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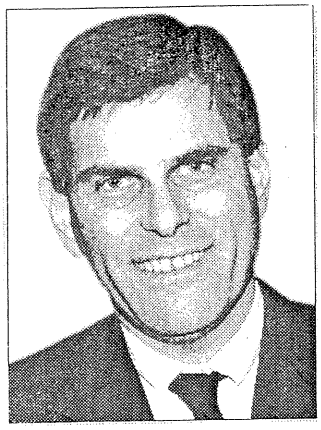
Water, the City and the Law



New York City's water supply system is a part of our infrastructure that raises legal issues of particular interest and concern. These issues combine questions of law and public policy in ways typical of those faced every day by attorneys of the Law Department. Striking the right balance between the availability of safe and affordable drinking water, the integrity of public open space and the preservation of natural resources is a challenge that calls for many skills of legal counseling and advocacy.

In this article, I will provide some general information about the city's water supply and focus on two issues currently in litigation: filtration for one of the city's three upstate water systems and the applicability of the federal Clean Water Act to transfers of untreated water.

Background

New York City supplies about 1.2 billion gallons of water every day to about nine million people — eight million in the city and one million upstate. This vast system depends on approximately two thousand employees at the city's Department of Environmental Protection (DEP) for its operation. DEP relies on its legal staff and the Law Department to provide advice and counseling on the applicability of various environmental laws in the "watershed" — the land area that drains into the city's 19 reservoirs. The Law Department initiates and defends litigation relating to the supply of our drinking water. DEP is developing health and safety environmental compliance programs to address deficiencies identified by a federal investigation and to satisfy the terms of a resulting plea agreement. These programs, which are being developed under the oversight of a federal monitor, will enhance protection of the water supply system and worker safety.

The city's drinking water comes from three separate upstate water supply systems. The entire watershed covers nearly 2,000 square miles, comprised of all or parts of 60 towns and 12 villages in eight upstate counties. The oldest of the three water supply systems, the Croton system, has been in service since the mid-19th century, and still provides about 10 percent of the city's drinking water. About 350,000 people live in the approximately 400 square miles of the Croton watershed, mostly in Westchester and Putnam counties. The Catskill system, created in the early 20th century, consists of two large reservoirs and provides approximately 40 percent of the city's water. The Delaware system was built in the mid-20th century, with the last of its four reservoirs coming on line in the 1950s.

Creating these water supply systems required state legislation authorizing the city to acquire land under and bordering the reservoirs. Construction of the Delaware system also posed interstate issues: unlike the Croton and Catskill reservoirs, which were made by damming tributaries to the Hudson River, three of the Delaware system reservoirs were created from source waters of the Delaware River. The Delaware flows through New York State to New Jersey, Pennsylvania and Delaware. Because of the potential impacts of the city's operation of the Delaware system reservoirs on water supplies and fisheries in those other states, the four states entered into a consent decree in 1954, prescribing a reservoir release management formula to protect the interests of the downstream states. In 1961 Congress established the Delaware River Basin Commission, an interstate body in which the city plays an advisory role, to oversee water supply allocation, drought management and flood control in the Delaware River Basin.

In operating its water supply systems, the city is subject to federal and state regulation, and, in turn, has its own regulatory authority. Since 1911, the New York State Public Health Law has allowed the city to enact and enforce regulations governing land use in the watershed to protect water quality.

Under the 1986 amendments to the federal Safe Drinking Water Act and the implementing regulations, all public water supply systems must either filter their water or obtain determinations from the U.S. Environmental Protection Agency (USEPA) or an authorized state agency that they meet stringent criteria for avoiding filtration. The city agreed over 10 years ago to filter the Croton system. Based on the high quality of the water in the Catskill and Delaware systems, and the limited development of those watersheds, the city has received a series of filtration avoidance determinations, or FADs, for those systems, the most recent of which was issued in November 2002.

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Croton Filtration

In 1992, the city entered into a stipulation with the New York State Department of Health (NYSDOH) providing for the design and construction of a filtration plant to treat water from the Croton system. In 1993, USEPA issued a determination requiring the city to filter Croton water. In response to litigation brought in federal court, the city entered into a consent decree with USEPA and NYSDOH which sets forth a schedule for completion of the filtration facility. The consent decree was modified in May 2002 and now requires the city to commence operation of the facility by 2011.

As one might well imagine, the siting of a water filtration facility has raised technical, legal and political difficulties. After considering more than 10 sites, the city determined that the Mosholu golf course in Van Cortlandt Park is the most desirable location. Because of its location, the site will require less tunneling work than other sites, saving time and money; the property is owned by and located within the city, avoiding acquisition costs and future taxes; and construction and operation at the site would create jobs for city residents. However, because this site contemplates locating a facility beneath dedicated parkland, the selection has raised the issue of park alienation.

When the city announced its decision in 1999 to site the plant underneath the Mosholu golf course, several citizen groups sued to prohibit the alleged interference with park use, or "alienation of parkland," which under state law requires state legislation. The United States District Court (EDNY) agreed with the city that siting the plant as designed would not constitute park alienation because the interference would be temporary and the golf course completely restored. However, on appeal, the U.S. Court of Appeals for the Second Circuit certified to the New York Court of Appeals the question whether this use would amount to improper park alienation under state law. The state Court of Appeals reached the opposite conclusion, and the Second Circuit reversed the District Court.

Since then, the city has evaluated two new sites — one in Westchester County and one in the Bronx along the Harlem River. After analyzing the results, the city has concluded that the Mosholu site remains preferable, and has sought local support and state legislative approval that will allow this much-needed project to proceed. Pursuant to the consent decree, the site must be selected by the end of this month. Legislation is now pending in the state Legislature authorizing use of the Mosholu site.

Filtration Avoidance

The Catskill and Delaware Systems. Unlike the densely populated Croton watershed, the watersheds of the Catskill and Delaware systems are largely undeveloped, and this water easily meets the objective filtration avoidance criteria. Moreover, the cost of filtering Catskill and Delaware water would be much greater than the corresponding cost for Croton water, providing additional incentive to avoid filtration. In order to obtain a FAD, however, a public water system must meet not only the objective criteria, but also must have a "watershed control program" which involves "ownership and/or written agreements with landowners within the watershed [so] that it can control all human activities which may have an adverse impact on the microbiological quality of the source water." Given that the Catskill and Delaware watersheds have a population of approximately 170,000, neither ownership of all the land nor separate written agreements with landowners would be feasible.

Instead, as part of its application for filtration avoidance, the city proposed a watershed protection plan, consisting of, among other things, a new and more restrictive set of land use regulations to protect the watershed from harmful development and a program to acquire particularly sensitive land to protect it from development entirely. Both programs require state approval and, not surprisingly, met with considerable resistance from upstate communities. In 1995, to deal with numerous conflicting interests and concerns, the incoming Pataki administration initiated what proved to be two years of negotiations involving the city, the state, upstate communities, USEPA and several environmental advocacy and land conservation groups.

The negotiations culminated in the New York City Watershed Memorandum of Agreement (MOA) — a 145-page document with some 1,500 pages of attachments — signed on Jan. 21, 1997. The MOA consists of four basic elements: new Watershed Regulations; a land-acquisition program; a collection of city-funded programs to protect and improve water quality, while preserving the economic vitality of the watershed communities; and the creation of the Watershed Protection and Partnership Council, a permanent standing body with representatives from the various watershed stakeholders.

The Law Department has assisted in drafting and interpreting the 1997 Watershed Regulations. In addition, the Law Department has brought a number of enforcement actions, on behalf of the city, when developers and facility operators have not cooperated with DEP. Virtually all of those lawsuits quickly resulted in compliance with the regulations.

Based on the long-term watershed protection program outlined in the MOA, USEPA issued a five-year FAD in 1997, which was renewed in 2002, subject to periodic reviews.

Shandaken Tunnel Litigation

Perhaps the most interesting legal issue to arise recently in connection with the city's water supply is whether the transfer of natural, untreated water from one reservoir in the system to another requires a permit under the federal Clean Water Act (a National Pollutant Discharge Elimination System or NPDES permit or, in New York, a State Pollutant Discharge Elimination System or SPDES permit). In March 2000, several fishing organizations filed suit in federal court claiming that the city needed a SPDES permit to operate its Shandaken Tunnel, which transfers water from the Schoharie reservoir to the main tributary of the Ashokan reservoir, the two reservoirs that comprise the city's Catskill water supply system. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York.* Approximately 40 percent of the Catskill supply, or 16 percent of New York City's drinking water, originates in the Schoharie.

New York City does not treat water collected in the Schoharie reservoir before diverting it through the Shandaken Tunnel. The Catskill Mountains have extensive deposits of

silts and clays, which are often exposed by erosion. As a result, although the water is clear by the time it reaches the city through a series of reservoirs that allow for ample settling, water originating in the Schoharie reservoir and released from the tunnel regularly contains elevated levels of suspended solids and, thus, turbidity.

The District Court (NDNY) dismissed the case, holding that transfers of natural water containing pollutants (as all natural water does), into receiving waters that would not naturally receive that water, do not require NPDES permits. In October 2001, the Second Circuit reversed. On remand, the District Court found the city liable under the Clean Water Act and held a trial on penalties and remedy. The city has appealed the District Court's decision to the Second Circuit.

While the city has applied for, and is diligently pursuing, a SPDES permit, there are serious legal obstacles to the city's obtaining a permit. Because there may be no practicable way to ensure that the water released from the Shandaken Tunnel can meet the applicable standard for turbidity, the Second Circuit's 2001 ruling could conceivably lead to a prohibition against New York City's continued use of the tunnel. Loss of this source would jeopardize the city's ability to meet its daily demand for water.

The National View

Nationwide, this interpretation of the Clean Water Act raises similarly important issues. In *Miccosukee Tribe of Indians v. South Florida Water Management District,* the U.S. Court of Appeals for the Eleventh Circuit, following the Second Circuit's decision in *Catskill Mountains,* held that a facility that simply moves water to another portion of the same water body requires an NPDES permit. (The facility at issue in *Miccosukee* provides flood control for Broward County.)

Because of the importance of this issue to public water suppliers as well as to flood control and water management, the city, joined by the National League of Cities and several organizations representing local water management agencies, submitted a brief amici curiae in support of a writ of certiorari to the Eleventh Circuit in *Miccosukee.* In January 2003, the Supreme Court called for the views of the solicitor general, who is expected to submit a brief by the end of May. The outcome in that case may affect the ultimate disposition of the New York case.