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VI. ENVIRONMENTAL LAW

Introduction

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During a recent oral argument in an environmental case before the Second Circuit, a judge remarked that he saw more extremism on both sides of environmental cases than in any other area of litigation. The remark was directed, as it happened, to a power company attorney who could not agree to a compromise acceptable to his environmental opponent.

Environmental cases are generally not settled. Consolidated Edison's proposal to construct a pumped storage reservoir and power plant on Storm King Mountain, for example, continues in litigation after more than eleven years, including four appeals to the Second Circuit.¹ Storm King is only one of eight power plants along the lower Hudson River under scrutiny by environmentalists and under review by environmental protection agencies.²

Other unsettled cases can be cited as well. Proposed construction of long distance high-voltage transmission lines through the Catskills in the Towns of Blenheim and Gilboa resulted in three Second Circuit opinions.³ Last term's decision effectively

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¹ Hudson River Fishermen's Ass'n v. FPC, 498 F.2d 827 (2d Cir. 1974); Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Scenic Hudson Preservation Conf. v. Callaway, 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974). *See also In re de Rham v. Diamond*, 32 N.Y.2d 34, 295 N.E.2d 763, 343 N.Y.S.2d 84 (1973).

² Consolidated Edison's Indian Point Units 1, 2 and 3; Central Hudson's Danskammer and Roseton plants; and Orange & Rockland's Bowline and Lovett plants. The federal agencies include the Environmental Protection Agency, Corps of Engineers, Nuclear Regulatory Commission and the Federal Power Commission. The state agencies include the Attorney General, Department of Environmental Conservation and the Public Service Commission.

³ Greene County Planning Bd. v. FPC, 528 F.2d 38 (2d Cir. 1975); Greene County

postponing construction of a three-State superhighway along the Route 7 corridor from Vermont to Connecticut was, after remand by the Supreme Court, reversed in a second opinion.⁴ The General Services Administration's proposal to construct a courthouse annex in Foley Square resulted in two Second Circuit decisions.⁵ And the controversial New York City Transportation Control Plan, designed to abate New York City's air pollution, has been litigated in the Second Circuit once, and is now awaiting readjudication.⁶

Environmental cases present difficult settlement situations. Consolidated Edison's plans for Storm King do not lend themselves to a compromise of, say, a smaller or less visible installation. Fishermen and coastal tourist facility owners are not apt to compromise after learning from the Nuclear Regulatory Commission [hereinafter referred to as NRC] that the Storm King Plant, along with the other Hudson River power plants, has the potential for killing forty-seven to sixty-four percent of the annual production of Hudson River striped bass.⁷ If Consolidated Edison's and other power company's current plans are approved, power plants along the lower Hudson River operating at capacity will circulate 15,150 cubic feet of water per second through the plants to cool condensers. By comparison, the average net downstream flow of the Hudson River for May is 22,500 cubic feet per second, for June is 12,500 cubic feet per second, and for July is 9,000 cubic feet per second.⁸ Thus, in June and July, the electric companies will use more water in their plants for cooling purposes than the Hudson River's total average net downstream flow.

Looking at such figures, one can easily understand one environmentalist's definition of the issue: just who owns the

Planning Bd. v. FPC, 490 F.2d 256 (2d Cir. 1973); Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

⁴ Conservation Soc'y, Inc. v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974), *vacated and remanded sub nom.* Coleman v. Conservation Soc'y, Inc., 423 U.S. 809 (1975), *rev'd on remand*, No. 73-2629 (2d Cir. Feb. 18, 1976).

⁵ Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

⁶ Friends of the Earth v. Environmental Protection Agency, 499 F.2d 1118 (2d Cir. 1974); Friends of the Earth v. Carey, 401 F. Supp. 1386 (S.D.N.Y. 1975), *appeal docketed*, No. 75-7497 (2d Cir., filed Aug. 29, 1975).

⁷ Nuclear Regulatory Commission, Final Environmental Impact Statement related to the operation of Indian Point Nuclear Generating Plant Unit No. 3, Dkt. 50-286, Vol. 1 p. 218 (Feb. 1975).

⁸ *Id.* at V-33.

river anyway? It is easy to imagine a power company official making the very same remark. Issues seen from such limited perspectives result in the equivalent of total war.

Charles Luce, Chairman of Consolidated Edison, defending the company's plans, argued that our society had reached the point "when [the] human environment must prevail over fish habitat."⁹ Yet it is startling to contemplate a fishless river as the result of providing the last kilowatts necessary to meet peak electric demand. It is self-evident that much is at stake when a private corporation's interpretation of public need could turn the Hudson River into a sterile waterway.

Other environmental controversies reaching the Second Circuit have been equally intense. Recent cases have involved preservation of urban neighborhoods¹⁰ and the maintenance of balanced regional transportation systems,¹¹ or have gained urgency from their relationship to public health¹² and to people's aspirations for aesthetic beauty and natural surroundings.¹³

The pivotal actor in terminating environmental controversies is the regulatory agency. Representing the public interest, the agency must serve two conflicting mandates: a developmental mandate to encourage, for example, growth in the national economy, and an environmental mandate under the National Environmental Policy Act and other environmental statutes. The Second Circuit and other courts consistently remind agencies that their environmental mandate must be discharged as faithfully as their developmental mandate. But the person who relaxes in anticipation of full blown environmental protection flowing from government agencies will quickly be jarred to reality. A persuasive case can always be presented for development. As the New York Court of Appeals recently noted in the context of zoning variances, the developer seeking a zoning variance has much to gain and little to lose. He is not reluctant

⁹ N.Y. Times, May 20, 1975, at 53, col. 4. Angus MacBeth, Attorney for the Hudson River Fishermen's Association, answering Luce, properly pointed out that the striped bass fishery threatened by the power plants is worth fifty million dollars annually, far more than the roughly thirteen million dollars needed annually to protect the fishery with closed-cycle cooling systems. N.Y. Times, June 3, 1975, at 32, col. 3.

¹⁰ Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975).

¹¹ Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974).

¹² Friends of the Earth v. Environmental Protection Agency, 499 F.2d 1118 (2d Cir. 1974).

¹³ Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975).

to spend money in retaining experts, lawyers and others needed to present his case favorably.¹⁴ Without a counterbalancing force the issue time and time again goes to the developer. Environmentalists at the same time have learned that success follows from organization, persuasive presentation of fact and concern, and constant reminders to the agency that an environmental constituency exists and represents a vital element in the community.

With respect to settlement of litigation, the agency's role as developer or regulator does not seem to matter; it does not matter, for instance, whether it is either the builder of a dam or the licensor of a private power plant. The agencies have their own independent understanding of the public welfare and their own missions, agendas and political considerations. An attack upon what an agency decides tends to be viewed by the same agency as an attack on the agency's power to determine issues clearly within its jurisdiction. By the time parties arrive at the courthouse a focus on the environmental issues may have all but disappeared. In such multi-party lawsuits the issue transcends who owns the river; rather, it becomes who owns the agency.

Settlements, of course, do occur. Three controversies involving modern Hudson River power plants ended in settlement. The power plants are Indian Point Unit 3,¹⁵ one of three nuclear units at Indian Point on Haverstraw Bay; Bowline Point,¹⁶ a massive fossil fuel plant across Haverstraw Bay from Indian Point; and Roseton,¹⁷ an equally large fossil fuel plant north of Newburgh. In each case the federal agency's staff sided decisively, although not completely, with the environmentalists.

In the Indian Point Unit 3 settlement, the staff of the Nuclear Regulatory Commission [hereinafter referred to as NRC], Consolidated Edison, the environmentalists, and other signatories agreed to withdraw requests for adjudicatory hearings in return for Consolidated Edison's commitment to install

¹⁴ *Douglaston Civic Ass'n, Inc. v. Galvin*, 36 N.Y.2d 1, 6, 324 N.E.2d 317, 320, 364 N.Y.S.2d 830, 834 (1974).

¹⁵ Stipulation, *In re Consolidated Edison Co. (Indian Point Station Unit 3)*, Nuclear Regulatory Comm'n Dkt. No. 50-286, Dec. 1974 (reproduced in *in re Consolidated Edison Co.*, No. 50-286, NRCLI-75-14 (Dec. 2, 1975)).

¹⁶ *Hudson River Fishermen's Ass'n v. Orange & Rockland Util., Inc.*, 72 Civ. 5460 (S.D.N.Y. Jan. 9, 1974) (unreported).

¹⁷ *Hudson River Fishermen's Ass'n v. Central Hudson Gas & Elec. Corp.*, 72 Civ. 5459 (S.D.N.Y. July 26, 1974) (unreported).

closed-cycle cooling at the plant by September 30, 1981. Consolidated Edison retained the right to make an application for a license change based on new data, but it would have to carry the burden of proving by new data and analysis that closed-cycle cooling was not needed.¹⁸

In the Bowline Point case, the Corps of Engineers agreed to prepare an environmental impact statement and to reconsider its earlier construction permit which had been issued without an environmental assessment. The power company was authorized to operate the plant but with significant reduction of water withdrawals for cooling purposes during the spring and early summer, the striped bass spawning season.¹⁹ The Roseton settlement²⁰ paralleled the Bowline settlement except that, because the plant was not yet in operation, there was no need to impose a restriction on water withdrawals.

Environmentalists have not appealed every agency decision authorizing a power plant along the Hudson River. In the important Indian Point Unit 2 licensing case, the NRC decision granting the license included substantial environmental protection measures, although not to the extent sought by environmentalists.²¹ The environmentalists did not seek review of the license although, as intervenors in the license proceedings, they had the right to do so. Indeed, the finality accorded to the Indian Point Unit 2 decision by all parties was the foundation upon which the Indian Point Unit 3 settlement was constructed.

The ability of the parties to settle or terminate these hard-fought environmental cases was strengthened by two factors. First, the environmentalists presented a credible position on the environmental issues and the appropriate agency responded to that position. Second, all parties focused on the environmental issues, avoiding issues of power or politics. Once the agency acted, adopting significant portions of the environmentalists' position, both the environmentalists and the developers were faced with a decidedly unfavorable litigation situation: there was little possibility of reversing the agency decision. The only re-

¹⁸ Stipulation, *supra* note 15, at xix-xx.

¹⁹ Hudson River Fishermen's Ass'n v. Orange & Rockland Util., Inc., 72 Civ. 5460 (S.D.N.Y. Jan. 9, 1974) (unreported).

²⁰ Hudson River Fishermen's Ass'n v. Central Hudson Gas & Elec. Corp., 72 Civ. 5459 (S.D.N.Y. July 26, 1974) (unreported).

²¹ *In re* Consolidated Edison Co. (Indian Point Station Unit 2), No. 50-247, ALAB-188, AEC 324 (1974).

maining viable course was to settle on the best terms available.

A case with a contrary agency response involving identical fishery issues was *Hudson River Fishermen's Association v. FPC*.²² In that case the Federal Power Commission [hereinafter referred to as *FPC*] refused to reopen or undertake further consideration of Consolidated Edison's license to build the Storm King pumped-storage plant even though evidence of a number of erroneous assumptions by the FPC had been called to the agency's attention by environmentalists. The Second Circuit in a prior review had approved the issuance of the license.²³ On review again after the FPC's refusal to reopen, a panel of the Second Circuit without dissent vacated the FPC's order denying the Hudson River Fishermen's petition for reconsideration, despite the existence of considerations relating to the doctrine of *res judicata*, administrative finality and administrative expertise.

The issue raised by the environmentalists was persuasive. The FPC had projected little harm to Hudson River biota on the assumption that the Hudson River flows only downstream, and, hence, fish eggs and larvae would be exposed to the plant intake only once.²⁴ In fact, the Hudson River is a tidal estuary with water flowing in both directions with the tides. Fish eggs and larvae pass the intakes as often as four times a day.²⁵ Environmentalists called attention to this error, but the FPC refused to hold a hearing and denied the application for reconsideration. The Second Circuit, on review, held that the FPC had abused its discretion and vacated the agency's order. Testimony at the resulting court-ordered hearings confirmed the potential seriousness of the FPC error. Consolidated Edison thereupon sought an adjournment of the hearing to permit gathering and evaluation of new data and a postponement of final decision. The Second Circuit permitted the adjournment and postponement, but enjoined construction of the plant and required the FPC to

²² 498 F.2d 827 (2d Cir. 1974).

²³ *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

²⁴ 498 F.2d at 831.

²⁵ *Id.* The major issue with respect to Hudson River power plants is not heat but entrainment. Entrainment means the carrying along of fish eggs, larvae and other biota into the plant with cooling water, where the biota are subjected to potentially lethal doses of abrupt temperature and pressure changes and mechanical abrasion. The plants act like enormous predators straining life from massive streams of once-through cooling water. *Id.* at 830 n.4.

recommence its hearing as soon as reasonably possible after October 1, 1976.²⁶

On the record of *Hudson River Fishermen's Association v. FPC*, there could be little expectation for compromise or settlement. The case appears to fall in the category of "who owns the agency."²⁷

The key role of the agency in fostering settlements became quite evident in the subsequent history of the three cases that were settled. Sad to report, all three settlements fell apart, to a greater or lesser extent, at that juncture when the agency backed away from its earlier responsive position. The NRC Atomic Licensing Appeals Board, which had to approve the Indian Point Unit 3 settlement, took the opportunity to write an opinion in which it "interpreted" out of the settlement the essential agreement between the parties, a specific requirement calling for construction of a cooling tower.²⁸ The Appeals Board claimed to approve the settlement "as interpreted," but, in fact, rewrote the parties' agreement in line with its view of the public interest. Both the staff of the NRC and the environmentalists, feeling betrayed by the Appeals Board, immediately reacted; the NRC staff demanded reversal of the Appeals Board determination by the Commission and the environmentalists directly appealed to the Second Circuit.²⁹ Faced with a rebellion of its own staff, and appellate court scrutiny, the Commission took the extraordinary action of excising the offending portions of the Appeals Board's opinion, and reinstated the settlement as originally agreed to, not as interpreted.³⁰

In the Bowline and Roseton power plant settlements, the

²⁶ *Hudson River Fishermen's Ass'n v. FPC*, No. 73-2253 (2d Cir. Aug. 8, 1975).

²⁷ In another case also involving the Federal Power Commission, Judge Mansfield, in his dissenting opinion, was, in effect, in agreement on the nature of the issue before that agency:

The pattern that emerges from the FPC's conduct is clear. The FPC first defers, then transfers, all in an attempt to thwart review and to insulate the hearing process from the data that this Court had earlier ordered that it make available for scrutiny at the hearing.

Greene County Planning Bd. v. FPC, 490 F.2d 256, 259-60 (2d Cir. 1973) (Mansfield, J., dissenting).

²⁸ *In re Consolidated Edison Co.*, No. 50-286, A-LAB-287, NRCI-75/9 (Sept. 3, 1975).

²⁹ *Hudson River Fishermen's Ass'n v. Nuclear Regulatory Comm'n*, appeal docketed, No. 75-4212 (2d Cir. Oct. 2, 1975), *petition dismissed on consent* (2d Cir. Dec. 9, 1975).

³⁰ *In re Consolidated Edison Co.*, No. 50-286, NRCLI-75-14 (Dec. 2, 1975).

Corps of Engineers simply defaulted. The settlements called for preparation of an environmental impact statement on both plants to be completed by July 1, 1974, and September 1, 1974, respectively. After failing to meet the court-ordered deadlines, the Corps filed an affidavit in explanation and estimated that it would complete its work by April 1975. As of this writing the Corps has yet to produce its statement and the plaintiffs have sought to hold the Corps in contempt.

The pattern of these three cases does not generate optimism. Agency responsiveness shifted in unpredictable ways, tending to undermine both the initial underlying consensus supportive of environmental interests and any sense of predictability as to future agency action. Even after settlement, elements within the agency reasserted agency prerogatives to the destruction of the settlement. Environmental litigation cannot always be settled simply because the agency responds to legitimate environmental issues. Yet responsive agency action on the environmental issue does appear essential.

The conclusion comes down to the unremarkable proposition that forceful court supervision of agencies is essential to further the possibility of settlement in environmental cases. The modern era of environmental litigation may be said to date from *Scenic Hudson Preservation Conference v. FPC*,³¹ when, eleven years ago, the Second Circuit chastised the FPC for acting like an "umpire blandly calling balls and strikes" rather than actively protecting public rights.³² Last term the Second Circuit again felt compelled to remind agencies that the National Environmental Policy Act requires "a careful and informed decision,"³³ and that "conclusory treatment" of environmental issues in environmental statements will not be tolerated.³⁴

There is potential for settlement in environmental cases where essential environmental values are in fact preserved. But where a regulatory agency short-changes its environmental mandate there is virtually no possibility of compromise; in such cases the loss of environmental values is usually a permanent loss worth the continued battle.

³¹ 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

³² *Id.* at 620.

³³ *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 516 F.2d 378, 389 (2d Cir. 1975).

³⁴ *I-291 Why? Ass'n v. Burns*, 517 F.2d 1077, 1081 (2d Cir. 1975).