LIGHTING THE WAY: THE LIGHTHOUSE DECISION AND JUDICIAL REVIEW OF AGENCY ACTION

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I. OVERVIEW

Despite the increasing complexity of administrative agency action, New York’s courts have received relatively limited guidance on judicial review or oversight of such agency actions, particularly informal agency action. However, the law of judicial review of agency action received an important addition in the Court of Appeals decision Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation.1 This development in New York administrative law marks a limit on judicial deference to agency action and perhaps more importantly demonstrates the need for a realistic hard look at the agency record, as well as a degree of deference calibrated to the reliability of the administrative action because not all agency decisions deserve the same degree of deference.2

The need for these refinements is particularly important in the environmental arena where the New York State Department of Environmental Conservation (“DEC”) is involved in regulating a substantial aspect of New Yorkers’ lives and business endeavors.3

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2 Id. at 176, 924 N.E.2d at 810, 897 N.Y.S.2d at 702. Agency action in New York is primarily reviewed pursuant to CPLR sections 7801–7806, which provides in relevant subparts:

[W]hether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . or . . . whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law is, on the entire record, supported by substantial evidence.

N.Y. C.P.L.R. 7803(3)–(4) (McKinney 2012).

3 The DEC was created on June 1, 1970 for the specific purpose of combining in a single agency all state programs designed to protect and enhance the environment. 1970 N.Y. Laws 866–67. The DEC, despite recent cuts in staff, still employs almost 3,000 persons, making it the second largest state agency. Employment, DEP’T OF ENVTL. CONSERVATION,
This regulatory process involves making both formal and informal decisions—decisions that the DEC claims should receive significant deference from the courts due to its expertise in regulating the environment.\textsuperscript{4} Accordingly, the standard of judicial review dealt with in the \textit{Lighthouse} decision is a matter that affects our daily lives, and therefore deserves considerable attention.\textsuperscript{5} However, there has long been a tension between advocates of a more probing review and the more conventional approach of granting considerable deference to agency action.\textsuperscript{6} This may be a result of the complex balancing act courts must perform: they must review many different types of agency action across myriad factual contexts, inquiring deeply enough to satisfy legally prescribed criteria of rationality and fairness but maintaining a light enough touch to respect the legitimate authority of agencies to make policy.\textsuperscript{7}

Historically, views on where the correct balance lies have evolved over time, from the origins of the administrative state in the time of the New Deal to the present day.\textsuperscript{8} The stakes of agency decision making can be high.\textsuperscript{9} This is especially true in the realm of environmental law, where agency determinations regarding complex scientific phenomena can have significant implications for the environment, human health, and the economy.\textsuperscript{10} As Professor Strauss has written, the key is striking the right balance:

\url{http://www.dec.ny.gov/about/jobs.html} (last visited Jan. 21, 2012). As the environmental revolution exploded in a burst of national and state legislation, DEC has become a regulator of water, air, waste, and, to some extent, development. See \textit{N.Y. ENVTL. CONSERV. LAW} § 3-0301 (McKinney 2012).

\textsuperscript{4} See discussion \textit{infra} Part II.

\textsuperscript{5} One scholarly commentator has observed: "the rights asserted in environmental cases are ‘important,’ and that they justify the imposition upon administrative agencies of ‘greater burdens of proof’ and the imposition on courts of the duty of ‘more thoroughgoing judicial review.’" David Sive, \textit{Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law}, 70 COLUM. L. REV. 612, 643 (1970) (quoting Louis L. Jaffe, \textit{Administrative Law: Burden of Proof and Scope of Review}, 79 HARV. L. REV. 914, 920 (1966)).


\textsuperscript{7} \textit{RODGERS, JR., supra} note 6, at 90.

\textsuperscript{8} See discussion \textit{infra} Part IV (reviewing various federal approaches from the 1940s until today).

\textsuperscript{9} See, e.g., discussion \textit{infra} Part II.

\textsuperscript{10} See discussion \textit{infra} Part V.
If one could capture in a formula the level and object of judicial scrutiny that would arm the forces of reason within the agencies without encouraging defensive, excess that would be our goal. It is, as it always has been, a matter of the judges being aware of their own limits at the same time as they set limits for others.11

But regardless of precisely where the balance of rigor and deference is struck, the need for some kind of meaningful judicial review—a review that actually engages with the critical issues of a case—is an enduring theme of American administrative law. Louis Jaffe has opined, “[t]he availability of judicial review is the necessary condition, psychologically if not logically, for a system of administrative power which purports to be legitimate, or legally valid.”12 The Lighthouse appeal is a fair example of the Court of Appeals trying to find the correct balance.

II. THE Lighthouse LITIGATION

Lighthouse involved a dispute over the administration of a new legislative program, the Brownfield Cleanup Program (“BCP”),13 designed to put areas contaminated with hazardous waste into productivity through tax credits keyed to cleanup and subsequent capital expenditures, and a state certification that the site had been cleaned up to a level where it could be developed.14 The critical issue in Lighthouse was whether the petitioner’s property was sufficiently contaminated with hazardous waste to be classified as a “brownfield” within the meaning of the BCP.15 As the Court of Appeals noted: “The BCP broadly defines the term ‘brownfield site’ as ‘any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant.’”16

The Lighthouse petitioner submitted an application for the inclusion of two adjacent parcels into the BCP stating that there

15 Lighthouse, 14 N.Y.3d at 164, 924 N.E.2d at 802, 897 N.Y.S.2d at 694.
16 Id. at 165, 924 N.E.2d at 803, 897 N.Y.S.2d at 695 (quoting N.Y ENVTL. CONSERV. LAW § 27-1405 (2) (McKinney 2008)).
were hazardous materials on the parcels that were above the DEC-issued soil cleanup objectives ("SCOs") and asserted that there would be difficulty in financing development due to the uncertainty of the required cleanup.\textsuperscript{17} Unfortunately for the \textit{Lighthouse} petitioner, its application for participation in the BCP arose in the context of the DEC having realized a miscalculation in the cost of the BCP program.\textsuperscript{18} At the outset of the BCP, the DEC had estimated that successful BCP applicants might receive a total of $135 million.\textsuperscript{19}

However, by 2008 the State Comptroller estimated that property enrolled in the program might receive a total of as much as $3.1 billion and that certain developers would receive as much as $100 million for a single site.\textsuperscript{20} The legislature responded to this issue by reducing the tax credits that would be available to new applicants.\textsuperscript{21} The more generous tax credits would apply to sites that had already filed for admission into the program, such as the \textit{Lighthouse} petitioner.\textsuperscript{22} The DEC had been active in attempting to winnow out high-end developments that would be entitled to the original significantly higher tax credits.\textsuperscript{23}

The BCP legislation directed DEC to promulgate soil cleanup standards,\textsuperscript{24} and the \textit{Lighthouse} petitioner argued that the soil on its sites exceeded those standards in certain areas.\textsuperscript{25} Nevertheless, the DEC Brownfield Program director denied the application for the two parcels based on a DEC engineer's evaluation that, although there were hazardous wastes on the parcels, "[t]here was no indication that contaminants... are present at levels that would

\textsuperscript{17} \textit{Lighthouse}, 14 N.Y.3d at 169–70, 924 N.E.2d at 805–07, 897 N.Y.S.2d at 697–99.
\textsuperscript{18} \textit{See id.} at 167–68, 924 N.E.2d at 804–05, 897 N.Y.S.2d at 696–97.
\textsuperscript{19} \textit{Id.} at 167, 924 N.E.2d at 804, 897 N.Y.S.2d at 696.
\textsuperscript{20} \textit{Id.} at 167, 924 N.E.2d at 805, 897 N.Y.S.2d at 697.
\textsuperscript{21} \textit{Id.} at 167–68, 924 N.E.2d at 805, 897 N.Y.S.2d at 697.
\textsuperscript{22} \textit{Id.} at 167, 924 N.E.2d at 805, 897 N.Y.S.2d at 697. The tax credits for the \textit{Lighthouse} petitioners would range from ten to twenty-two percent of the covered costs which included both the costs of remediation and the \textit{Lighthouse} petitioners' $250 million dollars in construction. \textit{Id.} at 166–68, 924 N.E.2d at 804–05, 897 N.Y.S.2d at 696–97.
\textsuperscript{23} For example, the DEC rejected a New York City parcel on a theory that it would have been developed without any tax benefits due to high value of the real estate. \textit{River Realty Co. v. N.Y. State Dep't of Envtl. Conservation}, 68 A.D.3d 564, 891 N.Y.S.2d 359 (App. Div. 1st Dep't 2009). In that case, the Appellate Division held "[w]e reject respondent's argument that a property may be deemed ineligible for the program on the ground that it would have been remediated in any event." \textit{Id.}; \textit{see also Destiny USA Dev., LLC v. N.Y. State Dep't of Envtl. Conservation}, 63 A.D.3d 1568, 1569–71, 879 N.Y.S.2d 865, 869 (App. Div. 4th Dep't 2009), \textit{leave to appeal denied, In re Destiny USA Dev., LLC}, 14 N.Y.3d 703, 925 N.E.2d 103, 898 N.Y.S.2d 98 (2010).
\textsuperscript{24} \textit{Lighthouse}, 14 N.Y.2d at 166, 924 N.E.2d at 804, 897 N.Y.S.2d at 696.
\textsuperscript{25} \textit{Id.} at 171, 924 N.E.2d at 807, 897 N.Y.S.2d at 699.
complicate the redevelopment or reuse of this property . . . .”\textsuperscript{26}

The \textit{Lighthouse} petitioner then brought an Article 78 petition alleging that the denial of its participation in the BCP was arbitrary and capricious.\textsuperscript{27} The DEC relied upon its staff engineer’s analysis, as summarized by the Court of Appeals:

On December 4, 2007, DEC answered, and asked Supreme Court to dismiss Lighthouse’s petition. DEC relied principally on the affidavit of the staff environmental engineer who recommended denying Lighthouse’s requests for acceptance into the BCP. He opined that the ‘exceedances of soil and groundwater cleanup standards’ at the properties were ‘limited in number compared with the large amount of data available’; and that ‘[t]he exceedances revealed by both historical and current sampling data were few in number, limited in magnitude, and widely dispersed.’ As a result, ‘[t]aken as a whole, the data [did] not indicate the presence of contamination at the [Riverfront and Inland Sites] in quantities or concentrations sufficient to require remediation.’\textsuperscript{28}

The \textit{Lighthouse} petitioner responded that the hazardous waste on the properties did complicate development and also submitted an affidavit from an experienced real estate attorney averring that the sites could only be developed by participating in the BCP.

He maintained, however, that there was ‘no question that the Project is feasible, would get financed, and could proceed if these were the only issues’; and that what prevented Lighthouse from going forward was the presence of hazardous wastes at the Riverfront and Inland Sites. He noted that ‘[n]o one will finance [Lighthouse’s project]’ absent ‘[DEC’s] approval of the investigation and remediation of hazardous wastes at the [properties], and a release of liability’ because ‘[o]therwise the risks are too great for lenders, particularly due to the relative low value of property in Upstate New York compared to the rest of the country’; and that ‘the [MCDPH] continues to insist that [Lighthouse] undertake remediation, but there is no one to sanction it’ since DEC ‘has disavowed jurisdiction’ under the

\textsuperscript{26} Id. at 170–71, 924 N.E.2d at 807, 897 N.Y.S.2d at 699 (quoting DEC’s decision).
\textsuperscript{27} Id. at 164, 924 N.E.2d at 802, 897 N.Y.S.2d at 694.
\textsuperscript{28} Id. at 172, 924 N.E.2d at 808, 897 N.Y.S.2d at 700.
In granting the petition, the supreme court held that the Lighthouse sites were brownfields within the meaning of the BCP statute. However, on appeal, the Appellate Division reversed, holding that "DEC's well-reasoned analysis of the BCP applications... coupled with the mandate that we must not substitute our judgment for that of the DEC, compels the conclusion that the court erred in granting the petition and directing the DEC to accept petitioner into the BCP." Indeed, the DEC argued that the courts did not have the requisite expertise to second guess its technical analysis and that the Lighthouse sites did not require remediation despite the presence of hazardous substances. Thus, Judge Read writing for the Court of Appeals accurately summed up the DEC's position:

Because the BCP is meant to restore contaminated real property to productive use, DEC argues that the phrase 'may be complicated' in the statutory definition of the term 'brownfield site' is 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 is the sole arbiter; and here,

"[f]rom a perspective that only an expert can have, DEC found the exceedances on [Lighthouse's] property to be relatively small in number and minimal in magnitude. Without the benefit of the agency's expertise or perspective borne of experience, the courts lack any basis to substitute their own judgment for that of DEC."

Further, DEC contends, once it determined that no cleanup

29 Id. at 174, 924 N.E.2d at 809, 897 N.Y.S.2d at 791.
31 Id. at 94, 872 N.Y.S.2d at 771.
32 The Attorney General argued that an agency's view on statutory interpretation ought to be granted deference if that agency is responsible for implementing the statute: As the agency charged by law with implementing the brownfields statute, DEC is entitled to judicial deference in its interpretation of the BCP eligibility standard. "The practical construction of the statute by the agency charged with implementing it, if not unreasonable, is entitled to deference by the courts." . . . A court should defer to the interpretation given a statute by an agency charged with its enforcement, if the interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute.

was warranted, redevelopment or reuse of the properties was, by force of this circumstance alone, not “complicated” within the meaning of the statutory definition.\textsuperscript{33}

The DEC’s action, the decision to reject the Lighthouse sites as brownfields, like many administrative actions, consisted of different and discrete functions. Initially, DEC staff construed the statute to mean that hazardous waste on the site must be present in quantities that are sufficient to require significant remediation, in other words, “complicated” meant that the remedial problems were so significant that the site warranted significant tax relief and the other benefits of the BCP.\textsuperscript{34} Essentially, the DEC staff was construing the statute to mean that minimal amounts of contamination were not intended to qualify sites for the significant tax benefits of the BCP. The second function is that a DEC staff engineer examined the evidence presented by Lighthouse’s experts and disagreed with the factual conclusions they put forward, concluding that there was no need for site remediation.\textsuperscript{35} DEC claimed that all of these administrative functions were insulated from searching review because they were all cloaked with deference.\textsuperscript{36} This, I suggest, is really an argument for “super deference,” or that the reviewing courts should not intrude in technical matters.\textsuperscript{37}

The Appellate Division did not focus on the DEC engineer’s technical reasoning but assumed that it was essentially in the realm of reasonableness;\textsuperscript{38} which would be the end of the judicial review process in accordance with well-established precedent. Accordingly, the Court of Appeals not only had before it a factual disagreement between the agency and the applicant’s technical staff but also and perhaps more importantly, a claim of deference based on the well-established doctrine that “‘[i]t is not the province of the courts to second-guess thoughtful agency decisionmaking . . . . The . . .”

\begin{footnotes}
\item[33] Lighthouse, 14 N.Y.3d at 175–76, 924 N.E.2d at 810, 897 N.Y.S.2d at 702 (quoting Brief for Respondents, supra note 32, at 23).
\item[34] Brief for Respondents, supra note 32, at 10–11.
\item[35] Id. at 12–15.
\item[36] Id. at 30–32.
\item[38] See Lighthouse Pointe Prop. Assocs. LLP v. N.Y. Dept’ of Envtl. Conservation, 61 A.D.3d 88, 94, 872 N.Y.S.2d 766, 770 (App. Div. 4th Dep’t 2009) (“It is beyond dispute that reasonable minds may differ in the interpretation and analysis of the data collected at the site, and it therefore cannot be said that the rejection by the DEC of petitioner’s BCP applications was unsupported by the evidence, nor can it be said that the DEC acted in an arbitrary and capricious manner in rejecting those applications.”).
\end{footnotes}
... agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination..."39 The Court of Appeals adopted a rule that stripped any deference from the first tenet of the State’s argument regarding the staff engineer’s determination.40 To support this holding, the Court cites and relies upon Kurcsics v. Merchants Mutual Insurance Co.41

The 1980 Court of Appeals decision in Kurcsics explained that if the interpretation of a statute “involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, [then] the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute.”42 However, if the court finds that interpretation of the statutory term at issue requires only “pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency...”43 For these types of statutory provisions, an agency’s “interpretive regulations are therefore to be accorded much less weight.”44

Kurcsics addressed judicial review of agency interpretation of a statute in the context of rulemaking, but the court subsequently confirmed that the Kurcsics framework also applies in other contexts.45 In the 2004 Madison-Oneida46 case, the court applied the framework in reviewing the determination of a Board of Cooperative Educational Services that five teaching assistants fell within a certain statutory classification and did not enjoy tenure protection.47 Citing Kurcsics, but couching the test in slightly stronger terms, the court concluded, “[a]t times deference is accorded to an administrative agency because of its expertise in a given area... However, in the instant case, this Court is faced

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39 Id. at 93, 872 N.Y.S.2d at 770 (quoting Riverkeeper, Inc. v. Planning Bd. of Town of Se., 9 N.Y.3d 219, 232, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007)).
42 Id. at 459, 403 N.E.2d at 163, 426 N.Y.S.2d at 458.
43 Id.
44 Id.
46 Id. at 51, 823 N.E.2d at 1265, 790 N.Y.S.2d at 620.
with the interpretation of statutes and pure questions of law and no deference is accorded the agency's determination.” Subsequent decisions continue the court’s non-deferential approach to agency interpretation of non-specialist statutory terminology.

The Kurcsics rule is at odds with a well-established and often invoked doctrine of judicial review enunciated in Howard v. Wyman:

“it is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld.” The reason for this rule is that the agency’s experience administering the statute imbues it with expertise that is generally applicable in interpreting the statute. Since 1971, this doctrine has been invoked by New York’s administrative agencies with religious vigor, and the Court of Appeals has continued to apply this doctrine in varied administrative settings. For example, in 2008, the Court of Appeals credited the Labor Department’s interpretative letter in Samiento v. World Yacht Inc.: “[t]he Labor Department’s interpretation of a statute it is charged with enforcing is entitled to deference. The construction given statutes and regulations by the agency responsible for their administration, ‘if not irrational or

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48 Id. at 58–59, 823 N.E.2d at 1268–69, 790 N.Y.S.2d at 622–23 (citations omitted).
51 Id. at 438, 271 N.E.2d at 529, 322 N.Y.2d at 685–86.
52 Inc. Vill. of Lynbrook v. N.Y. State Pub. Emp't Relations Bd., 48 N.Y.2d 398, 404, 399 N.E.2d 55, 58, 423 N.Y.S.2d 466, 468 (1979) (“As the agency charged with implementing the fundamental policies of the Taylor Law, the board is presumed to have developed an expertise and judgment that requires us to accept its construction if not unreasonable.” (citations omitted)).
unreasonable,” should be upheld.\textsuperscript{54}

The Samiento court relied on Chesterfield Associates v. New York State Dep’t of Labor,\textsuperscript{55} an earlier Court of Appeals decision, to support the proposition that if an agency is responsible for implementing a statute, then its views on interpreting that statute are entitled to deference.\textsuperscript{56}

This appeal does not call on us to engage in ‘pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent.’ Rather, we are asked to decide whether the Commissioner applied a reasonable methodology to evaluate Chesterfield’s compliance with its obligation under Labor Law § 220(3) to pay or provide for supplements at the prevailing rate on the five public projects at issue. Accordingly, the Commissioner’s determination to annualize Chesterfield’s contributions to the profit-sharing plan is entitled to deference.\textsuperscript{57}

Samiento and Chesterfield cover a broad array of administrative decisions. In Samiento, the Department of Labor had offered an advisory opinion that mandated restaurant “service” charges could be gratuities within the meaning of the labor law.\textsuperscript{58} However, in Chesterfield, the Department of Labor had worked out a formula to accommodate the need to equalize pay for government contract workers which increased the workers income, over the objection that the formula worked an unfair penalty.\textsuperscript{59} Neither of these decisions address the level of deference owed in an informal action, such as in Lighthouse.

III. COMBINED ISSUES OF FACT, LAW, AND JUDGMENT

The Lighthouse court essentially resolved differing views on conflicting maxims of judicial review. Judge Read reasoned:

[W]here “the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its

\textsuperscript{54} Samiento, 10 N.Y.3d at 79, 883 N.E.2d at 995, 854 N.Y.S.2d at 88.

\textsuperscript{55} Chesterfield, 4 N.Y.3d at 604, 830 N.E.2d at 291–92, 797 N.Y.S.2d at 393–94.

\textsuperscript{56} Samiento, 10 N.Y.3d at 79, 883 N.E.2d at 995, 854 N.Y.S.2d at 88.


\textsuperscript{58} Samiento, 10 N.Y.3d at 79–80, 883 N.E.2d at 995, 854 N.Y.S.2d at 88.

\textsuperscript{59} Chesterfield, 4 N.Y.3d at 601, 830 N.E.2d at 289, 797 N.Y.S.2d at 391.
interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.”

The Lighthouse Court of Appeals dispenses with DEC’s first claim of deference, deference to the DEC’s expertise in assessing the need for remediation, and rejects DEC’s second deference argument by concluding that it need not agree with the DEC’s interpretation of the statute that it is charged with administrating. The court does this by initially concluding that the issue on appeal is “one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent.” However there is no specific reference to the legislative history that directed the court to reject both the DEC’s factual finding and its application of the statute to the facts found by its staff engineer. Indeed, the Court of Appeals’ decision is non-specific, and relatively skimpy in its analysis of the BCP’s legislative history. Once finding that the legislative history mandates a “low eligibility threshold” Judge Read proceeds to dismember the DEC staff’s factual analysis:

In this case, the properties are concededly contaminated with multiple contaminants, often exceeding generally accepted cleanliness levels (the SCOs), and other environmental standards or criteria . . . . Further, Lighthouse has produced undisputed evidence demonstrating that the presence of contaminants at the properties has complicated redevelopment or reuse in several ways. First, the contamination . . . prevented the owner of the largest portion of it from developing a residential project; the [county health department] remains unwilling to sign off

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61 See Lighthouse, 14 N.Y.3d at 177–78, 924 N.E.2d at 811–12, 897 N.Y.S.2d at 703–04.

62 Id. at 176, 924 N.E.2d at 810, 897 N.Y.S.2d at 702 (“The meaning of the term ‘brownfield site’ presents precisely such a ‘question . . . of pure statutory reading.’”).

63 In analyzing the meaning of the term “brownfield site” the court recites “[t]here are two constituents to the definition: the presence or potential presence of a contaminant on the real property; and this presence or potential presence must complicate the property’s redevelopment or reuse.” Id. at 176, 924 N.E.2d at 810–11, 897 N.Y.S.2d at 702–03. Relying on common meaning of the words “present” and “complicate,” the court concludes: “Accordingly, real property qualifies 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 makes redevelopment or reuse more complex, involved, or difficult in some way.” Id. at 177, 924 N.E.2d at 811, 897 N.Y.S.2d at 703.
on any development . . . unless Lighthouse undertakes DEC-sanctioned remedial measures; and financing for redevelopment of the properties is contingent upon DEC’s approval of Lighthouse’s proposed investigatory and remedial measures and a release of liability.\textsuperscript{64}

Accordingly, the initial lack of deference is the Court of Appeals' refusal to accept the Attorney General’s deference argument to apply the more restrictive standard set forth in \textit{Howard v. Wyman}.\textsuperscript{65} Thereafter, it is downhill for the DEC. Thus, the Court of Appeals construing the statutory text reasoned: the statute requires “two constituents . . . : the presence or potential presence of a contaminant on the real property; and this presence or potential presence must complicate the property’s redevelopment or reuse.”\textsuperscript{66} Judge Read concludes: “[t]his low eligibility threshold is consistent with the statute’s legislative history.”\textsuperscript{67} The Court of Appeals’ decision, when fairly read, indicates considerable skepticism on the DEC engineer’s conclusion that remediation is not required but nimbly skips over that issue of deference by noting:

We are mindful that DEC assures Lighthouse that the overall profile of contamination on the properties does not call for remedial action. But this does not relieve Lighthouse’s plight. The properties are contaminated. Without a release of liability, neither Lighthouse nor its prospective lender can be confident that regulatory views about the necessity for or the adequacy of any self-directed cleanup will not change sometime down the line.\textsuperscript{68}

Although the Court of Appeals’ \textit{Lighthouse} decision appears to draw a bright line on when a reviewing court will withhold deference from an administrative agency, Judge Read does not elaborate on the Court of Appeals’ rationale for selecting one maxim of judicial review over the other. The concept of “complicate” could just as easily have lent itself to a ruling that the BCP legislation mandated that the agency implement a scheme to administer this new program. Judge Read does not discuss the Attorney General’s arguments for deference except to conclude that they are not applicable because the Court of Appeals merely had to discern the intent of the legislature through review of the legislative history.

\begin{footnotes}
\item[64] Id. at 178, 924 N.E.2d at 811–12, 897 N.Y.S.2d at 703–04.
\item[66] \textit{Lighthouse}, 14 N.Y.3d at 176, 924 N.E.2d at 810–11, 897 N.Y.S.2d at 702–03.
\item[67] Id. at 177, 924 N.E.2d at 811, 897 N.Y.S.2d at 703.
\item[68] Id. at 178, 924 N.E.2d at 812, 897 N.Y.S.2d at 704.
\end{footnotes}
and the construction of common non-technical terms.\textsuperscript{69}

The DEC’s rejection of the Lighthouse sites was not an agency position reached after an open, transparent, and adversarial process that would tend to produce a well-developed agency record. The staff engineer and his superior were not part of an open process that exposed their tentative position to public scrutiny and criticism prior to reaching a conclusion.\textsuperscript{70} It was not the process that the \textit{Howard} court had before it at the time it granted the respondent agency substantial deference. Nor, as indicated, is it so clear that \textit{Kurcsics} should govern. Accordingly, the Court of Appeals might have been on intellectually sounder ground if it had held that in the circumstances, the staff engineer’s decision did not deserve the level of deference that the DEC argued it should receive. Accordingly, its decision is like other “descriptions of . . . judicial review [which] tend to be mottled and malleable, filled with ifs and buts, and calico characterizations.”\textsuperscript{71}

Thus, \textit{Lighthouse} and the preceding administrative law decisions produce some degree of confusion by failing to distinguish between the various administrative agency functions, and illustrate the need for a more refined and nuanced form of judicial review, which takes cognizance of the different processes leading to administrative decisions. \textit{Kurcsics} and \textit{Howard} primarily deal with the agency’s interpretation of a statute or regulation; they do not relate to the agency’s fact-finding, application of policy, or discretion.\textsuperscript{72} The distinction between these functions is blurred in \textit{Lighthouse}; the Court of Appeals construes the BCP statute differently than DEC, and then makes a factual determination that conforms to its own interpretation of the BCP. The Attorney General’s preoccupation with receiving “super deference” allowed the court to substitute its judgment on both construction and factual determinations, leaving unresolved the issue of how much deference would have been owed

\textsuperscript{69} See \textit{id.} at 176–77, 924 N.E.2d at 810–11, 897 N.Y.S.2d at 702–03. The court broadly interpreted the definition of the term “brownfield site” as a matter of statutory reading; the terms “contaminant” is defined by the statute, and the words “present” and “complicate” are defined by Webster’s Third New International Dictionary. \textit{Id.}

\textsuperscript{70} \textit{Id.} at 176, 924 N.E.2d at 810, 897 N.Y.S.2d at 702 (stating that public notice and participation are features of the BCP at every phase).

\textsuperscript{71} \textit{RODGERS}, J.R., supra note 6, at 90.

to the DEC engineer’s factual determination alone. This judicial maneuver allows the Court of Appeals to find that the DEC had been arbitrary and capricious.

Moreover, a probing nuanced judicial inquiry is particularly warranted in environmental matters because administrative decisions are often dependent on difficult technical or scientific fact gathering and assessment. Failing to get the basic scientific facts right can dramatically skew administrative conclusions. This problem is magnified in many administrative decisions because the decision-making is part of an informal process wherein an agency staff member conducts an investigation, comes to a conclusion, and renders a decision without any significant procedural safeguards. This “insulation” presents obvious dangers of producing a skewed result.

New York Civil Practice Law and Rules (“CPLR”) Article 78 commands courts to review agency decisions for a “violation of

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73 See Lighthouse, 14 N.Y.3d at 175–76, 924 N.E.2d at 810, 897 N.Y.S.2d at 702. Attorney General Andrew Cuomo argued for respondents DEC that the DEC is the “sole arbiter” of an environmental decision and that the courts lack sufficient expertise to substitute their judgment for the judgment of DEC. Id.

74 See id. at 164, 924 N.E.2d at 802, 897 N.Y.S.2d at 694. The court concluded that DEC acted arbitrarily and capriciously, and contrary to the law in determining that the real property named in Lighthouse’s request did not meet the BCP definition of a brownfield site. Id.


76 For example, in a case involving a bid on a timber sale in California, the Forest Service was found to have relied on erroneous information in coming to its decision to reject the sale to the winning bidder. Wetsel-Oviatt Lumber Co. v. United States, 40 Fed. Cl. 557(1998).

Thus, the Court finds that the Forest Service did not have a reasonable basis for determining that harvest of the proposed Bald Mountain timber sale would have a significant adverse impact upon the California Spotted Owl because the analysis upon which that determination was based was founded upon data the Forest Service knew to be erroneous. Id. at 570; see also Chlorine Chemistry Council v. EPA, 206 F.3d 1286 (D.C. Cir. 2000) (remanding to the agency when EPA set contaminant levels at zero under the Safe Drinking Water Act despite consensus that acceptable exposure levels existed).


77 There is cold comfort in the hope that a staffer’s decision will eventually be subject to some sort of review by higher echelons or a court because (1) time often extracts a heavy price, and (2) the staffer’s decision becomes encrusted with the claim of deference.
lawful procedure [that] was affected by an error of law or was arbitrary and capricious or an abuse of discretion,”78 and if made pursuant to an evidentiary hearing is “on the entire record, supported by substantial evidence.”79 New York courts apply the “arbitrary and capricious” standard when reviewing agency decisions on mixed questions of law and fact, and grant significant weight to the agency view.80 In other words, a court will not find agency action arbitrary and capricious if its decision is rational and reasonable. One of the problems in this “one size fits all” standard is that administrative actions often are a mosaic of different administrative functions, with differing assurances of reliability. It is difficult to assume that all administrative decisions deserve this form of “super-deference.” This is particularly so in environmental cases which are often laden with scientific and technical issues.81 However, the science in such actions is often based on policy that is quite capable of lay understanding, as well as readily ascertainable facts.82 It is not clear that New York courts are prepared to

78 N.Y. C.P.L.R. 7803(3) (McKinney 2010).
79 C.P.L.R. 7803(4).
80 Riverkeeper, Inc. v. Planning Bd. of Town of Se., 9 N.Y.3d 219, 232, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007) (“It is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence.”); Flacke v. Onondaga Landfill Sys., Inc., 69 N.Y.2d 355, 363, 507 N.E.2d 282, 286, 514 N.Y.S.2d 689, 693 (1987) (“Where . . . the judgment of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, such judgment must be accorded great weight and judicial deference.” (citations omitted)); Warder v. Bd. of Regents of the Univ. of the State of N.Y., 53 N.Y.2d 186, 194, 423 N.E.2d 352, 356, 440 N.Y.S.2d 875, 879 (1981) (“It is well settled that in reviewing administrative action a court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.” (citing Pell v. Bd. of Educ. of Free Sch. Dist., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974))); Pell, 34 N.Y.2d at 231, 313 N.E.2d at 325, 356 N.Y.S.2d at 839 (“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.”).
81 See Meazell, supra note 6, at 735 (explaining that if an administrative agency makes a scientific error and the courts then rely on that agency’s decision, deference to that agency would exacerbate such an error).
82 See id. at 743–50 (discussing the scientific enterprise in agencies in Part I.B.); see also Sara A. Clark, Taking a Hard Look at Agency Science: Can the Courts Ever Succeed?, 36 Ecology L.Q. 317, 323–26, 353–54 (2009) (discussing agency bias as it is demonstrated in Forest Service policy and decision-making, and suggesting that policy bases and scientific bases for agency decisions should be disentangled and analyzed separately through judicial review).

Courts continue to face difficulties in reviewing agency science. Judges lack scientific training and are hesitant to substitute their judgment for that of an expert agency. Further . . . policy judgments are [often] hidden or not fully explained. However, the difficult task of a true hard look should not deter the courts from giving agency science the thorough review it necessitates.

Id. at 354.
recognize the need to probe the administrative record or to make distinctions where less deference is warranted due to the absence of administrative procedures that vet the decision and produce indicia of reliability.

Illustrative of this point is the variation on the arbitrary and capricious standard applied to decisions involving the State Environmental Quality Review Act or “SEQRA.” SEQRA imposes substantial burdens on New York administrative agencies to gather facts and devise mitigation for actions that might adversely affect the environment. That formulation provides “[j]udicial review of an agency determination under SEQRA is limited to ‘whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration of the basis for its determination.’”

The “hard look” doctrine was championed by Circuit Judge Skelly Wright who declared that the reviewing court should take a hard look at the agencies actions, as opposed to only requiring the agency to take that hard look. Or, as put more positively by another proponent of the judicial hard look, Circuit Judge Harold Leventhal:

A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent. “The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia.”

As indicated, meaningful judicial review requires recognition that not all administrative decisions deserve the same degree of deference. There is a far distance between the promulgations of a regulation pursuant to statutory requirements for notice, comment, and a responsive explanation, and the ad hoc “best professional

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83 N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (McKinney 2012).
84 See id. § 8-0109 (explaining the requirements of preparing an environmental impact statement).
87 See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 621.7, 621.10 (2011) (outlining the requirements for notice, comment, and explanations to permit seeking entities for major and
judgment” of a DEC Staff member. The former process has considerable indicia of reliability, and the second has little or none. Similarly, adjudicating proceedings with an opportunity for public exploration of the disputed issues provides an opportunity to develop a record with the resulting indicia of “reliability.” However, many DEC decisions are made in an informal manner without an administrative process that vets or provides some semblance of reliability. For example, the decision to exclude the site from the BCP in Lighthouse was made by a staff engineer without the benefit of a fact finding hearing, or even a notice and comment procedure.

IV. GUIDANCE FROM THE FEDERAL COURTS

Federal courts have recognized that the doctrines on deference to agency decisions are more nuanced than either Lighthouse or its New York predecessors have contemplated. As a general proposition, under what has been called the NLRB v. Hearst Publications, Inc. doctrine, the reviewing federal court should accept a reasonable agency interpretation even if it would reach a different one, a rule not unlike New York’s Howard v. Wyman doctrine. However, the federal courts also developed the Skidmore v. Swift & Co. doctrine of deference, limiting the deference accorded to an agency’s decision in light of the agency’s special expertise, experience, and informed judgment.

The limitations on federal deference may be illustrated by the subsequent development of the Supreme Court’s Chevron, USA, Inc. v. Natural Resources Defense Council doctrine, which, since 1984,

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88 See id. § 621.10(a)(1)–(3). Reliability is an appropriate goal, and courts have held agencies to a modified standard of reliability based on the holding in Daubert v. Merrell Dow Pharmaceuticals, Inc. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993). For the science supporting administrative decision-making, see Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004) ("The spirit of Daubert... does apply to administrative proceedings. ‘Junk science’ has no more place in administrative proceedings than in judicial ones.") (citations omitted); Peabody Coal Co. v. McCandless, 255 F.3d 465, 469 (7th Cir. 2001) ("An agency must act like an expert if it expects the judiciary to treat it as one.") (citations omitted).


has driven federal judicial review of agency actions:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\(^94\)

This “two step” *Chevron* doctrine soon became the rallying point for administrative agencies defending their actions.\(^95\) However, the Supreme Court eventually decided that agencies, notwithstanding some agency actions, deserved less than broad *Chevron* deference. The Supreme Court developed certain limitations on agency deference in recent cases, at least as they relate to either the first prong of *Chevron*, or to agency actions that are not supported by procedures that strengthen the decision’s reliability. These cases start with *Christensen v. Harris County*.\(^96\) Here, the unsuccessful plaintiffs argued that a Department of Labor opinion letter should be granted deference under *Chevron*.\(^97\) The Court held:

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like

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\(^94\) *Id.* at 842–43 (citations omitted).

\(^95\) Recently, the Supreme Court revisited the *Chevron* doctrine in *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011). Here, the Court appeared to acknowledge that while conventional modes of statutory construction should be applied in the first *Chevron* step, the agency deserves broader deference in the second step. *Id.* at 711. Acknowledging doctrines limiting deference, such as one examining the consistency of an agency’s interpretation over time, the Court noted that:

Under *Chevron*, in contrast, deference to an agency’s interpretation of an ambiguous statute does not turn on such considerations. We have repeatedly held that “[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.” We have instructed that “neither antiquity nor contemporaneity with [a] statute is a condition of [a regulation’s] validity.” And we have found it immaterial to our analysis that a “regulation was prompted by litigation.” *Id.* at 712 (alterations in original and citations omitted).

\(^96\) *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000).

\(^97\) *Id.* at 586.
interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.\footnote{Id. at 587 (citations omitted).}

In the following year, the Court attempted to sort through various doctrines of deference in *United States v. Mead Corp.*\footnote{Id. United States v. Mead Corp., 533 U.S. 218, 218, 236–37 (2001).} Justice Souter wrote for the majority of the Court:

The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . . .\footnote{Id. at 227–28 (citations and internal quotation marks omitted).}

Justice Souter further noted that agencies are entitled to “substantial deference” when Congress expressly directs that they fill legislative “gaps” by promulgating rules pursuant to the *Chevron* doctrine, but that in other circumstances, agency actions have received judicial responses of “near indifference.”\footnote{Id. at 228–29 (quoting Aluminum Co. of Am. v. Cent. Lincoln People’s Util. Dist., 467 U.S. 380, 389–90 (1984)).} Judge Souter explained “*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires.”\footnote{Mead Corp., 533 U.S. at 234 (citations omitted).} The Court held that an informal agency decision “may therefore at least seek a respect proportional to its power to persuade. Such a ruling may surely claim the merit of its writer’s thoroughness, logic, and expertise, its fit with prior interpretations, and any other sources of weight.”\footnote{Id. at 235 (citations and internal quotation marks omitted).} Accordingly, the post-*Chevron* cases mean that the agency decision may not warrant a high degree of deference without some procedural assurances that the issues have been adequately vetted during the administrative process.\footnote{Id. at 229–31 (citations omitted). But see id. at 231 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57, 263 (1995)).} An administrative process that is open, transparent, and adversarial would undoubtedly meet that standard.
V. HARD LOOK REVIEW OF ENVIRONMENTAL AGENCY ACTION REQUIRED

Professor Peter Strauss has observed:

The agency, not the court, has been directed to make judgments about whether a given road should be built, reactor licensed or environmental protection rule adopted... On the other hand, the agencies’ responsibility is intended to be constrained by procedures, by substantive law, and by expectations of rationality and openness.105

These learned generalizations take on an enlarged complexity when the court is reviewing environmental matters with scientific predicates, and which may have evolved into administrative decisions without the benefit of significant public input.106 The task of applying the arbitrary and capricious standard to the determination of whether the administrative decision is rational and reasonable is dependent upon the assurance that the agency decision is not the work of an individual staff member, or the insulated decision of a few agency staff members, but rather is the informed decision of the agency, made after the issue has been thoroughly exposed to procedures that will guarantee reliability. Such procedures should normally be open, transparent, and adversarial.

This deferential form of review should not be undertaken without understanding the technical issues that the agency was attempting to resolve.107 Failure to take a hard look at the science and facts—

105 STRAUSS, supra note 12, at 375.
106 See Sierra Club v. Costle, 657 F.2d 298, 400–01 (D.C. Cir. 1981) (“Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall.” (footnote omitted)); see also Paula A. Kelly, Judicial Review of Agency Decisions Under the National Environmental Policy Act of 1969—Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 10 B.C. ENVTL. AFF. L. REV. 79, 79 (1982) (“In environmental matters, courts have had a particularly difficult time determining the scope of their review of agency decisions. Environmental cases are often complex, involving highly scientific and technical issues.”).

Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material “progress.” But it remains to be seen
those which support the scientific conclusions—vitiates judicial review of scientific and technical decisions frequently made in environmental litigation.\textsuperscript{108} Rigorous record review and corresponding deference is mandated in environmental matters by two practical considerations: avoidance of political factors and the promotion of administrative efficiency. Thus a practical argument—in favor of strict review of agency rationality in combined questions of law, fact, and judgment—is that it might help prevent politicization of agency expertise. Political pressures, from direct meddling by the executive, to more mundane issues of fear of public embarrassment at having an error exposed, or insufficient resources and staffing, might lead to an agency failing to meet the required standards of rationality. Certainly, the Supreme Court’s landmark decision in \textit{Massachusetts v. EPA},\textsuperscript{109} wherein the Court had to “educate” the Environmental Protection Agency (“EPA”) on the overwhelming body of science relating to global warming, is a stark reminder of this concern.\textsuperscript{110}

Strict review with a varying degree of deference also provides a prospect of external accountability that can improve agency performance. This perspective is captured well in a law review article by a former member of EPA’s Office of General Counsel, who

\textit{Id.} at 1111 (citations omitted).


\textsuperscript{109} \textit{Massachusetts v. EPA}, 549 U.S. 497, 499 (2007).

\textsuperscript{110} See \textit{Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise}, 2007 \textit{SUP. CT. REV.} 51, 52 (2007) (“If the problem is the politicization of expertise, the majority’s solution in \textit{Massachusetts v. EPA} was a kind of expertise-forcing, or so we will claim. Expertise-forcing is the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies. Expertise-forcing is in tension with one leading rationale of the \textit{Chevron} doctrine, a rationale that emphasizes the executive’s democratic accountability and that sees nothing wrong with politically inflected presidential administration of executive-branch agencies. Whereas the \textit{Chevron} worldview sees democratic politics and expertise as complementary, expertise-forcing has its roots in an older vision of administrative law, one in which politics and expertise are fundamentally antagonistic.” (citations omitted)).
wrote that cases conducting rigorous judicial review of agency judgments can be a “great tonic,” because

[t]he effect of such judicial opinions within the agency reaches beyond those who were concerned with the specific regulations reviewed. They serve as a precedent for future rule-writers and give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.\footnote{111}

In conclusion, perhaps the late Professor Davis’ commentary is most apropos:

The scope of review varies all the way from total unreviewability to de novo review, but the dominant scope of review is in the middle: \textit{Courts usually substitute judgment on the kind of questions of law that are within their special competence, but on other questions they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction.}\footnote{112}

The Court of Appeals could have, and should have, defined that “middle” as including a hard look and deference calibrated to the nature of the agency process.

\footnote{111}{William F. Pedersen, Jr., \textit{Formal Records and Informal Rulemaking}, 85 \textit{Yale L.J.} 38, 60 (1975).}
\footnote{112}{5 \textit{Kenneth Culp Davis, Administrative Law Treatise} § 29:1 (2d ed. 1984) (emphasis in original).}