

## **Summary of Recent Court and Agency Decisions**

### **P & H Clinton Partnership v. Township of Clinton**

*2005 WL 4030211 (App. Div. 2006)*

*Decided May 25, 2006, Appeal filed July 7, 2006, to the Supreme Court of New Jersey*

#### **In re: Clinton Township**

*COAH Decision No 06-1806, decided October 11, 2006*

#### **Affordable Housing / Land Preservation/ Sewer Service Areas**

These cases involve the Windy Acres development, a proposed 911 unit development in Clinton Township that includes 150 units of affordable housing. The proposed 350 acre site is environmentally sensitive because it includes habitat for endangered species, a "Category One stream," steep slopes and extensive woodland. To try to secure sewer service for the development the developer sued the sewage authority of a neighboring town, claiming that it had to accept sewage from the development. The trial court dismissed the claim in its entirety. As urged by the Clinic, the Appellate Division decided that the implementation of an approved affordable housing plan should be controlled by the Council on Affordable Housing ("COAH") and not the courts. Thus, the decision found that unless COAH decided that providing sewer service to this development was the only way for Clinton to satisfy its affordable housing requirements, the developer cannot force a neighboring town to treat the sewage from the development. The developer is currently requesting certification to appeal to the Supreme Court of New Jersey.

More recently, COAH decided that a proposed settlement between the Township and the developer was not acceptable, because the site did not offer a realistic opportunity for development of affordable housing. COAH invited the Township to submit a new plan for affordable housing that need not include the Windy Acres site. This decision is important because for the first time it allows the Township to remove the Windy Acres site from its affordable housing plan because of environmental issues. The decision illustrates that the key to providing affordable housing in an environmentally sound manner is careful site selection. The Clinic is now working to achieve the client's objective of permanent conservation of the Windy Acres site.

### **In the Matter of AmerGen Energy Company, LLC (License Renewal for Oyster Creek Nuclear Generating Station)**

*Various Decisions by the Nuclear Regulatory Commission, the Atomic Safety and Licensing Board, and the Advisory Committee on Reactor Safeguards, February, 26 2006 to October 10, 2006*

#### **Nuclear Safety / Disclosure and Analysis of Environmental and Other Risks**

In ongoing litigation and advocacy before various bodies within the Nuclear Regulatory Commission ("NRC") the Clinic is assisting a Coalition of six citizens groups who are opposed to the relicensing of the oldest operating commercial nuclear power plant in the United States. The Coalition's contention that the containment system was dangerously corroded was admitted by Atomic Safety and Licensing Board ("ASLB") on February 27, 2006 and discovery ensued. The contention was only the second ever admitted in a relicensing proceeding and became the first ever contention to trigger discovery obligations during a relicensing proceeding. Thereafter, the reactor operator modified its monitoring of the containment and mooted the initial contention. Most recently, on October 10, 2006, the ASLB admitted a modified contention alleging that the latest proposal to monitor the containment is inadequate.

The documents disclosed in discovery and other developments showed that the situation at the reactor was worse than expected for a number of reasons. First, the Clinic discovered that most of the data upon which the reactor operator was relying to show it was safe was incorrect and unreliable. Second, the Clinic discovered that the reactor had violated its operating license for eight years until March 2006, leading to circumstances that could have caused more corrosion. On October 3, 2006, the reactor operator, the NRC Staff and the Clinic presented information to the Advisory Committee on Reactor Safeguards ("ACRS"). On October 4, 2006, the ACRS found that the Coalition's concerns were substantive and had not been adequately dealt with by the Staff or the operator. Thus, the ACRS

scheduled an unprecedented second meeting to give the operator and the Staff a chance to respond to the Clinic's presentation.

**Hackensack Riverkeeper, Inc. et al. v. Delaware Otsego Corp. et al.,**

*2006 WL 2642300 (D.N.J. Sept. 11, 2006)*

*Argued on April 10, 2006 before the U.S. District Court – Decided September 11, 2006*

**Preemption / Solid Waste**

This case involves the Clinic's efforts to close down unregulated waste transfer stations in New Jersey. In the absence of any oversight, the operators piled construction and demolition debris into enormous, 50' piles that were exposed to the rain and wind, and failed to observe the most basic operational controls. As a result, their operations discharged dust and contaminated runoff into nearby neighborhoods, wetlands and creeks. The sites were operated and owned by railroads, who claim an exemption under a rate deregulation statute, the Interstate Commerce Commission Termination Act. On behalf of two Waterkeeper groups, the Clinic sued for RCRA violations and moved for summary judgment on the preemption, standing and other jurisdictional affirmative defenses asserted by the railroad. The court upheld our motion on the preemption and jurisdictional grounds, thus becoming the first court in the country to hold that railroads cannot operate solid waste facilities free of regulations designed to protect public health and the environment.

**In re Proposed St. Mary's Abbey Continuing Care Retirement Community**

*Various Decisions of the New Jersey Department of Environmental Protection culminating in the Disapproval of Morris Township's Wastewater Management Plan and Amendment to the Northeast Water Quality Management Plan on July 26, 2006*

**Sewer Service Areas / Water Quality**

This is the latest decision in environmental groups' decade-long fight to preserve property at the edge of the Great Swamp and the historic Washington Valley, site of the Continental Army's winter camp. The owners of the property, a religious order that runs an exclusive private school, sought to build a luxury retirement home in a thickly-forested area of steep slopes and wetlands that border pristine tributaries to the Whippany River. The town had to create a sewer service area and the owners had to apply to extend sewers to the area. Based on comments received by the Clinic, the DEP rejected the application because (1) it would affect the tributaries, which are protected from "any measurable changes" under state antidegradation standards, (2) would clearcut and fragment 71 acres of mature forest that is critical habitat for the Red-Shouldered Hawk, Barred Owl and Wood Turtle, and is close to a summer breeding colony of Indiana Bat, (3) had a flawed stormwater management plan, (4) would affect the viewshed from Morristown National Historical Park and (5) was contrary to the State Development and Redevelopment Plan. The owners have filed an administrative appeal.

**In re Stormwater Management Rules**

*2006 WL 931754 (N.J. Super. App. Div. April 12, 2006) (slip copy)*

*Argued in February 2006 before the N.J. Appellate Division - Decided April 12, 2006*

**Stormwater Regulations / Riparian Buffers**

This case involves 300 foot buffers along each side of waters that are classified as "Category One" under the antidegradation policy. The New Jersey Builders Association contended that this regulation effectively made the buffer zone a "no-build" zone and was effectively the exercise of plenary land use power that is exclusively delegated to municipalities. The Court ruled that there is no clear distinction between land use and environmental regulations, and that the DEP's authority in this matter is found in both the agency's enabling statute, N.J.S.A. 13:1D, and in other laws whose purpose is to improve water quality and prevent water pollution. The court can infer from these laws that the DEP had the authority to create this regulation in order to carry out its responsibility. The Clinic submitted an amicus brief and argued the matter on behalf of several environmental groups.

**Natural Resources Defense Council, Inc., et al. v. U.S. Army Corps of Engineers**

2006 WL 559472 ( S.D.N.Y. March 8, 2006) (slip copy)

Argued in December 2005 before the U.S. District Court (S.D.N.Y.) -- Decided March 8, 2006

**NEPA Violation**

This case involves the Corps plans to dredge dioxin-contaminated sediments from Newark Bay. The Corps had issued a "finding of no significant impact" despite the fact that the EPA had recently categorized the Bay as a Superfund site (as a result of advocacy by the Clinic and others). In this NEPA action, the Court had bifurcated the case and ruled in June 2005 that the Corps's environmental assessment had violated the law. Natural Resources Defense Council, Inc. v. U.S. Army Corps of Engineers, 399 F. Supp. 2d 386 (S.D.N.Y. 2005). On the later ruling regarding remedy for the violation, the Court held that the initial and intervening environmental assessments were flawed for a number of scientific and legal reasons, and gave the Corps four months to prepare NEPA-compliant documentation before it would reconsider injunctive relief against the award of future dredging contracts. The Clinic represented NY/NJ Baykeeper and is co-counsel with NRDC, which represents itself and Green faith.

**Sussex Commons Outlets, Inc. v. Chelsea Property Group, et al**

Sussex County Superior Court – Law Division (May 3, 2006) – Discovery Master Ruling

**Fending Off SLAPP-Type Attacks**

The RELC represents a group of citizens, Citizens for Responsible Development at Ross' Corner, who are challenging the proposed development of a factory outlet mall in rural Frankford Township, Sussex County, New Jersey. Because of the success of CRDRC's advocacy and public education about the impact the outlet mall project will have on the area, and the Township's ability to develop a town center on the site and receive town center designation, CRDRC has been dragged into the discovery phase of litigation commenced by the developer against a competitor. The RELC spent the past year filing motions to quash subpoenas directed to CRDRC's officers, defending depositions, responding to motions for sanctions, and other motions. The developer moved to amend its complaint in this action to name CRDRC and its officers as nondefendant co-conspirators, all apparently in an effort to intimidate CRDRC and prevent it from participating in the public process. RELC curtailed discovery and defeated the sanctions motions in January and May 2006, but CRDRC still remains embroiled in that case. After failing to gain access to privileged or otherwise undiscoverable documents through discovery, the developer has recently attempted to use New Jersey's Open Public Records Act as a means to access the Clinic's files. The developer named the Clinic, and Rutgers University, in public records act litigation and that case is currently pending in Middlesex County Superior Court.

**In re Adoption of N.J.A.C. 7:26E-1.13**

186 N.J. 81 (2006)

Argued January 31, 2006, before the N.J. Supreme Court -- Decided February 28, 2006

**Groundwater Cleanup Standards**

This case involved a challenge to the DEP's regulation intended to implement provisions of the Brownfield Act. The regulation set a level of remediation intended to make ground water under contaminated brownfield sites eventually safe to drink. Insurance and industry groups contended that this regulation violated the Brownfield Act by applying pre-existing ground water standards for potable water to remediation of industrial sites instead of promulgating new, less stringent, site specific standards. The Clinic submitted amicus curiae briefs on behalf of New Jersey Work Environment Council, Ironbound Community Corporation, New Jersey Environmental Justice Alliance NY/NJ Baykeeper, Hackensack Riverkeeper, Edison Wetlands Association, and New Jersey Environmental Lobby. The Clinic submitted an amicus brief on behalf of these groups, arguing that the groundwater is a part of the public trust, that all groundwater in the State has to be protected as a future source of drinking water and that it would be unjust and unwise to write-off groundwater in urban areas. The Appellate Division and the Supreme Court upheld the regulation.

**Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Company**

*436 F.3d 82 (2d Cir. 2006).*

*Argued September 1, 2005, before the U.S. Court of Appeals (2nd Cir.) -- Decided January 24, 2006*

**Standing**

This appeal was taken from a lower court decision dismissing a citizen suit on the grounds that salt is not a regulated contaminant under the Clean Water Act. The Second Circuit held that the District Court should have resolved standing before reaching the merits and should adopt some process to assess facts underpinning standing even in the procedural posture of a motion to dismiss. The Clinic submitted an amicus brief on behalf of NRDC.

**IMO Freshwater Wetlands Statewide General Permits (A-115-04)**

*185 N.J. 452 (2006).*

*Argued September 27, 2005, before the N.J. Supreme Court -- Decided January 11, 2006*

**Constitutional Third-Party Hearing Rights**

This case involved the right of neighboring property owners who challenged a DEP permit to obtain a trial-like hearing in front of the Office of Administrative Law (OAL). Although the New Jersey Legislature has placed severe limits on the rights of third parties for administrative hearings in state permit matters, the neighboring landowners argued that they had a constitutional hearing right because their property rights were threatened by the prospect of flooding by the proposed development. The Appellate Division ruled in their favor and DEP appealed. The Supreme Court held that the DEP's administrative review procedure for the issuance of a freshwater wetlands permit satisfies traditional notions of due process because, in part, DEP's review is just part of an overall land use process that includes planning board review, and POND participated in trial-type hearings over several days of testimony before the planning board, which then denied the application as incomplete. The Clinic submitted a brief and argued the matter on behalf of Preserve Old Northfield and the neighboring property owners.

**In re NJPDES Permit No. NJ0025241 (A-116-04)**

*185 N.J. 474 (2006).*

*Argued September 27, 2005, before the N.J. Supreme Court -- Decided January 11, 2006*

**Statutory Third-Party Hearing Rights**

This case involved the Water Pollution Control Act (WPCA) and the hearing rights that it confers upon third parties from decisions regarding pollution discharge permits. In 2001, the Clinic submitted comments to NJDEP on a proposed wastewater discharge permit that would allow the Asbury Park to discharge effluent into the Atlantic Ocean; our client was principally concerned about the absence of limits in the permit on enterococci and the impacts on the ocean ecosystem. DEP issued the final permit without such limits and denied the Clinic's request for an administrative hearing. The Supreme Court held that, on the facts of this case, COA did not have a right to a hearing because there were no adjudicative facts in issue. However, the Court also held that DEP may not simply deny hearing requests without making factual findings, a very useful admonition to DEP that the Clinic will use in future hearing requests, where it will also be possible to follow the Court's guidelines about setting forth facts that require adjudicative findings. The Clinic submitted a brief and argued on behalf of Clean Ocean Action.

**J.P. Rail, Inc. v. New Jersey Pinelands Commission**

*404 F. Supp. 2d 636 (D.N.J. 2005)*

*Argued in October 2005 before the U.S. District Court (D.N.J.) -- decided December 22, 2005*

**Preemption / Solid Waste**

This case involved the proposed construction of a waste transfer facility on a site located within the Pinelands National Reserve. The proposed operator sued the State and claimed that it was exempt from the Pinelands Act and solid waste laws because those laws were preempted by a federal statute designed to deregulate rate controls over the rail industry. On cross-motions for a preliminary injunction, the Clinic filed an amicus brief and argued before the District Court. The court said that the proposed facility will probably not involve "transportation by a rail carrier," that preemption was not warranted and

granted a preliminary injunction in favor of New Jersey Pinelands Commission. The Clinic submitted an amicus brief and argued on behalf of Pinelands Preservation Alliance.

**In re Freshwater Wetlands General Permit 16**

*379 N.J. Super. 331 (App. Div. 2005)*

*Argued November 8, 2004, before the N.J. Appellate Division – Decided July 29, 2005*

**Wetlands / Threatened and Endangered Species**

On behalf of environmental organizations, the Clinic appealed a DEP decision to issue a freshwater wetlands general permit that allowed a developer to try to fence out protected rattlesnakes from a development. The fence was ineffective and had the effect of harming the snakes. The Court reversed and remanded the permit, holding that DEP was authorized to delegate permit review to the Pinelands Commission, but that remand was necessary to make findings of fact regarding the impact fence construction would have on wildlife and wetlands.

**Raleigh Avenue Beach Association v. Atlantic Beach Club, Inc., et al. (A-40-04)**

*185 N.J. 879 (2005)*

*Argued January 19, 2005, before the N.J. Supreme Court -- Decided July 26, 2005*

**Public Trust Doctrine / Public Access to Beaches**

This case involved a private beach club that denied the public any access or use of its beach. The Supreme Court held that Atlantis must allow public access to its upland sands under the Public Trust Doctrine, that the Doctrine extended to privately-owned beaches, and that the DEP had jurisdiction to review fees proposed by Atlantis for use of its beach. The Clinic submitted an amicus curiae brief and argued the matter on behalf of Citizens' Right to Access Beaches, Inc.

**K. Hovnanian Companies of North Central Jersey, Inc. v. New Jersey Department of Environmental Protection**

*379 N.J. Super. 1 (App. Div. 2005)*

*Argued May 9, 2005, before the N.J. Appellate Division -- Decided July 1, 2005*

**Water Discharge Permit / Threatened and Endangered Species / Ripeness, Exhaustion**

This case involved a permit allowing wastewater to be discharged to a pristine stream that is habitat for the protected wood turtle. The Clinic successfully petitioned to upgrade the antidegradation classification of the receiving waters, and DEP revoked the permit. The builder filed an administrative challenge to the revocation, and separately filed suit in Superior Court claiming that the revocation violated fair housing obligations because a few of the houses were to be designated as low-income housing. The Appellate Division held that the trial court properly dismissed the complaint grounds of ripeness and failure to exhaust administrative remedies. The Clinic represented John and Wendy Neu and the Concerned Citizens of Union Township.

**In re Authorization for Freshwater Wetlands General Permits, Water Quality Certification and Waiver of Transition Area for Access**

*372 N.J. Super. 578 (App. Div. 2004)*

*Argued November 4, 2004, before the N.J. Appellate Division – Decided November 16, 2004*

**Wetlands / Administrative Law / Findings**

On behalf of a conservation group, the Clinic appealed a DEP decision to issue a letter of interpretation and a freshwater wetlands general permit to a developer to allow fill in an area subject to flooding. The court remanded the permit so that DEP could conduct more fact-finding and investigative analysis into whether the wetlands were isolated.

**In the Matter of a Petition for a Declaratory Ruling Regarding the City of Plainfield's Park-Madison Site**

*372 N.J. Super. 544 (App. Div. 2004).*

*Argued September 20, 2004, before the N.J. Appellate Division -- Decided October 15, 2004*

***Parkland Diversions***

In an earlier case, *In re Amendment to Recreation and Open Space Inventory of City of Plainfield*, 353 N.J. Super. 310 (App. Div. 2002), the Clinic had successfully challenged the ability of a municipality to take parkland for the construction of a municipal building. In response, the municipality obtained a special legislative fix that purported to exempt the parcel from applicable diversion rules. The Clinic challenged the application of the amendment to the parcel, but it was developed during the period of litigation. The Appellate Division held that the question brought was not moot because if the amendment did not apply the city would be required to supply a replacement site or compensation for the lost parkland. In this case, the court ruled that the amendment did apply to the land and that the city did not have to compensate with additional parkland. The Clinic argued the case for Citizens and Friends for Equitable Stewardship and the Sierra Club – New Jersey.