

SPRINGBOARD

LEGAL TRENDS AND ANALYSIS

INDEPENDENT ORGANIZATION RANKS SPR #1 FIRM FOR ENVIRONMENTAL LAW IN NEW YORK FOR SECOND YEAR IN A ROW

Lauding the Firm's "unbeaten experience and local knowledge," Chambers and Partners, an independent law firm and

attorney ranking publication, again ranked SPR as the leading environmental practice in New York. **CONT'D page 10**

NEW INITIATIVES PROSECUTE WORKPLACE-SAFETY VIOLATIONS USING ENVIRONMENTAL LAWS

Daniel Riesel and Dan Chorost*

In May 2005, the United States Department of Justice ("DOJ"), the United States Department of Labor Occupational Safety and Health Administration ("OSHA") and the United States Environmental Protection Agency ("EPA") announced a major enforcement priority ("Initiative") to provide for inter-agency coordination and prosecution of workplace-safety violations through the use of environmental statutes. The Initiative is being spearheaded by the DOJ's Environment and Natural Resources Division ("ENRD"). The Initiative already has resulted in significant inter-agency training and coordination, and increased enforcement activities.

The Initiative is of particular consequence to businesses dealing with hazardous substances, because today, even routine workplace-safety incidents may subject an employer and its management structure to increased scrutiny in both the safety and the environmental spheres. And unlike the relatively modest penalties contemplated by

traditional workplace-safety laws and regulations, environmental statutes carry the possibility of substantial pecuniary penalties, criminal liability, and lengthy incarceration.

According to the Assistant Section Chief for the Environmental Crimes Section and the ENRD attorney primarily responsible for the Initiative, the Initiative was first contemplated in 2003 when ENRD supervisors recognized a pattern in several investigations and prosecutions then underway. "We noticed that employers who ignored worker safety often ignored environmental safety, and that gross violations of environmental laws and regulations often precipitated worker injury or death." The Initiative thus represents an attempt to address these most serious of violators by training OSHA compliance officers to recognize, and refer to DOJ, environmental violations, and to enhance communication between OSHA, EPA and DOJ so the "worst offenders" are identified, investigated and prosecuted. **CONT'D page 1**

INSIDE SPRINGBOARD

NEW INITIATIVES PROSECUTE WORKPLACE-SAFETY VIOLATIONS USING ENVIRONMENTAL LAWS	COVER
MUNICIPAL LAW UPDATE: COURT OF APPEALS HOLDS THAT ELEVATED TAKINGS SCRUTINY DOES NOT APPLY TO DEVELOPMENT RESTRICTIONS	3
DEC AND DOH ISSUE DRAFT POLICIES GOVERNING SOIL VAPOR INTRUSION THAT WILL ADD ONEROUS NEW REQUIREMENTS FOR CLEANING UP CONTAMINATED SITES	7
SPR NEWS	9
DENIAL OF APPLICATION FOR PRELIMINARY SUBDIVISION AND ASSOCIATED TOWN PERMITS UPHELD IN WESTCHESTER COUNTY	9
COURT OKAYS PROPOSED OCTAGON PARK DEVELOPMENT ON ROOSEVELT ISLAND, DISMISSING CLAIMS OF PARKLAND ALIENATION	9

SPR

S I V E • P A G E T • R I E S E L
www.sprlaw.com

Although the Initiative was made public in May 2005, DOJ has been conducting a “pilot program” in the northeastern United States since 2003. That pilot program involved coordinated review of EPA and OSHA dockets, training of OSHA employees, and several recent, high-profile prosecutions discussed below. The goal of these trainings is to give trainees the tools so that they are capable of recognizing and referring potentially serious violations to EPA and DOJ for further investigation.

Mr. Goldsmith recently explained that OSHA trainees are excited about the Initiative because, “there used to be only one DOJ attorney to handle enforcement nationwide, today several of the ENDR’s thirty-nine prosecutors spend significant portions of their time on these cases – and that number will continue to increase as more cases come in.” The fact that OSHA’s rank-and-file are beginning to refer cases for prosecution represents a change in OSHA’s culture, which historically disfavored criminal enforcement. As reported in 2003 as part of a New York Times series, between 1982 and 2002 OSHA declined to seek prosecution in 93% of the 1,242 cases in which workers were killed due to willful safety violations.^[1]

The trend reflected by the Initiative is not limited to the federal government. In December 2004, New York Attorney General Elliot Spitzer announced his office would prosecute workplace-safety crimes using state environmental statutes. This strategy avoids pre-emption by OSHA and empowers the state with the “sword of Damocles of criminal prosecution hanging over the owner of the company.”^[2]

Mr. Spitzer pointed to the September 2004 indictment in People v. Bronx Auto, N.Y. Sup. Ct., No. 3671-2004, charging a junkyard company and two officers with reckless endangerment and endangering public health, safety or the environment. N.Y. Environmental Conservation Law, §§ 37-0101, et seq. The indictment alleges an employee was injured after being ordered to clean without protective gear a storage tank containing waste fluids. Appearing together with the Police Department and Department of Environmental Conservation commissioners, Mr. Spitzer warned “[b]usiness owners who put profit before the safety of their workers and violate environmental laws will be held accountable.”^[3]

The federal Initiative and its state counterpart are the culmination of the gradual intersection of the formerly-distinct spheres of environmental regulation and workplace-safety regulation. The theoretical basis of this intersection can be traced to an alliance between OSHA and EPA first memorialized by two Memoranda of Understanding (“MOU”) entered into in the 1990s. Through these MOUs, the agencies agreed to conduct joint inspections and investigations, to share data and conduct inter-agency training, and to issue reports on major chemical accidents.^[4] While the extent to which those MOUs were implemented is not clear, the agreements demonstrated that high-level officials had begun to reject the notion that workplace-safety and environmental safety were separate regulatory universes. The importance of this development was not widely noticed, however, until landmark convictions were affirmed in the Hansen and Elias cases.

Prosecuting Hansen and Elias Under RCRA

One of the most potent weapons currently used by federal prosecutors to combat workplace-safety violations is the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C.A. § 6901, et seq., a cornerstone of federal environmental legislation. But RCRA’s connection to worker-safety prosecutions is not necessarily obvious; after all, the Occupational Safety and Health Act (“OSH Act”), 29 U.S.C.A. § 651, et seq., traditionally has been relied upon to ensure employers “furnish to each of [their] employees ... a [workplace that is] free from recognized hazards [likely] to cause death or serious harm to [their] employees.” 29 U.S.C.A. § 654(a)(1). The OSH Act achieves this goal, in part, by requiring that employers comply with occupational safety and health standards promulgated by OSHA.

By contrast, RCRA's purpose is to regulate hazardous wastes "from cradle to grave," and the statute has spawned a detailed regulatory system aimed at reducing the release and improper disposal of hazardous waste. RCRA supplements traditional workplace-safety law such as the OSH Act by requiring the safe storage and handling of hazardous waste, and providing for civil penalties of up to \$32,500 per violation per day, where employees improperly are exposed to workplace hazards. 42 U.S.C.A. §§ 6928.

One reason for the increased reliance by prosecutors upon RCRA instead of the OSH Act may derive from the fact that OSH Act violations can be more onerous to prove. For example, OSHA establishes permissible exposure limits for toxic and hazardous substances by setting ceiling values and eight-hour, time-weighted averages. Given the potential complexities involved in proving an exposure case over eight-hour shifts and forty-hour weeks, the more-straightforward standards provided for by environmental statutes may be attractive to prosecutors. Moreover, the penalties authorized by environmental statutes often are markedly more severe than those of the OSH Act.

ONE REASON FOR THE INCREASED RELIANCE BY PROSECUTORS UPON RCRA INSTEAD OF THE OSH ACT MAY DERIVE FROM THE FACT THAT OSH ACT VIOLATIONS CAN BE MORE ONEROUS TO PROVE. FOR EXAMPLE, OSHA ESTABLISHES PERMISSIBLE EXPOSURE LIMITS FOR TOXIC AND HAZARDOUS SUBSTANCES BY SETTING CEILING VALUES AND EIGHT-HOUR, TIME-WEIGHTED AVERAGES. GIVEN THE POTENTIAL COMPLEXITIES INVOLVED IN PROVING AN EXPOSURE CASE OVER EIGHT-HOUR SHIFTS AND FORTY-HOUR WEEKS, THE MORE-STRAIGHTFORWARD STANDARDS PROVIDED FOR BY ENVIRONMENTAL STATUTES MAY BE ATTRACTIVE TO PROSECUTORS.

In 2001, the Eleventh Circuit affirmed in United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001), what at the time was the longest sentence ever imposed for an environmental workplace crime. The Hansen case involved LCP Chemicals, a manufacturer of bleach, soda and acid. Due to inadequate safety measures, employees suffered burns after exposure to mercury and hydrochloric acid. Four officers were indicted for conspiracy to commit environmental crimes and for various substantive violations of environmental laws, including knowingly exposing employees to hazardous materials in violation of

RCRA. Upon conviction, three officers were sentenced to between four and nine years each, while another was given 18 months after cooperating with prosecutors.

In late 2001, the Ninth Circuit affirmed the conviction and 17-year prison sentence of Allen Elias in United States v. Elias, 269 F.3d 1003 (9th Cir. 2001). The owner of a fertilizer company, Elias ordered employees to clean a cyanide-laced sludge tank while wearing only their regular work clothes. After the employees complained of sore nasal passages, an early symptom of cyanide poisoning, Elias promised to purchase safety equipment but ordered employees to clean the tank immediately. Upon re-entering the tank, an employee collapsed and suffered permanent brain damage. Elias was convicted of violating three RCRA counts, including knowingly endangering employees. Elias also was convicted of making a material false statement under the OSH Act.

The Motiva, Salvagno and Atlantic States Cases

Federal prosecutors are implementing the Initiative by bringing cases not only under RCRA, but also under the Clean Air Act ("CAA"), the Clean Water Act ("CWA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

On March 17, 2005, Motiva Enterprises LLC ("Motiva"), the fifth largest oil-refining operation in the United States, pleaded guilty to one CAA and two CWA counts arising from an explosion that killed an employee and injured nine others. The incident occurred at a Motiva refinery when vapors from a corroded steel tank caused the tank to explode and spill 99,000 gallons of acid into the Delaware River. Motiva pleaded guilty to negligently releasing an extremely hazardous substance into the ambient air which negligently placed a person in imminent danger of death or serious injury, a CAA violation, and to two CWA violations for discharging pollutants to the river. Motiva paid a \$10 million fine, the largest such fine in Delaware history.^[5]

The CAA has been used successfully to prosecute workplace-safety violations with great effect in other cases, as well. Violating the CAA is punishable by civil penalties of up to \$27,500 per violation per day, while the most severe criminal penalties provide that:

Any person who knowingly releases into the ambient air any hazardous air pollutant ... or any extremely hazardous substance ... and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both.

Violations of this section by a corporation are punishable by a fine of up to \$1,000,000. In December 2004, a judge in the Northern District of New York imposed, in United States v. Salvagno, 314 F.Supp.2d 115 (2004) the two longest prison sentences for an environmental crime, as well as massive fines and restitution payments. Over a ten-year period, the defendants violated the CAA's asbestos standards by directing over 500 employees to remove dry asbestos instead of wetting it first, and defrauded clients on 1,500 abatement jobs by falsifying laboratory samples.

The Salvagno defendants were convicted of nine CAA counts and other charges, sentenced to between 19 and 25 years, and ordered to forfeit \$3.7 million and pay approximately \$46 million in restitution.^[6]

CERCLA, too, is being employed in cases under the workplace-safety approach embodied by the Initiative. In December 2003, a New Jersey pipe foundry with a long history of workplace injuries was indicted. Atlantic States and five of its executives are charged with, among other things, CWA and CERCLA violations, and for conspiracy to violate the CWA and to make false statements. The indictment alleges the systematic alteration of accident scenes, and of workplace conditions that caused an employee death and numerous serious injuries. The case is pending in the District of New Jersey.

Conclusion

On both the state and federal levels, environmental statutes and regulations increasingly are being used to regulate workplace safety. These formerly-distinct regulatory universes are now bound by both historical trends as well as current developments, such as the federal Initiative and similar state-level initiatives. This trend also raises the inevitable question about the appropriateness of replacing a statutory regime specifically designed for the protection of the workplace, with statutory regimes generally thought to apply to areas outside of the workplace. These developments have changed dramatically the legal landscape for employers by threatening more significant penalties for noncompliance, including extended prison sentences for corporate officials, than would be possible in enforcement proceedings brought under the OSH Act alone. SPR

MUNICIPAL LAW UPDATE: COURT OF APPEALS HOLDS THAT ELEVATED TAKINGS SCRUTINY DOES NOT APPLY TO CASES INVOLVING DEVELOPMENT RESTRICTIONS

Steven Barshov and Ashley Miller

Can a town require a prospective homebuilder to file a perpetual development restriction on property for environmental protection purposes, without paying the landowner any compensation in return? Yes, at least where the property restricted was already subject to nearly-identical environmental regulations, and as long as the town's action does not deny the landowner "economically viable" use of its property. So said a Court of Appeals divided 4-3, with two dissents filed, in Smith v. Town of Mendon.^[1] The case confronts an issue of first impression, and the opinion may raise as many questions as it answers.

SOURCES: NEW INITIATIVES PROSECUTE WORKPLACE-SAFETY VIOLATIONS USING ENVIRONMENTAL LAWS

- [1] Barstow, David and Bergman, Lowell "With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws," New York Times, May 2, 2005.
- [2] Minners, John, "Bx. Auto Venture Corp. indicted for environmental crimes," Bronx Times, September 16, 2004. Assurance and OSHA on Chemical Accident Investigation, dated December 1, 1996.
- [3] BNA, Inc., "Attorney General Spitzer Urges Unions To Use Environmental Laws For Job Safety," Daily Environment, December 9, 2004, page A-2; New York Committee for Occupational Safety and Health, "Attorney General Spitzer Discusses Criminal Prosecution at NYCOSH Meeting," NYCOSH Update: Health and Safety News, December 9, 2004.
- [4] MOU Between OSHA and the U.S. EPA Office of Enforcement, dated November 23, 1990; MOU Between the U.S. EPA Office of Solid Waste and Emergency Response, Office of Enforcement and Compliance Assurance and OSHA on Chemical Accident Investigation, dated December 1, 1996.
- [5] Minners, John, "Bx. Auto Venture Corp. indicted for environmental crimes," Bronx Times, September 16, 2004.
- [6] BNA, Inc., "Motiva Pleads Guilty to Air, Water Violations Stemming from Delaware Refinery Explosion," Daily Environment, March 18, 2005, page A-2.
- [7] Sentencing Memorandum of the United States, United States v. Salvagno, et al., United States District Court, Northern District of New York, Case No. 5:02-CR-00051-HGM, at 1-3. See also Kates, William, "25 and 20 years for son, father who ran massive asbestos fraud," Associated Press, December 23, 2004; "Lengthy jail sentences imposed for illegal asbestos removal activities," Daily Record of Rochester, January 6, 2005.

*Publication of an extended version of this article is forthcoming in the New York University Environmental Law Journal.

The case addressed the specific question of whether the Town of Mendon committed an unconstitutional “taking” of property when the Town required the plaintiff, the Smith family, to file perpetual development restrictions on portions of their ten-acre parcel, in exchange for the Town granting the Smiths approval to build a single family home on another portion of the property. Complicating matters somewhat, the development restrictions were almost identical to a pre-existing Town environmental protection ordinance.^[2]

Factual Background

The Smith family applied for site plan approval to build a single family home on a ten-acre parcel of land they owned. Parts of the parcel were already subject to the town’s Environmental Protection Overlay District (“EPOD”) law, prohibiting building, clearing, discharging stormwater, filling, or excavating within environmentally sensitive areas, such as steep slopes, areas adjacent to streams, certain wooded areas, and floodplains. In order to conduct any such regulated activity, a landowner must apply for a permit, prove that no environmental harm would occur to those EPOD areas, and show the landowner had no reasonable alternative to the activity.^[3] It should be noted that the facts of the case are unusual, since it is uncommon for towns to require site plan approval for residential uses.

The Smiths’ proposed home was not within any of the designated EPOD areas. Theoretically, then, they had a right to build their home without interference on the unregulated property. The Town Planning board took a different view, however, and required the Smiths file a perpetual ‘conservation restriction’ on that portion of the property already within EPOD area in order to receive site plan approval for the entire parcel. The restriction prohibited the Smiths, and all subsequent owners in perpetuity, from building, clear-cutting, altering stream flow, or operating motor vehicles within the regulated area. Essentially, the conservation restriction was identical to the EPOD ordinance in both content and geographic scope, but the restriction lasted forever, whereas the town could at any time repeal the EPOD ordinance. The town said the restriction was designed to put future property owners on notice of the development limits on the parcel.^[4] One of the restriction’s benefits noted by the court is the lowered administrative costs to the town in enforcing its EPOD ordinance. It is also significant that the restriction effectively protects the town government from their successors reversing or modifying their current legislative enactments.

The Smiths Challenge the Town’s Decision

The Smiths challenged the Planning Board’s decision in court, bringing a hybrid Article 78 proceeding and declaratory judgment action seeking review of the town’s conditional approval of the application. The Smiths argued that by requiring the development restriction the town was imposing an unconstitutional exaction, and thus taking their property without proper compensation. While the Planning Board’s quid-pro-quo arrangement may fit a loose, intuitive definition of exaction, the Court of Appeals disagreed.

Conditions as Exactions

While municipalities often impose conditions on permit approvals, certain conditions, known as exactions, are subject to careful scrutiny in court in order to ensure governments do not impose unfair tradeoffs on landowners. Courts are usually wary of towns inflicting burdensome conditions on developers that have no relationship to the law the town is enforcing.

Thus, for example, a town would generally not have the power to require that a developer provide a public pathway across private property as a condition to a developer’s sewer hookup permit, because the purposes furthered by the pathway, public access and recreation, are not related to the purposes of sewer regulations, namely sanitary disposal of waste.^[5] In such a case, the town would likely have to pay for the

taking of the path. However, if a landowner seeks a permit to build under a local ordinance that ensures public access to a beach, requiring the landowner to set aside a public path to that beach might be a permissible condition, with no compensation required, because the condition furthers the intent of the regulation being enforced. Courts describe this relationship a “nexus” between the regulation’s purpose and the condition imposed.^[6] Furthermore, even where such a nexus exists, a plaintiff may challenge a condition on the grounds that it is not “roughly proportional” to the harm being remedied.^[7]

As a result of this elevated scrutiny, it is often easier for a landowner to win compensation when the government has imposed an exaction, as opposed to when the government is enforcing a generally applicable law like a zoning ordinance.

The Smiths made exactly these arguments; they argued that the U.S. Supreme Court’s precedents on exactions should apply to their case, which would thereby force the government to show both a nexus between the regulation’s purpose and the condition, as well as a rough proportionality between the harm remedied by the regulation and the burden on the property owner. Had the Smiths succeeded in characterizing the town’s action as an exaction, they would have had a much greater chance of showing a compensable taking.

The Court Of Appeals Finds No Taking

However, the court rejected the Smiths’ argument, instead finding that the development restrictions were not an “exaction,” which it defined as conditions involving “dedication of property to public use.”^[8] Because the Smiths retained the right to exclude others from their property, the court reasoned, the Smiths retained the “most important” property right, and thus no property had been dedicated. The court also rejected the Smiths’ argument that they were forced to relinquish their right to seek a variance under the particular procedures of the EPOD ordinance, noting that even if this were considered a property right, under the conservation restrictions they could still apply for permission to conduct regulated activities.^[9]

Thus, the court determined the traditional, government-friendly balancing test for takings should apply,^[10] evaluating the goals of the regulation and its economic impact on the landowner. The court reasoned that no taking had occurred here since the restrictions would not appreciably diminish the Smiths’ property values, because the EPOD regulations would have applied essentially the same restrictions on their property anyway.

The court therefore found that where a development restriction is the condition imposed, plaintiffs have a much higher burden, namely, they must show they have been deprived of economically viable use of their property.^[11] Most strikingly, no “nexus” between the condition imposed and the purpose of the regulation is required. The court reasoned that in the case of a development restriction, unlike a public pathway, the owner retains the important rights of excluding others and selling the property.^[12]

What is “economically viable use” and how much reduction in value is required for it to be “denied”? It is telling here that the Smith court cited the U.S. Supreme Court case Lucas v. South Carolina Coastal Commission,^[14] in which the owner won a takings claim on a per se total takings basis, because the trial court found that he had been deprived of all economic use of the property. Thus, to the extent that Lucas’ reasoning bears on future cases, the Smith case may impose on litigants the burden of showing they have been deprived of all economic use of their property.

SOURCES: MUNICIPAL LAW UPDATE: COURT OF APPEALS HOLDS THAT ELEVATED TAKINGS SCRUTINY DOES NOT APPLY TO CASES INVOLVING DEVELOPMENT RESTRICTIONS

[1] 4 N.Y.3d 1 (2004), available at <http://www.courts.state.ny.us/ctapps/decisions/dec04/177opn04.pdf>. The Smith’s attorney has stated that plaintiffs intend to file for review in the U.S. Supreme Court.
[2] *Id.*, at 1-2.
[3] *Id.*, at 2-3.
[4] *Id.*
[5] See Nollan v. California Coastal Comm., 483 U.S. 825 (1987).
[6] See *id.*
[7] See Dolan v. City of Tizard, 512 U.S. 374 (1994).
[8] *Id.*, at 5.
[9] *Id.*, at 5-7.
[10] *Id.*, at 9 (citing Agins v. City of Tiburon, 447 U.S. 255 (1988)).
[11] 4 N.Y.3d at 8-9.
[12] *Id.*, at 7.
[13] *Id.*
[14] *Id.*, n.11.
[15] *Id.*, at 21.
[16] See *id.*, at 7.
[17] ECL § 49-0303(1).
[18] See 4 N.Y.3d at 14.
[19] *Id.*, at 10.
[20] *Id.*, at 7.
[21] *Id.*, at 17-18.

Future Impacts On Property Owners

This latest ruling continues a long and established line of case law in New York that makes it very difficult for plaintiffs to prevail on regulatory takings claims. While it remains to be seen how the case is applied by lower courts, given the unusual factual scenario in the case, it is probable that Smith v. Mendon will be limited in its future application to cases with highly similar facts. However, the language of the decision itself does not explicitly limit its reasoning to its facts, giving rise to the potential for municipalities to attempt to apply the case to different factual situations.

One such application would be the argument that because development restrictions are not “property” for exactions purposes, such restrictions cannot constitute a taking unless they effectively destroy all economically viable use of the property. Such a reading would give municipalities nearly unfettered discretion to impose such development restrictions. As the dissent pointedly stated, such a result would, “come as unexpected and unwelcome news to many New York property owners.”^[15] Because the case does not explicitly limit its reasoning to cases where the property is subject to a pre-existing, nearly identical ordinance, there is therefore a possibility that municipalities may see Smith as a carte blanche endorsement of imposing conservation easements on property owners. This potential imposes a greater burden on property owners and developers to work to distinguish their particular case on its facts from Smith v. Mendon.

The court’s reasoning could also impact the legal status of conservation easements. By declining to apply the heightened exactions standard because no “property” was transferred from the Smiths to the Town, and further recognizing that the development restrictions were in effect conservation easements, the court in effect found that the conservation easements did not themselves constitute property.^[16] Such a finding would be contrary to the widespread acknowledgement of conservation easements’ status as valid property interests.^[17] In the hands of motivated and creative future litigants, it is possible that the court’s implicit finding that this conservation easement was not in fact property could provide grounds to challenge the validity and tax status of otherwise valid easements.^[18] On the other hand, the court did affirm that preserving environmentally sensitive lands in perpetuity was a measure which substantially advances a legitimate government purpose.^[19]

The court’s reasoning may also call into question the meaning of “public use,” which the court interpreted to mean physical access by the public.^[20] As the dissent points out, “public use” in the takings context generally does not refer only to physical access, but to a wide variety of public benefits, including environmental protection.^[21] Thus the court’s reasoning,

while limited to determining whether the exactions standard applies, may nonetheless shift a formerly settled area of law.

These uncertainties could reshape negotiations between municipalities and developers where conservation restrictions are at issue, even while the full implications of the court’s reasoning are worked out in future cases. For now, it remains clear that proving a regulatory taking is a difficult path for an applicant seeking a land use approval where the government seeks to impose a development restriction or conservation easement.

IT REMAINS CLEAR THAT PROVING A REGULATORY TAKING IS A DIFFICULT PATH FOR AN APPLICANT SEEKING A LAND USE APPROVAL WHERE THE GOVERNMENT SEEKS TO IMPOSE A DEVELOPMENT RESTRICTION OR CONSERVATION EASEMENT.

SPR

DEC AND DOH ISSUE DRAFT POLICIES GOVERNING SOIL VAPOR INTRUSION THAT WILL ADD ONEROUS NEW REQUIREMENTS FOR CLEANING UP CONTAMINATED SITES

Steven C. Russo and Michael Bogin

The New York State Department of Health (“DOH”) and the New York State Department of Environmental Conservation (“DEC”) have both recently issued draft guidance and policy documents, respectively, that will impact past, current and future cleanups of hazardous waste sites in New York State. These policy initiatives, which reflect a national trend, concern soil vapor intrusion and the risk that subsurface vapors associated with known or suspected volatile chemical contamination could adversely impact human health. While labeled agency “guidance” and thus not having the force of a promulgated regulation, these new initiatives are likely to have broad implications for parties who have or are cleaning up and/or developing hazardous waste sites.

The DEC policy is especially significant because it is not limited to ongoing or future cleanups. Rather, it includes sites that have already received DEC releases, which may be reopened pursuant to standard “reopener” language contained in most DEC releases and closure orders. Thus, this new policy may force Brownfield “volunteers” as well as parties that have resolved enforcement actions, to implement additional remedies at sites in order to address potential vapor intrusion issues, even though the health impacts from this exposure remain uncertain.

What Is Soil Vapor Intrusion?

Soil vapor intrusion is the migration of volatile chemicals from a subsurface source to the indoor air of buildings. Vapor intrusion occurs when contaminants vaporize and rise up through cracks, gaps, or pores in soil and foundations into homes and other buildings. Vapor intrusion is known to have occurred at several Superfund sites in New York State and has the potential to be a problem at Brownfield sites as well.

The current DOH/DEC initiative is likely driven by a number of factors. For example, recently there have been a number of high profile instances where low-level Chlorinated Volatile Organic Compounds (“CVOCs”) have had a greater than expected ability to migrate into structures from soil or groundwater. Thus, regulators have learned that a subsurface source does not need to be directly beneath a structure to contaminate the vapor immediately beneath the building’s foundation. The ongoing cleanup at a former IBM facility in Endicott, New York is the most prominent example of that phenomenon, and the experience of DOH and DEC at that site is widely thought to be the primary impetus to the new soil vapor intrusion initiative. Other factors that have caused heightened agency focus on the issue are the increased development of Brownfield sites and the greater use of institutional controls to address soil and groundwater contamination.

The DOH Guidance

The DOH guidance is a technical document that outlines the general steps and strategies for environmental consultants in collecting appropriate and relevant data to identify current or potential human exposures to contaminated subsurface vapors. This technical guidance significantly lowers the threshold for sub-slab soil investigation and indoor air sampling at sites at or near a location where CVOCs have been identified. It also outlines general steps and

strategies for collecting appropriate and relevant data to identify current or potential human exposures to contaminated subsurface vapors associated with the site. A soil vapor intrusion investigation is necessary if the site has an existing subsurface source or likely subsurface source of volatile chemicals or if the existing buildings or possible future construction may be erected near a subsurface source of volatile chemicals. The DOH Guidance contains two decision matrices that identify what, if any, additional investigation measures must be taken, depending on the contaminant identified, and the mitigation or remediation measures that must be employed when contamination is detected.

The DEC Policy

In November 2004 DEC introduced a draft program policy to evaluate vapor intrusion pathways at sites contaminated with CVOCs. The DEC policy, which applies to “Past, Current and Future Sites,” is often referred to as the DEC’s “reopener policy,” because it may significantly affected all CVOC contaminated sites, including sites that have been previously cleaned up and closed out by DEC. This includes brownfield sites cleanup up under the old Voluntary Cleanup Program, and the current Brownfield Cleanup Program.

The DEC Policy requires that “all completed, current and future contaminated sites in New York State” that have the potential for exposures related to soil vapor intrusion undergo a data gathering and review process that analyzes the site history, characteristics of the land, potentially exposed population and any of the building or environmental factors that affect soil vapor intrusion. Because each site presents a unique set of circumstances there is no strict formula for evaluation. The Policy includes a weighting system based on various factors to categorize and address the sites impacted by CVOCs. For example, DEC will target a site for action if it exhibits a complete vapor intrusion pathway, defined by DEC as a contaminant pathway that leads to human exposure to vapors originating from site contamination.

Implications For Regulated Parties

The DOH/DEC vapor intrusion initiative could have far reaching repercussions for parties that own and/or seek to redevelop contaminated sites. The application of the new DEC Policy to Brownfield sites, including sites that have already received DEC releases, may force Brownfield applicants to undertake far more extensive cleanups to address potential vapor intrusion issues, even though the health impacts from this exposure remain uncertain. Often the remedial approach to address this problem will be some kind of active engineering control, such as a sub-slab venting system or soil vapor extraction system. Such active measures, however, could present marketing problems for Brownfield developers seeking to convert former industrial properties to residential use. Those developments may be less attractive to potential purchasers when they learn that the basements of those new buildings have active vapor remediation systems. Parties seeking to develop contaminated sites to residential use may, where practicable, seek to remove all contamination rather than rely on institutional controls, if relying on such controls necessitates installation of an active vapor control system.

SPR

DENIAL OF APPLICATION FOR PRELIMINARY SUBDIVISION AND ASSOCIATED TOWN PERMITS UPHELD IN WESTCHESTER COUNTY

SPR successfully defended an Article 78 proceeding challenging the Town of Cortlandt Planning Board's denial of a preliminary subdivision approval (including a considerable variance from a dead-end street length limitation) and Town Steep Slopes, Freshwater Wetlands, and Tree Removal permits sought for a 30-lot residential development proposed for construction on the face of Dickerson Mountain in Cortlandt. Prior to denying the applications, the Planning Board had accepted as complete a Final Environmental Impact Statement ("FEIS") prepared by the applicant and, not surprisingly, took an advocative tone in favor of the project. However, the Planning Board's findings statement, which partially relied on comments it had received from the public and involved agencies during the post-FEIS comment period, determined that the project had unmitigated significant impacts. The statement also included separate findings with respect to each of the Town code provisions under which the applicant sought approvals, each of which contained an independent standard for showing need for the particular approval. Based on these findings, the Planning Board denied the applications.

The developer challenged the denial, primarily relying on the Planning Board's adoption of the FEIS, and arguing that the board had been swayed by community opposition. The Westchester County Supreme Court held that facts in the record supported the Planning Board's findings to the extent necessary to show a rational basis, particularly considering that the developer had been unwilling to consider a smaller development would have reduced steep slopes and wetland disturbance.

The court additionally held that the alleged inconsistency between the FEIS and the findings statement did not make the Planning Board's decision arbitrary, as the findings statement reviewed the project with respect to the standards in the applicable Town Code provisions as well as pursuant to SEQRA. The court held that the Planning Board's determinations that these standards had not been met by the applicant were supported by the record. **SPR**

Daniel Riesel and Elizabeth Read represented the Planning Board of the Town of Cortlandt.

COURT OKAYS PROPOSED OCTAGON PARK DEVELOPMENT ON ROOSEVELT ISLAND, DISMISSING CLAIMS OF PARKLAND ALIENATION

In April, Justice William Wetzel of the New York County Supreme Court rejected claims of Roosevelt Island resident group seeking to stop ongoing construction of a proposed residential project on the site of a former psychiatric hospital on the Island. The developer of the project, SPR client MEPT Octagon, is undertaking a \$10 million restoration of the Octagon Building, which is the only remaining element of the former hospital and will form the cornerstone of two residential wings that will be built on the footprints of the former hospital wings. The developer is also expanding and improving recreational uses adjacent to the development.

The Roosevelt Island Operating Corporation ("RIOC"), which holds a lease to the Island from New York City and has subleased the project site to the developer, had primary jurisdiction to review and approve the project, a process which took several years, culminating in a final approval on October 14, 2004. In early November 2004 construction began. In late December, Roosevelt Island Residents' Association and some of its individual members commenced an Article 78 proceeding opposing the project based on three different claims relating to parkland alienation. First, they argued the development area was dedicated parkland under the public trust doctrine, which cannot be alienated or converted to non-park uses without an act of the state legislature. While the area had not been actually dedicated by any legal action, the petitioners argued it was parkland primarily by virtue of its inclusion in an "open space area" identified in the General Development Plan for Roosevelt Island ("GDP").▶

CONT'D from previous page

Second, the petitioners argued the development area was protected by a 2002 law that limits development within the GDP's designated open space areas to that which includes historic restoration and furthers the use of the areas as open space areas. Their final argument was that the relocation of tennis courts 15 feet to the east, which courts had been improved with Environmental Quality Bond Act ("EQBA") funds, violated a provision in the EQBA which prohibits use of lands improved with EQBA funds for non-park purposes without an act of the legislature approving of substitute parkland.

At the beginning of March 2005, the petitioners moved by order to show cause for a preliminary injunction enjoining further construction on the project. Justice Wetzel denied the motion for a preliminary injunction and concurrently dismissed each of the petitioners' claims, finding that the undisputed facts demonstrated there had been no improper parkland alienation under any of the three theories. He held first, with respect to the 2002 law, that while the project involved the development of residences within a portion of the designated "open space area" – a portion which had in fact been fenced off for many years due to the unsafe rubble left behind from the demolition of the hospital wings – it fit within the statute's exception for development that includes historic restoration and furthers the use of the area as open space, as the surrounding area will be improved with a new ecological park, an expanded waterfront recreational area, and new tennis courts.

Second, the court held that residential development the within previously fenced-off area, which had been inaccessible to the public for many years, was not a violation of the public trust doctrine. The court found that the 2002 law itself, which protected the GDP's "open space areas" from development to a limited extent but significantly did not dedicate them as parkland, was "conclusive evidence" that these areas were not parkland, because if they were already dedicated parkland, the court held, "the 2002 legislation would have been completely superfluous." Moreover, the court noted the open space areas identified in the GDP had been modified several times, demonstrating that its designation of these areas did not constitute a dedication of parkland. The court also rejected the petitioners' argument that the area in question had become parkland implicitly through use; the area had been fenced off, and any use of it for recreational purposes was "incidental and unauthorized."

With respect to the EQBA, the court upheld the opinion of the New York State Office of Parks, Recreation and Historic Preservation, which administers EQBA grants, that the small shift in the location of the courts did not constitute an alienation, given the context of the other park improvements and the addition of new open space along the waterfront. The court held in the alternative that even if the shift did constitute alienation, it was properly deemed *de minimis* under the "well recognized maxim *de minimis non curat* – the law does not concern itself with trifles." This holding is significant because it is the first time a court has applied a *de minimis* exception in the context of parkland alienation, and it represents a rejection of arguments posed by the New York State Attorney General's office, which filed briefs in the case as *amicus curiae*, that no such exception exists. Notably, Justice Wetzel admonished the petitioners for raising this trivial claim, stating, "[t]hat Petitioners even suggest that this entire Project should be stopped because tennis courts are being renovated and shifted a few feet calls into question Petitioners' good faith in bringing this proceeding."

Finally, the court held that an alternative reason for denying the petitioners injunctive relief was their laches in commencing the proceeding in the first place. RIOG had approved the project in mid-October, construction had commenced openly – and was reported in the local press – shortly thereafter, yet the petitioners waited more than two months to bring their challenge. The court also held that the petitioners were guilty of laches in failing to seek a temporary restraining order even as construction continued at a large expense to the developer, at that point more than \$15 million. **SPR**

David Paget, Steven C. Russo and Elizabeth Read represented the developer, MEPT Octagon, LLC and Becker and Becker Associates.

"RANKING" CONT'D from front cover

Noting that "the city's real estate market has faced crucial environmental issues in the wake of 9/11," C&P USA noted that "the firm's in-depth knowledge in contamination and permitting makes it a favorite for development work." Three SPR partners, Daniel Riesel, David Paget and Mark Chertok, were singled out as leading attorneys.

The 2005 edition of Who's Who Legal also concluded that SPR "is the leading firm for environmental expertise in the state of New York." Who's Who noted that Daniel Riesel is "one of the founders of environmental law" and described David Paget as "among the world's most highly respected practitioners." The ranking publication, which is based on independent survey work with general counsels and business lawyers, also singled out the "well-respected" Mark Chertok for praise. With three SPR partners listed as leaders in their field, the firm had more lawyers listed "than any other in New York." **SPR**

SIVE • PAGET • RIESEL, P.C.

has been a pioneer in environmental law for over forty years and continues to be a leader in Environmental Law, Litigation, Development & Land Use, and Municipal Law.

Whether guiding a development project through the government approval process, or trying complex civil and criminal cases, Sive, Paget & Riesel brings an unparalleled depth of experience and insight to its corporate, government and individual clients.

SPR is a member of ELN, a national network of environmental law firms.
www.elnonline.com

SPR

S I V E • P A G E T • R I E S E L
www.sprlaw.com

460 Park Avenue
New York, NY 10022
212.421.2150

SPRINGBOARD
LEGAL TRENDS AND ANALYSIS