



Judge Blasts NYS Environmental Agency

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[New York Law Journal](#)

Wednesday, May 31, 2000

ALBANY — With harsh words for New York's regulators, an upstate judge has ordered the State Department of Environmental Conservation to step up its compliance with federal Clean Air Act requirements.

Acting Supreme Court Justice Dan Lamont of Schoharie gave the State two years to complete a review process, mandated by both federal and state law, and issue permits for pollution-emitting industrial facilities. Justice Lamont flatly rejected the State's argument that the DEC had other priorities and could, at will, put the permit regulations on the back-burner.

"DEC is not authorized to disregard the clear mandates of the Legislature in order to pursue other activities which it believes are more beneficial to the public," Justice Lamont wrote in *New York Public Interest Research Group v. New York State Department of Environmental Conservation*, 7280-99/ RJI No. 01-99-ST0458.

The case arises out of a proceeding initiated by the New York Public Interest Research Group (NYPIRG) under Article 78 of the Civil Practice Law and Rules. It is rooted in state and federal mandates regarding air quality.

Under a 1990 amendment to the Clean Air Act, 42 U.S.C. Section 7401(b)(1), each state is required to establish a permit program governing polluting facilities such as factories and power plants. The permits are to ensure regular monitoring of compliance with the Clean Air Act. The amendment authorized enforcement of the permit provisions by the federal government, the state or members of the public as "citizen suit" complainants.

New York State responded to that mandate by enacting legislation requiring DEC to issue permits by December 1999. At the end of last year, DEC had acted on only 21 percent of the permit applications. Currently, permits have been issued to 29 percent of the facilities, after NYPIRG brought an action to establish an enforceable schedule for compliance.

Noting that "DEC has failed to come anywhere close to completing the permitting schedule established by the statute and it's [sic] own regulation," Justice Lamont added that the statute is "crystal clear" in its mandate.

Agency Priorities

DEC contended that its other mandates and responsibilities are at least as important as those covered under the Clean Air Act and that it has the discretion to allocate funds and prioritize as it sees fit. Justice Lamont disagreed.

"While the court is cognizant of the respondents' contentions regarding which activities provide the most benefit to the public and believes that DEC's present allocation of resources may well provide the most benefit to the public, the court is also cognizant of the fact that the petitioner and other experts in the field believe that a greater allocation of resources to the permitting process would be more beneficial in the long run," Justice Lamont said. "This court need not and will not make any determination regarding which allocation of funds is in the best interests of the public — and would be hard pressed to do so."

NYPIRG was represented by staff attorneys Keri Powell and Brian Flack. Defending DEC was Assistant Attorney General Joseph Koczaja.

"The program is way behind schedule and it appeared that it would be years and years before we saw even a draft permit for many of the state's largest polluters," Ms. Powell said. This decision "puts DEC on a reasonable schedule for taking final action on these permits so the public will know if [polluters] are complying with the Clean Air Act."