

# Artificial Diversion of Water/Property Damage: New York Appellate Court Considers Whether Nuisance/Trespass Claims are Time-Barred



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The New York Supreme Court (Appellate Division) addressed a procedural issue associated with an action seeking damages and injunctive relief involving allegations that defendants were responsible for property damage as a result of the artificial diversion of water onto plaintiff's property. See *EPK Properties, LLC v. Pfohl Brothers Landfill Site Steering Committee, et. al*, 2018 WL 1441538.

The Appellate Division's March 23rd Memorandum and Order states that Defendant Niagara Mohawk power Corporation ("Mohawk") owns land running along the eastern border of EPK Properties, LLC ("Plaintiff").

East of Mohawk's parcel is stated to be the Pfohl Brothers Landfill ("Landfill") that had been remediated pursuant to the Federal Superfund statute.

Defendant Pfohl Brothers Landfill Site Steering Committee ("Committee") is stated to have overseen the design and construction of the Superfund remedial action. This action is stated to have included a surface water management program to "channel water away from adjacent residences and streets."

The remedial action was planned to direct surface water toward an existing wetland and then to a nearby creek. Defendant Town of Cheektowaga was required to implement an operation and maintenance plan in accordance with the New York State Department of environmental Conservation requirements.

EPK Properties, LLC, purchased its property in 2006. In 2007 and 2010 it requested determinations from the United States Army Corps of Engineers ("Corps") asking whether a proposed development on its property would disturb federal wetlands.

The Corps informed plaintiff that the conditions on the property had "changed substantially." Such changes are stated to have required a new delineation of federal wetland boundaries.

Plaintiff commenced an action on July 24, 2014, alleging that revised federal wetland boundaries would eliminate any beneficial use of the property.

The lower court dismissed the negligence cause of action. As a result, the Appellate Division only considered whether the lower court had properly determined that the causes of action for nuisance and trespass were time-barred.

The Appellate Division notes that an action to recover damages for injury to property must be commenced within three years of the date of the injury. The cause of action accrues when the damage is apparent.

Defendant is stated to have established nuisance and trespass causes of action accrued:

. . . at the latest, in June 2010, which is when plaintiff received the information from the USACE and the damage to its property was apparent. . .

Plaintiff responded that:

. . . because the water flows continually onto its property, the torts are continuous in nature and, as a result, plaintiff's causes of action for nuisance and trespass are not time-barred.

The Appellate Division rejects Plaintiff's argument. It notes that courts apply the continuing wrong doctrine in cases of nuisance or continuing trespass where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed.

The Appellate Division concludes that Plaintiff's allegations as to damages can be traced to a specific, objectionable act. This act is stated to be the implementation of the remedial plan. As a result, the Court concludes that the accrual date does not change because of continuing consequential damages.

The Court holds that damage to the property became apparent at the latest in June of 2010. Further, such damage is deemed traceable to an original objectionable act. Consequently, the Court holds that Plaintiff's nuisance and trespass causes of action are time-barred and were properly dismissed.

[A copy of the opinion can be downloaded here.](#)