

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

In the Matter of

**PORT OF OSWEGO AUTHORITY, PORT OF ALBANY
COMMISSION, AMERICAN GREAT LAKES PORTS
ASSOCIATION, CANFORNAV INC., FEDERAL
MARINE TERMINALS INC., POLSKA ZEGLUGA
MORSKA, CHAMBER OF MARINE COMMERCE, and
CANADIAN SHIPOWNERS ASSOCIATION,**

**AFFIDAVIT OF SCOTT J.
STONER**

Petitioners-Plaintiffs,

For a Judgment Pursuant to CPLR Article 78 and for
Declaratory Relief Pursuant to CPLR Section 3001

-against-

INDEX # 10296-08

**PETE GRANNIS, as Commissioner of the New York
State Department of Environmental Conservation, and the
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,**

Respondents-Defendants

State of New York)
) ss:
County of Albany)

Scott J. Stoner, an employee of the New York State Department of Environmental Conservation,
being duly sworn, deposes and says:

1. I am currently employed as a Research Scientist 4 and Chief of the Standards and Analytical Support Section in the Division of Water, Central Office of the New York State Department of Environmental Conservation, ("DEC" or "the Department"), located in Albany, New York. I have held this position since January

2006. I hold a Bachelor of Science degree in Chemistry from Bates College and a Master of Science degree in Toxicology from the University of Arizona. I submit this affidavit in support of the Department in the above-referenced legal matter. The affidavit is based on my own personal knowledge, on knowledge gained from Department files, and discussion with Department and U.S. Environmental Protection Agency (U.S. EPA) staff and other experts, and on my review of the reports, studies, and other sources cited.

2. I have been employed with the Department since 1988. I began working as a Research Scientist 1 in 1988, was promoted to Research Scientist 2 in 1989, Research Scientist 3 in 1994, and Research Scientist 4 in 2006. Throughout the course of my entire 20 year career with the Department, I have worked in the water quality standards program, which establishes standards to protect the waters of New York from pollution. These standards set limits for the presence of pollutants in State water-bodies to ensure those water-bodies can be used for their best usage(s). The standards can be either numerical or narrative. Numerical standards are specific levels of substances, such as, for example, 0.09 micrograms per liter of polychlorinated biphenyls (PCBs). Narrative standards are descriptive statements, such as, for "Taste-, color-, and odor-producing, toxic and other deleterious substances": "None in amounts that will adversely affect the taste, color or odor thereof, or impair the waters for their best usages." (See: 6 NYCRR §703.2) New York's water quality standards ensure that the level of water quality necessary to protect state waters' best usage is maintained and protected. Through the Clean Water Act certification process (such as New York's certification of U.S. EPA's Vessel General Permit), these water quality standards are translated into specific

federal permit obligations that permitted entities must satisfy.

3. According to the U.S. EPA, as of April 2007 more than 30 million organic and inorganic substances have been documented and nearly 14 million are commercially available (See: http://www.dtsc.ca.gov/AssessingRisk/PPCP/upload/01_Daughton.pdf).

U.S. EPA and New York State each have about 200 numerical water quality criteria or standards (See: <http://www.epa.gov/waterscience/criteria/wqctable/index.html> and 6 NYCRR part 700, *et. seq.*)

4. U.S. EPA, in its advance notice of proposed rulemaking ("ANPRM") for its Water Quality Standards Regulation at 40 CFR Part 131 (See: 63 Federal Register 36742 - 36806, July 7, 1998), provides the following background about narrative water quality criteria:

"Narrative criteria can be an effective tool for controlling the discharge of pollutants when numeric criteria are not available. Narrative criteria, which have become known as "free froms", were first developed in 1968 and continue to be used in State and Tribal water quality standards. EPA guidance explains that these "free froms" apply to all waters of the United States at all flow conditions (including ephemeral and intermittent streams)(see Water Quality Standards Handbook: Second Edition (EPA-823-B-94-006, August 1994). Narrative 'free from' criteria guidance indicates that all waters be free from substances, for example, that (a) cause toxicity to aquatic life or human health, (b) settle to form objectionable deposits, (c) float as debris, oil, scum and other materials in concentrations that form nuisances, (d) produce objectionable color, odor, taste or turbidity, or (e) produce undesirable aquatic life or result in the dominance of nuisance species."

In the same ANPRM, U.S. EPA further explained that narrative water quality criteria form the basis for permit limits for pollutants for which there are no numerical water quality standards:

“In addition, where the permitting authority determines that a specific pollutant for which the State or Tribe has not adopted a chemical criterion is in a discharge in an amount that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion, the permit must contain effluent limits for that pollutant that are based on an interpretation of the State’s or Tribe’s narrative criterion.”

5. Despite the fact that NYS has numerical standards for several hundred individual chemicals and other deleterious substances, narrative standards remain as valid, fully enforceable requirements of law for protecting New York’s waters. New substances are being created all the time, potentially posing threats to the state’s waters and those waters’ best usage(s). The process for developing and establishing numerical water quality standards is both lengthy and highly complex. It would be impossible to establish individual standards for each of the more than 30 million substances that are known, or to keep pace with the new chemicals being created. Thus, narrative standards must remain an essential enforcement tool for the protection of the State’s waters.

6. Nor does the fact that the U.S. EPA only has approximately 200 numerical national recommended water quality criteria (See: <http://www.epa.gov/waterscience/criteria/wqctable/index.html>) preclude the state from either establishing additional numerical standards, or from continuing to use and enforce its narrative standards. Reliance on narrative standards is necessary to control the introduction of pollutants into New York State waters. Narrative standards, including those for deleterious substances, have been part of the State’s regulations dating back to at least 1967 (See: 6 NYCRR part 700, et. seq.). The current EPA-approved language of the narrative standard for “Taste-, color-, and odor-producing, toxic and other deleterious

substances” of “none in amounts that will adversely affect the taste, color or odor thereof, or impair the waters for their best usages” (See: 6 NYCRR § 703.2) has been in effect since September 1, 1991.

7. New York’s 6 NYCRR § 703.2’s narrative water quality standards, and Part 701’s designated uses for classes of waters, were duly promulgated long ago by the Department and have existed in essentially their current form since the early 1990’s. Pursuant to my conversation with U.S. EPA, that agency in 1992 approved revisions to 6 NYCRR Parts 701, 702, and 703 that were adopted by DEC in 1991.

8. I have reviewed petitioners-plaintiffs’ (“Petitioners”) pleading in this case and have identified a number of inaccurate, misleading statements. For example, paragraph 184 of the Verified Petition and Complaint (“Complaint”) states that “NYSDEC relied on 6 NYCRR § 703.2, which reads ‘no toxic or other deleterious substances may be discharged that impair the waters for their best usages,’ to create new standards for biological organisms.” This statement incorrectly quotes the regulation, which does not refer to a discharge. In actuality, the narrative standard at 6 NYCRR §703.2 for “Taste-, color-, and odor-producing, toxic and other deleterious substances” reads, “None in amounts that will adversely affect the taste, color or odor thereof, or impair the waters for their best usages.” This is among New York’s existing standards which set forth maximum allowable levels for substances in water bodies, irrespective of a discharge.

Petitioners’ claim that NYSDEC relied on § 703.2 to “create new standards for biological organisms,” is inaccurate. I know that no such new standards have been

created within my Standards and Analytical Support Section, where standards are normally created. In addition, based on discussion with Francis Zagorski, P.E., of DEC's Division of Water, I understand that no such new standards have been created in the 401 certification process.

9. Complaint paragraph 185 states that "Biological materials do not meet the definition of 'toxic or deleterious substances.'" But as acknowledged in complaint paragraphs 31-33, aquatic invasive species (AIS) are a serious problem. Clearly, some biological materials like AIS are "deleterious." (See: American Heritage Dictionary, Second College Edition, Houghton Mifflin, 1982), defining "deleterious" to mean "having a harmful effect; injurious"; and "substance" to mean "that which has mass and occupies space; matter." AIS are therefore subject to regulation under 6 NYCRR 703.2's narrative standard, which applies to "...toxic and other deleterious substances."

10. Similarly, complaint paragraph 186 states that "Biological materials, such as plankton, are necessary for life in New York water bodies, and are not 'toxic or deleterious' substances." This statement is simplistic at best. First, based on discussion with Francis Zagorski, P.E., of DEC's Division of Water, DEC considers AIS to be deleterious but has made no representation in its 401 certification process that AIS are inherently "toxic." Second, it is widely recognized that certain things or substances can be beneficial or innocuous in some contexts but deleterious in other contexts. Petitioners acknowledge this in complaint paragraph 31, where they say that "Aquatic invasive species are plants, animals, and microscopic organisms that can cause serious problems outside of their native range." Similarly, in complaint paragraph 32, petitioners state that

[zebra mussel, round goby, and spiny water flea] "...populations grow rapidly, competing with and negatively impacting the survival of organisms native to the Great Lakes, as well as other New York water bodies." As another example, it is clearly established science that substances that are helpful at a certain level can be harmful at another level. For example, "...high doses of Vitamin A can cause liver toxicity and birth defects, high doses of selenium can affect the brain, and high doses of estrogens may increase the risk of breast cancer, even though low doses of all these substances are essential for life." (See: Casarett and Doull's Toxicology. The Basic Science of Poisons, sixth edition. Curtis D. Klaassen, Editor. McGraw-Hill. 2001). New York has a numerical water quality standard for selenium to protect sources of drinking water.

Yet another example involves nutrients in the environment. According to U.S. EPA, "Nutrients, in appropriate amounts, are essential to the health of aquatic systems." (See: National Strategy for the Development of Regional Nutrient Criteria, EPA 822-R-98-002. June 1998). At higher amounts, however, nutrients can have a deleterious effect. According to the U.S. EPA, "excessive nutrients, however, can result in excessive growth of macrophytes or phytoplankton and potentially harmful algal blooms leading to oxygen declines, imbalance of aquatic species, public health threats, and a general decline in the aquatic resource." [Id.]. U.S. EPA further states, "The term nutrient is loosely used to describe a compound that is necessary for metabolism. Nitrogen (N) and phosphorus (P) are required in relatively large amounts by cells and are called macronutrients..." New York State has a legally promulgated and enforceable narrative standard for N and P at 6 NYCRR § 703.2: "None in amounts that will result in growths of algae, weeds and slimes

that will impair the waters for their best usages."

11. Complaint paragraph 187 states that "NYSDEC has listed water quality standards for toxic and other deleterious substances at 6 NYCRR § 703.5, including Table 1, which lists standards for hundreds of pollutants," and that "The biological organisms that DEC is regulating in Conditions Two and Three of the 401 Certificate are not listed in § 703.5 or in Table 1." While DEC has listed numerical standards at 6 NYCRR 703.5 Table 1 for several hundred toxic and other deleterious substances, simply because a pollutant is not listed in 703.5 Table 1, or elsewhere within 703.5, in no way limits the DEC's ability or authority to regulate it, pursuant to the EPA-approved State narrative water quality standards. (See: paragraphs 4-6 above in this affidavit.)

Although "biological organisms," like AIS, are not listed in 703.5, it is clear that AIS are "pollutants" as defined under the Clean Water Act and State law, which definitions include "biological materials." (See: 33 U.S.C. § 1362(6); ECL § 17-0105(17)). Other biological materials that are regulated by New York State water quality standards include total and fecal coliforms.

12. Complaint paragraphs 188 and 189 refer to "effluent standards" and assert that there are federal and state regulatory requirements for developing them. Please note that there are no such things as "effluent standards" in NYSDEC's water quality program. However, "Effluent limitations," are broadly defined as follows:

"Effluent limitations mean any restriction on quantities, qualities, rates and concentrations of chemical, physical, biological, and other constituents of effluents that are discharged into or allowed to run from an outlet or point source or any other discharge within the meaning of section 17-0501 of the Environmental Conservation Law into surface waters, groundwater or

unsaturated zones.”

(See: 6 NYCRR § 700.1(a)(15); See also 33 U.S.C. § 1362(11).)


13. Complaint paragraph 190 states that “6 NYCRR § 702.9 specifies that the development of standards and guidance for the protection of aquatic life must conform to the procedures set forth in §706.1, which require development of acute and chronic standards for the toxicity of a pollutant with respect to aquatic life.” To the best of my knowledge, there is no requirement in law that any numeric water quality standards be developed for any pollutant, other than for a very limited number of toxic pollutants. For example, numeric standards must be listed for certain toxic pollutants pursuant to 33 U.S.C. § 1317(a)(1) (See: 33 U.S.C. § 1313(c)(2)(B); 40 CFR §§ 131.11(a)(1) and (b)(1)), but there is no requirement to replace narrative standards with numeric standards (See: PUD No. 1 v. Washington Department of Ecology, 511 U.S. 700, 716 (1994)). New York’s EPA-approved narrative water quality standards, which were legally promulgated in 1991, remain independently enforceable appropriate requirements of State law. 6 NYCRR §706.1 simply provides procedures to be followed [unless alternative procedures are used pursuant to § 702.9(g)] if a standard or guidance value is derived.

Respectfully Submitted,



Scott J. Stoner
New York State Department of
Environmental Conservation
Chief of the Standards and
Analytical Support Section in the Division of Water

Affirmed under penalty of perjury, this
13th day of February, 2009



NOTARY PUBLIC

MONICA KRESHIK, ESQ.
Notary Public, State of New York
No. D2KR5044537
Qualified in Rensselaer County
Commission Expires 10/8/2011

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Sir/Madam:

Take notice that the within is a copy of
the duly Filed and

entered in the office of the Clerk of
County on the of

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TO: