of, *inter alia*, mixed solid waste, which is unsorted loads of recyclables and non-recyclables. AGG would pick up the loads of mixed solid waste from its customers and then deliver it to East County Recycling (ECR), a material recovery facility. ECR would separate the loads to recycle what it could; the remainder non-recyclables were taken to a landfill. Although AGG could not estimate how much of a customer's load was recyclable, the owner of ECR stated that of the 60,000 tons of mixed solid waste his company collects per year, on average, at least 10% to 20% of each load was non-recyclable garbage.

Defendants-appellants Washington County and City of Beaverton (Beaverton) regulate trash collection through the use of exclusive franchises, and issue licenses or certificates that grant companies the exclusive authority to collect waste in a particular geographical area. Beaverton equated mixed solid waste with regular garbage or refuse, and cited AGG for the unauthorized collection of solid waste since AGG did not hold an exclusive license. AGG thereafter applied for a license, but was informed that Beaverton would take no further action on their application. AGG sued for injunctive relief in the United States District Court for the District of Oregon, claiming that the local trash-hauling regulations were preempted by the Federal Aviation Administration Authorizing Act of 1994 (FAAAA), which states that, with limited exceptions:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.[1]

The District Court granted a permanent injunction on the theory that plaintiff was a motor carrier transporting property, and therefore defendants' exclusive licensing authority was preempted by the FAAAA. Defendants appealed to the United States Court of Appeals for the Ninth Circuit, arguing that the local trash-hauling regulations were not preempted because Congress did not intend mixed solid waste to be considered property.

Issue: Whether Congress expressed a clear and manifest intention to preempt local trash-hauling regulations through the enactment of the Federal Aviation Administration Authorizing Act of 1994.

Analysis: The Ninth Circuit Court of Appeals looked at both the language and legislative history of the FAAAA to ascertain Congress' intent when enacting the statute. Although the Supremacy Clause of the United States Constitution deems federal law the "supreme Law of the Land," the Court recognized that a Federal Act does not supersede a state's traditional police powers unless it was the clear and manifest intention of Congress to do so.[2] In support of Congress' recognition that waste hauling is and has traditionally been a state and local function subject to state and local regulations, the Court cited 42 U.S.C. § 6901(a)(4), which states that "the collection and disposal of solid waste should continue to be primarily the function of State, Regional and local agencies."[3] The Court noted that the collection of garbage and refuse is inherently local in nature given its direct effect on a community's health, safety, and aesthetic well-being, and thus cautioned "against the possibility that Congress lightly would preempt local regulation in this field."[4]

The Court of Appeals determined from the FAAAA's legislative history that the major purpose of the preemption clause was to draw a distinction, thereby leveling the playing field, between motor carriers (such as UPS which is subject to state regulation) and air carriers (such as Federal Express which is not subject to state regulation).[5] The Court interpreted the purpose of the FAAAA to demonstrate that Congress did not intend to preempt state and local trash-hauling regula-

tions. Furthermore, the Department of Transportation declared that under the case law of the Interstate Commerce Commission (ICC), garbage and refuse are not considered property, therefore garbage collectors are not considered motor carriers of property and remain unaffected by the preemption provision.[6] The Court stated that Congress' reliance on ICC case law and its concomitant beliefs at the time the FAAAA was drafted dictate the expression of its clear intention not to preempt state and local trash-hauling regulations.[7]

Appellee argued that since ICC case law considers mixed solid waste loads property, it is therefore not garbage and refuse, and remains unaffected by the legislative history of the FAAAA. The Court of Appeals rejected this argument in reliance on the fact that at least 10-20% of all the mixed solid waste loads collected by appellee (which equates to thousands of tons) is non-recyclable, and could not conclude that Congress intended to preclude state and local governments from regulating the collection of such large amounts of garbage and refuse.[8] The Court concluded that under the FAAAA Congress did not demonstrate a clear and manifest intent to divest state and local governments of the authority to regulate garbage and refuse collection merely because a load may be comprised of some recyclable material.[9] The Ninth Circuit Court of Appeals reversed the order of the District Court for the District of Oregon and vacated the permanent injunction.

Woomee Lee, '03

Endnotes

1. 49 U.S.C. § 14501(c).
2. *AGG Enters. v. Washington County*, 281 F.3d 1324, 1328 (9th Cir. 2002).
3. *Id.*
4. *Id.*
5. *Id.* at 1329.
6. *Id.*
7. *Id.*
8. *Id.* at 1330.
9. *Id.*

* * *

Comm. for Environmentally Sound Dev., Inc. v. City of New York, 737 N.Y.S.2d 792 (Sup. Ct. 2001)

Facts: In 1952, as part of the Columbus Circle Redevelopment Plan, New York City (NYC) acquired the area bounded by West 58th Street, West 60th Street, Ninth Avenue, and Columbus Circle. NYC conveyed this property in 1953 to the Triborough Bridge and Tunnel Authority (TBTA), who subsequently constructed the New York Coliseum on the site. In 1985, NYC and the TBTA closed the Coliseum and agreed to sell the site to Boston Properties.

Relating to a proposed project for the site, a Final Environmental Impact Statement (1989 FEIS) was issued in 1989 pursuant to SEQRA, the State Environmental Quality Review Act.[1] Although the proposed project conformed to the 1989 FEIS and was approved by the New York City Board of Estimate, the property was never transferred to Boston Properties and the site was not developed.

In December 1993, NYC and the Authority (the TBTA and the Metropolitan Transportation Authority (MTA)) agreed that NYC's consent would be required for any subsequent sale or lease of the site. In May 1996, NYC and the Authority further agreed that the Authority could not designate an end user of the site without NYC's prior written approval.

In July 1996, the TBTA issued a Request for Proposals (RFP) that set forth a new development project for the site. The RFP required the new project to conform to urban design guidelines that limited the floor area of any project built on the site to 2.1 million zoning square feet. Since the RFP called for a development project that differed from the proposed plan that was analyzed in the 1989 FEIS, the TBTA issued a Final Supplemental Environmental Impact Statement (1997 FSEIS). Pursuant to SEQRA, the Authority adopted a Statement of Findings that made clear that any new development of the site must abide by the 2.1 million zoning-square-foot limitation.

The RFP was later amended to include a jazz theater, and the potential developers submitted revised proposals to reflect this addition. The TBTA took a "hard look" at the environmental impacts of the revised proposals and concluded that it was not necessary for another SEIS to be prepared since no new adverse environmental impacts were identified. NYC concurred with the TBTA's findings.

In July 1998, Columbus Centre, LLC, (Columbus), was chosen to develop the site and executed a sales agreement with the TBTA and NYC to buy the property. Columbus signed a covenant that required the entire project to be limited in size to 2.1 million zoning square feet, however the overall gross square footage of the project was not limited. NYC was given the exclusive authority to enforce the covenant.

In a July 28, 2000, letter to the MTA (a carbon copy of which was sent to Columbus' parent company, Related Companies, L.P.) about Columbus' indication to the public that the project was 2.8 million square feet, a number of local elected officials requested that the MTA take a "hard look" at the project to determine whether the project's size had increased in any way to require additional environmental review. In an August 25, 2000,

response letter to Councilmember Ronnie Eldridge, Related Companies, L.P., assured that the project would remain less than 2.1 million zoning square feet, and explained that although the project was over 2.8 million gross square feet, nearly 700,000 square feet consisted of below-grade and mechanical space which, pursuant to the urban design guidelines, was not included in the 2.1 million zoning-square-foot limitation.

On July 31, 2000, the Authority conveyed all of its interest to Columbus, and Columbus executed the covenant containing the size restrictions. The New York City Buildings Department issued work permits in 2001.

On June 14, 2001, petitioners, a community environmental group and individual community members, filed a CPLR article 78 petition in the New York County Supreme Court. The first cause of action claimed that the Authority violated its duty under SEQRA to take a "hard look" at the project to determine if the changes in the project's size required further environmental review. In the alternative, petitioners argued that NYC violated the SEQRA obligations by failing to ensure that Columbus abided by the size limitation imposed by the 1997 FSEIS and the covenant. In the second cause of action petitioners alleged that the Buildings Department exceeded its legal authority, violated the covenant, and ran afoul of SEQRA when it approved the project plans and issued a work permit. The third cause of action contended that imminent, not yet enacted changes in federal law concerning carbon monoxide standards for the New York City area mandated additional environmental reviews.

Issues:

1. Whether the Authority was the lead agency under SEQRA and whether as lead agency, the Authority violated its duty under SEQRA to take a "hard look" at the project to determine if the changes in the project's size required further environmental review.
2. Whether the City violated its obligations under SEQRA by not ensuring that Columbus abided by the size limitation in the 1997 FSEIS and the covenant.

Analysis: The Supreme Court found that the Authority's role as lead agency ended when it sold the land and required Columbus to enter into a covenant, which was exclusively enforceable by NYC, that limited the size of the project in accordance with the 1997 FSEIS. However, the Court noted that a lead agency's responsibility under SEQRA to examine changes to a project does not end once the agency issues a Statement of Findings. SEQRA imposes no time limitations governing the need to prepare an SEIS and offers no indication as to when the obligations of a lead agency cease.[2] Furthermore, since "a lead agency can be 're-established' after [a Statement of Findings] specifically for the purpose of preparing an SEIS,"[3] the Court determined it would not be consistent with the letter and spirit of SEQRA, which requires agencies to focus attention on environmental impacts and minimize adverse environmental affects to the maximum extent practicable, to not hold an agency responsible to conduct further environmental review.[4]

The Supreme Court also found that because the Authority sold the land to Columbus (and thus relinquished control over the project and its status as lead agency) and executed a covenant that entrusted NYC with the exclusive authority to enforce the size limitation in the 1997 FSEIS, NYC took on the responsibilities of "lead agency" even though it was not technically denominated as such. Therefore, because NYC had the responsibilities of the lead agency, it had an obligation to make certain Columbus abided by the size limitation in the 1997 FSEIS. Additionally, the Court highlighted that NYC was the only entity from the 1997 SEQRA review process that still remained an active participant in the project. The Court also noted that NYC was in the best position to know whether Columbus was in compliance with the existing SEQRA limitations since its agencies reviewed all the construction and development plans.

The New York County Supreme Court concluded that petitioner's first cause of action alleged a viable claim against NYC and ordered a factual hearing to determine whether it was barred by the statute of limitations. The Court dismissed petitioner's second cause of action because they failed to exhaust administrative remedies by first appealing to the Board of Standards and Appeals.[5] Finally, the Court concluded that the third cause of action was not ripe for review because the regulations had not yet been enacted.

Jason P. Capizzi, '03

Endnotes

1. N.Y. Envtl. Conserv. Law § 8-101 (2002).
2. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 617.9(a)(7) (2002) (N.Y.C.R.R.).
3. *Comm. for Environmentally Sound Dev., Inc. v. City of New York*, 737 N.Y.S.2d 792, 801 (Sup. Ct. Dec. 10, 2001) (*See* 6 N.Y.C.R.R. § 617.6(b)(6)(i)(a) (2002)).
4. *Id.* at 802 (*See Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986)).
5. *Id.* at 805.

* * *

Consol. Edison Co. v. Allstate Ins. Co., 98 N.Y.2d 208 (2002)

Facts: From 1873 through 1933, appellant Con Edison owned and operated a gas manufacturing plant in Tarrytown, New York. Anchor Motor Freight, a subsequent owner of the site, contacted Con Edison in 1995 after discovering contamination during an investigation required by the New York Department of Environmental Conservation (DEC). After entering into an agreement with the DEC to clean up the site, Con Edison commenced an action seeking a declaratory judgment, demanding defense and indemnification for damages arising from the contamination, against 24 insurers who issued general liability policies during the contamination period. All of the policies overlapped, and most included language detailing coverage that assumed liability for accidents or occurrences arising during the policy period.[1]

The insurance companies argued that the fair method of allocation was pro-rata allocation, which would equally tap each policy existing during any part of the contamination period, whereas Con Edison argued for joint and several allocation. Since the contamination decreased over time, the New York County Supreme Court recognized that if the insurance policies were attached equally, liability would be misallocated to policies covering the later, lesser-contaminated period as compared with those covering the earlier, more severely contaminated period.[2] The Supreme Court divided Con Edison's $51 million estimate of damages by 50 (the number of years specified in the complaint) and determined that the 17 policies which attached at levels greater than $ 1.1 million were nonjusticiable. Four other insurers settled, and the remaining three went to trial.

Having reasoned that this was "not an exclusion being asserted by the insurance company[ies], but a claim being asserted by the policy holder,"[3] the trial judge charged the jury that the burden of proof was on Con Edison to show that the contamination was accidental or unintentional. The jury determined that the damage was not the result of an accident or occurrence, which precluded coverage, and Con Edison appealed. The Appellate Division of the New York Supreme Court, First Department, affirmed. The New York Court of Appeals granted Con Edison's motion for leave to appeal.

Issues:

1. Whether the burden of proof falls on the insured to establish coverage resulting from an accident or occurrence within the meaning of the policies, or on the insurer to exclude coverage by establishing that the resulting property damage was intended.
2. Whether pro-rata allocation or joint and several allocation is the proper method for determining insurance liability for multiple policies held sequentially over a contamination period.

Analysis: The Court of Appeals unanimously affirmed the Appellate Division's placement of the burden on Con Edison to show that the contamination was an accident; reiterating the general principle that an insured has the burden to show coverage existed, and that an insurer has the burden to defeat liability by showing an applicable exclusion contained in the policy. The Court noted that the specific terms "accident" and "occurrence," although not defined in the policies as unintended or unexpected, were explicitly covered, and determined that the lack of any language setting forth exceptions to coverage was proof that accidental damage did not create an exclusion; "[a]ny language providing coverage for certain events of necessity implicitly excludes other events."[4]

Having concluded that a fortuitous loss is a necessary element of insurance policies based on either an accident or occurrence, the Court of Appeals offered two reasons why placing the initial burden on the insured to show that the damage was the result of an accident or occurrence is appropriate: (1) the insured is provided with an incentive to detect pollution it is releasing early on, and (2) the insured is the party with "'better and earlier access to the actual facts and circumstances surrounding the [contamination],' including information about its own intentions and expectations."[5]

The Court of Appeals looked closely at the policies' terms for coverage of "all sums" arising "during the policy period" to determine the proper allocation method of an insurers' liability. The policies were "to indemnify the insured for all sums which the insured shall be obligated to pay by reason of the liability."[6] The Court determined that this language was inconsistent with joint and several allocation, because joint and several allocation would force the policy to cover liability outside of the coverage period. Since the policies unambiguously stated that coverage was to apply during the policy period, the Court found that pro-rata allocation was the appropriate method to be applied.

Verita Gulati, '03

Endnotes

1. *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218-219 (2002).
2. *Id.* at 216-217.
3. *Id.* at 217.
4. *Id.* at 219.
5. *Id.* at 220 (quoting *Northville Indus. Corp. v. National Union Fire Ins. Co.*, 89 N.Y.2d 621, 634 (1989)).
6. *Id.* at 222.

* * *

Consol. Edison Co. v. Pataki, 292 F.3d 338 (2d Cir. 2002)

Facts: Respondent Consolidated Edison Company of New York (Con Ed) is a public utility charged with providing electrical power to Manhattan. Among its plants is the Indian Point 2 Nuclear Generating Facility (IP2). The statute at the heart of this appeal was enacted in response to a power outage at IP2 caused by a defective generator.

On February 15, 2000, a tube in one of IP2's steam generators developed a crack. This cracked tube was promptly discovered and Con Ed took IP2 offline to replace the defective generator. To cover electricity demand while IP2 was offline, Con Ed was forced to purchase electricity from other sources. Pursuant to an agreement with the New York State Public Service Commission, Con Ed increased its rates to incorporate the cost of purchasing replacement electricity and other costs associated with the outage.

Three days after the outage, the New York State Assembly held a hearing on a variety of different topics related to the outage. At this hearing it was learned that Con Ed had knowledge that the steam generators used at its IP2 plant were subject to corrosion and failure. It was further discovered that Con Ed had purchased replacement generators for IP2 in 1985 but had never installed them. In response, the New York State Legislature passed Chapter 190 of the Laws of 2000, which prohibited Con Ed from passing on the costs associated with the outage to its ratepayers; section 2 of which provides in relevant part: "With respect to the February 15, 2000 outage at the Indian Point 2 Nuclear Facility, the New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility."[1]

On August 14, 2000, Con Ed filed suit in the United States District Court for the Northern District of New York seeking a declaratory judgment and permanent injunction barring the enforcement of the statute. Con Ed argued, *inter alia*, that the statute violated the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution.

On October 10, 2000, the District Court granted Con Ed's request for a permanent injunction finding that the statute violated both the Equal Protection Clause and the Bill of Attainders Clause. From this judgment, appellant appealed to the United States Court of Appeals for the Second Circuit.

Issue: Whether Chapter 190 of the Laws of 2000, which prohibited Con Ed from recovering from its ratepayers any costs associated with replacing the power from IP2, violated the Bill of Attainders Clause of Article 1, Section 10 of the United States Constitution.

Analysis: The Circuit Court began by noting that a statute constitutes an impermissible bill of attainder only if it "determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[2] Because it was incontrovertible that Con Ed was not given a jury trial, the Court was left only with the questions of whether (1) Con Ed was an individual that could invoke the protections of the clause, (2) Chapter 190 determined guilt, and (3) Chapter 190 inflicted punishment.[3]

Turning first to the question of whether Con Ed was an individual, the Court noted that while a wide variety of constitutional rights may be asserted by corporations, there are certain purely personal guarantees that are unavailable to corporations. In determining whether a right is purely personal, a court must look to its "nature, history, and purpose."[4] The Court concluded that the protection afforded by the Bill of Attainder clause is not purely personal for two reasons. First, the guarantee is closely related to procedural due process, which has been applied to corporations. Second, the cases in which constitutional rights have not been applied to corporations involved state attempts to regulate and investigate corporate wrongdoing, which was not the case here.

The Court next turned to the issue of guilt and concluded that although Chapter 190 did not speak in terms of guilt or innocence on its face, because the statute focused on Con Ed's conduct relating to the IP2 outage as the basis for the sanction imposed, this constituted evidence that the legislature considered Con Ed guilty of some wrongdoing. The Court noted, in particular, the language of the statute stating that "[Con Ed] failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers."[5] Also of relevance was the fact that the legislature's response was limited solely to the IP2 incident.

Finally, the Court announced three factors to determine whether a statute is punitive: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a [legislative] intent to punish.'"[6]

The only traditional punishment implicated in the case at hand was the punitive confiscation of property. The Court noted that Chapter 190 clearly deprived Con Ed of a property interest by prohibiting the ordinarily permitted pass-through of costs. However, since it was uncertain whether deprivation constituted the same

thing as a confiscation, the Court did not decide whether Chapter 190 imposed a traditional attainder.

Next, the Court turned its focus upon whether Chapter 190 could reasonably be said to further nonpunitive legislative purposes. The Court noted a number of nonpunitive interests served by the statute's cost-through prohibition. For example, the legislature could have concluded that Con Ed, rather than the ratepayers, should have to bear the costs attributable to the outage. Similarly, the statute could also function to deter similar conduct by Con Ed, as well as other public utilities, in the future.

However, since it was undisputed that Con Ed would have been allowed to pass through to ratepayers the costs of covering power demand while replacing the generators during a scheduled outage, the Court concluded that forcing Con Ed to absorb those same costs after the accidental outage could only be justified if the statute was viewed as a punishment. Moreover, the Court noted that there were clearly "less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives."[7] For example, the legislature could have drafted Chapter 190 to exclude from the pass-through prohibition those costs that would have been incurred absent any misconduct on the part of Con Ed.

Finally, the Court turned to whether the legislative history of Chapter 190 indicated a legislative intent to punish. An examination of the legislative record of Chapter 190 uncovered that certain legislators unquestionably intended to punish Con Ed. The Court acknowledged that statements by a "smattering of legislators" were not sufficient on their own to justify a conclusion that Chapter 190 was punitive.[8] However, the stated intent of these legislators did serve to bolster the Court's prior independent conclusion that a substantial portion of Chapter 190's pass-through prohibition was clearly punitive.

The United States Court of Appeals for the Second Circuit therefore affirmed the judgment of the United States District Court for the Northern District of New York holding that Chapter 190 of the Laws of 2000 violated the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution.

Robert Scott Gonzales '03

Endnotes

1. *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 344 (2d Cir. 2002).
2. *Id.* at 346 (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977)).
3. *Consol. Edison Co.*, 292 F.3d at 346.
4. *Id.* at 347.
5. *Id.* at 349.
6. *Id.* at 350.
7. *Id.* at 351 (quoting *Nixon*, 433 U.S. at 482).
8. *Consol. Edison Co.*, 292 F.3d at 354.

* * *

Save Our Main St. Bldgs. v. Greene County Legislature, 740 N.Y.S.2d 715 (3d Dep't 2002)

Facts: Save Our Main Street Buildings is an unincorporated association organized to preserve the historic and cultural resources of the Village of Catskill in respondent Green County. Individual members of Save Our Main Street Buildings who live in the Village's East Side Historic District, along with the association itself, appealed from a September 11, 2001, judgment of the Greene County Supreme Court dismissing a CPLR article 78 proceeding for want of standing.

After several years of investigation into the feasibility of the following project, respondent issued a bond resolution in June 2001 calling for the acquisition and demolition of 10 buildings located on or adjacent to Main Street in the Historic District, and their replacement with a 108,000-square-foot office building. Respondent, in order to assess the potential environmental impacts of the project, consulted an engineering firm, which obtained the opinion of an architectural historian that indicated the integrity of Main Street would not be adversely affected should the new building be placed, as planned, to preserve the streetscape. The consultants noted that none of the buildings to be demolished were listed as one of the over 500 hundred historic structures that comprise the Historic District. The consultants additionally noted that a vacant lot from the demolition of another building in 1997, and an existing parking lot, already break the line of building facades along Main Street at the project site. Based on the consultant's findings, respondent issued a negative declaration of environmental significance for the project pursuant to the State Environmental Quality Review Act (SEQRA).[1]

Petitioners, alleging a failure to comply with SEQRA, commenced a CPLR article 78 proceeding to annul respondent's resolution and negative declaration. The Supreme Court dismissed the petition after finding, *inter alia*, that petitioners lacked standing to bring the proceeding. Asserting that their residence in close proximity to the project site establishes standing and alleging that they suffer different injuries than those of the general public, petitioners appealed before the Appellate Division of the New York Supreme Court, Third Department. Scenic Hudson, the Preservation League of New York State and the National Trust for Historic Preservation submitted amicus briefs in support of petitioners' challenge.

Issue: Whether petitioners alleged a unique, direct environmental injury to warrant standing in a CPLR article 78 proceeding under SEQRA.

Analysis: To establish standing under SEQRA, "it is well settled that unless the claimed SEQRA violation relates to a zoning enactment, a party must allege a specific environmental injury which is 'in some way different from that of the public at large.'"[2] The Appellate Division noted that "generalized environmental concerns will not suffice and, when no zoning-related issue is involved, there is no presumption of standing to raise a SEQRA challenge based on a party's close proximity alone."[3]

The Appellate Division was not persuaded by any of the individual petitioners' claims that standing had been established. Individual petitioners 1, 2 and 3 each asserted similar claims that the project would alter their viewshed and the character of the Historic District. Individual petitioner 4 additionally alleged that his antiques business located two blocks from the project site would be adversely affected by the "effects of increased pedestrian and vehicle traffic that [would] be generated by the [p]roject."[4] Individual petitioner 5 alleged, *inter alia*, that she lives in close proximity to the project, is a member of an organization dedicated to restoring Village business districts, and regularly conducts educational walks through the Village to highlight the historic and aesthetic qualities of Main Street.

Although standing has been recognized when a party alleges an adverse impact on a scenic view from his or her residence,[5] the Appellate Division agreed with the Supreme Court's finding that petitioners would not sustain the alleged visual impacts because their residences were not within the sight, 1,000 feet,[6] of the project. The Appellate Division concluded that any adverse effects on the individual petitioners' scenic view would not be any different than those suffered by the public at large. Since the record reflected that individual petitioner 4 would have no direct view of the project because his business is located on the same side of the street, the Appellate Division stated "it wholly fails to show how increased pedestrian and vehicular traffic would harm, rather than benefit, his business."[7] The Appellate Division further noted that standing could not be based on the claim that "a project would 'indirectly affect traffic patterns, noise levels, air quality and aesthetics throughout a wide area.'"[8]

The Appellate Division of the New York Supreme Court, Third Department, affirmed the Greene County Supreme Court's decision to dismiss petitioners' CPLR article 78 proceeding for want of standing under SEQRA because no unique, direct environmental injury had been alleged. Save Our Main Street Buildings was therefore unable to satisfy the three-part test set forth in *Society of Plastics Indus.*[9] to establish organizational standing. The New York Court of Appeals denied petitioners' motion for leave to appeal.[10]

Jason P. Capizzi, '03

Endnotes

1. N.Y. Envtl. Conserv. Law § 8-101 (2002).
2. *Save Our Main St. Bldgs. v. Greene County Legislature*, 740 N.Y.S.2d 715, 717 (3d Dep't 2002).
3. *Id.*
4. *Id.* at 718.
5. *Id.* (*See Steele v. Town of Salem Planning Bd.*, 606 N.Y.S.2d 810 (3d Dep't 1994)).
6. *Save Our Main St. Bldgs.*, 740 N.Y.S.2d at 718 n.1.
7. *Save Our Main St. Bldgs.*, 740 N.Y.S.2d at 718.
8. *Id.* (quoting *Oates v. Vill. of Watkins Glen*, 736 N.Y.S.2d 478, 481 (3d Dep't 2002).
9. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 (1991).
10. *Save Our Main St. Bldgs. v. Greene County Legislature*, 2002 N.Y. LEXIS 1953 (July 9, 2002).

* * *

Dittmer v. County of Suffolk, 188 F. Supp. 2d 286 (E.D.N.Y. 2002)

Facts: Plaintiff Henry Dittmer, a property owner suing individually and on behalf of approximately 167 other property owners similarly situated, alleged constitutional violations stemming from the enactment of the New York Pine Barrens Protection Act (PBPA).[1] Defendants include the three Eastern Long Island towns of Brookhaven, Riverhead and Southampton, Suffolk County, a corporate entity formed by N.Y. State to implement the PBPA (the "Commission") and its members (the Suffolk County Executive, a representative of the N.Y. State Governor, and the three towns' Town Supervisors).

The protection, preservation, and proper management of New York's largest natural drinking water source and the Pine Barrens' ecosystem are among the stated goals of the PBPA. The PBPA divides the Pine Barrens into a Core Preservation Area and a Compatible Growth Area. To protect the Core Preservation Area, the Commission developed the Comprehensive Land Use Plan, which prohibits and/or redirects new development by issuing, in exchange for development rights, Pine Barren Credits (PBCs) through the Pine Barrens Credit Clearinghouse (the "Clearinghouse").[2] PBC recipients are able to either use the PBCs to increase development density on other property they own outside of the Core Preservation Area, or sell the PBCs to owners of such receiving parcels.[3] PBC recipients can also sell the PBCs for 80% of their minimum value, which is determined by the Commission, to the Clearinghouse as a last resort.[4]

The Commission may grant landowners in the Core Preservation Area permission to develop their property upon a showing of extraordinary hardship.[5] Landowners in the Core Preservation Area may also develop their land if it is either: developed for agricultural or horticultural use; developed under a residential development plan that complies with current zoning regulations and received preliminary or final development approval on or before June 1, 1993; or used to construct single family homes on road-side parcels identified by the Commission.[6]

The United States District Court for the Eastern District of New York dismissed plaintiff's original substantive due process claim, and was left to decide plaintiff's equal protection claim, which alleges that his property was treated differently than similarly situated federally owned property. Plaintiff contended that Riverhead officials negotiated the designation of the federal property with the parties charged to map the protected areas, and that town officials would only approve the Pine Barrens conservation effort if the federally owned property was exempted from the Core Preservation Area.

Issue: Whether the New York Pine Barrens Protection Act facially violates the Equal Protection Clause of the 14th Amendment because it treats plaintiff's property differently than similarly situated federally owned property.

Analysis: The United States District Court for the Eastern District of New York described that in an equal protection challenge, laws and statutes that treat persons differently are subject to rational basis scrutiny unless disparate treatment based on a suspect or quasi-suspect class or the violation of a fundamental right has been claimed.[7] The Court noted that suspect and quasi-suspect classifications are race, gender, alienage or national origin, and that fundamental rights are the rights to privacy, vote, marry, travel and freely associate.[8] Since plaintiff alleged neither disparate treatment based on a suspect or quasi-suspect class, or the violation of a fundamental right, the Court determined that rational basis scrutiny was the appropriate level of review. A statute subject to rational basis scrutiny in an equal protection claim will survive if there is any plausible justification for the distinctions drawn, and the Court noted that it is plaintiff's burden to negate all purported justifications.[9]

The Court found that the protection of New York's largest natural drinking water source and the preservation of the Pine Barrens' ecosystem were legitimate state interests, and that the land conservation plan implemented by New York's legislature in the PBPA rationally furthered those goals by distinguishing between private and federal land ownership.[10] Since plaintiff failed to negate every conceivable basis supporting the PBPA, the Court upheld the constitutionality of the PBPA. Similarly, the Court determined that plaintiff's allegations of vagueness and overbreadth did not adequately address how the PBPA failed to protect the Pine Barrens' ecosystem, and that plaintiff's allegations of political impropriety and inappropriate power brokering did not invalidate the PBPA's goals.[11]

The United States District Court for the Eastern District of New York found on cross motions for summary judgment that: (1) the PBPA was subject to rational basis review in deciding the equal protection challenge; (2) protection of New York State's largest natural drinking water source and the Pine Barrens' ecosystem were legitimate state interests; (3) plaintiff's argument that the PBPA was unconstitutionally broad and vague failed to negate every conceivable basis supporting the PBPA; (4) plaintiff's allegations of political impropriety and inappropriate power-brokering did not invalidate the PBPA's goals.

Nydia Durand '03

Endnotes

1. N.Y. Envtl. Conserv. Law § 57-0101 (2002).
2. *Dittmer v. County of Suffolk,* 188 F. Supp. 2d 286, 289 (E.D.N.Y. 2002).
3. *Id.*
4. *Id*.
5. *Id.*
6. *Id.*
7. *Id.* at 292.
8. *Id.*
9. *Id.* at 293.
10. *Id.*
11. *Id.* at 293-294.

* * *

Spitzer v. Farrell, 742 N.Y.S.2d 285 (1st Dep't 2002)

Facts: In May 1996, the New York State legislature adopted an amendment to the Environmental Conservation Law, requiring New York City to close the Fresh Kills landfill on Staten Island by January 1, 2002. To comply with the legislature's amendment, the New York City Department of Sanitation (DOS) adopted interim measures to reduce the amount of waste deposited at Fresh Kills until the City adopted its final strategy to address waste reduction. The DOS's interim plan called for the approximately 2,300 tons of solid waste that is collected in Manhattan daily, to be transported by 393-650 diesel-powered trucks to a New Jersey solid waste facility via the George Washington Bridge and the Holland and Lincoln Tunnels.

Prior to implementing the interim plan, the DOS was required by the State Environmental Quality Review Act (SEQRA)[1] to investigate whether the preparation of an Environmental Impact Statement (EIS) was required. SEQRA requires governmental agencies to review the environmental impact of any nonexempt action proposed, and to prepare an EIS for any action that "may have a significant effect on the environment."[2] If the proposed action does not pose any potentially significant adverse impacts on the environment, the governmental agency can issue a negative declaration and proceed without an EIS.

Before issuing a negative declaration, the governmental agency must "identify the relevant areas of environmental concern," take a "hard look" at them, and "set forth a reasoned elaboration for its determination."[3] These obligations compelled the DOS to conduct an initial environmental assessment as to whether the addition of several hundred diesel-powered trucks to three of Manhattan's already congested exits might have a significant impact on the environment.

Diesel engines emit particulate matter into the atmosphere, which is measured in microns. Airborne particulate matter can enter the lungs through respiration and cause or aggravate pulmonary health conditions. Finer particulate matter particles can penetrate the lungs deeper than coarser particles, and are more likely to contribute to adverse health effects. Over 90% of the particulate matter in diesel-engine admissions consists of particles measuring 2.5 microns (PM2.5) or less in diameter.[4]

The DOS's initial environmental assessment was limited to, and based on, whether the exhaust from the diesel-powered trucks would elevate particulate matter emissions to PM10, which would be a violation of the Clean Air Act. The DOS concluded that their proposed plan "would not cause a potentially significant adverse traffic-related air quality impact" in the area around the Holland Tunnel, and would also not cause any adverse public heath problems.[5] A negative declaration was issued, and an EIS was not prepared.

Petitioner-appellant Eliot Spitzer filed a CPLR article 78 petition to annul the negative declaration in the New York County Supreme Court. The petition was denied and appellant appealed this order before the Appellate Division of the New York Supreme Court, First Department.

Issue: Whether the DOS erred by limiting their study to particulate matter measuring PM10, thereby ignoring newer, not yet enforceable NAAQ standards regarding the potential negative impacts PM2.5 could have on the environment.

Analysis: Section 109 of the Clean Air Act requires the United States Environmental Protection agency (EPA) to promulgate National Ambient Air Quality Standards (NAAQS) for all criteria air pollutants, of which particle matter is one.[6] Prior to 1997, NAAQS were maintained for PM10, however since further scientific review has revealed that PM2.5 emissions contributed to a number of adverse health effects, the EPA issued an implementation plan to monitor and collect data for three years before enforcing new NAAQS for PM2.5.[7]

Since the DOS ignored the negative potential impact PM2.5 emissions would have on its plan and based its determination on the inadequate PM10 measure, the Appellate Court held that the DOS erroneously equated "significance" under SEQRA with compliance with inadequate PM10 NAAQS promulgated under the Federal Clean Air Act. The Court stated that the absence of legally enforceable PM2.5 NAAQS under the Clean Air Act does not relieve the DOS of the obligation to consider the negative impact of the PM2.5 under SEQRA.[8]

The Appellate Court held that the DOS's determination, that its plan for dealing with Manhattan waste would have no adverse environmental or health effects, failed to identify and take a "hard look at" the plan's potential PM2.5 impact which was clearly a "relevant area of environmental concern."[9] The Court annulled the DOS's negative declaration and directed the DOS to perform a new environmental assessment taking into account PM2.5 emissions.[10]

The New York Court of Appeals has since granted respondent's motion for leave to appeal.[11]

Eric Eubanks, '03

Endnotes

1. N.Y. Envtl. Conserv. Law § 8-101 (2002).
2. *Spitzer v. Farrell*, 742 N.Y.S.2d 285, 287 (1st Dep't 2002).
3. *Id.* (*See Merson v. McNally*, 665 N.Y.S.2d 605, 609-610 (1997)).
4. *Spitzer*, 742 N.Y.S.2d at 288.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 288-289.
9. *Id.* at 289 (*See Merson*, 665 N.Y.S.2d at 609).
10. *Spitzer*, 742 N.Y.S.2d at 289.
11. *Spitzer v. Farrell*, 2002 N.Y. LEXIS 3172 (Oct. 17, 2002).

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