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## Foreword

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## Foreword

The national goals of clean air<sup>1</sup> and clean water<sup>2</sup> were put into law more than a decade ago. Since then, the commitment to implement environmental laws has been diverted by different and apparently more urgent economic priorities. The Environmental Protection Agency (EPA), the principal agency charged with enforcing these laws, argues that too often regulations mandate costly expenditures for marginal results—a luxury our cost-conscious nation can ill afford.

Imbued with the present Administration's philosophy of returning regulatory responsibility to the states, the EPA has turned its attention to the Clean Water Act,<sup>3</sup> which is scheduled for reauthorization in 1983.<sup>4</sup> The Agency is in the process of writing new rules that would give the states the flexibility to set water quality standards tailored to local needs.<sup>5</sup> The wisdom of this approach will depend on whether each state has the ability to maintain or improve upon the Act's goals of "fishable" and "swimmable" waters,<sup>6</sup> because the states will have to assume a greater share of the regulatory burden. Despite these changes in our national priorities, it is clear that the American people remain committed to the ideals of environmental protection.<sup>7</sup>

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1. Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. V 1981).

2. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

3. *Id.*

4. EPA's Draft Amendments to the Clean Water Act, 13 *Env't Rep. (BNA)* 2057-60 (Mar. 11, 1983).

5. Proposed Rule, Water Quality Standards Regulation, 47 *Fed. Reg.* 49,234 (Oct. 29, 1982).

6. 33 U.S.C. § 1251(a)(2).

7. In November 1982, the results of a poll sponsored by a corporation with interests in packaging, forest products, and energy production were released. The poll surveyed members of the general public, environmentalists, and representatives of large and small businesses. The results showed that 60% of the public, 59% of large companies, and 51% of small companies favored increases in the costs of services and

Given Congress's current concern with the Clean Water Act, it is appropriate in this inaugural issue of the *Pace Environmental Law Review* to concentrate on recent developments in water law. Several of the Notes and Comments which follow, while focused on New York, suggest the varied scope of water law, the complex interests encountered when implementing the law at the local level, and the pressures mounting to postpone timetables and relax attainment standards.

The issue opens with an equally timely topic. Carol E. Dinkins, Assistant Attorney General, outlines the Justice Department's negotiation and litigation strategy to ensure cleanup of hazardous waste sites, pursuant to the Resource Conservation and Recovery Act<sup>8</sup> and Superfund.<sup>9</sup> It is encouraging to learn, at a time when public attention is focused on this long-ignored danger, that cleanup of these sites will benefit from the Department's vigorous civil and criminal enforcement efforts.

Professor Donald W. Stever, Jr., surveys the confusing area of law that has evolved under the attorneys' fee provisions of environmental statutes, an issue that is awaiting decision by the Supreme Court.<sup>10</sup> Professor Stever suggests that Congress may have created a statutory standard for fee awards that is intentionally vague so that the courts would be free to create a rule in common law fashion. He proposes that the rules which have evolved under these provisions, princi-

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products to reductions in environmental cleanup. Fifty-five percent of the general public favored maintaining current air pollution standards "even if some factories close as a result." Research and Forecasts, Inc., *Toward Responsible Growth*, sponsored by the Continental Group. 13 *Env't Rep. (BNA)* 1053-54 (Nov. 19, 1982). The results of this poll are consistent with the New York Times/CBS News Polls conducted in January and September 1981 (*N.Y. Times*, Feb. 3, 1981, at A1, col. 3; Oct. 4, 1981, § 1, at 30, col. 3), and a poll conducted by Louis Harris in May and September 1981 (12 *Env't Rep. (BNA)* 280-81, 789-90 (Oct. 23, 1981)).

8. Resource Conservation and Recovery Act [hereinafter RCRA], 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981).

9. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

10. *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982) (per curiam), cert. granted, 103 S. Ct. 254 (1982). After this article went to press, the United States Supreme Court decided this case under the name of *Ruckelshaus v. Sierra Club*, 51 U.S.L.W. 5132 (U.S. July 1, 1983).

pally in the D.C. Circuit, be refined in order to achieve greater uniformity and to respect more closely the environmental goals of the statutes.

The Association of the Bar of the City of New York proposes in a Committee report that section 5519(a)(1), the stay of enforcement provision of the New York Civil Practice Law and Rules, be amended to conform to the State Environmental Quality Review Act (SEQRA).<sup>11</sup> Under SEQRA, state and local agencies are required to consider the impact of their actions on the environment and to prepare an environmental impact statement.<sup>12</sup> Agency failure to comply with SEQRA can result in an order to enjoin a proposed activity which might damage the environment. Nevertheless, the injunction can be avoided by the agency because, under section 5519(a)(1), the mere filing of a notice of appeal automatically stays an order. The agency may then proceed with the activity, damage the environment, and undermine SEQRA's remedial purpose. The report proposes a return to the pre-1965 language of section 5519(a)(1) so that an agency which appeals an order would be required to present the issues in court before a stay is granted.

Martin G. Anderson questions the outcome of *City of New York v. EPA*,<sup>13</sup> in which the City successfully challenged EPA's refusal to extend the deadline of the City's permit to continue dumping sewage sludge at a site twelve miles offshore. The court adopted the City's argument that the dumping was preferable, for the present, to potentially more hazardous landfill alternatives. The Note concludes that EPA's choice not to appeal the decision, as well as the Agency's more relaxed policy toward ocean-waste disposal, may invite other municipalities to continue or begin ocean dumping as a solution to their sewage disposal problems. This would be contrary to the policy of the Marine Protection, Research, and Sanctuaries Act of 1972.<sup>14</sup>

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11. N.Y. Envtl. Conserv. Law §§ 8-0101 to 8-0117 (McKinney Supp. 1982-1983).

12. *Id.* at § 8-0109(2).

13. 543 F. Supp. 1084 (S.D.N.Y. 1981).

14. 33 U.S.C. §§ 1401-1473 (1976 & Supp. V 1981). On December 20, 1982, the

Millicent Greenberg examines the Supreme Court's analysis in *Milwaukee v. Illinois*,<sup>15</sup> where the Court held that the Federal Water Pollution Control Act Amendments of 1972 preempt federal common law of nuisance claims in interstate water pollution disputes. The Note supports the majority's holding that when Congress enacts comprehensive legislation dedicated to a single area of the law, the federal courts are not free to supplement the statute. It is unclear to what extent lower federal courts will apply *Milwaukee* as precedent to preempt federal common law claims brought under other environmental statutes.<sup>16</sup>

Lois R. Murphy follows the case history of the Byram River—the first river to be a plaintiff in a lawsuit<sup>17</sup>—through

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EPA proposed to redesignate the 12-mile site known as the New York Bight for continued disposal of sewage sludge. Request for Comments, 47 Fed. Reg. 56,665 (Dec. 20, 1982). The EPA stated that ocean dumping has been permitted "as a direct result" of *City of New York v. EPA* and the court-approved settlement, even though the Marine Protection, Research, and Sanctuaries Act of 1972 [hereinafter MPRSA] bans ocean dumping after December 31, 1981. 13 Env't Rep. (BNA) 1442 (Dec. 24, 1982).

On December 22, 1982, a lawsuit was filed in the District Court for the District of New Jersey against the EPA and six New Jersey sewage authorities to obtain a phase-out of ocean dumping through environmentally safe land-based alternatives, dewatering facilities, and pretreatment of industrial wastes. *National Wildlife Fed'n v. Gorsuch*, Civ. No. 82-4314 (D.N.J. Dec. 22, 1982) (Complaint). On March 16, 1983, Rep. Bill Hughes of New Jersey announced that he would introduce an amendment to MPRSA in order to ban ocean dumping because the EPA "refused to implement the ocean dumping law." 13 Env't Rep. (BNA) 2110-11 (Mar. 25, 1983).

15. 451 U.S. 304 (1981).

16. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Supreme Court extended its holding in *Milwaukee* to include federal common law of nuisance claims against ocean dumping brought under the MPRSA because "[t]he regulatory scheme . . . is no less comprehensive. . . ." *Id.* at 22. See also, *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (the Clean Air Act preempts federal common law of nuisance claims in a suit alleging air pollution caused by releases from a hazardous waste site); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1148 (E.D. Pa. 1982) (RCRA and Superfund preempt federal common law of nuisance claims in an action for costs to clean up a city-owned hazardous waste dump).

17. Since the Byram achieved standing in 1974, this novel device has been used to bring lawsuits on behalf of a bird and a tree. See *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F. Supp. 985, 991 (D. Hawaii 1979) (suit brought under the Endangered Species Act by a bird, among other plaintiffs; the court, however, relied on the "standing" of other plaintiffs); *Ezer v. Fuchsloch*, 99 Cal. App.3d 849, 853, 863-

the Connecticut<sup>18</sup> and New York<sup>19</sup> courts, and evaluates the effectiveness of the litigation tool as a way to clean up a local river polluted by a village sewage treatment plant. Although the plaintiffs won their case, and although there have been some improvements in the river, time has not been on their side. More than twenty years have passed since the first efforts were made to clean up the Byram. The Note observes that while laws exist to prohibit pollution of this river, they have not been enforced.

C. Scott Vanderhoef looks at the current statutory and common law of New York as it applies to the experience of a private water purveyor in tapping the Ramapo Aquifer of Rockland County during a drought. The Comment proposes that the present statute governing groundwater withdrawals on Long Island<sup>20</sup> be amended to regulate this resource state-wide.

Steven Chananie compares the "taking" issue in New York and Connecticut under each state's coastal zone management program. These programs give the states the power to regulate and limit the development of privately owned land situated within their coastal boundaries. Although New York and Connecticut seem to differ in the way they determine what is a taking for the purposes of just compensation, the Comment concludes that the difference is more apparent than real. Unless there has been a practical confiscation of the property so that it cannot be put to any reasonable purpose or any economic use, the developer will not be able to prove that there has been a taking. Thus, each state will be relatively free to regulate the development of its coastal lands without being unduly burdened by the requirement of just compensation.

The issue closes with a review by Professor Nicholas A.

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64, 160 Cal Rptr. 486, 493 (1979) ("defendants were not entitled to a ruling that the tree in question had an independent 'right' to exist").

18. *Byram River v. Village of Port Chester*, 7 Env't Rep. Cas. (BNA) 1127 (D. Conn. 1974).

19. *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975).

20. N.Y. Envtl. Conserv. Law § 15-1527 (McKinney 1973 & Supp. 1982-1983).

Robinson of four books which explore different ways of incorporating environmental values into the land use decision-making process. Modern land use has evolved from unfettered development, to a system of zoning, to the imposition of environmental land use controls. Two books examine how the environmental impact assessment process only marginally promotes the sound use of land.<sup>21</sup> The other two books propose natural resource planning as a better way to promote ecologically sound development.<sup>22</sup>

These Articles, Notes, and Comments illustrate that the effort to implement environmental policies is not an easy task. More than likely the polluter will be a municipality, in the guise of the "people," or an industry, with a loyal constituency in the community, and the costs of compliance will have to be borne by taxpayers or passed on to consumers. Too often the debate over environmental protection is phrased as a choice between economic growth and preservation of a quality of life. The challenge to reconcile these two worthy goals has never been greater. The staff of the *Pace Environmental Law Review* enthusiastically joins in this debate and invites your participation.

*Janice Pargh, Class of '83*

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21. H. Boschken, *Land Use Conflicts: Organizational Design and Resource Management* (1982); F. Case & J. Gale, *Environmental Impact Review and Housing: Process Lessons from the California Experience* (1982).

22. R. Lemire, *Creative Land Development: Bridge to the Future* (1979); A. Palmer, *Toward Eden* (1981).