

# Viewpoint

## Attorney questions fairness of new beach law

By Peter G. McGrath  
Concord

On June 3, 1995, the New Hampshire Legislature enacted a law which defines where the public beach ends and where a private landowner's beachfront property begins. The act, RSA 483-C, entitled Public Use of New Hampshire Coastal Shorelands, enlarges the area of the beach that is public by defining the boundary of the public beach as the "high water mark" of the highest tide over the 19-year span. While the Legislature wanted to guarantee that the New Hampshire shoreline would be accessible to the public, it did so at

the expense of people who own beachfront property.

Even worse, the Legislature wanted to designate even more coastal land as public beach. The Legislature reasoned that because the public traditionally used the beach covered by the ebb and flow of the tides as well as the "portion of sand and rocks" above the high tide line, the public beach should include that portion of "sand and rocks." The Legislature thought that because the public for years has used the land above the high water mark, the public had established a right to use this land. In legal language, this right is called

an easement.

The Legislature's proposed definition of public beach as including coastal land above the high water mark was so controversial that the Legislature made a rare request for an opinion of the New Hampshire Supreme Court on the proposed legislation. The Supreme Court determined that the state could not designate coastal land above the high water mark public because that would be a "taking" of property from land owners with-

out just compensation for their loss, a violation of the Fifth Amendment to the U.S. Constitution. In effect, the state can "take" any properties it desires but must compensate the property owner fairly. Here, the court ruled the state was taking the land and not paying for it.

There may still be problems for this new piece of legislation. Gov. Stephen Merrill was so troubled by the Legislature's definition of the boundary between the public and private land that he let RSA 483-C become law without his signature. Most other states along the Eastern seaboard have defined the public boundary to be the average high tide line.

The practical effect of this new legislation is that it may create more controversy and litigation. One source exclaimed that the law would be a boon for surveyors because it would be difficult to determine the location of highest tide over the 19-year cycle. As for potential challenges to the law, some property owners in the Rye Beach area have taken legal action claiming that the state has taken

their property and not compensated them for it, thus constituting a "taking." The law may create more work for the courts by now giving the courts the job of determining on what parcels of land does the law effect a "taking," and on what parcels of land it does not. Only time will tell whether the new beach access law equally balances the rights of beachfront property owners against the rights of the general beach-using public.

*(Peter G. McGrath is an attorney and former federal prosecutor. He has been practicing litigation and environmental law for more than six years.)*

### Community Commentary

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beckly with attention of Louisiana and other issues that divide

Please see SUMMIT on A2

Bush and Gorbachev review honor guard upon Gorbachev's arrival at White House. AP photo

# S.L. refinery and its president indicted



PHOTOGRAPHY/TOM SWART  
U.S. Attorney General Dick Thornburgh, with Dee Benson at his side, announces charges against Ekotek.

**Ekotek: 12-count felony indictment charges a host of environmentally unsafe practices**

By Joseph Baumgardner  
Deseret News environmental specialist

Ekotek, a Salt Lake refinery, and its president, Steven M. Self, have been charged in Utah's first-ever felony indictment alleging environmental crimes.

The 12-count felony indictment — announced Thursday by U.S. Attorney General Dick Thornburgh, the nation's top law enforcement officer — charges a host of unsafe practices took place at the Ekotek refinery, 1628 N. Chicago.

The crimes carry a potential maximum penalty of \$24 million in fines plus 45 years in prison for Self, upon conviction. The indictment, issued Wednesday afternoon by a grand jury in Salt Lake City, charges Self and Ekotek with conspiracy, mail fraud and violations of environmental laws.

"This case presents perhaps the most serious type of environmental misconduct — a company in the waste management business which, according to the indictment, dumped these substances into the community and duped environmentally conscious businesses into believing that waste materials were being properly disposed of," Thornburgh said. He

spoke at a press conference in the Federal Court House in downtown Salt Lake City.

Assistant U.S. Attorney Peter McGrath, the lead lawyer for the government in the case, said that in terms of potential penalties, this is one of the largest environmental indictments ever issued in the country.

In addition to the indictment, a three-count felony information was filed Wednesday against Ekotek's vice president, Steven F. Miller. U.S. Attorney Dee Benson said Miller pleaded guilty Wednesday afternoon to all three charges — conspiracy, storage and disposal of hazardous material without a permit, and violation of the Clean Water Act.

He is to be sentenced on July 31 and faces up to 18 years in prison and \$750,000 in fines. Benson said that as part of a plea agreement, Miller is cooperating in the case against Ekotek and Self. The guilty plea was taken in the chambers of U.S. District Judge David Sam.

The indictment charges such serious crimes as burning tons of hazardous material without a permit, falsifying records and dumping greasy water into the Salt Lake sewer system.

"Prior to the investigation, plumes of black smoke and ash and bad odors were reported by nearby residents," says a Justice Department press release.