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State Environmental Regulations

Expert Analysis

Is Judicial Deference To DEC Decisions Disappearing?

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Courts typically defer to the governmental agency charged with the responsibility for the administration of a statute in those instances where the agency's interpretation or application "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," and the agency's determination "is not irrational or unreasonable."[1] Over the past 16 months or so, however, New York courts—from the Court of Appeals to the Appellate Divisions to the Supreme Courts—have issued a number of decisions refusing to afford judicial deference to decisions by the New York State Department of Environmental Conservation (DEC). One may wonder whether the DEC has lost respect in the courts, or whether it is just on a bad, but temporary, losing streak.

Brownfields Decisions

Consider the unanimous Court of Appeals decision by Judge Susan Phillips Read, issued on Feb. 18, 2010, in M*atter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Envtl. Conservation*.[2] This case arose after Lighthouse Pointe Property Associates LLC sought to redevelop land located along the Genesee River in Monroe County into a $250 million mixed-use waterfront development. Lighthouse divided the land into two development parcels: a 22-acre riverfront site and a 25.4-acre inland site. In 2006, Lighthouse filed two requests for acceptance into the Brownfield Cleanup Program (BCP), which is administered by the DEC, one for each parcel.

The following June, the DEC denied the requests on the ground that neither of the properties was a brownfield site within the meaning of ECL 27-1405(2), which defines the term as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant." The DEC found "no reasonable basis" to believe that contamination or the potential presence of contamination was complicating the redevelopment or reuse of the property.

Lighthouse brought an action against the DEC seeking to annul the agency's determination and to require the agency to accept the parcels into the BCP. The Supreme Court, Monroe County, granted the petition and ordered the DEC to accept the properties into the BCP, finding that the Legislature had "intended a low threshold for admission into the BCP."

The Appellate Division, Fourth Department, with one justice dissenting, reversed and dismissed the petition. The majority concluded that the DEC's "well-reasoned analysis" of Lighthouse's BCP applications, "coupled with the mandate that we must not substitute our judgment for that of the DEC," compelled the conclusion that the court had erred in granting the petition and directing the DEC to accept Lighthouse into the BCP. The dissenting justice characterized the DEC's interpretation of the term "brownfield site" as "unreasonably narrow."

The dispute reached the Court of Appeals, where the DEC argued that the phrase "may be complicated" in the statutory definition of "brownfield site" was reasonably interpreted to mean that the property's redevelopment or reuse may be complicated by the need for a cleanup, an environmental decision of which it was the sole arbiter. In its decision, the Court explained that real property qualified as a "brownfield site" for purposes of acceptance into the BCP so long as the presence or potential presence of a contaminant within its boundaries made redevelopment or reuse more complex, involved, or difficult in some way.

A "low eligibility threshold" was consistent with the statute's legislative history, the Court observed, noting that the Lighthouse properties were concededly contaminated with multiple contaminants, often exceeding soil cleanup objectives and other environmental standards or criteria. The Court acknowledged that the overall profile of contamination on the properties did not call for remedial action, but it found that the properties were contaminated and that without a release of liability as provided in the BCP, neither Lighthouse nor a prospective lender could be confident that regulatory views about the necessity for or the adequacy of any self-directed cleanup would not change in the future.

Interestingly, the Court did not remand the case to the DEC for further consideration in light of its decision, which was an alternative proposed by the DEC. Finding that the record was sufficiently developed for the Supreme Court to conclude, as it did, that, as a matter of law, Lighthouse was eligible for acceptance into the BCP, the Court ordered the judgment of the Supreme Court to be reinstated.

Brownfields in Brooklyn

The BCP program also was at issue—and the DEC's decision rejected—in *Matter of 29 Flatbush Assoc. LLC v. New York State Dept. of Envtl. Conservation*.[3] In its decision on May 3, 2010, the Supreme Court, Kings County, vacated a determination by the DEC denying the application of the owner of a former parking lot in Brooklyn (which the owner had purchased for $28 million in November 2007) for inclusion in the BCP. The court held that the DEC's

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determination was arbitrary and capricious or an abuse of discretion and remanded the matter to DEC for further consideration.

The court also ordered the owner to (i) perform further investigations at the site (specifically a groundwater investigation, a soil vapor investigation, the completion of a soil characterization analysis and a magnetometer survey), (ii) submit the investigation results to DEC, (iii) submit documentary evidence of its efforts to obtain financing for the project, and (iv) submit documentation demonstrating its alleged inability to proceed with the project unless the site was accepted into the BCP.

The property owner then moved to reargue the part of the court's decision requiring it to submit further information to the DEC. It did not, however, seek reargument of the portion of the court's decision finding the DEC's determination denying the site into the BCP as arbitrary and capricious or an abuse of discretion. The court granted the property owner's motion for reargument in its decision issued on March 22, 2011.

In that decision, it continued to hold that the DEC's determination denying the property owner's application for the site's inclusion in the BCP was arbitrary and capricious or an abuse of discretion and it upheld vacating that determination. But it also held that the administrative record was complete and it ordered the property owner's site into the BCP, relying in large part on the Court of Appeals decision in the Lighthouse Pointe matter.[4] Moreover, in a further slap at the DEC, in its decision on the motion to reargue, the court granted the property owner an award of costs, disbursements, legal and other fees.

Underground Storage Tanks

The recent wave of rejections by courts of DEC decisions has gone beyond brownfields. For example, *Matter of Merrick Auto Serv. Inc. v. Grannis*[5] arose after the operator of a gas station in Merrick, Long Island, arranged for underground fiberglass storage tanks to be relined with a thick layer of fiberglass as a precautionary measure and under the manufacturer's supervision after one of the tanks developed a crack and leaked. The DEC, however, informed the operator that the tanks could not be used to store petroleum because their "re-manufacturing" failed to comply with the new tank requirements under 6 NYCRR 614.3 and their "re-conditioning" failed to comply with 6 NYCRR 614.6, which only allowed for reconditioning of steel tanks.

The DEC subsequently determined that the tanks had been substantially modified when they were "re-conditioned/re-manufactured," and that, "[i]n omitting standards for relining fiberglass tanks, the Department's intent was to maintain more careful oversight of such projects by requiring the filing of a variance request."

The Supreme Court, Nassau County, annulled that decision and ruled that the DEC's regulations did not apply to the operator's storage tanks. The DEC appealed, and this past March, the Appellate Division, Second Department, affirmed. It simply declared that the DEC's determination to require the operator to obtain a variance in connection with the reconditioning of its tanks lacked a sound basis in reason and was "without regard to the facts," as the DEC had conceded that 6 NYCRR 614.3 and 614.6 did "not apply to the subject fiberglass tanks."

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Diesel Emissions

In April, the Third Department continued this trend of refusing to give judicial deference to the DEC's interpretation of statutes and regulations. *Matter of New York Constr. Materials Assn. Inc. v. New York State Dept. of Envtl. Conservation*[6] involved a challenge to DEC regulations issued under the state's Diesel Emissions Reduction Act (DERA) to address the public health threat posed by diesel fuel combustion. Various contractors contended that the DEC's interpretation of the DERA language imposing diesel emission controls on vehicles operated "on behalf of" the state exceeded its authority in that nothing in DERA indicated a legislative intent to include subcontractors, sub-subcontractors and others who did not contract directly with the state in the group of entities subject to regulation.

The Third Department first found that the DEC's interpretation of the statutory language was not entitled to judicial deference, explaining that no special expertise was required to construe the phrase "on behalf of" found in the DERA statute. It also rejected the DEC's argument that deference should be accorded to the agency's interpretation because the Legislature had delegated "comprehensive, interpretive and subordinate policy-making authority" to the DEC on the subject of diesel emission controls in vehicles used for state work.

The Third Department instead found that DERA was not enacted "in broad outline," with details left to the DEC to arrange, nor was it evident that the Legislature found it difficult to lay down definite and comprehensive rules. Indeed, it found DERA precisely defined those vehicles for which compliance was required and provided an extensive list of vehicles to be excluded, such as those used for agriculture, mowing or snow plowing, "harvesters, wood chippers, forwarders, log skidders" and certain emergency response vehicles.[7] Thus, it held that no deference was required.

The Third Department then decided that the Legislature did not intend to impose DERA's requirements on vehicles other than those used by prime contractors under direct contract with state agencies and public authorities. Accordingly, it concluded, the definitions of "on behalf of," "contractor," and "subcontractor" in 6 NYCRR 248-1.1(10), (20) and (28) imposed DERA's requirements on a larger class of private vehicles than the Legislature intended and had to be annulled as in excess of DEC's authority.[8]

Conclusion

By no means is judicial deference to agency decisions and regulations a dying doctrine in general.[9] But a host of recent court decisions in proceedings challenging a wide range of DEC determinations and regulations suggests an unwillingness on the part of the judiciary in New York to defer to the DEC now. Whether this is a short-term aberration or a permanent development remains to be seen.

1. Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980).

2.14 N.Y.3d 161 (2010).

3. 27 Misc.3d 1217(A) (Sup. Ct. Kings Co. 2010), reargument granted by, adhered to, 30 Misc. 3d 1239(A), 2011 NY Slip Op 50407U (Sup. Ct. Kings Co. 2011).

4. 2011 NY Slip Op 50407U at pp. 6-11.

5. 82 A.D.3d 895 (2d Dept. 2011).

6. 2011 N.Y. Slip Op. 03165 (3d Dept. April 21, 2011).

7. ECL 19-0323(1)(b).

8. See, also, Riccelli Enters. Inc. v. New York State Dept. of Envtl. Conservation, 30 Misc. 3d 573 (Sup. Ct. Onondaga Co. 2010) (6 NYCRR 248-1.1(b)(20) was "ultra vires, in excess of jurisdiction, affected by error of law, beyond the statutory delegation of the authority set forth by the Legislature, null, void and of no force and effect due to DEC's unlawful expansive definition of the term 'on behalf of.'").

9. See, e.g., Matter of Island Waste Servs., Ltd. v. Tax Appeals Trib. of the State of N.Y., 77 A.D.3d 1080 (3d Dept. 2010) (confirming determination by Tax Appeals Tribunal).