ENVIRONMENTAL LAW

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INTRODUCTION

This *Survey* year was a relatively quiet one for environmental law in New York State. No environmental legislation or administrative decisions broke new ground. The Court of Appeals decided only six environmental cases. As is usual, SEQRA and the oil spill/underground storage tank cases dominated decisions statewide.

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Two of the six Court of Appeals cases involved appeals from Town Justice Courts. *People v. Van Buren* resulted in a four-to-three decision with two dissenting opinions.[1] The issue was whether City of New York Water Supply Police could issue speeding tickets in the Catskill Mountains off of city land.[2] The majority based its decision on regulations adopted by the city and a 1983 law that "conferred police office status on" Water Supply Police.[3] The majority explained that the relationship to the environment was such that if someone were speeding, "the driver poses a danger to the watershed because of the increased probability of an accident that could cause a '[p]etroleum product' or other pollutants to be discharged onto watershed lands, which would seep into groundwater or flow toward a water supply site."[4]

Chief Judge Kaye's dissent centered on the limitations of the law, which provided that such police could only act "'to protect the sources, works, and transmission of water.'"[5] Judge R. S. Smith's dissent, joined by Judge Rosenblatt, argued that only legislation could expand the authority of the Water Supply Police to issue speeding tickets.[6]

Town of Concord v. Duwe involved various violations of town land use laws dealing with solid waste and recycling.[7] One wonders why the Court even entertained the case, given the restrictive jurisdiction the Court of Appeals enforces. *State v. Speonk Fuel, Inc.* was a navigation law case, which will be discussed later with the other navigation law cases.[8] *City Council of Watervliet v. Town Board of Colonie*[9] and *Crown Communication New York, Inc. v. Department of Transportation*[10] will be discussed with other SEQRA cases.

Smith v. Town of Mendon involved an alleged regulatory taking.[11] The Court posed the question to be decided as "whether a municipality commits an unconstitutional taking when it conditions site plan approval on the landowner's acceptance of a development restriction consistent with the municipality's preexisting conservation policy."[12] The Court answered

1. 4 N.Y.3d 640, 830 N.E.2d 1130, 797 N.Y.S.2d 802 (2005).
2. *Id.* at 644-46, 830 N.E.2d at 1131-32, 797 N.Y.S.2d at 803-04.
3. *Id.* at 645, 830 N.E.2d at 1132, 797 N.Y.S.2d at 804.
4. *Id.* at 648, 830 N.E.2d at 1134, 797 N.Y.S.2d at 806 (alteration in original) (citation omitted).
5. *Id.* at 649-50, 830 N.E.2d at 1135, 797 N.Y.S.2d at 807 (Kaye, C.J., dissenting).
6. *Id.* at 652-53, 830 N.E.2d at 1137, 797 N.Y.S.2d at 809 (R.S. Smith, J., dissenting).
7. 4 N.Y.3d 870, 872, 832 N.E.2d 23, 24, 799 N.Y.S.2d 167, 168 (2005).
8. 3 N.Y.3d 720, 722, 819 N.E.2d 991, 993, 786 N.Y.S.2d 375, 377 (2004).
9. 3 N.Y.3d 508, 508, 822 N.E.2d 339, 339, 789 N.Y.S.2d 88, 88 (2004).
10. 4 N.Y.3d 159, 159, 824 N.E.2d 934, 934, 791 N.Y.S.2d 494, 494 (2005).
11. 4 N.Y.3d 1, 6, 822 N.E.2d 1214, 1215, 789 N.Y.S.2d 696, 697 (2004).
12. *Id.*

no.[13]

The Smiths owned "a 9.7 acre lot in the [t]own . . . [which] include[d] several environmentally sensitive parcels, [fell] within [a] . . . 100-year floodplain boundary and [was] located within 500 feet of a protected agricultural district."[14] The land also had steep slopes and contained an established woodlot.[15] As such, those portions of the property lay "within environmental protection overlay districts (EPODs), pursuant to" town law.[16] Each of those EPOD areas was subject to "comprehensive use restrictions," and none of the areas were proposed to be disturbed by the Smiths' application to build a single-family home on the property.[17]

After a negative declaration under SEQRA, the town Planning Board issued final site plan approval conditioned upon the Smiths filing conservation easements on their property for those areas subject to EPODs with a scope equal to the EPOD restrictions.[18] The Court relied on the usual string of United States Supreme Court decisions[19]—*Palazzolo v. Rhode Island,*[20] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[21] *Lucas v. South Carolina Coastal Council,*[22] *Nollan v. California Coastal Commission*[23] and *Dolan v. City of Tigard*[24]—in reaching its decision that a regulatory taking was not involved.[25]

In *Bates v. Dow Agrosciences, L.L.C.*, the United States Supreme Court addressed the issue of "whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)" preempts state law claims against a pesticide manufacturer.[26] The answer, based upon FIFRA section 136v(b), was no, in a seven-to-two decision with Justices Thomas and Scalia concurring in part of the judgment and dissenting in part.[27] The Court ruled that section 136v(b) preempts competing state label requirements and "any statutory or common-law rule that would impose a labeling requirement

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 7, 822 N.E.2d at 1215, 789 N.Y.S.2d at 697.
18. *Id.*, 822 N.E.2d at 1215-16, 789 N.Y.S.2d at 697-98.
19. *Id.* at 9-11 & nn.2-6, 822 N.E.2d at 1217-19 & nn.2-6, 789 N.Y.S.2d at 699-701 & nn.2-6.
20. 533 U.S. 606 (2001).
21. 526 U.S. 687 (1999).
22. 505 U.S. 1003 (1992).
23. 483 U.S. 825 (1987).
24. 512 U.S. 374 (1994).
25. *Smith*, 4 N.Y.3d at 11-15, 822 N.E.2d at 1219-21, 789 N.Y.S.2d at 701-03.
26. 125 S. Ct. 1788, 1793 (2005).
27. *Id.* at 1792, 1803, 1805.

that diverges from those set out in FIFRA," but that it does not preempt any state rules that are consistent with FIFRA's language.[28]

Dow registered a pesticide with label directions which did not disclose that the pesticide would be damaging to peanut crops under certain conditions.[29] Farmers whose crops were damaged sued, but Dow argued that FIFRA preempted the farmers' state law claims.[30] The Court disagreed.[31]

The Court cited its earlier decision in *Wisconsin Public Intervenor v. Mortier*,[32] which held "that FIFRA was not 'a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States,'" in support of its decision.[33] Citing *Silkwood v. Kerr-McGee Corp.*,[34] the Court pointed out "[t]he long history of tort litigation against manufacturers of poisonous substances" and stated that "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."[35] The decision resolved a split among the federal circuits and state appellate courts,[36] although neither the Second Circuit nor the New York Court of Appeals had addressed the issue.

This *Survey* year, the Second Circuit handed down two decisions based on federal law that will have an impact on New York State. In *Waterkeeper Alliance, Inc. v. United States Environmental Protection Agency*, the Second Circuit struck down the Environmental Protection Agency's "concentrated animal feeding operations ('CAFOs')" regulations for various violations of the Federal Clean Water Act.[37] Many of the provisions of the decision are relevant to New York State's regulation of CAFOs under state law, which include smaller farm operations than the federal program. New York's CAFOs have come under increasing scrutiny; especially since a multimillion-gallon manure lagoon spilled into the Black River in August 2005, causing various municipalities to close down their water supplies for a period of time.[38]

28. *Id.* at 1803.
29. *Id.* at 1793.
30. *Id.* at 1792-93.
31. *Id.* at 1803.
32. 501 U.S. 597, 607 (1991).
33. *Bates*, 125 S. Ct. at 1797 (quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 607 (1991)).
34. 464 U.S. 238, 251 (1984).
35. *Bates*, 125 S. Ct. at 1801.
36. *Id.* at 1794.
37. 399 F.3d 486, 490-92, 524 (2d Cir. 2005).
38. *See* Michelle York, *Workers Trying to Contain Effects of Big Spill Upstate*, N.Y. TIMES, Aug. 15, 2005, at B5; *see also* Press Release, Environmental Advocates of New

In *Palmieri v. Lynch*, the plaintiff sued a New York State Department of Environmental Conservation (DEC) inspector and a DEC intern under 42 U.S.C. §§ 1983 and 1985, and a state law trespass claim.[39] The plaintiff applied for a DEC tidal wetlands permit seeking to allow the extension of his ninety-two-foot residential dock by fifty feet into Great South Bay, and to add a third boat lift to the dock.[40] Around the same time, and as he had on a prior occasions, the plaintiff forbade the DEC in writing from doing "a land-based inspection of the premises."[41]

The inspector nonetheless went to the property, rang the doorbell, and when it was not answered, proceeded through a gate containing a "No-Trespassing" sign into the backyard of the house where she was greeted by the owner carrying a video camera and ordering her off the property.[42] The inspector "explained that, if she could not complete her inspection, she could not complete her review of [his] permit application," but she promptly left the property when the plaintiff insisted.[43]

The plaintiff sued for a violation of his Fourth Amendment rights, conspiracy, and state law trespass.[44] The decision issued by the United States District Court for the Eastern District of New York falls under the saying "bad facts make bad law." I think Judge Straub of the Second Circuit, concurring in the dismissal of the conspiracy charge and dissenting with regard to the section 1983 claim, has the better argument; but then, his is the dissent.[45]

Judge Straub argued that the majority opinion was "an extraordinary step" and "represent[ed] an aggressive shift in our Fourth Amendment jurisprudence away from the rights of individuals to maintain control of their homes toward the privilege of government agents to invade without either receiving consent or casting their claims of need into the crucible of judicial review."[46]

The dissent advises that the proper process would have been to advise the plaintiff "no inspection—no permit," and if the plaintiff held to his

York, Black River Poisoning and Fishkill Preventable, Groups Say: Weak State Regulations Must Be Strengthened (Aug. 17, 2005), *available at* http://www.eany.org/pressreleases/2005/081705.html.

39. 392 F.3d 73, 75-76 & n.1 (2d Cir. 2004).
40. *Id.* at 76.
41. *Id.*
42. *Id.* at 76-77.
43. *Id.*
44. *Id.*
45. *Id.* at 88, 97 (Straub, J., concurring in part and dissenting in part).
46. *Id.* at 88.

position, to deny the permit application.[47] The dissent would have allowed the lawsuit on section 1983 grounds pointing out that the invasion of rights was not de minimis, although the damages may have been nominal.[48]

The majority, in dismissing the action, stated "[a] warrantless inspection of a private dwelling by a municipal administrative officer without the consent of the owner is generally unreasonable absent specifically delineated circumstances."[49] The court went on to state that "'searches pursuant to a regulatory scheme need not adhere to the usual requirements' where special governmental needs are present."[50] The court then cited various cases involving warrantless regulatory inspections of businesses, homes of parolees and probationers, schools, mines, and a government worker's computer.[51] The court then made the following jump:

> We think it is wise for courts to be cautious in applying the special needs doctrine, given that it allows for a degree of governmental intrusion into concededly private areas. But we cannot escape the conclusion that in cases such as the one at bar, the doctrine may be especially applicable, given its utility in providing a framework to balance important non-arbitrary governmental objectives against de minimis intrusions in situations in which there is some degree of an expectation of privacy.[52]

The court then recited the three principal factors that must be addressed: "(1) 'the nature of the privacy interest allegedly compromised . . .' (2) 'the character of the intrusion imposed . . .' and (3) 'the nature and immediacy of the [state's] concerns and the efficacy of the [governmental conduct] in meeting them.'"[53]

The court then broke down the nature of the privacy into two elements: the "subjective expectation of privacy" and the "objectively reasonable expectation of privacy."[54] The court found that "the character of the intrusion . . . was minimal" because it "largely encompassed" what any member of the public could see from the water, and "the [p]laintiff had a diminished expectation of privacy" outside his home.[55] The court held that "the state's interest in regulating construction on tidal wetlands overrode any asserted expectation of privacy" and concluded that "[the]

47. *Id*. at 91.
48. *Id*. at 93-94, 96-97.
49. *Id*. at 78-79 (citing Camara v. Mun. Court of S.F., 387 U.S. 523, 528-29 (1967)).
50. *Id*. at 79 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)).
51. *Id*. at 79-80 & nn.3-4.
52. *Id*. at 80.
53. *Id*. at 81 (alterations in original) (citations omitted).
54. *Id*. at 81-82.
55. *Id*. at 85-86.

holding merely allows courts to use the balancing test to determine the reasonableness of particular search activity in the enforcement of environmental regulatory schemes."[56] The decision cannot be reconciled with *Camara*.[57]

One United States District Court case that does not fit into any specific category warrants discussion in this year's *Survey.* In *Bullock v. Gerould*, a DEC Environmental Conservation Officer (ECO) sued various DEC supervisory personnel under 42 U.S.C. § 1983 alleging that the defendants violated his constitutional rights of equal protection and due process by "attempting to destroy exculpatory evidence" and directing subordinates to hide exculpatory facts in order to falsely discipline the plaintiff.[58] The plaintiff, although suspended, was reinstituted with back pay after arbitration.[59]

ECO Bullock, the plaintiff, was operating a DEC-owned snowmobile when he accidentally ran into a ditch, causing over $2,300 in damage to the snowmobile.[60] Chief ECO Gerould was sent to investigate the accident and prepared a "report indicating that the ditch was not visible from a distance."[61] The plaintiff's superior, Lieutenant Baker, prepared a report based upon Gerould's investigation that stated the plaintiff "had less than two seconds to react once he saw the ditch."[62] After reviewing Gerould's report, the "defendant Assistant Director of Law Enforcement . . . directed [a] defendant Environmental Conservation Investigator [(ECI)] . . . to tell Gerould to amend his report by deleting any references to the lack of visibility of the ditch."[63] The ECI sent Gerould an email stating that the ECI "would 'prefer' that the sentences referring to . . . visibility . . . be deleted because 'it would be cleaner at arbitration if we left those things unsaid.'"[64]

Gerould complied, and emailed a new report to various people, including Lieutenant Baker, and requested that Gerould's first report be destroyed.[65] When Lieutenant Baker responded and asked why the deletions had been made, he received a call from another defendant Chief ECO who advised him that "'Albany wanted to go after [p]laintiff by

56. *Id.* at 86.
57. *See supra* note 50.
58. 338 F. Supp. 2d 446, 448-49 (W.D.N.Y. 2004).
59. *Id.* at 448-49.
60. *Id.* at 448.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

placing the blame for the accident on [p]laintiff.'"[66]

The court dismissed the due process claim because the defendants' conduct, although wrongful and improperly motivated, did not rise to a level that "'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscious.'"[67]

I. STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)

Typical of past years, more decisions were handed down involving the State Environmental Quality Review Act (SEQRA)[68] than any other area of state environmental law. The Court of Appeals rendered two decisions, neither monumental. In *City Council of Watervliet v. Town Board of Colonie*, the Court pointed out that "the annexation of 100 or more contiguous acres constitutes a Type I action" requiring that SEQRA be addressed; ipso facto, the proposed acquisition of thirty-seven acres would be an "unlisted action" subject to SEQRA.[69] Noting the deference given a governmental body with regard to the scope of a law being administered, the Court found that DEC's regulation was neither unreasonable nor irrational, and therefore SEQRA applied.[70] Interestingly, anticipating a further argument, the Court then addressed the appropriate level of review in a case such as the one before the Court, stating that where no specific use was yet proposed, an environmental assessment form (EAF), rather than a draft environmental impact statement (DEIS) would be appropriate, seeming to prejudge what the EAF would disclose.[71]

In *Crown Communication New York, Inc. v. Department of Transportation*, the Court, in a four-to-three decision, affirmed a Second Department decision modifying a lower court's ruling that cellular towers erected by a private vendor on State DOT property were not subject to local zoning regulations pursuant to the "'balancing of public interests' test" adopted in *In re County of Monroe*.[72]

The Court found that the installation of licensed commercial antennae

66. *Id.*

67. *Id.* at 451 (citation omitted). The Court left standing the equal protection cause of action. See *Id.*

68. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-8-0117 (McKinney 2005 & Supp. 2006).

69. 3 N.Y.3d 508, 517-18 & nn.7-8, 822 N.E.2d 339, 343 & nn.7-8, 789 N.Y.S.2d 88, 92 & nn.7-8 (2004).

70. *Id.* at 518, 822 N.E.2d at 343-44, 789 N.Y.S.2d at 92-93.

71. *Id.* at 519-20 & nn.9-10, 822 N.E.2d at 344-45 & nn.9-10, 789 N.Y.S.2d at 93-94 & nn.9-10.

72. 4 N.Y.3d 159, 164-66, 824 N.E.2d 934, 936-38, 791 N.Y.S.2d 494, 496-98 (2005) (citing *In re* County of Monroe, 72 N.Y.2d 338, 341, 530 N.E.2d 202, 203, 533 N.Y.S.2d 702, 703 (1988)).

on the towers on DOT land served "a number of significant public interests that are advanced by the State's overall telecommunications plan."[73] The DOT had complied with SEQRA before issuing a negative declaration with regard to the application by the private vendor.[74]

For years, environmental attorneys have discussed the issue of the "perfect" application under SEQRA. A "perfect" application is one where environmental issues are raised and addressed in the permit application such that the complete application would not have a potentially significant impact on the environment. At least in the Second Department, that question has now been answered. In *Incorporated Village of Poquott v. Cahill*, the Long Island Power Authority (LIPA) proposed the installation of nine natural gas-fired combustion turbines at five sites on Long Island.[75] "As part of the project, LIPA selected KeySpan" Corporation to install "and operate two generators at the Port Jefferson Energy Center" adjacent to the Port Jefferson Power Station.[76]

Following the required procedures, LIPA notified the other involved agencies, and was designated as lead agency.[77] The project was determined to be a Type I action under SEQRA and an EAF was prepared and circulated.[78] The Appellate Division, Second Department, found that

> [t]he EAF included a comprehensive report . . . that identified and reviewed in detail the areas of environmental concern . . . including air emissions, noise, waste water discharges, waste generation and disposal, visual resources, environmental justice concerns, traffic, on-site ammonia storage, and consistency with the New York State Coastal Management Program. The EAF also considered the cumulative impact of the Energy Center and the four other proposed combustion turbine facilities included as part of the Project, as well as the impact of the Energy Center's location adjacent to the existing Power Station.[79]

The court noted that while Type I actions presumptively required an environmental impact statement (EIS), here the mitigating measures that might be addressed in an EIS were "part and parcel" of the "proposal and permit applications" that were the subject of public comments, regulatory reviews, and legislative hearings.[80] Consequently, the appellate division

73. *Id.* at 163, 167, 824 N.E.2d at 935-36, 938, 791 N.Y.S.2d at 495-96, 498.
74. *Id.* at 164, 824 N.E.2d at 936, 791 N.Y.S.2d at 496.
75. 11 A.D.3d 536, 538, 782 N.Y.S.2d 823, 826 (2d Dep't 2004).
76. *Id.*, 782 N.Y.S.2d at 826-27.
77. *Id.*, 782 N.Y.S.2d at 827.
78. *Id.* at 539-40, 782 N.Y.S.2d at 827.
79. *Id.* at 540, 782 N.Y.S.2d at 828.
80. *Id.* at 539-42, 782 N.Y.S.2d at 827-30.

implicitly found the presumption was overcome, found no procedural or substantive errors, and affirmed the dismissal of the petition.[81] Query: even with a "perfect" application, would LIPA have been better off taking all the information it put in the EAF to justify a negative declaration into an EIS, and then either negatively declaring it or finalizing the EIS based upon the draft after the public comment?

Contrast *Cahill* with *Avy v. Town of Amenia*.[82] In *Avy*, the applicants submitted an EAF with regard to a proposed rezoning to move an auto repair business to a new location.[83] The Town Board followed the steps to become lead agency and referred the matter to the town's Planning Board.[84] The Planning Board issued a report, which stated the "proposed project 'appear[ed]' to be a goal of the [town's] 'Master Plan' and 'appear[ed]' to comply with the recommendation of the Future Land Use Map."[85] The report also "recommended that 'the Town Board consider the . . . Map amendment.'"[86]

The Town Board then referred the application to the County Planning Board, which recommended denial.[87] In a footnote, the supreme court noted that the County Planning Board found the proposal was consistent with the town's Master Plan.[88]

The Town Board then retained a consultant who recommended that Part I of the EAF be deemed incomplete for failure to supply requested information.[89] In response, the applicant's consultant acknowledged the deficiencies in the EAF, but asked the Town Board to "accept the conceptual site plan."[90] Then, the New York State Department of Environmental Conservation (DEC) identified the potential "presence of threatened and endangered species of flora and fauna on the [p]roperty."[91] The applicant's consultant then submitted a revised EAF, which "identified [fourteen] potentially significant environmental impacts."[92] The Town Board scheduled a public hearing and resubmitted the application to the County Planning Board, which again recommended denial.[93] The town

81. *Id.* at 538, 540-42, 782 N.Y.S.2d at 826, 828-29.
82. No. 908/04, 2004 WL 1949174, at *1 (Sup. Ct., Westchester Co. Aug. 13, 2004).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at *2.
88. *Id.* at *2 n.1.
89. *Id.* at *2.
90. *Id.*
91. *Id.*
92. *Id.* at *3.
93. *Id.*

then held its public hearing, issued a negative declaration, and approved the rezoning.[94]

The supreme court, in a well-written decision, addressed issues of standing, ripeness, and SEQRA compliance.[95] Pointing out that the petitioners were all immediate neighbors to the project, and that a SEQRA action is ripe when an agency commits itself to a "'definite course of future action,'" the court reached the merits of the SEQRA determination.[96] Finding that the rezoning "was an integral part of the ultimate development of the [p]roperty," the court determined that the project was a Type I rather than an unlisted action, and that the town "did not take the requisite 'hard look' required by SEQRA."[97] In addition, the town could not delegate and defer review of the impacts identified to the town Planning and Zoning Boards in connection with a future subdivision, site planning, and special permit applications.[98] Although the court did not use the word, its analysis compares the project handling to a segmentation analysis.[99]

After striking down the project based upon the failure of the Town Board to comply with the substantive requirements of SEQRA, the court declined to address the issues of "spot zoning, and whether or not any conflict of interest existed."[100]

In *Fleck v. Town of Colden,* the Appellate Division, Fourth Department, reversed the supreme court below and remitted a deer farm site plan application in an agricultural area to the Town Board for further action.[101] The appellate division found that the action was a Type I and not an unlisted action, and that "'the record must show that [the Town Board] identified the relevant areas of environmental concern, took a 'hard look' at them . . . and made a 'reasoned elaboration' of the basis for its determination.'"[102] The appellate division also pointed out that the town should look at the long-term impacts of the proposed project, and found the short EAF used inadequate for that purpose.[103] It is unclear from the decision whether the appellate division was requiring an EIS, or whether a properly completed, detailed EAF would allow the Town Board to make an appropriate SEQRA determination.

94. *Id.*
95. *Id.* at *5-12.
96. *Id.* at *6-7 (citation omitted).
97. *Id.* at *7-8.
98. *Id.* at *11-12.
99. *Id.* at *7-12.
100. *Id.* at *12.
101. 16 A.D.3d 1052, 1053, 792 N.Y.S.2d 281, 283 (4th Dep't 2005).
102. *Id.* at 1054, 792 N.Y.S.2d at 284 (citation omitted).
103. *Id.* at 1054-55, 792 N.Y.S.2d at 284.

In *Custom Topsoil, Inc. v. City of Buffalo*, the Appellate Division, Fourth Department, affirmed the lower court's decision, which found that a use permit application was not a ministerial or nondiscretionary act under the Buffalo City Code, and therefore, SEQRA must be complied with.[104]

In *Ellsworth v. Town of Malta,* the town approved a thirty-nine-acre subdivision.[105] The Appellate Division, Third Department, found that the subdivision was properly "classified as an unlisted action," and the short EAF and related materials combined with frequent open meetings with experts and other relevant agencies established that the SEQRA determination was "supported by substantial evidence."[106] However, the appellate division went on to say

> [a]lthough it is the preferred practice that the Board set forth more of a reasoned elaboration for the basis of its determinations, this particular record is adequate for us to exercise our supervisory review to determine that the Board strictly complied with SEQRA procedures, and the degree of detail with which each factor must be discussed varies with the circumstances of each case.[107]

In *Nicklin-McKay v. Town of Marlborough Planning Board*, 853 days passed from the time of the submission of the application until a negative declaration was issued.[108] Neighbors sued, claiming the period of review was too long.[109] The court concluded that "the declaration was not untimely," pointing out that the twenty-day period laid out by the regulations was advisory only, that the Planning Board as lead agency had gathered substantial evidence by "holding both public meetings and hearings" with regard to the project, and that the Planning Board made its decision at the first meeting following the expiration of the deadline for comments.[110]

The court also rejected the petitioners' contention that because "six potentially large impacts" were identified, a positive declaration was required.[111] The court opined that identification only required the lead agency to take a "further evaluation" to see if the impacts were significant.[112] The court found that the board took that required hard look

104. 12 A.D.3d 1168, 1168-69, 785 N.Y.S.2d 637, 637-38 (4th Dep't 2004).
105. 16 A.D.3d 948, 948, 792 N.Y.S.2d 227, 228 (3d Dep't 2005).
106. *Id.* at 948-50, 792 N.Y.S.2d at 229-30.
107. *Id.* at 950, 792 N.Y.S.2d at 230 (citation omitted).
108. 14 A.D.3d 858, 861, 788 N.Y.S.2d 448, 451 (3d Dep't 2005).
109. *Id.* at 860-61, 788 N.Y.S.2d at 451.
110. *Id.* at 861, 788 N.Y.S.2d at 451-52 (citing 6 N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(b)(3)(ii) (1995)).
111. *Id.* at 861, 788 N.Y.S.2d at 452.
112. *Id.*

and fulfilled its responsibilities under SEQRA, even with a negative declaration.[113]

In *Defreestville Area Neighborhood Ass'n v. Planning Board of North Greenbush,* a proposed subdivision started out as a Type I action, but evolved into an unlisted action because of a decrease in the number of units.[114] The project was approved with a conditional negative declaration (CND)[115] containing twelve conditions.[116] The court addressed certain prefatory matters, including mootness, and noted that petitioners did not delay in commencing the proceeding and unsuccessfully sought injunctive relief on more than one occasion.[117] The court concluded the proceeding was not moot because, as the Court of Appeals said, "'[s]imply put, structures . . . most often can be destroyed.'"[118]

The court concluded in *Defreestville* that the SEQRA issues were properly dealt with by reference to the extensive record and the planning board's action, "with the guidance and assistance of its own independent engineering firm and legal counsel, [and the planning board itself] complied with the procedural and substantive requirements of SEQRA . . . in issuing the CND."[119]

In *Long Island Contractors' Ass'n v. Town of Riverhead*, in addition to standing and statute of limitation issues in this SEQRA lawsuit, the petitioners alleged a failure to join necessary parties.[120] The town's action dealt with the temporary operation of a portable asphalt plant at the town landfill.[121] The plant would be used to eliminate the landfill by "mining" the landfill as an alternative to capping the landfill and leaving it in place.[122]

The court found DEC was not a necessary party "as it did not conduct the SEQRA review."[123] It did, however, find that the town's contractor and

113. *Id.* at 861-62, 788 N.Y.S.2d at 452.

114. 16 A.D.3d 715, 720-21, 790 N.Y.S.2d 737, 742-43 (3d Dep't 2005).

115. CNDs can only be issued in an unlisted action.

116. *Defreetsville Area Neighborhood Ass'n*, 16 A.D.3d at 720-21, 790 N.Y.S.2d at 743.

117. *Id.* at 717-18, 790 N.Y.S.2d at 740.

118. *Id*. at 717-18, 790 N.Y.S.2d at 740 (quoting Dreikausen v. Zoning Bd. of Appeals of Long Beach, 98 N.Y.2d 165, 172, 774 N.E.2d 193, 196, 746 N.Y.S.2d 429, 432 (2002)); *see also* Abate v. City of Yonkers, 10 A.D.3d 605, 607, 781 N.Y.S.2d 667, 670 (2d Dep't 2004) (finding action moot for failure to seek a preliminary injunction).

119. *Defreestville Area Neighborhood Ass'n*, 16 A.D.3d at 721, 790 N.Y.S.2d at 743.

120. Long Island Contractors' Ass'n v. Town of Riverhead, 17 A.D.3d 590, 591, 793 N.Y.S.2d 494, 496 (2d Dep't 2005).

121. *Id.* at 592-93, 793 N.Y.S.2d at 496-97.

122. *Id.* at 592, 793 N.Y.S.2d at 496.

123. *Id.* at 593, 793 N.Y.S.2d at 498.

subcontractor of the asphalt plant to be operated were necessary parties.[124] The court then ruled that dismissal was "not warranted where, as here, the interests of the named party and the nonjoined party are so intertwined that there is virtually no prejudice to the nonjoined party."[125]

In *Gyrodyne Co. of America v. State University of New York at Stony Brook,* in the context of an eminent domain proceeding, the court found "SUNY Stony Brook identified 'the relevant areas of environmental concern,' took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination."[126]

In *Town of Goshen v. Serdarevic*, the town by resolution authorized its highway superintendent to triple the size of a drainage pipe under a prescriptive town road and to extend a roadside drainage ditch "for an additional 800 to 1,200 feet" as "routine maintenance."[127] The appellate division affirmed the lower court ruling that this was not a Type II action, but remitted the case for modification and entry of a declaratory judgment and permanent injunction.[128] The decision contains an excellent discussion of the law with regard to roads acquired by the government by prescriptive use.[129]

In *Malloy v. Incorporated Village of Sag Harbor*, the court began its analysis with the words "[a]ssuming that the petitioner had standing," signaling that there was a question of standing, but respondents had not raised it.[130] The decision is more important for its discussion of the scope of a municipality's ability to regulate mooring rights under Navigation Law section 46-a(1).[131] The court found that the state "[l]egislature could not have intended such a result" and rewrote the law rather than leaving the issue to the state legislature to amend.[132]

In *Chatham Towers, Inc. v. Bloomberg*, the court modified a lower court ruling which required the City of New York to complete an EIS in ninety days.[133] The city was proposing implementation of a security plan for One Police Plaza that would impede access to nearby buildings.[134]

124. *Id.*
125. *Id.* at 594, 793 N.Y.S.2d at 498.
126. 17 A.D.3d 675, 676, 794 N.Y.S.2d. 87, 89 (2d Dep't 2005) (quoting Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986)).
127. 17 A.D.3d 576, 579, 793 N.Y.S.2d 485, 488 (2d Dep't 2005).
128. *Id.* at 580, 793 N.Y.S.2d at 489.
129. *Id.* at 579, 793 N.Y.S.2d at 488.
130. 12 A.D.3d 107, 108, 784 N.Y.S.2d 141, 142 (2d Dep't 2004).
131. *Id.* at 109-110, 784 N.Y.S.2d at 143-44.
132. *Id.* at 111, 784 N.Y.S.2d at 144-45.
133. 18 A.D.3d 395, 395-96, 795 N.Y.S.2d 577, 578 (1st Dep't 2005).
134. *Id.*, 795 N.Y.S.2d at 578-79.

In *Metropolitan Museum Historic District Coalition v. De Montebello,* petitioners commenced a proceeding in 2003 to challenge actions originally adopted in 2001 based upon a SEQRA determination finalized in December 2000.[135] The project had been scaled back as a result of the events of 9/11.[136] The court rejected petitioners' attempt to characterize their petition as one in mandamus starting from when petitioners demanded a new SEQRA review.[137]

In *Community Preservation Corp. v. Miller*, the First Department affirmed the dismissal of a challenge to New York City's Childhood Lead Poisoning Prevention Act for lack of standing.[138] The lower court decision discusses the standing issue in the context of environmental versus economic harm.[139]

The supreme court discussed the issue of alternative sites in *Croton Watershed Clean Water Coalition Inc. v. Planning Board of Southeast*.[140] Pointing out that a "no build" alternative is not required for a private (as opposed to public) developer, the court approved the "as of right" alternative presented by the private developer.[141]

II. PETROLEUM

In *State v. Speonk Fuel, Inc.*, Speonk contracted to purchase a gas service station and its storage system.[142] Upon finding one tank failed a tightness test, the tank was removed from service by the prior owner/operator who left contamination in the ground before any transfer of title to Speonk's owner.[143] Seven weeks later, Speonk acquired the service station and system and its president acquired the contaminated land.[144] Because the prior owner failed to satisfy DEC's requirements and then went out of business and left the country, DEC took over the investigation and remediation and sued Speonk and its president as the owner of the

135. 20 A.D.3d 28, 31-33, 796 N.Y.S.2d 64, 67-68 (1st Dep't 2005).

136. *Id.* at 32, 796 N.Y.S.2d at 67.

137. *Id.* at 36, 796 N.Y.S.2d at 70.

138. 15 A.D.3d 193-94, 788 N.Y.S.2d 609-10 (1st Dep't 2005).

139. Cmty. Pres. Corp. v. Miller, 5 Misc.3d 388, 393-94, 781 N.Y.S.2d 603, 607-08 (Sup. Ct., N.Y. Co. 2004); *see also* Wall St. Garage Parking Corp. v. Lower Manhattan Dev. Corp., No. 108432/2004, 2004 N.Y. Misc. LEXIS 2580, at *8-10 (Sup. Ct., N.Y. Co. Nov. 3, 2004).

140. No. 19407/03, 2004 WL 2480011, at *9-14 (Sup. Ct., Westchester Co. Sept.15, 2004).

141. *Id.* at *13.

142. 3 N.Y.3d 720, 722, 819 N.E.2d 991, 993, 786 N.Y.S.2d 375, 377 (2004).

143. *Id.*

144. *Id.*

property and as dischargers.[145]

Speonk and the owner moved for summary judgment on the grounds they were not dischargers and the leaking system had been removed prior to their acquiring ownership.[146] When the supreme court denied the motion, the appellate division affirmed, holding that a "successor owner of a system from which a discharge has occurred is liable when contamination remains after purchase."[147] The appellate division stated that a "discharger is not permitted to challenge the reasonableness of the Fund's expenditures."[148]

Over a vigorous dissent from Judge R.S. Smith arguing the majority was engaged in judicial legislation,[149] the majority stated "we consider it sufficient for purposes of liability here that, with knowledge of its vendor's discharge of oil and the need for cleanup, Speonk did nothing."[150]

Unmentioned in the decision is a stipulation entered into by the state, Speonk, and the owner of the real estate in which Speonk consented to entry of judgment against it on the issue of liability in exchange for a release to the owner of the real estate, who was also the president of Speonk.[151]

In *State v. Passalacqua*, the state sued both the present and former owners of a gas station.[152] The supreme court had granted the present owner's motion against the former owner on the issue of liability.[153] The appellate division reversed, finding that the present owner "had to establish, as a matter of law, that he was not a 'discharger' liable under the statute" to be entitled to statutory indemnity under Navigation Law section 181(5).[154] The appellate division had questions of fact and therefore reversed and remanded for trial.[155]

In *State v. Neill,* after a basement fuel spill and cleanup, the owner declined to do an investigation outside the house.[156] DEC then conducted an investigation and found nothing, but billed the defendant.[157] The

145. *Id.* at 722-23, 819 N.E.2d at 993, 786 N.Y.S.2d at 377.
146. *Id.* at 723, 819 N.E.2d at 993, 786 N.Y.S.2d at 377.
147. *Id.*
148. *Id.*, 819 N.E.2d at 993-94, 786 N.Y.S.2d at 377-78.
149. *Id.* at 724-25, 819 N.E.2d at 995, 786 N.Y.S.2d at 379 (R.S. Smith, J., dissenting).
150. *Id.* at 724, 819 N.E.2d at 994, 786 N.Y.S.2d at 378.
151. State v. Speonk Fuel, Inc., 307 A.D.2d 59, 60-61, 762 N.Y.S.2d 674, 675 (3d Dep't 2003).
152. 19 A.D.3d 786, 787-88, 797 N.Y.S.2d 576, 577-78 (3d Dep't 2005).
153. *Id.* at 788, 797 N.Y.S.2d at 578.
154. *Id.* at 790, 797 N.Y.S.2d at 580.
155. *Id.* at 790-91, 797 N.Y.S.2d at 580.
156. 17 A.D.3d 802, 803, 795 N.Y.S.2d 355, 356 (3d Dep't 2005).
157. *Id.*, 795 N.Y.S.2d at 356-57.

appellate division, citing Navigation Law section 172, found the defendant liable for the costs.[158]

In *State v. Dennin*, Dennin claimed that he had sold, by oral contract, real property to his daughter-in-law, a co-defendant.[159] After underground storage tanks (USTs) were removed and contamination was found, the co-defendant daughter-in-law started remediation but then asked the state to take over.[160] The supreme court granted summary judgment to defendant Dennin, stating liability could not be premised solely on ownership.[161] The appellate division disagreed, citing *State v. Green* for the proposition that "a landowner who has control of the activities on the property and has reason to believe petroleum products will be stored there may be held liable as a discharger."[162] The court also denied a constitutional challenge to the State's expenditures under the spill fund, citing *State v. Speonk Fuel, Inc.*[163]

In a private Navigation Law action, *Starnella v. Burke Heat*, the court found the defendant liable for plaintiff's attorney's fees as an "indirect damage" under Navigation Law sections 181(1), (2), and (5).[164]

In *State v. Robin Operating Corp.*, Robin Operating Corporation (ROC) owned property on which a petroleum spill occurred.[165] In an action by the State against ROC and the lessees of the property, ROC cross claimed against the lessee and sublessee.[166] During trial, the supreme court dismissed claims against one defendant.[167] After the close of proof, the court dismissed cross claims against other defendants, finding that ROC had not established "that the tank was in use at any time during the co-defendants tenancy."[168] ROC also conceded that the hole in the tank in question "was caused over time" and "that no tests were performed to determine how long the gasoline had been in the ground."[169] Notwithstanding the court's earlier ruling that defendants were jointly and severally liable to the State, ROC failed to obtain indemnification or

158. *Id.* at 803-04, 795 N.Y.S.2d at 357.
159. 17 A.D.3d 744, 744, 792 N.Y.S.2d 682, 684 (3d Dep't 2005).
160. *Id.* at 744-45, 792 N.Y.S.2d at 684.
161. *Id.* at 745, 792 N.Y.S.2d at 684.
162. *Id.* (citing State v. Green, 96 N.Y.2d 403, 405, 754 N.E.2d 179, 182, 729 N.Y.S.2d 420, 422 (2001)).
163. *Id.* at 745-46, 792 N.Y.S.2d at 685 (citing State v. Speonk Fuel, Inc., 3 N.Y.3d 720, 724, 819 N.E.2d 991, 994-95, 786 N.Y.S.2d 375, 378-79 (2004)).
164. 14 A.D.3d 694, 695, 789 N.Y.S.2d 227, 227-28 (2d Dep't 2005).
165. 16 A.D.3d 944, 945, 793 N.Y.S.2d 208, 209 (3d Dep't 2005).
166. *Id.*
167. *Id.*
168. *Id.* at 945-46, 793 N.Y.S.2d at 209-10.
169. *Id.* at 946, 793 N.Y.S.2d at 210.

contribution against its co-defendants.[170] As this case makes clear, facts count and quality consultants who age spills can make a difference.

Several federal court decisions are of note. In *Lambrinos v. Exxon Mobil Corp.*, plaintiffs made supplemental state law claims under the Navigation Law and for trespass, nuisance, negligence, and punitive damages.[171] Spills had occurred in 1991, 1996, and 1997 at defendant's gas station.[172] Fuel tanks and a septic tank containing, inter alia, waste oil and antifreeze were removed.[173] The contamination moved downgradient onto plaintiff's property.[174]

The court denied summary judgment under the Resource Conservation and Recovery Act (RCRA) because of factual issues, but granted summary judgment under the Navigation Law, leaving the appropriate remedy and the amount and allocation of damages to be determined at trial.[175] The court also denied defendant's motion for summary judgment to dismiss plaintiff's claim for punitive damages.[176]

In *Green Hills (USA), L.L.C. v. Aaron Streit, Inc.*, the plaintiffs purchased a building relying on the defendants' representation that no underground storage tanks (USTs) had been present, and on the plaintiff's consultant's conclusions that the site was clean.[177] After discovering two leaking USTs on the property, the plaintiff sued both the consultant and the seller under RCRA and state law claims, including the New York Navigation Law.[178]

The court cited *Sommer v. Federal Signal Corp.*, which "recognized a number of circumstances in which legal duties independent of contractual obligations could exist" and that "[s]eparate tort liability can also arise 'from a breach of . . . contract.'"[179] Finding that the consultant was alleged to be professionally negligent, the work performed was of significant public interest, and the breach of the consultant's duties "could have dramatic consequences," the court allowed the lawsuit to proceed on both a tort and contract basis.[180]

170. *Id.*, 793 N.Y.S.2d at 209-10.

171. No. 1:00-CV-1734, 2004 U.S. Dist. LEXIS 19598, at *2 (N.D.N.Y. Sept. 29, 2004).

172. *Id.* at *4.

173. *Id.* at *4-5.

174. *Id.* at *5.

175. *Id.* at *23, *26.

176. *Id.* at *25-26.

177. 361 F. Supp. 2d 81, 84 (E.D.N.Y. 2005).

178. *Id.* at 83-84.

179. *Id.* at 90 (quoting Sommer v. Fed. Signal Corp., 79 N.Y.2d 540, 551, 593 N.E.2d 1365, 1369, 583 N.Y.S.2d 957, 961 (1992)).

180. *Id.* at 90-91.

Some cases, like *Aldrich v. Pattison*, are not important because they break new ground; they are important because of their encyclopedic review of the law.[181] In *Kara Holding Corp. v. Getty Petroleum Marketing, Inc.*, which is one such case, the plaintiff owned property contaminated by the defendants' discharge.[182] The plaintiff sued under every conceivable federal and state law.[183] Although no new law was decided and the plaintiff could not recover a large amount, the decision lays out what one might sue for and how to go about it.[184]

In *Blumenfeld Development Group, Ltd. v. Roux Associates, Inc.*, the defendant performed a faulty site assessment for the contract purchaser of real estate.[185] The purchaser assigned its interests in the purchase contract to the plaintiff, who, after closing, discovered the problem, cleaned it up and sued the defendant for the faulty site assessment.[186] The supreme court dismissed the complaint because it found that the plaintiff was reimbursed for damages and the Phase I report stated it was prepared for the exclusive use of the original contract purchaser.[187]

III. ENVIRONMENTAL INSURANCE

In *H.L. & F.H. Realty Corp. v. Gulf Insurance Co.*, the plaintiff's broker obtained insurance for both the equipment company and the owner.[188] When the policy was issued, by admitted mistake, the owner was not named as an additional insured.[189] An underground spill was discovered, and the broker had the owner listed as an additional insured on the policy retroactively.[190] The court found the following: (1) the omission of the name was a clerical error; (2) "the identity of the insured did not affect the risk" incurred by the insurance company; and (3) "as the underwriter's supervisor conceded, there was no reason [to exclude]

181. *See generally* Aldrich v. Pattison, 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dep't 1985).

182. No. 99 CIV. 0275 (RWS), 2004 WL 1811427, at *3 (S.D.N.Y. Aug. 12, 2004).

183. Plaintiff sued under the RCRA; *Id.* at *9-11; the Clean Water Act; *Id.* at *12-13; Navigation Law; *Id.* at *13-16; Trespass; *Id.* at *16-17; Nuisance and Negligence; *Id.* at *17; and Intentionally Wrongful Conduct; *Id.* at *17-18. Plaintiff also withdrew two claims, one for violation of New York Education Law, and a related claim for indemnification and restitution. *Id.* at *9.

184. *Id.* at *3-29.

185. No. 1880/02, 2004 WL 2609384, at *1 (Sup. Ct., Nassau Co. Sept. 28, 2004).

186. *Id.*

187. *Id.* at *1-3.

188. 19 A.D.3d 646, 647, 798 N.Y.S.2d 107, 108 (2d Dep't 2005).

189. *Id.*

190. *Id.*

plaintiff as an insured on the policy."[191] The court therefore struck defendant's affirmative defense asserting fraud.[192]

In *Griffith Oil Co. v. National Union Fire Insurance Co.*, the appellate division modified the lower court's decision and held that one defendant insurance carrier must defend and another defendant must indemnify the plaintiffs with respect to the plaintiffs' claim of "lost product" in a proceeding brought by the United States Environmental Protection Agency (EPA).[193] The court also affirmed the dismissal of a cause of action that claimed the insurance carriers committed intentional misconduct, finding the insurance carriers "had an arguable basis for denying coverage."[194]

In a federal diversity case, *National Union Fire Insurance Co. v. American Re-Insurance Co.*, the court determined that under Second Circuit precedent, New York choice of law rules would apply, and in this particular case, New York law called for Ohio law to apply to an insurance claim arising in Michigan.[195] On the defendant's motion for summary judgment, and the plaintiff's motion to strike an affirmative defense, which asserted the defendant's pollution exclusion barred coverage of the plaintiff's reinsurance claims, the court determined that the defendant's pollution exclusion clause was so broad as to be ambiguous; thus, it had to be construed against the insurer (in this case, the re-insurer).[196] Therefore, the court denied the motion for summary judgment and struck the affirmative defense.[197]

IV. HISTORIC PRESERVATION

In *Cornell University v. Beer*, the Ithaca Landmarks Preservation Commission (ILPC) denied Cornell's application to construct a parking lot.[198] The court found no rational basis for two of the three ILPC findings, and with regard to the third, agreed with the lower court that since the view to be protected had not existed in years, the third finding was not rational either.[199] The court stated "it is plain that respondents failed to engage in a deliberative process balancing the public interest in that use against the public interest in keeping the existing wooded area unchanged."[200]

191. *Id.* at 647-48, 798 N.Y.S.2d at 109.
192. *Id.* at 648, 798 N.Y.S.2d at 109.
193. 15 A.D.3d 982, 984, 789 N.Y.S.2d 352, 354 (4th Dep't 2005).
194. *Id.* at 983, 789 N.Y.S.2d at 353.
195. 351 F. Supp. 2d 201, 207 (S.D.N.Y. 2005).
196. *Id.* at 203, 206, 209-12.
197. *Id.* at 203, 213.
198. 16 A.D.3d 890, 891, 791 N.Y.S.2d 682, 682-83 (3d Dep't 2005).
199. *Id.* at 892-93, 791 N.Y.S.2d at 684.
200. *Id.* at 894, 791 N.Y.S.2d at 685.

In *Snyder Development Co. v. Town of Amherst Town Board*, the Fourth Department first remanded the case to the supreme court to make proper findings.[201] On resubmission, the court found the findings supported by the record and held that the Town Board had the authority to modify a proposal of the town historic preservation commission pursuant to General Municipal Law section 96-a.[202]

In *City of New York v. 10-12 Cooper Square, Inc.*, the court considered a question of first impression: whether the defendants could be compelled

> to undertake such work as is necessary to (1) make the exterior of the building watertight so as to prevent deterioration, decay, damage, or disrepair; (2) maintain the significant architectural elements on the exterior to prevent deterioration, decay, damage or disrepair; and (3) maintain all of the interior of the building to avoid deterioration, decay, damage or disrepair.[203]

The defendants argued that the building was never properly designated as a landmark, that it was in good repair, and that the city's definition of "good repair" was unreasonable.[204] The court ruled against the defendants on all issues and enjoined them accordingly.[205]

V. SOLID WASTE

In *Mohawk Valley Organics, L.L.C. v. New York State Department of Environmental Conservation*, the Department of Environmental Conservation (DEC) revoked an open air composting facility's solid waste permit because of severe odor problems and because the "petitioner had exceeded a 100 ton per day limitation on its acceptance of biosolids."[206] DEC repeatedly confirmed the presence of severe odors.[207] The court found the petitioner's contention that the 100 ton per day limitation was based on a monthly average was contradicted by the express terms of the permit.[208]

VI. AGRICULTURE & MARKETS & ZONING

In *Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Board*, the

201. 12 A.D.3d 1092, 1092, 785 N.Y.S.2d 215, 215 (4th Dep't 2004).
202. *Id.* at 1093, 785 N.Y.S.2d at 216.
203. 7 Misc.3d 253, 254, 793 N.Y.S.2d 688, 689-90 (Sup. Ct., N.Y. Co. 2004).
204. *Id.*, 793 N.Y.S.2d at 690.
205. *Id.* at 255-58, 793 N.Y.S.2d at 690-93.
206. 13 A.D.3d 938, 938-39, 787 N.Y.S.2d 188, 189 (3d Dep't 2004).
207. *Id.* at 939-40, 787 N.Y.S.2d at 189-90.
208. *Id.* at 940, 787 N.Y.S.2d at 190.

appellate division affirmed a lower court ruling that "Agriculture and Markets Law article 25-AA supercedes any local zoning provisions," including those provisions which predate the creation of an agricultural district.[209]

VII. AIR

In *NRG Energy, Inc. v. Crotty*, the court addressed three separate Article 78 proceedings challenging the Acid Deposition Reduction Program (ADRP) original regulations and emergency adopted regulations.[210] The court dismissed the appeals as moot since final regulations were adopted during the appeals.[211] The court found that the final regulations were substantially "different from the original and emergency regulations" and further, the cases did not fall within any of the recognized exceptions to the mootness doctrine.[212] The court declined to vacate the lower court's decision vacating DEC's original ADRP regulations, attributing "no malintent to DEC in undertaking this course of conduct."[213]

In *Sherwin-Williams Co. v. Crotty*, the plaintiffs challenged the "creation and implementation of the Architectural and Industrial Maintenance Coatings regulations ('AIM Regulations') for the State of New York."[214] The AIM Regulations contained two tiers of regulated business, with smaller businesses having the opportunity to apply for a three-year exemption with the possibility of a single three-year extension.[215] The court dismissed the plaintiffs' Clean Air Act and 42 U.S.C. § 1983 claims to the extent they alleged violations of the CAA and all state law causes of action under the Eleventh Amendment.[216] However, the court denied the motion to dismiss the plaintiffs' claims based upon the Commerce Clause and the Equal Protection Clause under 42 U.S.C. § 1983.[217] The court based its determination on the allegations of fact presumed to be true "that the New York AIM Regulations do not have a rationally related government interest and that the resulting classification of manufacturers based on output of product is arbitrary and capricious."[218]

209. 13 A.D.3d 846, 847-49, 786 N.Y.S.2d 643, 645-46 (3d Dep't 2004).
210. 18 A.D.3d 916, 917-18, 795 N.Y.S.2d 129, 131 (3d Dep't 2005).
211. *Id.* at 918, 795 N.Y.S.2d at 131.
212. *Id.* at 919-20, 795 N.Y.S.2d at 132-33.
213. *Id.* at 920, 795 N.Y.S.2d at 133.
214. 334 F. Supp. 2d 187, 190 (N.D.N.Y. 2004).
215. *Id.* at 192.
216. *Id.* at 194-96.
217. *Id.* at 194-95.
218. *Id.* at 196.

VIII. ENDANGERED SPECIES

In *State v. White Oak Co.*, the State moved "to enjoin the defendants from conducting any activities on certain land that would kill or disturb tiger salamanders, or . . . their habitat except . . . in accordance with an Endangered Species Permit."[219] The lower court had granted summary judgment dismissing the complaint.[220] The appellate division reversed, searched the record, and granted summary judgment to the state which had not requested it.[221] The court found that the provisions of the State Environmental Quality Review Act (SEQRA) did "not change the jurisdiction of the DEC . . . [that] a State agency . . . cannot be equitably estopped from exercising its governmental functions . . . . [and that] [t]he conduct of the DEC did not warrant the application of the doctrine of estoppel."[222]

In *People v. Dellecave*, the defendant was charged with violating the provisions of a permit issued to him by the DEC pursuant to 6 NYCRR § 182.5(b)(5), the illegal "possession of an endangered and threatened species," and "the unauthorized sale of an endangered and threatened species."[223] In a decision which set forth the testimony in great detail, the court weighed the testimony of a SUNY School of Environmental Science & Forestry graduate, whose studies did not include the species involved, and whose only training in endangered species was in her Environmental Conservation Police Officer (ECPO) training, against the defendant, who was the owner of a reptile business, had worked at the Bronx Zoo, and had worked with reptiles for seventeen years breeding and selling rare and exotic animals to zoos.[224] In the dispute over whether certain reptiles were subject to regulation, the court weighed the defendant's testimony against the ECPO's pictures from a Smithsonian Handbook and found that the People had failed to prove any violation beyond a reasonable doubt.[225]

IX. HAZARDOUS WASTE TAX

In *CWM Chemical Services, L.L.C. v. Roth*, the appellate division modified and affirmed a lower court decision striking down portions of New York State's special assessments on generation and disposal of

219. 13 A.D.3d 435, 436, 787 N.Y.S.2d 333, 334 (2d Dep't 2004).
220. *Id.*
221. *Id.* at 438, 787 N.Y.S.2d at 336.
222. *Id.* at 437-38, 787 N.Y.S.2d at 335-36.
223. No. 1557/05, 2005 WL 1021596, at *1 (Dist. Ct., Nassau Co. Apr. 18, 2005).
224. *Id.* at *1-3.
225. *Id.* at *1-2, *5.

hazardous waste in New York.[226] The plaintiff was a hazardous waste treatment, storage, and disposal facility with both in-state and out-of-state customers.[227] The appellate division agreed that Environmental Conservation Law sections 27-0923(2)(d) and 27-0293(3)(c) would not be unconstitutional if treated as exclusions of only the generator tax and not the disposal tax.[228] The court's rationale in striking down the tax follows the well-paved trail of United States Supreme Court decisions on similar laws in other states.[229]

X. MINED LAND RECLAMATION AND OIL AND GAS

In *Booth v. Hanson Aggregates, New York, Inc.*, plaintiffs sued defendant claiming that defendant's mining operations caused their wells to run dry.[230] The appellate division modified the lower court decision and reinstated a cause of action based on public nuisance; holding that a public nuisance action may be commenced by a private party if the person can show a "special injury beyond that suffered by the community at large."[231]

In *Western Land Services, Inc. v. Department of Environmental Conservation*, petitioners contested a declaratory ruling that the Department of Environmental Conservation (DEC) has "authority to limit an unleased mineral rights owner or non-operating mineral rights lessee to less than 8/8ths of unit production attributable to acreage compulsorily integrated into a spacing unit after the unit operator has recouped drilling costs and a risk penalty."[232] The court held in favor of the petitioners and ruled that the issue was a question of statutory interpretation not requiring deference to agency expertise, and that DEC did not have the discretion to reduce the 8/8ths because that interpretation would render one part of the statute meaningless.[233] The court upheld DEC's declaratory ruling on the other issues in the lawsuit.[234]

226. 15 A.D.3d 77, 78, 87, 787 N.Y.S.2d 780, 782, 788 (4th Dep't 2004).

227. *Id.* at 79, 787 N.Y.S.2d at 782.

228. *Id.* at 79-83, 787 N.Y.S.2d 782-85.

229. *See* Fulton Corp. v. Faulkner, 516 U.S. 325, 327 (1996); Oregon Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 95, 98, 108 (1994), Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 336-37 (1992), Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 274-75, 289 (1977).

230. 16 A.D.3d 1137, 1137-38, 791 N.Y.S.2d 766, 767 (4th Dep't 2005).

231. *Id.* at 1138, 791 N.Y.S.2d at 767 (quoting 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280, 292, 750 N.E.2d 1097, 1104, 727 N.Y.S.2d 49, 56 (2001)).

232. No. 3091-04, 2004 WL 2563598, at *1 (Sup. Ct., Albany Co. Nov. 1, 2004.).

233. *Id.* at *1, *5.

234. *Id.* at *6.

XI. INDOOR SMOKING

Indoor smoking continues to generate controversy. In *Elmwood-Anderson Corp. v. Novello*, the Erie County Health Commissioner adopted regulations pursuant to New York's Clean Indoor Air Act (CIAA).[235] The county appealed a ruling that annulled the Erie County indoor smoking ban and granted petitioner a six-month waiver because the county's guidelines for waivers were "arbitrary and capricious as well as irrational."[236]

The Fourth Department found the county regulations on waivers inconsistent with the state statute and therefore void.[237] However, the court found the lower court had improperly granted a six-month waiver since "'[m]andamus does not lie to compel the performance of a discretionary act.'"[238] Accordingly, the court voided the six-month waiver to the petitioner and remanded the matter to the County Health Commissioner to formulate new regulations.[239]

In *Patricia Ann Cottage Pub, Inc. v. Mermelstein*, the court vacated the findings of fact, and decisions and orders in three separate administrative proceedings.[240] The court found "the hearing officer merely adopted the flawed conclusions of the investigator."[241] The bar owners had all posted "No Smoking" signs, removed all ashtrays and asked any smokers to extinguish their cigarettes.[242] The owners, however, did not stop serving patrons who continued to smoke.[243] A challenge to the constitutionality of the law failed because petitioners had failed to serve the attorney general as required by law.[244]

In *Herbert Paul, CPA, P.C. v. 370 Lex, L.L.C.*, a tenant sued the owner of his building, the property manager, as well as the smoking next door tenant under the New York City Administrative Code, state Public Health Law (PHL) article 13-E, and for breach of enjoyment because secondhand smoke infiltrated plaintiff's office and made "[c]ertain rooms

235. 11 A.D.3d 969, 970, 782 N.Y.S.2d 312, 313 (4th Dep't 2004).

236. *Id.* at 971, 782 N.Y.S.2d at 314 (quoting Elmwood-Anderson Corp. v. Novello, 3 Misc. 3d 858, 865, 775 N.Y.S.2d 472, 478 (Sup. Ct., Erie Co. 2004)).

237. *Id.* at 971-72, 782 N.Y.S.2d at 314-15.

238. *Id.* at 972, 782 N.Y.S.2d at 315 (quoting Garrison Protective Servs., Inc. v. Office of Comptroller, 92 N.Y.2d 732, 736, 708 N.E.2d 994, 996, 685 N.Y.S.2d 921, 923 (1999)) (alteration in original).

239. *Id.*

240. 6 Misc. 3d 492, 493, 786 N.Y.S.2d 283, 284 (Sup. Ct., Suffolk Co. 2004).

241. *Id.* at 495, 786 N.Y.S.2d at 286.

242. *Id.* at 493-94, 786 N.Y.S.2d at 285.

243. *Id.* at 494, 786 N.Y.S.2d at 285.

244. *Id.* at 495, 786 N.Y.S.2d at 286.

of plaintiff's suite . . . completely unusable."[245] The court, on motions for summary judgment, dismissed the private nuisance claims against the landlord and property manager, but not against the source of the smoke.[246] The court also dismissed the state law claims because PHL article 13-E does not create a private cause of action; and dismissed the Administrative Code provisions for failure to come within its terms.[247] The claims for quiet enjoyment and private nuisance were set for trial.[248]

XII. LEAD PAINT

In *Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller*, petitioners challenged the Childhood Lead Poisoning Prevention Act.[249] The supreme court dismissed for lack of standing and the appellate division affirmed because petitioners' injury would be no different from the injury to the public at large.[250] Nonetheless, the court discussed the merits and found that "[t]he rebuttable presumption . . . that paint in pre-1960 buildings has a lead base is rationally supported" and that "[t]he City Council did not exceed its authority in legislating this presumption, which is merely evidentiary and does not impose absolute liability."[251]

XIII. THE ADIRONDACK PRESERVE

In *People v. McCulley*, the defendant "operat[ed] his snowmobile on a historic old road in the Town of Keene" through state forest preserve lands.[252] Defendant then advised a New York State Forest Ranger of his deed and "requested that he be issued a ticket."[253] Defendant was charged with a violation of 6 NYCRR § 196.2.[254] The issue was whether the road in question, which was concededly public at one time, had been abandoned pursuant to Highway Law section 205.[255] If the road were abandoned, then the wilderness ban on operating a motor vehicle as defined in Environmental Conservation Law section 9-0101(6) would create liability.[256]

245. 7 Misc. 3d 747, 748, 794 N.Y.S.2d 869, 870 (Sup. Ct., N.Y. Co. 2005).
246. *Id.* at 752, 794 N.Y.S.2d at 873.
247. *Id.* at 751-52, 794 N.Y.S.2d at 872-73.
248. *Id.* at 752, 794 N.Y.S.2d at 873.
249. 15 A.D.3d 194, 194, 789 N.Y.S.2d 126, 127 (1st Dep't 2005).
250. *Id.*, 789 N.Y.S.2d at 128.
251. *Id.* at 195, 789 N.Y.S.2d at 128.
252. No. 4528, 2005 WL 756582, at *1 (Essex County Ct. Mar. 23, 2005).
253. *Id.* at *4
254. *Id.*
255. *Id.*
256. *Id.*

Defendant was convicted after a bench trial in town court.[257] On appeal, after a lengthy description of the history of the road and state legislation going back to 1810, as well as the more modern use of the road, the court reversed on the law, the facts and "in the interest of justice."[258] If you like history, even if the merits of the case mean nothing, this is an interesting decision.

XIV. WETLANDS

Certain cases have a life of their own. In *Stewart Park & Reserve Coalition, Inc. (SPARC) v. Slater*, plaintiffs sought to bar "a proposed project to construct an interchange connecting an interstate highway with Stewart Airport."[259] There were three prior decisions.[260] This decision, which will probably be appealed, moves the case towards a final conclusion.

In 2002, the district court granted the federal and state defendants' summary judgment dismissing the case, but then "granted [p]laintiffs' [m]otion for a [s]tay and further granted an [i]njunction pending the [p]laintiffs' appeal."[261] The Second Circuit reversed and remanded the case stating that

> the Defendants will have to determine whether (1) there are no prudent and feasible alternatives to using the Stewart Buffer Lands and the Crestview Lake Property for the interchange project, and (2) whether the project includes all possible planning to minimize whatever harms will result to the Stewart Buffer Lands and the Crestview Lake Property.[262]

The state and federal defendants revisited the project, conducted an analysis, moved the interchange to "completely avoid any encroachments" on the lands which the Second Circuit identified as being protected by Transportation Law section 4(f), and moved to vacate the stay and injunction.[263] The project as proposed requires the filling of "approximately 5.35 acres of wetlands and 1.87 acres of open water" subject to DEC and Army Corp of Engineers permits, which were applied

257. *Id.* at *1.
258. *Id.* at *5-13.
259. 358 F. Supp. 2d 83, 85 (N.D.N.Y. 2005).
260. *Id.*
261. *Id.*
262. *Id.* at 85-86 (quoting Stewart Park & Reserve Coalition, Inc. v. Slater (SPARC III), 352 F.3d 545, 557 (2d Cir. 2003)).
263. *Id.* at 86, 90.

for and granted.[264] As a condition of the permits, the defendants would expand a small wetland in the protected lands and use the excavated materials "to reclaim an abandoned shale quarry to create a vegetated meadow."[265] Some temporary construction would take place on the protected lands.[266] The New York State Department of Transportation and the Federal Highway Administration approved the analysis of these impacts.[267]

In opposing the motion, plaintiffs argued that the redesigned project does impact upon the protected lands and that an additional 1,200 acres of land east of the Stewart Buffer lands were also protected.[268] Plaintiffs argued that the de facto use of these 1,200 acres made that land subject to protected status as well, even in the absence of any official recognition.[269] Plaintiffs also argued that the fifteen acres of mitigation activity (which defendants argued would enhance the parkland) made the fifteen acres part of the "transportation facility."[270] Referring to 23 CFR § 771.135(p)(1), the court disagreed and found the defendants' actions not unreasonable.[271]

The court also discounted plaintiffs' arguments that if the interchange were built, commercial growth would be induced on the 1,200 acres east of the interchange, pointing out that that issue was governed by the law of this case, and had been addressed in the National Environmental Policy Act (NEPA) and State Environmental Quality Review Act (SEQRA) studies, reviewed by both the District Court and the Second Circuit.[272]

XV. LEASES – ENVIRONMENTAL CONDITIONS

In *Benderson Development Co. v. Neumade Products Corp.*, the landlord sued its tenant pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and for breach of contract, strict liability for an ultrahazardous activity, and creation of a public nuisance.[273]

In 1990, during a Resource Conservation and Recovery Act (RCRA) inspection, the New York State DEC documented numerous high priority

264. *Id.* at 91.
265. *Id.* at 91-92.
266. *Id.* at 92.
267. *Id.*
268. *Id.* at 95-96.
269. *Id.* at 95-99.
270. *Id.* at 99.
271. *Id.* at 99-100.
272. *Id.* at 103-04.
273. No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, at *1 (W.D.N.Y. June 13, 2005).

violations at the facility operated by defendant under a lease from plaintiff.[274] The defendant pled guilty to a misdemeanor and was fined.[275] The defendant also entered into an Order with DEC requiring remediation.[276] In November 1991, plaintiff "reported a petroleum spill caused by five failing underground storage tanks" on the property.[277] In December 1991, plaintiff and defendant entered into a new lease which contained provisions regarding hazardous substances, environmental cleanup and compliance with environmental laws which would "*survive the termination of the [l]ease*."[278] In September 1993, DEC advised that defendant had complied with the remedial requirements of the Order.[279]

In December 1993, plaintiff removed the five tanks and eighty tons of contaminated soil.[280] In November 1996, plaintiff's counsel advised defendant's counsel that, during a "routine pre-vacancy inspection," areas of environmental concern had been identified and that defendant should engage a "mutually acceptable environmental firm [to confirm that] the leased [p]remises are not in violation of any applicable environmental law or regulations."[281]

In April 1997, the consultant obtained samples finding volatile organic chemicals and petroleum-based contamination.[282] The lease was extended for several months.[283] Prior to the expiration of the extension, plaintiff's counsel reminded defendant of its obligation to remediation and the obligation to pay rent for ninety days after providing plaintiff with a "*clean condition report*" as specified by law.[284] In 1998, plaintiff sued defendant because of the continuing contamination.[285] As a result of depositions, additional contamination was found.[286] In 2000, plaintiff entered into a Consent Order with the DEC to perform even further remedial work.[287]

On motions for summary judgment, the court found the plaintiff could not recover from defendant under 42 U.S.C. §§ 9607 or 9613(f)(1), but

274. *Id.* at *3.
275. *Id.* at *5.
276. *Id.* at *4.
277. *Id.* at *5.
278. *Id.* at *5-7 (emphasis added).
279. *Id.* at *10.
280. *Id.*
281. *Id.* at *10-11.
282. *Id.* at *11.
283. *Id.* at *12.
284. *Id.* at *12-13 (emphasis added).
285. *Id.* at *13.
286. *Id.* at *14-15.
287. *Id.* at *25.

could collect under 42 U.S.C. § 9613(f)(3)(B).[288] The court found compliance with the National Contingency Plan and granted summary judgment to plaintiff on the remaining CERCLA claim.[289]

With regard to the contract cause of action, the court also found plaintiff could seek indemnity for cleanup costs incurred within six years of the commencement of the action, but found issues of fact regarding the extent of defendant's liability.[290]

With regard to the continuation of the rent, the court denied summary judgment because there is no New York law requiring a "*clean condition report*."[291]

Plaintiff also sought damages resulting from defendant's disposal of hazardous substances and under public nuisance.[292] The court found that public nuisance and abnormally dangerous activities are not preempted by CERCLA, but the statute does preempt claims under restitution and indemnification.[293]

Except for the claim for contribution under CERCLA, all motions for summary judgment were denied with the action to proceed to trial.[294] This decision is particularly instructive for attorneys representing landlords or tenants. All might want to modify the lease in question based upon this decision to correct its deficiencies and use a base lease for industrial leases *and commercial leases*.

CONCLUSION

This *Survey* year for environmental law was one of small incremental changes with no great legislative, administrative, or judicial landmarks or indication of future changes to come.

288. *Id.* at *31-33.
289. *Id.* at *35-45.
290. *Id.* at *45-51.
291. *Id.* at *49-51 (emphasis added).
292. *Id.* at *51-52.
293. *Id.* at *52-53.
294. *Id.* at *56.