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# Hearing Reports Under the Environmental Conservation Law: Their Function, Preparation, and Importance

Daniel A. Ruzow & J. Langdon Marsh\*

## I. Introduction

The Department of Environmental Conservation (DEC) was created by the New York State Legislature in 1970 to carry out the environmental policy of New York.<sup>1</sup> Each year the Commissioner of DEC issues over 100 decisions and orders following quasi-judicial or adjudicatory proceedings conducted by DEC's Administrative Law Judges. The adjudicatory proceedings conducted by DEC fall into two broad categories: 1) administrative enforcement hearings<sup>2</sup> that are brought against persons who have allegedly violated New York's environmental laws, and 2) administrative permit or licensing hearings,<sup>3</sup> where an application for a permit is made

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This article is drawn from remarks made by the authors at a seminar for Administrative Law Judges of the N.Y.S. Department of Environmental Conservation conducted by the Environmental Law Committee of the Association of the Bar of the City of New York in April of 1984.

1. See generally N.Y. Env'tl. Conserv. Law § 1-0101 (McKinney 1984) (the environmental policy of New York). Under the Environmental Conservation Law, the head of the Department of Environmental Conservation is the Commissioner, who is appointed by the Governor, by and with the advice and consent of the Senate. The Commissioner holds office at the pleasure of the Governor by whom he was appointed, and until a qualified successor is appointed. *Id.* at § 3-0103.

2. See N.Y. A.P.A. §§ 301-307 (McKinney 1984) (Adjudicatory Proceedings); N.Y. Admin. Code tit. 6, § 622 (1978) (Uniform Enforcement Hearing Procedures, which are authorized by N.Y. Env'tl. Conserv. Law § 71-1709(8)).

3. See N.Y. A.P.A. § 401 (Licenses); N.Y. Env'tl. Conserv. Law § 70-0119 (Public Hearings); N.Y. Admin. Code tit. 6, § 624 (1981) (Permit Hearing Procedures, which

in order to undertake an activity regulated under the Environmental Conservation Law (ECL),<sup>4</sup> and it is contested by either DEC regulatory staff or an interested member of the public.

In each of these hearings, the Administrative Law Judge prepares a comprehensive hearing report that contains a summary of the proceedings, the findings of fact, and the conclusions drawn.<sup>5</sup> With rare exception, the Commissioner adopts the hearing report as the Department's decision, including adoption in full of its findings of fact and conclusions. Additionally, the Commissioner may expound upon matters raised in the hearing report or in the record in a manner which supplements or modifies statements, findings, or conclusions made by the Administrative Law Judge. Taken together, the Administrative Law Judge's hearing report and the additional comments made by the Commissioner constitute the final decision rendered by DEC.

Decisions which are issued following adjudicatory proceedings must comply with the requirements of the State Administrative Procedure Act (SAPA) § 307.<sup>6</sup> Subdivision 1 of this section provides in pertinent part that:

A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.<sup>7</sup>

The Commissioner of DEC relies heavily on the findings of fact and conclusions contained in the hearing reports and

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are authorized by N.Y. Env'tl. Conserv. Law § 70-0107(1)).

4. N.Y. Env'tl. Conserv. Law §§ 1-0101 to 72-0602.

5. N.Y. Admin. Code tit. 6, § 624.7(d).

6. N.Y. A.P.A. § 307 (Decisions, determinations and orders); *see also id.* § 401 (Licenses).

7. *Id.* § 307(1).

such reports are therefore used to decide important cases and to satisfy SAPA's requirements. Accordingly, Administrative Law Judges have a critical role in the development of the administrative law of the Department and must ensure that the hearing reports continue to reflect the high standards expected by the Commissioner, the DEC, and the public at large.

This Article explores the principal functions served by the administrative hearing reports that are prepared by the Administrative Law Judges within DEC, and also reviews judicial challenges to administrative decisions which may be based upon the administrative hearing reports.

## II. Functions of the Hearing Report

A hearing report serves four principal functions:

- 1) as a vehicle for the adjudication of contested factual and legal issues;
- 2) as a main basis for regulatory decision making by the Commissioner;
- 3) as a final environmental impact statement (FEIS) required by the State Environmental Quality Review Act,<sup>8</sup> but only when DEC is the lead agency and a draft environmental impact statement (DEIS) has already been submitted as a part of the permit application;<sup>9</sup> and
- 4) as a legal and technical precedent in DEC's administration of environmental laws.

### A. Adjudication

The resolution of the facts and legal issues raised in

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8. N.Y. Env'tl. Conserv. Law § 8-0109(2) (McKinney 1984).

9. N.Y. Env'tl. Conserv. Law §§ 8-0101 to -0117 (the requirements governing the preparation, filing, and consideration of environmental impact statements); N.Y. Admin. Code tit. 6, § 617 (1978) (implementing regulations, which are authorized by N.Y. Env'tl. Conserv. Law § 8-0113). The Permit Hearing Procedures that are outlined in the *N.Y. Admin. Code* also contain provisions regarding preparation of the DEIS. See N.Y. Admin. Code tit. 6, §§ 624.3, 624.6, 624.7, 624.10, 624.15, 624.16 (1981).

DEC's permit and enforcement hearings is one of the greatest responsibilities of the Department's Administrative Law Judges. They fulfill this responsibility by assuring that a complete evidentiary record is developed, and by preparing written findings of fact and conclusions relating to evidence produced in the administrative hearing record. Through careful and time consuming analytical study, the Administrative Law Judges adjudicate the contested issues of fact and law, and set forth the results of their analysis in the hearing report.

DEC's adjudicatory proceedings have grown more complicated as its regulatory framework has expanded and as the complexity and sophistication of the scientific, engineering, and technical world in which DEC operates have grown. New statutes have been enacted almost annually since the codification of the ECL in 1972.<sup>10</sup> DEC's regulations have similarly grown in volume and complexity in an attempt to contend with each new environmental problem and crisis. Regulations governing solid waste disposal, for example, have expanded from a few pages in 1972 to hundreds of pages in 1985 relating to transportation, construction, operation, and monitoring requirements.<sup>11</sup>

The liability for violations of the ECL in terms of penalties and the costs of remediation has also expanded. For example, the civil penalties which the Commissioner can assess for hazardous waste violations are now as high as \$25,000 per violation and \$50,000 for a second violation.<sup>12</sup> Unfortunately,

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10. See Explanation to N.Y. Evtl. Conserv. Law at III.

11. See N.Y. Admin. Code tit. 6, §§ 360-373 (1985).

12. N.Y. Evtl. Conserv. Law § 71-2705. Note that § 71-2705(1) also provides, in the instance of a first violation "an additional penalty of not more than twenty-five thousand dollars for each day during which such violation continues . . . ." *Id.* In addition, injunctive relief, revocation or suspension of a permit, or denial of a pending permit renewal application may be imposed upon the violator. A comparable penalty of fifty thousand dollars exists for a second violation. Criminal sanctions, as provided in § 71-2705(2), include a possible misdemeanor charge along with a fine. *Id.* Felony provisions were enacted in 1981. See §§ 71-2707 to -2721.

According to the McKinney's Practice Commentary following § 71-2707 and written by Philip Weinberg, "This and the sections through 71-2721 make the unauthorized knowing possession or disposal of hazardous waste, and related crimes, class D and class E felonies . . . They indicate the most serious intent on the part of the Legislature to enforce the hazardous waste articles stringently, in recognition of the

the exposure to such potential civil liability almost guarantees the presence of defense attorneys who are skilled in trial strategies that are designed to delay administrative adjudication as well as to defeat administrative charges.

A new complicating factor in fact finding is the growing trend towards consideration of scientific facts and judgments on acceptable levels of risk. For example, an "ultimate fact"<sup>13</sup> to be found by an Administrative Law Judge may be whether a permit limitation is acceptable if it does not reduce the risk from toxic contamination to a level which can feasibly or economically be met, even if the scientific evidence is inconclusive. The adjudicatory or fact finding process is further complicated by existing regulatory standards which are often subjective and readily capable of varied interpretation. Given the nature of the environmental sciences, often the only certainty that can be expected is that no two experts will share the same opinion. Nevertheless, findings of fact must be made.

Kenneth Culp Davis, in his *Administrative Law Text*, differentiates between two types of facts: ultimate facts and basic facts. An ultimate fact is one which is usually expressed in the language of the statutory standard. For example, "the rate is reasonable"; "the action is in the public interest."<sup>14</sup> Today, we would generally call these facts the conclusions. The basic facts are those facts gleaned from the evidence which support the ultimate fact or conclusion.<sup>15</sup> According to Davis,

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severe consequences of improper handling and disposal of these substances." *Id.* § 71-2707 commentary. Depending on the offense charged, penalties under the felony enforcement provisions include fines of \$100,000 or double the amount of the defendant's gain, whichever is higher, or, following a hearing, the cost of restoration, a possible prison term, or a combination of these. N.Y. Env'tl. Conserv. Law § 71-2721.

13. K. Davis, *Administrative Law Text*, § 16.04 (1972).

14. *Id.*

15. *Id.* Another administrative law commentator also explains that:

[I]t is an indispensable prerequisite to effective judicial review that the agency's decision set forth the findings of basic fact, as well as the conclusions of ultimate fact and conclusions of law derived therefrom. . . . Obviously, unless the findings of basic fact are stated, the reviewing court cannot effectively discharge its responsibilities in determining whether there was substantial evidence to support the basic findings, or whether the basic findings supported the conclusion of ultimate fact. . . . It is not easy, of course, to

[f]acts might theoretically be lined up on a scale from the most specific to the most general. At one end is each statement of each witness, then a summary of the testimony of each witness, then a summary of the testimony and other evidence on each side, then the basic findings, and at the opposite end the ultimate findings. Courts do not want agencies to include detailed summaries of testimony in their findings; they want what they call the basic facts.<sup>16</sup>

In the context of DEC's adjudication of multi-party, multi-issue permit applications, findings of fact tend to be extensive and multi-tiered. For example, in order to predict whether air emissions will meet federal standards, findings may be required on the proper modeling techniques, prevailing wind velocities and directions, topographical features, stack heights, plume characteristics, etc. Conflicting expert testimony may be present in the record concerning any or all of these facts. Determining which facts should be relied on is essential in order for the ultimate decision to be rendered. However, findings need not be made on every subsidiary evidentiary fact, argument, or immaterial issue.<sup>17</sup> Where multiple experts testify and reach different conclusions based upon the same facts, credibility of the witness may play an important role in resolving the conflicts between the experts. Where such credibility is an important factor, it may be necessary to recite this fact in the report.<sup>18</sup>

Administrative Law Judges' conclusions play a critical role in the adjudication process. The compliance of a permit application with the applicable statutory and regulatory standards is resolved in the conclusions. In enforcement actions,

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determine in every case which are the 'ultimate' and which the 'basic' facts. Whether an individual was employed by a company might be a basic fact under some circumstances; but in a different situation, this issue might be the ultimate point in controversy.

F. Cooper, *State Administrative Law* 465, 467, 475 (1965).

16. Davis, *supra* note 13, § 16.04.

17. L. Modjeska, *Administrative Law Practice and Procedure* 161 (1982); 2 Fed. Proc., Law. Ed. § 2:183 (1981); 5 Ad. L. (MB) § 39.05, at 39-21 (1983).

18. See *Envtl. Defense Fund v. Flacke*, 96 A.D.2d 862, 465 N.Y.S.2d 759 (1983).

the Administrative Law Judge's conclusions address whether or not a violation has taken place, the extent of the offender's penal liability, and the appropriateness of remediation. In writing conclusions, the Administrative Law Judges have the opportunity and responsibility to explain the means by which they arrived at a conclusion regarding regulatory compliance. They must weave together a myriad of findings of fact (which at times may seem to have no connection with each other) into a rational, logical and reasonable explanation. The more complex issues have a greater need for facts,<sup>19</sup> and the Administrative Law Judge therefore has a greater responsibility to explain the basis of the conclusion by tying together the pertinent facts as they are found.

### B. *Basis for Decision Making*

The second important function of the hearing report is to provide a basis for the Commissioner to reach a final decision.<sup>20</sup> As noted above, the Commissioner relies heavily on the hearing report which generally provides the Commissioner with a road map into the record of the adjudicatory proceeding.<sup>21</sup> It provides an essential link to the record by identifying

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19. See *Shermack v. Bd. of Regents*, 64 A.D.2d 798, 799, 407 N.Y.S.2d 926, 928 (1978).

20. In enforcement-related hearings, the hearing officer [Administrative Law Judge] must prepare and submit his report to the Commissioner within 30 days of the close of the hearing. N.Y. Admin. Code tit. 6, § 622.13. The Commissioner then has 30 days after receipt of the hearing report to make a final determination based upon the record that is submitted to him. *Id.* § 622.14(a). In permit-related hearings, although there is no specific period of time designated within which the Administrative Law Judge must forward his report to the Commissioner, *see id.* § 624.7(d), the Commissioner must make his decision within 60 days after the official closing of the hearing record. *Id.* § 624.15(a).

21. The regulations concerning permit hearings specifically state that "[t]he Commissioner's decision shall be made upon consideration of the report and complete record, supported by substantial evidence and shall be in writing stating the reasons for the action taken." *Id.* § 624.15(b). The regulations concerning enforcement hearings state in relevant part that, "[t]he final determination shall be embodied in a final order which shall contain findings of fact and conclusions of law or reasons for the final determination . . . ." *Id.* § 622.14(b). It is therefore important that an Administrative Law Judge provide an evidentiary basis in his report so that the Commissioner may justifiably rely upon the report when making his final determination.



the parties, and summarizing their principal arguments, the legal issues to be decided, the evidence found by the Administrative Law Judge to be persuasive, important policy issues, and varying interpretations of departmental regulations that are asserted by the parties.

In the process of adjudicating the contested factual and legal issues, it is obvious, but worthy of repetition, that the Administrative Law Judges must base their judgments on evidentiary matters in the record. Ultimately, as discussed below, the absence of supporting evidence can defeat a decision notwithstanding an erudite recital of the importance and true meaning of the statute. As a practical matter, the Commissioner will not know whether every finding is supported by evidence in the record and therefore has entrusted the creation and control of the record and its ultimate review to the Administrative Law Judge.

In the process of distinguishing between those facts which must be found and those which, while interesting and form a part of the evidentiary record, are not critical to the determination of the statutory requirements or issues identified for adjudication, utilization of the briefs submitted by the parties may play an important role in an adjudicatory proceeding. Since the issues focused on by the parties in post-hearing briefs are more than likely to be the ones critical to the ultimate determination, using the briefs as a checklist of the factual and legal issues in contention appears to be a useful practice.<sup>22</sup>

### C. *Use of the Hearing Report as the FEIS*

In 1975, New York enacted the State Environmental Quality Review Act (SEQRA),<sup>23</sup> which is "considered by many to be an environmental bill of rights, establishing environmental values as equal to other public values in govern-

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22. The regulations concerning permit hearings provide in pertinent part that, "[a]t the concluding session of the hearing, the ALJ will determine whether to allow the submission of written post-hearing briefs and proposed findings of fact." N.Y. Admin. Code tit. 6, § 624.7(a)(7).

23. N.Y. Env'tl. Conserv. Law § 8-0101.

mental action.”<sup>24</sup> The act was created by using the National Environmental Policy Act of 1969<sup>25</sup> and the miniature versions of this statute enacted in California<sup>26</sup> and Washington<sup>27</sup> as guidelines.<sup>28</sup>

Since legislators were uncertain of the changes that would be caused by the enactment of SEQRA, its full implementation was twice postponed until November 1, 1978, when it finally became effective for all levels of government.<sup>29</sup> Under the law, DEC was charged with adopting regulations for the implementation of SEQRA,<sup>30</sup> and accordingly DEC issued its final set of regulations on September 1, 1978.<sup>31</sup>

Of the three basic mandates imposed by SEQRA, the third and most widely known mandate is that agencies or applicants for permits or approvals prepare an environmental impact statement (EIS) “on any action they propose or approve which may have a significant effect on the environment.”<sup>32</sup> To avoid multiple, uncoordinated environmental re-

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24. Marsh, *Symposium on the N.Y.S. Env'tl. Quality Review Act Introduction—SEQRA's Scope and Objectives*, 46 Alb. L. Rev. 1097 (1982).

25. 42 U.S.C. § 4321 (1982).

26. Cal. Pub. Res. Code §§ 21000-21177 (West 1977 & Supp. 1985).

27. Wash. Rev. Code Ann. §§ 43.21C.010 to .914 (1983 & Supp. 1985).

28. Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 Alb. L. Rev. 1155, 1157 (1982).

29. Marsh, *supra* note 24, at 1105.

30. N.Y. Env'tl. Conserv. Law § 8-0113. However, DEC has no authority to enforce the regulations it has adopted. Such responsibility has been left to the courts, “acting at the request of individual citizens, public interest groups, businesses and units of government affected by particular actions, to require that the regulations be obeyed.” Marsh, *supra* note 24, at 1106.

31. N.Y. Admin. Code tit. 6, § 617. “These regulations took effect November 1, 1978. A minor amendment was adopted effective December 12, 1978.” Marsh, *supra* note 24, at 1105 n.46.

32. N.Y. Env'tl. Conserv. Law § 8-0109(2). The first basic mandate imposes an affirmative duty on local and state agencies to

review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this article [SEQRA], and shall recommend or effect such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this article.

*Id.* § 8-0107.

views and the possibility that each agency involved with a particular action would make a different determination of significance, the "lead agency" concept was developed by the legislature.<sup>33</sup>

Guidance about how to choose a lead agency is available in DEC's regulations.<sup>34</sup> The regulations also provide a dispute resolution mechanism which permits the DEC Commissioner to act as an arbitrator between several agencies, whether or not DEC is an involved agency in the matter.<sup>35</sup> If the agencies cannot agree, the Commissioner will choose the lead agency based upon a consideration of priorities detailed in the DEC regulations.<sup>36</sup>

When DEC is the lead agency under SEQRA and a DEIS has been prepared and submitted by an applicant, DEC has placed the responsibility for preparation of the FEIS on the Administrative Law Judge when the application is made the subject of an adjudicatory proceeding.<sup>37</sup> This added responsibility broadens the scope of relevant inquiry beyond DEC's traditional program or permit areas. When a DEIS accompanies an application, the issues encountered by DEC may concern land use, neighborhood character, public safety, and historic preservation, among others. All must be addressed in the hearing report.<sup>38</sup>

The hearing report that will serve as the FEIS must satisfy additional requirements to those enumerated above. These include utilizing a topical organization which facilitates reference to various portions of the report, and responds to

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The second basic mandate is that

[a]gencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic, and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

*Id.* § 8-0109(1).

33. Marsh, *supra* note 24, at 1110; see N.Y. Env'tl. Conserv. Law § 8-0111(6).

34. N.Y. Admin. Code tit. 6, § 617.6(d).

35. *Id.* § 617.6(e).

36. *Id.*

37. See *id.* § 624.7.

38. See *id.* § 617.11.

substantive comments on the DEIS whether or not the matters are adjudicated. For those matters which are adjudicated, findings of fact and conclusions should be structured so that they are in fact responsive to the comments raised. For example, if the DEIS finds evidence of adverse environmental effects that may be caused by the proposed action, the FEIS under SEQRA must "fully review adverse environmental effects and identify alternatives, but viable steps for mitigating those effects must also be discussed."<sup>39</sup> For those matters which are not adjudicated, the applicant's and other parties' responses must be clearly labeled and identified as part of the FEIS.

The FEIS will also serve as the environmental record for all other involved agencies that have decision-making roles. Accordingly, organization of the report should attempt to facilitate use of the FEIS by these agencies to the greatest extent possible.

Lastly, the hearing report will provide the factual basis for the "findings" required to be made under SEQRA<sup>40</sup> by the Commissioner. The conclusions must address all contested issues, including economic and social matters, in addition to the environmental issues that arise from specific regulatory requirements and those issues arising from SEQRA's supplemental authority.<sup>41</sup> Since the EIS process mandated by SEQRA is enforced by judicial review of the agency action, the "lead agency must compile a careful record documenting the EIS process. This record is the basis for determining both the procedural correctness and the substantive reasonableness of the agency's decision."<sup>42</sup>

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39. Robinson, *supra* note 28, at 1173.

40. N.Y. Env'tl. Conserv. Law § 8-0109(8); N.Y. Admin. Code tit. 6, § 617.9.

41. See *Town of Henrietta v. Flacke*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (1980).

42. Robinson, *supra* note 28, at 1174 (citing *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 275-76, 552 P.2d 674, 679 (1976); *Wisconsin's Env'tl. Decade v. Public Serv. Comm'n*, 79 Wis. 2d 409, 419, 256 N.W.2d 149, 155 (1977)).

#### D. *Hearing Reports as Precedent*

Hearing reports also serve as important legal and technical precedent for DEC administrative action. As discussed below, there are relatively few judicial decisions which discuss or interpret the ECL and its implementing regulations. The courts' deference to the expertise of administrative agencies, coupled with the substantial evidence rule governing judicial review,<sup>43</sup> has resulted in even fewer cases which evaluate the reasonableness of DEC's technical requirements. The hearing reports therefore provide a rare opportunity for the regulated community to obtain DEC's viewpoint on a variety of technical matters.

Due to a dearth of generally available legal precedent regarding the ECL, the value to the regulated community of DEC's administrative determinations cannot be overstated. Indeed, recent amendments to SAPA now require the maintenance by state agencies of an index to all decisions issued after adjudicatory proceedings by both name and subject.<sup>44</sup> Recent law review articles have highlighted the existence and importance of DEC's administrative decisions for purposes of guidance in implementing SEQRA.<sup>45</sup> Members of the environmental legal community who regularly practice before DEC have begun to raise prior decisions of DEC as precedent in subsequent proceedings, and urge adherence to the prior holdings established therein on the basis of stare decisis.

DEC now widely distributes the Commissioner's decisions, including the hearing reports, within DEC in order to promote uniformity and consistency between programs and

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43. See *Howard v. Wyman*, 28 N.Y.2d 434, 438, 271 N.E.2d 528, 529-30 (1971); *Town of Hempstead v. Flacke*, 82 A.D.2d 183, 441 N.Y.S.2d 487 (1981); see also N.Y. Civ. Prac. Law §§ 7801-06 (McKinney 1985); N.Y. A.P.A. § 306; 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 379 N.E.2d 1183 (1978) (discussion of the "substantial evidence" rule).

44. N.Y. A.P.A. § 307(3) (added by chapter 504 of the laws of 1983).

45. Ulasewicz, *The Department of Environmental Conservation and SEQRA: Upholding its Mandates and Charting Parameters for the Elusive Socio-Economic Assessment*, 46 Alb. L. Rev. 1255 (1982); Levine, *The New York State Environmental Quality Review Act of 1975: An Analysis of the Parties' Responsibilities in the Review/Permit Request Process*, 12 Fordham Urb. L. J. 1 (1984).

regions. The hearing reports and ensuing decisions often involve novel interpretations of regulations that have wide applicability throughout DEC, and their distribution aids in the uniform administration of DEC's environmental mandates.

### III. Discussion: Challenges to Administrative Hearing Reports

#### A. "Older" Law and Decisions

Approximately thirty percent (30%) of the decisions and orders issued by the Commissioner each year are challenged in judicial proceedings brought pursuant to Article 78 of the CPLR.<sup>46</sup> Petitions challenging these decisions normally allege that the decision was arbitrary or capricious and/or was not supported by substantial evidence.<sup>47</sup> There are only a handful of cases either decided or pending which have specifically challenged the adequacy of the findings of the Administrative Law Judge. In three of the decided cases,<sup>48</sup> the adequacy of the hearing reports was upheld. However, the petitioners did not specifically rely on the requirements of SAPA § 307.1 as the basis for their challenge.

SAPA was enacted in 1975 and the provisions of § 307.1 have not been the subject of extensive litigation. The few cases decided are discussed below. By comparison, the provi-

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46. N.Y. Civ. Prac. Law §§ 7801-06 (McKinney 1985). Section 7801 states in relevant part that, "[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article." *Id.* § 7801. Unless otherwise provided by law, a determination may not be challenged by a proceeding under this article if it is *not* final, or can be adequately reviewed by appeal to a court, or some other body, or officer, where such party is expressly authorized by statute to rehear the matter. However, if the determination was made on rehearing, or a rehearing was denied, or the time in which a rehearing can be requested has elapsed, an Article 78 proceeding may ensue. Lastly, a determination may not be challenged under an Article 78 proceeding if it was made in a civil or criminal matter, "unless it is an order summarily punishing a contempt committed in the presence of the court." *Id.*

47. N.Y. Civ. Prac. Law § 7803(3), (4).

48. See *Lovett v. Flacke*, 83 A.D.2d 718, 442 N.Y.S.2d 635 (1981); *Env'tl. Defense Fund v. Flacke*, 96 A.D.2d 862, 465 N.Y.S.2d 759 (1983); *Power Auth. of the State of N.Y. v. Flacke*, 94 A.D.2d 69, 464 N.Y.S.2d 252 (1983).

sions of the federal Administrative Procedure Act (APA),<sup>49</sup> set forth in 5 U.S.C. § 557, contain an analogous requirement for findings and have been the subject of many federal court decisions.<sup>50</sup>

Prior to the codification of the requirement for written findings and conclusions, a common law requirement was adopted by federal and state courts. Kenneth Culp Davis, in his *Administrative Law Text*, identifies "practical reasons" for the evolution of the common law requirement of findings: "The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction."<sup>51</sup>

In an early U.S. Supreme Court decision concerning the challenge of an Interstate Commerce Commission rate determination, the Court had difficulty in understanding the basis for the Commission's determination. Justice Cardozo explained,

[t]he difficulty is that it [the Commission] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.<sup>52</sup>

In an early New York case, *Elite Dairy Products v. Ten*

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49. 5 U.S.C. §§ 551-559 (1982).

50. See, e.g., 5 U.S.C.S. § 557 annot. cases (Law. Co-op. 1985), 5 U.S.C.A. § 557 annot. cases (West 1985). A similar findings requirement for federal judges deciding civil cases without juries, Fed. R. Civ. P. 52, has generated a large body of federal case law involving the adequacy of findings by the courts. See e.g., Fed. R. Civ. P. 52 annot. cases (West 1985).

51. K. Davis, *Administrative Law Text* § 16.03 (1972).

52. *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935).

*Eyck*,<sup>53</sup> the Court of Appeals reviewed a determination under a statute which provided that milk licenses could not be granted

unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that issuance of the license is in the public interest.<sup>54</sup>

As noted by Davis, “[f]or the court to review the bulky record without knowing which of the six factors the commissioner found to be lacking would obviously be wasteful.”<sup>55</sup> The Court of Appeals went on to hold that, “[o]nly after the commissioner has made findings of fact can the court decide whether the findings are sustained by the evidence . . . .”<sup>56</sup>

In another important New York case involving an “ancestor” Commission of DEC, a decision by the Water Power and Control Commission was overturned for failure to make factual findings.<sup>57</sup> The findings made by the Commission were limited to the statutory requirements set forth in the Conservation Law § 523 (predecessor to ECL § 15-1503). The court held that,

[i]n the absence of separate findings of fact, the conclusions last quoted above, although cast in language suggested by the statute . . . cannot be regarded as sufficient to support the Commission’s determination. . . . It [the applicant] is entitled to findings by which it may know upon what factual basis the Commission’s determination.

Findings of fact in support of decisions by courts and administrative boards alike serve to give assurance to par-

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53. 271 N.Y. 488, 3 N.E.2d 606 (1936).

54. *Id.* at 494.

55. Davis, *supra* note 51, § 16.03.

56. *Elite Dairy Products*, 271 N.Y. at 498.

57. *New York Water Service Corp.*, 283 N.Y. 23, 27 N.E.2d 221 (1940).



ties concerned that the decisions are based upon evidence of record and were not reached arbitrarily or influenced by extra-legal considerations. Where, as in this instance, a statutory review of the decision may be had . . . findings of fact in some form are essential to enable the parties and any appellate court intelligently to determine whether the decision follows as a matter of law from the facts stated as its basis and whether the findings of fact have any substantial support in the record.<sup>58</sup>

The Court of Appeals' decision, holding that mere statutory conclusions are insufficient, has been reaffirmed several times over the years.<sup>59</sup>

#### B. "More Recent" Law

In *Montauk Improvement Inc. v. Proccacino*,<sup>60</sup> the Court of Appeals held that,

[a] court cannot surmise or speculate as to how or why an agency reached a particular conclusion. Failure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review . . . .<sup>61</sup>

This rule has also been applied by the Court of Appeals to zoning cases by requiring zoning boards of appeal to make written findings.<sup>62</sup>

The above discussion makes patently clear the requirement that findings of fact must be made, and that in order for such findings to be sustained, they cannot merely parrot statutory requirements. However, there are fewer cases with even less consistency on the question of the degree of specificity

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58. *Id.* at 30.

59. See *Montauk Improvement Inc. v. Proccacino*, 41 N.Y.2d 913, 363 N.E.2d 344 (1977); *Simpson v. Wolansky*, 38 N.Y.2d 391, 343 N.E.2d 274 (1975); *Barry v. O'Connell*, 303 N.Y. 46, 100 N.E.2d 127 (1951).

60. 41 N.Y.2d 913.

61. *Id.* at 914.

62. See *Syracuse Aggregate v. Weise*, 51 N.Y.2d 278, 414 N.E.2d 651 (1980).

necessary for findings of fact. On the subject of ultimate facts, the Supreme Court has explained that the "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact."<sup>63</sup> Nevertheless, according to the Court in *United States v. Pierce Auto Freight Lines*, an ultimate finding is not enough in the absence of a basic finding to support it.<sup>64</sup> On the subject of basic findings, which are somewhere between ultimate findings and a summary of each bit of evidence,<sup>65</sup> a federal court of appeals has held that "[t]he decisions require a commission in a quasi-judicial proceeding to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings . . . ."<sup>66</sup> According to the Supreme Court, "findings based on the evidence must embrace the basic facts which are needed to sustain the order."<sup>67</sup> Lastly, the Court in *Pierce Auto Freight Lines* has found: "given that the report contains all the essential findings required . . . the Commissioner is not compelled to annotate to each finding the evidence supporting it."<sup>68</sup>

Accordingly, when the findings are too general, the reviewing court may have difficulty filling the gap between the evidence and the general findings; when they are too detailed, the court may want something by way of 'basic findings' in the nature of a summary.<sup>69</sup>

There are several recent New York cases which provide some more specific guidance on the adequacy of findings of fact. In *Shermack v. Bd. of Regents*,<sup>70</sup> decided under SAPA § 307, the petitioner's license to practice pharmacy was revoked following a finding that he dispensed prescription drugs without a prescription. Petitioner claimed that he had contacted the prescribing doctor by phone and had received an oral pre-

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63. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937).

64. 327 U.S. 515, 533 (1946).

65. Davis, *supra* note 51, § 16.04.

66. *Capital Transit Co. v. Pub. Util. Comm'n*, 213 F.2d 176, 187 (D.C. Cir. 1953), *cert. denied*, 348 U.S. 816 (1954).

67. *Morgan v. United States*, 289 U.S. 468, 480 (1936).

68. 327 U.S. at 529.

69. Davis, *supra* note 51, § 16.04.

70. 64 A.D.2d 798, 407 N.Y.S.2d 926 (1978).

scription. The findings of fact recited that on the five days in question, petitioner, without a prescription, dispensed certain drugs in an unlabeled container. While it affirmed the revocation, the court held that, "it would have been better if the respondent [Board of Regents] had explicitly commented on the petitioner's defense, but in the relatively simple context of this case the factual findings made are minimally adequate."<sup>71</sup>

The Appellate Division's use of the expression "minimally adequate" is important to note since it implies that the more complicated the facts, the greater the extent of findings necessary to support the ultimate determination.

In *Mohawk Airlines, Inc. v. Tully*,<sup>72</sup> the airline asserted that it was not liable for use taxes on inventory that is purchased out of New York State and shipped to Pittsburgh. The airline placed in evidence a copy of a letter to its vendors directing them to alter the shipping of certain parts from Utica to Pittsburgh, as well as an affidavit from the individual who mailed the letter. The finding of fact concerning this transaction reads as follows:

(14) Applicant Allegheny contends that parts destined for New York and included in the Sales Tax Bureau's Audit were never received in New York. A letter allegedly sent to suppliers which advised them to divert shipments of parts scheduled for delivery to Utica, New York, to a point outside the State, was offered in evidence.<sup>73</sup>

After reviewing what was obviously a mere summary of the evidence in the record, Appellate Division ruled that "[p]aragraph 14 is plainly not a finding of fact (see State Administrative Procedure Act, § 307, subd. 1) and the commissioner never even resolved the issue in its decision. On remand, the question must be decided."<sup>74</sup>

In another Appellate Division case involving alleged vio-

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71. *Id.* at 799.

72. 75 A.D.2d 249, 429 N.Y.S.2d 759 (1980).

73. *Id.* at 253.

74. *Id.*

lations by a nursing home of the State Hospital Code, the court observed:

For example, as to finding 7kk (violation of 731.2[b][6] [orientation to be given to nurses]) the department's expert (whose testimony is cited in finding 7kk) thought the nursing orientation was inadequate because the 'orientation program was the same for RN's, LPN's, and nursing assistants.' If the Commissioner's finding 7kk is based on this group orientation procedure, it would seem to depend on a subjective interpretation of section 731.2[b][6], which does not explicitly require separate orientations for each class of nurses. The Commissioner's finding may be based on other portions of the transcript cited in finding 7kk, but such imprecise findings make impossible petitioners' task of challenging the reasonableness of the finding, especially when as here, it is one of over 50 findings based on some 2,700 pages of testimony.<sup>75</sup>

An obviously incensed court went on to rule that,

[a]lthough ordinarily administrative determinations vacated for lack of specificity are remanded to the agency with an opportunity for it to clarify its findings . . . in this case, given the great burden suffered by petitioners in defending against the myriad (for the most part miniscule) charges, the respondent is foreclosed from attempting to remedy its vague findings.<sup>76</sup>

In two recent cases involving DEC, the adequacy of the Department's findings was upheld. In *Lovett v. Flacke*,<sup>77</sup> a water supply decision was challenged on the basis of an asserted lack of substantial evidence. In this case, two hydrogeologists testified—one for the applicant and one for an intervenor—concerning the adequacy of the water supply sought to be tapped. The finding by the Administrative Law Judge as to

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75. *Koelbl v. Whalen*, 63 A.D.2d 408, 413, 406 N.Y.S.2d 621, 624, *appeal denied*, 413 N.Y.S.2d 1026 (1978).

76. *Id.*

77. 83 A.D.2d 718, 442 N.Y.S.2d 635 (1981).

the adequacy of the supply was based upon the account of the applicant's hydrogeologist. The testimony of the intervenor's hydrogeologist was *expressly* rejected by the Administrative Law Judge with a justification. On appeal, the court held that the "choice of conflicting expert testimony in this area was properly within the discretion of the administrative agency."<sup>78</sup> The express rejection by the Administrative Law Judge of the intervenor's expert witness testimony avoided judicial usurpation of administrative functions.<sup>79</sup> Failure to have explained why the hydrogeologist's testing was rejected could have resulted in a remand to DEC.<sup>80</sup>

In *Env'tl. Defense Fund v. Flacke (EDF)*,<sup>81</sup> the adequacy of an FEIS prepared by the Administrative Law Judge concerning the coal conversion of the Orange and Rockland Utilities Lovett facility was challenged. Specifically challenged was the failure to respond in the Hearing Report/FEIS to testimony of certain witnesses concerning impacts on the Hudson Highland region due to increased acidification.<sup>82</sup> The Appellate Division, after enumerating various references to findings and conclusions in the hearing report dealing with acid precipitation and its impacts throughout portions of the Northeast, held that ECL § 8-0109.2 does not require that

the FEIS summarize and respond to the testimony of every witness presented at these hearings consuming over 7,000 pages of transcript. The FEIS, after its extensive analysis, arrives at the conclusion that the impact of increased sulfur deposition would be minimal. As noted by the United States Court of Appeals, Ninth Circuit, 'the [environmental impact] statement need not achieve scientific unanimity on the desirability of proceeding with the proposed action . . . .'<sup>83</sup>

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78. *Id.* at 719.

79. *See* Davis, *supra* note 51, § 16.05.

80. *See* Harborlite Corp. v. ICC, 613 F.2d 1088 (D.C. Cir. 1979).

81. 96 A.D.2d 862, 465 N.Y.S.2d 759 (1983).

82. *Id.* at 863.

83. *Id.* at 863 (citing *Life of the Land v. Brinegar*, 485 F.2d 460, 473 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974)).

The adequacy of the hearing report in terms of compliance with SAPA § 307.1 was not raised by the petitioner.

Aside from the cases described above, no New York cases have been found which specifically require that the basis for rejection of testimony be stated in the findings. However, notwithstanding the absence of such precedent, where credibility plays an important role in the determination of the weight of testimony of a witness or between two or more witnesses, it would certainly be beneficial to both the Commissioner and the reviewing courts for the Administrative Law Judges to set forth the bases of their reasoning in the findings of fact or the conclusions.<sup>84</sup>

As a final note, current U.S. Court of Appeals cases for the Third Circuit involving Social Security disability benefits have required federal Administrative Law Judges to explain in their findings the basis for their rejection of relevant evidence or conflicting probative evidence in the record. For ex-

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84. In *Power Auth. of N.Y. v. Flacke*, 94 A.D.2d 69, 464 N.Y.S.2d 252 (1983), petitioners challenged the validity of a DEC determination which concluded that the Authority's proposed hydroelectric-pumped storage facility in Prattsville, New York would violate state water quality standards and effluent limitations. As a result of its determination, DEC denied the certification of the Authority's proposed facility. Thus, the Federal Regulatory Commission (FERC) was prohibited by § 401 of the Federal Water Power and Control Act of 1972, as amended by the Clean Water Act of 1977, from granting the Authority a license for the proposed facility absent certification that it would not cause any discharge into the navigable waters.

Upon oral argument of the case, counsel for petitioners argued that the Administrative Law Judge who presided over the DEC certification hearing failed to rule upon "any of the Authority's proposed findings of fact or even acknowledge that they were submitted, thereby violating SAPA § 307(1) as well as Section 624.7(d) of DEC's own regulations." Brief for Petitioner at 67. Petitioner's counsel also contended that the Administrative Law Judge made no specific references to the record in his Findings and Conclusions (except to certain attached exhibits in the appendices to the Decision), and therefore the Authority could "only guess at what portions of the evidence (if any) Respondents had in mind when they made their Decision." *Id.* at 68.

Lastly, petitioners argued that a reviewing court must examine the record as a whole to determine if the administrative agency's Decision was based on substantial evidence. *Id.* at 92. The implication was that the Administrative Law Judge failed to adequately assess the credibility of the petitioner's expert witness testimony since he did not expressly state the basis for its rejection in his report. This point, however, was not addressed in the court's decision, which originally held in favor of the petitioners, but was subsequently reversed by the Court of Appeals in *Power Auth. of N.Y. v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726 (1983).

ample, in *Gober v. Matthews*,<sup>85</sup> in its decision remanding the case before it to the agency for a new hearing, the court held that

unless the Secretary has analyzed all evidence and has sufficiently explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of the court's 'duty to scrutinize the record as a whole to determine whether the conclusions reached are rational.'<sup>86</sup>

Similarly, in *Cotter v. Harris (I)*,<sup>87</sup> the court, in formulating its decision that the Secretary's determination was not based on substantial evidence, stated that

[t]here are cogent reasons why an administrative decision should be accompanied by a clear and satisfactory explanation of the basis on which it rests. Chief among them is the need for the appellate court to perform its statutory function of judicial review. A statement of reasons or findings also helps to avoid judicial usurpation of administrative functions, assures more careful administrative consideration, and helps the parties plan their cases for judicial review.<sup>88</sup>

The court went on to note that,

we need from the ALJ [Administrative Law Judge] not only an expression of the evidence s/he considered which supports the result, but also some indication of the evidence which was rejected. In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored.<sup>89</sup>

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85. 574 F.2d 772 (3rd Cir. 1978).

86. *Id.* at 776 (citing *Arnold v. Sec'y of Health, Educ. & Welfare*, 567 F.2d 258, 259 (4th Cir. 1977)).

87. 642 F.2d 700 (3rd Cir. 1981).

88. *Id.* at 704-05 (citing K. Davis, *Administrative Law Treatise* § 16.05 (1958)).

89. *Id.* at 705.

On motion for rehearing of claimant's appeal,<sup>90</sup> the court found that its decision in *Cotter* (I) does not place an "onerous burden" on the Administrative Law Judge and that the

opinion simply requires that the ALJ indicate that s/he has considered all the evidence . . . and provide some explanation of why s/he has rejected probative evidence which would have suggested a contrary disposition . . . . The court's opinion does not require the ALJ to undertake any additional inquiry, but merely to explain the basis for the decision to reject evidence which s/he has already made.<sup>91</sup>

In *Stewart v. Sec'y of Health, Educ. & Welfare*,<sup>92</sup> after two administrative hearings had already taken place due to a prior remand by the District Court, the Court of Appeals again remanded the case because the "ALJ failed to provide any explanation for his implicit rejection of . . . [claimant's] testimony regarding the effects of the medication he took."<sup>93</sup>

Lastly, in *Wallace v. Sec'y of Health and Human Services*,<sup>94</sup> the court remanded the case before it to the agency "[b]ecause the ALJ either misread the report of Dr. Sibert or rejected his conclusion without explaining his reasons for doing so . . . ."<sup>95</sup>

Although the subject matter of Social Security disability benefit cases may justify a closer degree of judicial scrutiny than do DEC licensing and enforcement hearings, the cases point to the continuing concern of the judiciary that the basis for administrative decisions be clearly articulated in the body of the decision itself. The federal cases present a variety of important practical and legal issues in administrative adjudication and perhaps should be used as guidelines by administrative agencies to avoid inappropriate judicial usurpation of

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90. *Cotter v. Harris* (II), 650 F.2d 481 (1981).

91. *Id.* at 482.

92. 714 F.2d 287 (3rd Cir. 1983).

93. *Id.* at 290.

94. 722 F.2d 1150 (3rd Cir. 1983).

95. *Id.* at 1153; see also *Kent v. Schweiker*, 710 F.2d 110, 114 (3rd Cir. 1983).



their administrative decision-making.

#### IV. Conclusion

The hearing reports prepared by Administrative Law Judges within DEC serve the following four purposes: as vehicles for the adjudication of contested factual and legal issues; as main bases for regulatory decisionmaking; as final environmental impact statements (under certain circumstances); and as legal and technical precedent within DEC. The contents of the hearing reports are therefore of significant value and importance to the Commissioner of DEC and to the reviewing courts.

The DEC Commissioner relies heavily on the hearing reports since they become the foundations of the final determinations that are made at the conclusion of enforcement and permit proceedings. Reviewing courts also rely heavily on the hearing reports because they become the prime sources for review when determining if the Commissioner's decision was based upon substantial evidence.

In conclusion, hearing reports fulfill the needs of the decisionmaker and the reviewing courts when Administrative Law Judges clearly articulate within them the bases for resolution of the issues in controversy. Although the preparation of lengthy and detailed hearing reports is tedious and time consuming, the ensuing benefits clearly outweigh the initial burdensome effort. Adequately prepared hearing reports, in whatever capacity they serve, will stand up to judicial scrutiny and deter, if not halt, unwarranted judicial usurpation of administrative decision-making.