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Byram River v. Village of Port Chester: Winning is Not Enough

I. Introduction

In recent years, the eight-mile long Byram River¹ has acquired a unique legal significance. Though it is not counted among the world's great rivers, the Byram has the distinction of being a plaintiff in a federal lawsuit. *Byram River v. Village of Port Chester*² was initiated to stop pollution of the river by the sewage treatment plant in Port Chester, New York. Designating the river as the lead plaintiff rightfully emphasized

1. The Byram River originates at Byram Lake in North Castle, New York. It passes through eastern Westchester County (Westchester), New York, and then through Greenwich, Connecticut, emptying into the Long Island Sound. Its last mile forms the natural boundary between Port Chester and Greenwich, thus making it the state line for New York and Connecticut. Within this navigable mile, the Byram holds fresh water, salt water, and polluted water. As a tidal stream, it is subject to reversal of flow every six hours. Tides of Change in the Byram, Port Chester Daily Item, June 18, 1978, at G11.

The Interstate Sanitation Commission (ISC) has designated the Byram River Class A water, indicating that it is primarily suitable for recreation purposes, shellfish culture, and the development of fish life. ISC regulations require that "All waters of the Interstate Sanitation District . . . shall be of such quality and condition that they will be free from floating solids, settleable solids, oil, grease, sludge deposits, color or turbidity to the extent that none of the foregoing shall be noticeable in the water or deposited along the shore or on aquatic substrata in quantities detrimental to the natural biota; nor shall any of the foregoing be present in quantities that would render the waters in question unsuitable for use in accordance with their respective classifications." To meet these conditions, there is a prohibition against discharge of sewage or other polluting matter. ISC Water Quality Regulations § 1.01, pursuant to S.J. Res. 159, 49 Stat. 932 (1935).

2. *Byram River v. Village of Port Chester (Byram I)*, 7 Env't Rep. Cas. (BNA) 1127 (D. Conn. 1974), (*Byram II*), 394 F. Supp. 618 (S.D.N.Y. 1975). There were two federal court decisions in the Byram River litigation. The first memorandum decision rendered by Judge Jon O. Newman of the District Court for the District of Connecticut dismissed the case. The case was then transferred to the Southern District of New York where Judge Whitman Knapp found most of the defendants liable. This culminated in a Stipulation and Order. Records, Motions, and Memoranda relating to the Connecticut portion of the case will be referred to as *Byram I* and those relating to the New York portion will be referred to as *Byram II*.

it as the suit's focus and served as a useful tactic³ to breathe new life into a protracted battle.

This case study illustrates the difficulty of enforcing environmental laws, administrative decrees, and court orders. Even though federal, state, administrative, and common law each prohibit pollution of this interstate waterway, an updated secondary sewage plant has yet to be built and inadequately treated effluent is still being discharged from the plant into the Byram.

II. The Parties

The parties involved in *Byram River v. Village of Port Chester* cover a wide spectrum of litigants. The plaintiffs

3. Making the river a plaintiff was based on a theory posited by Professor Christopher Stone in *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Calif. L. Rev. 450 (1972).

Stone would give the natural world legal rights akin to those enjoyed by other inanimate entities, such as trusts, corporations, municipalities, subchapters, partnerships, and nation-states. He believes that if trees, rivers, animals and other non-human resources are given the right to sue, the courts would be compelled to consider damages to the environment as well as to the persons involved. This theory generates a multitude of questions: How does a natural object get rights? Who should speak for the natural object? Would anthropomorphizing all the natural things around us and granting legal status to them flood the courts with a new class of litigants? And, is this new voice duplicative and unnecessary? Even though questions such as these must be answered and refinements made before this embryonic theory is totally viable, the Byram River suit, as one of its first progeny, illustrates that people are willing to ally themselves with a natural object without expectation of monetary gain. The suit also indicates that courts are willing to focus on an environmental object apart from the harm done to traditional complainants.

Unfortunately, throughout this suit, little notice was taken of the river as a plaintiff. While two federal judges punctuated their opinions with the fact that the Byram River was one of the plaintiffs, and each court document bore a caption acknowledging the river's participation as a moving party, this was the total extent of the legal cognizance of the river. A natural object suing in its own right is an unusual, infrequent, and questionable tactic. Yet, no defendant moved to dismiss the river, litigated its status, or addressed it as an adversary.

Although the river's role as a plaintiff has not significantly altered the outcome of this litigation, its de facto recognition as a plaintiff should not be overlooked. This suit has cleared a new path for others to follow in the Southern District of New York and the District of Connecticut. For a more extensive discussion of Stone's theory, see *The Byram River Has Standing, So What?*, a research paper by this author on reserve at Pace University School of Law Library, White Plains, N.Y.

include: the Byram River; J. A. B. Haughwout, a riparian;⁴ the Byram River Pollution Abatement Association (BRPAA), a group of concerned citizens;⁵ and the Town of Greenwich, Connecticut, which borders the river.⁶ The defendants all share some measure of responsibility for the operation of the Port Chester sewage treatment plant. They include: the Village of Port Chester (Port Chester), on the New York side of the river;⁷ the County of Westchester and its chief executive (Westchester);⁸ the Interstate Sanitation Commission (ISC), a compact having jurisdiction over the quality of the Byram waters;⁹ and the New York State Department of Environmen-

4. J.A.B. Haughwout is a Greenwich resident who lives on the shores of the Byram. His property is approximately 1,000 feet from the sewage treatment plant diagonally across the river, affording him the opportunity to monitor variations in the quality of the effluent discharged from the plant. He has a sailboat docked at his property and is adversely affected in the recreational use of his land by the pollution in the river. Amended Complaint, *Byram I*.

5. The Byram River Pollution Abatement Association (BRPAA) is a nonprofit, tax-exempt corporation of the State of Connecticut formed with the object of protecting and improving the quality of the water of the Byram River. To implement its goals, the BRPAA has been creative and persistent. Members have raised funds to pay for legal services and operating costs of the Association. For instance, the movie "Jaws" became a benefit for the BRPAA titled "Jaws for a Cause." Bumper stickers were sold bearing the slogan, "Byram River Giver." In addition, press releases constantly emanated from the Association documenting the long cleanup of the Byram. BRPAA was involved in monitoring noise, odors, and particulate matter from Peckham Industries, dredging of the Byram to deepen it for bridge clearance, and donating water-testing equipment to the Health Department of the Town of Greenwich. (This information was winnowed from three cartons of clippings and documents that were given to this author by J.A.B. Haughwout in April 1981.)

6. This pollution impairs the ability of Greenwich residents to live on and own property along the river, to use the river for boating, swimming, and fishing, and to enjoy the town bathing beach. It also imperils the comfort, health, and welfare of those living in Greenwich. Amended Complaint, *Byram I*.

7. From 1915 until 1977, the Village of Port Chester has owned and operated its own sewage treatment plant on Fox Island Road. The plant is located directly on the Byram River, approximately one-half mile from its mouth. Updating Supplement for Blind Brook and Port Chester Sanitary Sewer Districts, Dec. 1974, Malcolm Pirnie, Inc.

8. Although Westchester entered into an agreement in December 1968 with defendant Port Chester, whereby Port Chester would join the Blind Brook Sewer District in 1969 and the primary responsibility for design and construction of a new sewage plant would be assumed by Westchester, the actual transfer of responsibility took place in 1977. Daily Item, June 18, 1978.

9. S.J. Res. 159, 49 Stat. 932 (1935). The ISC is a compact created in 1936 by an

tal Conservation and its chief executive (DEC),¹⁰ which evaluate and approve the construction of sewage plants in the state.

III. Procedural History

A. *New York Administrative and State Court Proceedings*

More than two decades ago, the ISC ordered Port Chester to construct a new sewage treatment plant by September 1963. Port Chester had been "discharging sewage and other polluting matters into the waters of the Interstate Sanitary District in violation of the tri-state compact; Chapters 3 and 4 of the Laws of 1936 of the State of New York, and of the standards for Class 'A' waters prescribed by the Interstate Sanitation Commission for the water in the vicinity of said Village of Port Chester."¹¹

In February 1962, when it became apparent that a plant would not be built by the original deadline, the ISC filed suit in the Supreme Court of New York.¹² Minimal reconstruction

Act of Congress. It is a tri-state organization including New York, New Jersey, and Connecticut that abates existing water pollution and controls future water pollution in the tidal waters of the New York metropolitan area, including its harbors, tributaries, and estuary waters. The waters of the western portion of the Long Island Sound and of the plaintiff Byram River are within the jurisdiction of this compact.

The Commission has investigatory as well as regulatory powers. Its regulations concern the classification of waters and the establishment of effluent standards. It may conduct hearings to determine if there have been violations of its standards, and it has the enforcement power to issue orders to any municipality for the abatement of pollution within its jurisdiction.

10. The New York Department of Environmental Conservation (DEC) is empowered under state and federal law to establish standards for the construction of sewage treatment plants and must approve such plans before construction. "The D.E.C. compares the proposed facility's importance to that of other projects submitted by other localities—taking account of local pollution conditions and the effectiveness of the existing plant—and assigns it a priority. With a sufficiently high priority rating, a proposal becomes eligible for federal funds and in turn, for state funds." *Byram I*, 7 Env't Rep. Cas. (BNA) at 1130; 33 U.S.C. §§ 1251-1299 (1976 & Supp. V 1981); 40 C.F.R. § 35.920-2 (1982); see also N.Y. Envtl. Conserv. Law §§ 51-0303 to 51-0305 (McKinney Supp. 1982-1983), 6 N.Y. Admin. Code Envtl. Conserv. § 652.4 (1972).

11. Administrative Order, ISC, May 3, 1961.

12. *ISC v. Village of Port Chester*, Index No. 3598-1962 (Sup. Ct. Westchester County, 1962).

and enlargement of the existing plant was undertaken by Port Chester in 1965, before the case reached trial. However, neither the State Department of Health nor the ISC was satisfied. Further effluent samplings confirmed the inadequacy of the sewage plant.¹³ In 1966, Judge Joseph F. Gagliardi ordered the completion of a new plant by May 1968.¹⁴

Three months before Judge Gagliardi's deadline, Port Chester and the ISC reached a court-approved agreement to postpone completion of adequate treatment facilities until 1971.¹⁵ This, in turn, was partially nullified when the Port Chester plant became the responsibility of Westchester's Blind Brook Sewer District in 1969, thereby relieving Port Chester of direct responsibility for complying with the court's order.¹⁶

Westchester hired an engineering firm to develop a plan for new facilities intended to be part of a countywide system.¹⁷ The county submitted a proposal for the new plant to the DEC in April 1972. A year later, the DEC informed Westchester that the proposal was unacceptable, primarily because the plan did not comply with the Westchester Comprehensive Sewer Study.

Once again, a timetable for compliance had not been met. Administrative and court action by the ISC had produced orders directed first to Port Chester and then to Westchester, but neither government could be forced to comply.

13. Memorandum from William Borghard, Commissioner of Environmental Facilities, to Edwin G. Michaelian, County Executive, July 9, 1973.

14. *ISC v. Village of Port Chester*, Index No. 3598-1962.

15. Amended Complaint, *Byram II*.

16. See *supra* note 8.

17. Pursuant to state approval, the consulting engineering firm of Malcom Pirnie, Inc., was engaged by Westchester in December 1969 to prepare a wastewater facility report. This was followed in August 1970 by another contract for the detailed plans and specifications. Memorandum from William Borghard, Commissioner of Environmental Facilities, to Edwin G. Michaelian, County Executive, July 9, 1973; Amended Complaint, *Byram II*; Letter of Warren Schlickerrieder, Chief of the Project Evaluation Section, Bureau of Municipal Wastes, DEC, to Westchester, Apr. 3, 1973; and Letter from Eugene F. Seebold, Associate Director Division of Pure Waters, DEC, to William Borghard, Deputy Commissioner of Public Works, County of Westchester, Mar. 10, 1972.

B. Federal Court Proceedings

1. The District Court of Connecticut

In 1974, in light of these failures, J. A. B. Haughwout, the BRPAA, and the Town of Greenwich commenced a civil lawsuit on their own behalf and on behalf of the Byram River in the United States District Court for the District of Connecticut.¹⁸ This time the river and its friends were seeking to vindicate their own claims and were not relying on the state agencies. As plaintiffs, they sought to obtain relief which they could enforce themselves.

In the Complaint, defendants Port Chester, Westchester, the DEC, and the ISC were accused of nonfeasance of duty resulting in an overloaded, inadequate, poorly operated sewage plant. Equitable relief was sought: (a) to enjoin additional connections to the existing plant; (b) for specific performance of the contract between Port Chester and Westchester to construct an adequate plant; (c) to require that Port Chester apply for the necessary grants to finance the work and the reservation of these funds until needed; and (d) for the appointment of a receiver to supervise the preparation of plans and construction as expeditiously as possible.¹⁹

Defendants Port Chester, Westchester, and the DEC moved to dismiss the suit for lack of jurisdiction and eleventh amendment sovereign immunity.²⁰ Connecticut District Court Judge Jon O. Newman dismissed the action as to Westchester and the DEC for lack of *in personam* jurisdiction but denied the Motion as to Port Chester, "whose action if proven, [made] it a primary tortfeasor."²¹ Judge Newman analyzed Port Chester's responsibility as direct and immediate, "comparable to that of a gunman firing across a state line."²² Although the court did not address the constitutional

18. *Byram I*, Env't Rep. Cas. (BNA) 1127.

19. Amended Complaint, *Byram II*.

20. *Byram I*, 7 Env't Rep. Cas. (BNA) at 1129. The Connecticut long-arm statute allowed the Connecticut plaintiffs to obtain in personam jurisdiction over Port Chester but the statute did not extend jurisdiction to the DEC and Westchester.

21. *Id.*

22. *Id.*

or substantive issues, it found that it had subject matter jurisdiction "predicated on 28 U.S.C. § 1331 to consider the claim of a nuisance upon interstate waters in violation of federal common law."²³

After the Connecticut suit was filed, the DEC initiated proceedings. It resurrected a May 13, 1968 Order requiring completion of a secondary plant by 1971 to abate pollution under orders of the New York Commissioner of Health.²⁴ This renewed Order against Westchester and Port Chester was enforceable under penalty of a \$1,000 bond but was made subject to receipt of federal funds.²⁵ An affidavit from New York State requesting a dismissal of the Connecticut suit on jurisdictional grounds remarked that the state disapproved of the continuing pollution of the Byram River and that it was acting through its own administrative procedures to force the defendants to comply with New York water pollution control laws.²⁶ The DEC did not explain its prior inaction. This move could be interpreted merely as a means to facilitate its dismissal from the federal lawsuit.

Anticipating a transfer of the case to the Southern District of New York, where *in personam* jurisdiction could be

23. *Id.* at 1128. The continued viability of these grounds for subject matter jurisdiction (federal common law of nuisance upon interstate waterways) is questionable in light of the United States Supreme Court's recent decision in *Milwaukee v. Illinois*, 451 U.S. 304 (1981). In the 1972 case, *Illinois v. Milwaukee*, 406 U.S. 91, 108, the Court ruled that the federal common law of nuisance gave a state access to the federal courts to pursue a claim of interstate pollution. However, the Court in its more recent holding decided that *Illinois v. Milwaukee* was rendered obsolete when Congress passed the Federal Water Pollution Control Act Amendments of 1972. Justice William H. Rehnquist declared that "when Congress addresses a question previously governed by a decision resting on federal common law, the need for such an unusual exercise of law-making by federal courts disappears." 451 U.S. at 314.

24. The DEC is the successor to the New York State Board of Health. Motion to dismiss the Complaint by the DEC pursuant to Fed. R. Civ. P. 12(b), Dec. 28, 1973.

25. Motion to dismiss the Complaint by the DEC, *Bryam I.*

26. *Id.* Haynes Johnson, attorney for the plaintiffs, in a letter to Bruce F. Cohen, President of the BRPAA, Jan. 21, 1973, expressed the fear that New York State's Consent Judgment, enforceable with a monetary bond, was merely a tactic to show the federal court that there was no longer a problem. Johnson was dismayed by the order because it allowed the penalty to be contingent on receipt of funding and would therefore cause extensive delay.

obtained over all the defendants, the ISC filed an affidavit promising immediate action in return for dismissal of the suit.²⁷ The ISC appeared to welcome the suit as a way to accomplish what it had been unable to achieve during the prior eleven years, but, once the case was transferred, it too asked to be dismissed as a party.²⁸ Dismissal was not granted.²⁹

2. *The Southern District of New York*

The Byram River case was transferred under change of venue³⁰ to the Southern District of New York, where Judge Whitman Knapp dismissed only the DEC as a defendant because of eleventh amendment immunity.³¹ The court found all of the other defendants liable and on January 8, 1976, approved a Stipulation and Order drawn up by representa-

27. Affidavit of Peter Cooper, Special Counsel to the ISC in support of and amplification of defendant's Answer, information, and background to aid the court in narrowing the issues for resolution, *Byram II*.

28. Telephone interview with Dr. Mitchell Wendell, Chief Counsel of the ISC, Aug. 1981. Since the ISC administrative order was the precursor to all other actions in this controversy, the author asked Dr. Wendell if the ISC might institute further action on behalf of the river. Dr. Wendell explained that while the sewage plant in Port Chester has improved since its takeover by Westchester in 1977, other pollution problems in the ISC district have not. The Port Chester plant, though a concern to the ISC, does not have a high priority. It should be noted that the ISC operates by statutory mandate to abate water pollution. By not fulfilling, but avoiding its obligations, it acts to the detriment of the plaintiffs and contrary to its mandate. To date, the ISC has not enforced its own administrative orders, nor have the orders initiated by the ISC suit and issued by the New York State Court been fulfilled. During this interview, Dr. Wendell did not explain why the ISC asked for a dismissal from the suit after the case was transferred to the Southern District of New York.

29. *Byram II*, 394 F. Supp. at 627.

30. Judge Newman transferred the case to the Southern District of New York pursuant to 28 U.C.S. § 1404(a) change of venue, which states that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

31. The DEC was found to be an arm of the state created to perform an essential government function. The state is therefore the real party in interest and immune from suit under the eleventh amendment.

32. Stipulation and Order, *Byram II*.

tives of both sides. The parties agreed to a timetable and an order enforcing it, for construction of a new sewage facility in Port Chester to be completed by late 1978.

The Order required reports of applications for state and federal funds, public environmental hearings, infiltration studies, construction plans, schedules, specifications, awarding of contracts, and monthly status reports to be sent to the court and to the plaintiffs. Operating reports on the existing facility and periodic inspections of the plant were also mandated.³³ In essence, the Stipulation and Order not only provided for a timetable for construction of a new plant but also provided for operation and maintenance of the existing one in compliance with the required standards of the ISC, the DEC, and the plant's NPDES permit.³⁴ At the time, plaintiffs' attorney believed the agreement included realistic dates for the execution of each step necessary for construction.³⁵ However,

33. Id. Dr. Wendell of the ISC stated during a telephone interview in August 1981, that the ISC was no longer active in the *Byram* suit because it was assigned only an inspection and reporting duty. It was ordered to make regular inspections of the Port Chester plant and to send the results to the DEC and to the Southern District. Supposedly, the inspections would have been conducted as part of the routine procedure of the ISC, had it not been ordered by the court.

34. Plaintiffs' Memorandum in Support of their Motion for Supplemental Relief under the Stipulation and Order of Jan. 8, 1976, *Byram II* includes the following effluent requirements:

- I.S.C. Regulations §§ 2.05(b) through 2.05(e) relating to coliform level (not over 200 per 100 ml); biochemical oxygen demand ('BOD'), (at least 200 per 100 ml); settleable solids removal (at least 90%), and freedom from floating solids, settleable solids . . . color or turbidity (1.01).
- New York State's definition of 'effective primary treatment' as 'the removal of substantially all floating and settleable solids . . .' (Envtl. Conserv. Law § 17-0509) (See note 47 for the updated requirements).
- The NPDES permit No. NY0226786 requires, among other things, 'a substantially complete removal of settleable solids shall be achieved' (B) (1a). A National Pollution Discharge Elimination System (NPDES) permit pursuant 33 U.S.C.A. § 1342 is required for the discharge of any pollutant into the nation's waters and is supposedly granted as long as the source meets the 'best technology' and related effluent limitations or, prior to meeting these, to comply with 'such conditions as the Administrator determines are necessary to carry out the provisions of this Act.'

35. Greenwich Times, Jan. 5, 1976.

as of October 1982, construction of the new plant had yet to begin.³⁶

IV. Progress

While a secondary plant has not been built, some progress has nonetheless been made. On March 24, 1976, the DEC approved plans for the Port Chester-Blind Brook secondary sewage treatment system. These plans were certified as meeting the federal administration's requirements and the "Federal Guidelines on Design, Operation, and Maintenance of Waste Water Treatment Facilities".³⁷ On June 25, 1976, Westchester was designated to receive financial assistance from the United States Environmental Protection Agency.³⁸ The federal government's share is to be seventy-five percent of the cost of the project and the state and county are to split the remainder.³⁹ A contract was awarded in April 1978 for construction of two major pipelines and a mile-long outfall line going into the Long Island Sound.⁴⁰ One of the pipelines which has already been completed will carry sludge from the Blind Brook plant in Disbrow Park, Rye, New York, to the Port Chester plant, where a sludge-burning facility may be constructed.⁴¹ Presently, sludge is trucked to a receiving man-

36. Telephone interview with William Borghard, Westchester Commissioner of Environmental Facilities, Aug. 1981, and visual observation at the plant in Aug. 1982. Telephone interview on Oct. 28, 1982, with Thomas Laurel, Manager of the Port Chester Plant.

37. Letter to Mary Leyland, Chief of the Grants Administration Branch of the United States Environmental Protection Agency (EPA), from Frank D. Bogedain, Director of the Bureau of Sewer Programs, Division of Pure Waters, DEC, Mar. 24, 1976.

38. Letter to Gerald Handsler, Regional Administrator of EPA, Region II, from Thomas P. O'Callaghan, Senior Assistant Westchester County Attorney, Sept. 17, 1976.

39. Letter to Haynes Johnson from William Schlickerrieder, Chief of the Project Evaluation Section, Bureau of Municipal Wastes, DEC, Apr. 3, 1973.

40. Daily Item, Apr. 1, 1978.

41. One of the engineering studies evaluating the ramifications of sludge burning has found that the use of polymers would be more cost effective than use of fossil fuel to burn the sludge. This is probably the method that will be employed, though no final decision has been made. Telephone interview with Thomas Laurel, Manager of the Port Chester plant, Oct. 18, 1982.

hole in Hawthorne and transferred to Yonkers where it is loaded onto a barge. It is then deposited in the Atlantic dump area.⁴² The effluent from Port Chester's plant will be run through another pipe to Oakland Beach in Rye and then through the outfall line into the Long Island Sound.⁴³ This means that upon completion of the secondary treatment plant, effluent from the Port Chester facility will never enter the Byram River.

V. Further Delays

By 1976, even though money had been set aside and federal and state approval of plans had been granted, Port Chester's secondary sewage plant was still not under construction. Several problems had emerged revolving around the design and siting of the plant. The consulting engineering firm that had been hired to design the new plant presented a plan which required an expanded site consisting of two parcels of land totaling 2.9 acres located immediately adjacent to, and downstream from, the existing plant.⁴⁴ The land was

42. *Id.*

43. Effluent is cleansed wastewater which is left when sludge is removed. Preliminary Value Engineering Report, Medcalf and Eddy, Inc., Nov. 1979.

44. *Id.* The land was occupied by the Krystinel Corp., a manufacturer and wholesaler of ferrite products. At the time, the company had only 37 employees and was worth \$64,110. It had already been negotiating a twenty-year tax-free deal in Hudson, New York, anticipating the enforcement of the condemnation clause in its 1969 lease. This lease ran until 1979 and the landlord, not Krystinel, was to receive the first \$300,000 of condemnation payments. Plaintiff's Memorandum in Support of their Motion for Supplemental Relief under the Stipulation and Order of Jan. 6, 1976, *Byram II*. Krystinel was eligible for relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 (1976 & Supp. IV 1980) and hired Arthur D. Little, Inc. to assess the costs and aid in the relocation. However, at a meeting with the EPA, Senior Assistant Westchester County Attorney, Thomas O'Callaghan was told that the EPA regulations did not contemplate reimbursement of expenses of the magnitude set forth in the Arthur D. Little proposal. In addition, the proposal itself was not sufficiently precise. Letter to Gerald Handsler, Regional Administrator, EPA Region II, from Thomas O'Callaghan, Senior Assistant Westchester County Attorney, Nov. 29, 1976. Further delay was occasioned by the lack of experience of the EPA Region II in relocating a business such as Krystinel. Letter to Helen S. Beggan, Chief of Grants Administration Branch, EPA Region II, from Thomas O'Callaghan, Senior Assistant County Attorney of Westchester, Sept. 17, 1976.

finally obtained in 1979, but only after another revision of the plans had been made the previous year based on a smaller site. According to William Borghard, Westchester Commissioner of Environmental Facilities, another value engineering study is now being conducted.⁴⁵

In addition, the plaintiffs have always been concerned with building a "state of the art" plant rather than one that would be obsolete upon completion.⁴⁶ During the span of this litigation, environmental laws have become stricter than those the Port Chester plant was initially unable to satisfy.⁴⁷ The necessity for redesign to meet these new requirements added to the long delays in obtaining federal and state funding. Thus, a vicious cycle was created in which delays necessitated redesign which created further delays.

VI. Enforcing the Order

It should not be forgotten that the Southern District's Stipulation and Order of January 8, 1976, had two themes:

At one point, the County abandoned its plan to take the buildings occupied by Krystinel. The plaintiffs felt that they were being "blackmailed" by this inconsequential company and requested a redesign around the existing structures on the original site. Funds were eventually appropriated for the relocation of Krystinel and the land was finally purchased by the County. The factory buildings were then demolished. Interview with J.A.B. Haughwout, Apr. 1981, and visit to the property, in Aug. 1982.

45. A value engineering study highlights ways to economize without reducing the overall intent and scope of a project. Telephone interview with William Borghard, Westchester Commissioner of Environmental Facilities, Aug. 1981. In a deposition taken on January 20, 1975, Commissioner Borghard stated that since coming to the County in November 1969, he has had the primary responsibility for design and construction of wastewater facilities in Westchester.

46. Haughwout was also concerned about the escalating costs due to inflation. Nevertheless, he wanted the best plant possible. Interview with J.A.B. Haughwout, Apr. 1981.

47. The Port Chester plant is considered a primary treatment plant. Such a plant should remove suspended solids, and solids that settle, by means of screens and gravity sedimentation. A primary plant is only required to remove 35% of the biological matter. The 1972 amendments to the Federal Water Pollution Control Act have dramatically increased the level of treatment that is mandated. Removal of biological matter must reach 85% for all publicly owned sewage treatment plants and the facilities to accomplish this must be operational by 1983. 33 U.S.C. § 1311(b)(1)(B) (1976). These federal requirements for secondary treatment, C.F.R. § 133.102 (1982), have been incorporated in N.Y. Env'tl. Conserv. Law § 17-0509 (McKinney Supp. 1982-83).

one, the construction of new facilities and the other, the maintenance and compliance of the existing wastewater plant. While the long-term project was moving slowly ahead, the interim functioning of the plant was still not meeting required standards. In November 1976, Haynes Johnson, attorney for the plaintiffs, in his tireless effort "to get things moving," filed a Motion for Supplemental Relief⁴⁸ highlighting the slippage in the timetable required by the Stipulation and Order. It stressed the necessity of bringing the plant into compliance with existing regulations in lieu of possible sanctions. These sanctions included a contempt order, an injunction enjoining further sewer hookups, daily fines for not meeting dates of construction, and the appointment by the court of a receiver to maintain and operate the plant.⁴⁹ After conference with Judge Knapp in January 1977 to discuss the timetable, the case was adjourned *sine die*. No additional relief was granted. On April 19, 1979, however, the Stipulation was amended and modified to require the ISC to conduct periodic inspections of the plant, not less than every three months.⁵⁰ Since then, plaintiffs' attorney has not made any further motion to enforce the Stipulation and Order.⁵¹

48. Plaintiffs' Memorandum in Support of their Motion for Supplemental Relief under the Stipulation and Order of January 8, 1976, *Byram II*.

49. *Id.* at 1-2. Plaintiff's attorney, Haynes Johnson, quoted in *The Daily Item*, Nov. 2, 1973, said, "We are interested not in collecting damages, we are interested in accomplishing a clean-up of the river." Within the same article he also said that he would ask the court to rule that no additional hookups be made to the present sewage plant until the new plant was built. This would have threatened three highrise buildings then planned for the Port Chester marina as they would require sewer tie-ins. The court did not grant this relief nor did it allow fines for noncompliance with its Stipulation and Order of Jan. 8, 1976. To date, sanctions have yet to be imposed.

50. The case was adjourned without appointing another date on which to assemble. Index for the court file, 74 Civ. 4059, *Byram II*.

51. Telephone interview with Haynes Johnson, Apr. 1981. This author asked Johnson what it would take to reach closure in this suit. Johnson admitted that his time was now limited and that he had been remiss in not returning to court for further relief. It should be noted that a good part of his efforts have been pro bono and there is still an outstanding bill of close to \$4,000 owed to him by the BRPAA for the period of the suit prior to the County takeover of the plant in 1977. The extensive and meticulous documents he drafted are an example of the cost in time and energy expended by an attorney in a suit of this nature.

A recent conversation with Thomas Laurel, the Port Chester plant manager, revealed that the plant is operational and that it is generally meeting the permit requirements for primary treatment.⁵² However, Laurel also points out that the plant is not designed to handle the quantity of wastewater that it receives and more flow is processed than the plant's permit allows. Presently, one settling tank is being repaired to ready it for winter, and next year major repairs on the grid chambers are anticipated. Within the last year, a metal cap was installed over the sludge-holding tank in an effort to reduce odors.⁵³

VII. Prognosis

Three judges have expressed their dissatisfaction with the ineffective sewage treatment of the Port Chester plant and the resulting pollution of the Byram River.⁵⁴ Their efforts and those of the plaintiffs⁵⁵ have yet to be realized. Despite

52. Telephone Interview with Thomas Laurel, Manager of the Port Chester plant, Oct. 18, 1982.

53. *Id.*

54. Judge Joseph F. Gagliardi stated, "The testimony establishes that these waters are so polluted as to pose a serious danger to the health of any persons or animal life being in them." *ISC v. Village of Port Chester*, Index No. 3598-1962. In 1974, Judge Jon O. Newman noted that "[c]ontroversy over who is responsible for the Byram River's pollution has concerned courts and agencies for more than thirteen years. The river's substandard condition is a matter of record. The controversy concerns who should act to abate it." *Byram I*, 7 *Env't Rep. Cas. (BNA)* 1127. In his 1975 decision, Judge Whitman Knapp wrote that "[a]dministrative proceedings have proven ineffectual for over fourteen years, and the Byram River continues to be a depository for raw and untreated sewage. While this Court usually grants deference to state administrative procedures, in this situation, any further delay in this litigation would be unconscionable." *Byram II*, 394 *F. Supp.* at 623.

55. Ironically the plaintiffs were successful in cleaning up the river whenever they went up against private businesses. However, seemingly clearcut judgments rendered against government agencies, charged with obeying and enforcing the laws, have not furthered the plaintiffs' interests.

The following are three examples among the hundreds of newspaper articles, reports, data, and correspondence generated about the pollution of the Byram River:

a) United States Department of Interior report on the Byram River issued April, 8, 1969 stated: "American Felt Company in Glenville, Connecticut at River Mile 3.6 is the largest single polluter of the river . . . The River below the discharge is visibly high in color and suspended solids. Local residents

administrative orders of 1961 and 1968, and court orders of 1966, 1968, and 1976, it is possible that a secondary treatment plant may never be built in Port Chester. While it seems that Westchester is earnest in its efforts to remedy the short-term problems at the plant, dilatory tactics by Port Chester continue to plague the long-term project.

Port Chester has recently recognized the great potential of its riverside property and has developed a plan for a waterfront facelift. The plan includes docks for pleasure craft, shops, a promenade, and a hotel. Most relevant is the desire by Port Chester to have condominiums built on the vacant property adjacent to the sewage plant.⁵⁶ Westchester and Port Chester are now negotiating the possible use of alternate sites for the expanded plant instead of this now prime parcel.⁵⁷ The whole waterfront project could in fact have a salutary effect on the run-down industrial area around the plant as well as on the plant itself. High-rent paying neighbors in such close proximity to the plant could be a constant source of pressure for the plant to meet required standards. The interest in a properly functioning facility would be bolstered by the financial concerns of private property owners in the deterioration of the value of their land. On the other hand, an alternate site

report that occasional discharges from American Felt Company are responsible for turning the river various colors."

b) *Greenwich Times*, May 3, 1971: "Pressure on Byram River polluters will increase for the next five months while Westchester County Health Department cruises the Byram River in a runabout taking water samples and checking outfalls for violators. The study is the result of a recent Environmental Protection Agency report that attributed much of Long Island Sound's pollution to Port Chester harbor."

c) *The Daily Item*, Sept. 10, 1970: Thomas Glenn, Commissioner of the ISC is quoted as saying: "The Port Chester problem has been a headache for a long time. The plant there doesn't even meet our old standards, let alone our new ones." In response to questions about the brown solid masses reported to be floating in the Byram, Mr. Glenn said, "That stuff doesn't meet anybody's standards."

56. *N. Y. Times*, Sept. 12, 1982, § 1, at 25, col. 1.

57. Telephone interview with Thomas Laurel, Manager of the Port Chester plant, Oct. 18, 1982. Interview with Anthony Trelewicz, Director of Environmental Management and Operations for the Westchester Department of Environmental Facilities, Oct. 28, 1982.

for expansion that is not contiguous to the existing plant may escalate the costs of a secondary facility beyond the burden that Westchester, and proportionately Port Chester, would be willing to bear. The future of the plant, and any prospective upgrading and enlargement, rests partly on the outcome of these negotiations.

The viability of a secondary treatment plant in Port Chester is also threatened by possible action on the part of Westchester in seeking an exemption from the eighty-five percent standard for removal of biological matter. Such a waiver was sought by the Mamaroneck plant, also in Westchester.⁵⁸ The EPA orally denied the Mamaroneck waiver application on October 19, 1982.⁵⁹ The application failed to prove that reduced treatment would not affect the quality of waters into which the plant discharged. This ruling is subject to review and, if appealed, the appeal will probably focus on the three reasons for refusal cited in the EPA's decision: 1) "reduced treatment would worsen water and biological conditions"; 2) "standards for dissolved oxygen, widely used to measure pollution, could probably not be met"; 3) "marine life and recreational activities would probably be harmed."⁶⁰

Waivers of this nature are allowed under § 301(h) of the Federal Water Pollution Control Act Amendments of 1977.⁶¹ They have been granted primarily on the West Coast where there are deep waters and strong currents which eliminate the need for expensive advanced treatment facilities.⁶² The

58. The Administrator of EPA, with state concurrence, is authorized to issue permits which modify the secondary treatment requirements of the Act. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, as amended by, Pub. L. No. 97-117, 95 Stat. 1623, codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1981); N. Y. Times, Oct. 16, 1982, at 31, col. 1.

59. N.Y. Times, Oct. 19, 1982, at B3, col. 4.

60. *Id.*; see Analysis of the Section 301(h) Secondary Treatment Waiver Application for Mamaroneck, N.Y. prepared by the EPA Office of Marine Discharge Evaluation at 5-6 (1982).

61. 33 U.S.C. § 1311(h) (Supp. V 1981); See *NRDC v. EPA*, 656 F.2d 768 (D.C. Cir. 1981) where EPA's regulations implementing § 1311 were challenged.

62. The deadline for applications for such waivers was Dec. 29, 1982. N.Y. Times, Oct. 16, 1982, at 31, col. 1; see Comment, Marine Discharge of Municipal Waste by California Coastal Cities, 3 *Stan. Envtl. L. Ann.* 104 (1980-81).

original intent of these waivers was to allow plants discharging into "marine waters"⁶³ the flexibility to treat sewage less than those plants that discharge into fresh water.⁶⁴ The exact level of treatment necessary to attain the standards set by the state, and the flushing and absorption capacity of the receiving water,⁶⁵ are among the basic factors to be weighed and balanced in a waiver determination. Arbitrary national standards do not take these local variables into account. The EPA wants to make the regulatory program more flexible by giving the states greater discretion in determining the use of a particular body of water and the applicable standards to evaluate its level of pollution.⁶⁶

In an effort to meet the Clean Water Act's interim goals of "fishable" and "swimmable" waters for our nation,⁶⁷ the EPA has proposed new rules allowing water quality standards to be geared to site-specific needs.⁶⁸ These rules are consistent with the Agency's efforts to make significant changes in environmental programs through budgetary, personnel, regulatory, and enforcement policies. Not surprisingly, this is a step back in time. Nationwide, technology-based effluent standards were motivated by the states' failure to protect and improve water quality. The EPA now seems to assume that most states have acted responsibly under the Clean Water Act

63. "[T]he discharge of any pollutant into marine waters' refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics. . . ." 33 U.S.C. § 1311(h) (Supp. V 1981).

64. Municipal Wastewater Treatment Construction Grant Amendments of 1981, H.R. Rep. No. 270, 97th Cong., 1st Sess. 3, reprinted in 1981 U.S. Code Cong. & Ad. News 2644-46.

65. 33 U.S.C. § 1311(h) (Supp. V 1981) provides that a waiver will be granted if an applicant demonstrates to the satisfaction of the Administrator that there is a water quality standard for the pollutant for which the modification is requested; the modification will not interfere with the attainment or maintenance of that standard; the applicant has a system for monitoring the impact of the discharge; the modification will not alter requirements on other sources; all pretreatment requirements will be enforced; a schedule has been established to eliminate the entrance of toxics into the treatment works; and there will be no new or increased discharge.

66. N.Y. Times, Sept. 13, 1982, at A1, col. 4 and Oct. 20, 1982, at A1, col. 3.

67. 33 U.S.C. § 1251(a)(2) (1976).

68. N.Y. Times, Sept. 13, 1982, at A1, col. 4 and Oct. 20, 1982, at A1, col. 3.

and their respective state programs and that they can be trusted with further authority in order to strengthen the federal program.

Determination of whether the requirement of secondary treatment has been arbitrarily imposed should be a concern for every municipality. Unnecessary spending of federal, state, and local money hurts everyone's pocketbook and takes away from other important programs. In the case of the Port Chester plant, equations for assimilative capacity have not been made.⁶⁹ However, the evidence to date and the history of the plant overwhelmingly indicate that a secondary plant is appropriate. It is probably for these reasons that the Westchester Commissioner of Environmental Facilities has speculated that a waiver application is unlikely.⁷⁰

Unfortunately, even more time must pass before this tale can end. An optimist would predict that a new plant would be in operation within five years if all obstacles were to be removed in the near future. A pessimist would hope that Westchester continues its vigilant upkeep of the present plant because construction of a secondary plant is not within sight.

Lois R. Murphy, Class of '83

69. Such equations are developed from models. These equations help to predict how much pollution a body of water can absorb. Telephone interview with Thomas Laurel, Manager of the Port Chester plant, Oct. 18, 1982.

70. Interview with William Borghard, Commissioner of Environmental Facilities, Oct. 20, 1982.