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FEATURE ARTICLE

VALUATION OF WATER SUPPLIES IN EASTERN WATERSHED CONFLICTS AND PLANNING

By William W. Wade

Conflicts over water supplies and water rights are appearing from the Midwest to the middle-Atlantic states and down to Florida. Eastern policymakers clearly realize what their Western counterparts have been living with since at least Mark Twain's fateful remark in the 19th century: "Whiskey's for drinkin'; water's for fightin'." Ultimately, this translates to what is the value of water.

Standard economic methods allow the estimation of the value of water by end-uses within individual water agencies. Economic methods translate end-users' water needs into economic values for reliable water supplies—or economic cost of shortages when supplies become unreliable.

The value of enhanced supplies is critical to water supply planning to determine "how much" increased reliability is economic. The engineering mentality of the first half of the 20th century—find a flowing stream and build a dam—is no longer acceptable.

This article discusses determinants of value for urban water use and explains how to estimate the cost of residential water shortages within service areas.

A key result of valuation allows comparison of the values for water maintained in reservoirs to meet service area demands with the values of releases to maintain downstream flows.

Water Conflicts are No Longer the Exclusive Challenge of the West

Water is a natural resource, endowed by nature and harnessed only after the fact by humans. Managing water supplies to meet mankind's unquenchable needs has been a longtime challenge in the West. The problem has worked its way from the drier West to the rapidly growing East. Achieving supply reliability in the face of population and economic growth has become an economic challenge.

Two inexorable trends press the nation's limited water supplies: Rising population, with rising per capita demands for water use; and increasing efforts to protect remaining ecosystems and habitat that support natural resources and wildlife.

A federal agency projects that at least 36 states will face water shortages within the next five years because of a combination of rising temperatures, drought, population growth, urban sprawl, waste and excessive use. "Is it a crisis if we don't do some decent water planning, it could be," according to Jack Hoffbuhr, executive director of the American Water Works Association. "We've hit a remarkable moment," said Barry Nelson, senior policy analyst with the Natural Resources Defense Council. "The 20th century was the century of water engineering. The 21st century will have to be the century of water efficiency."

The Southeast

Much of the Southeast remains covered by an "exceptional" drought—the National Weather Service's worst drought category. The affected area extends over much of Tennessee, Alabama and the northern half of Georgia, as well as parts of North and South Carolina, Kentucky and Virginia.

Raleigh NC suffers with drought. Earlier in the year, the U.S. Army Corps of Engineers cut the flow of water from the Falls Lake, the primary source of water for Raleigh's customers. Raleigh Mayor Charles Meeker said that the reduction of 17 million gallons a day would, through the end of March, retain as much as 500 million gallons of water in the lake for

water supply. Falls Lake has enough drinking water to last into next year. But what then? What about the communities downstream of Raleigh that depend on those releases for their water supply? And what about the health of the riverine ecosystem?

South Carolina filed a lawsuit in June 2007 against North Carolina alleging that North Carolina's past and pending interbasin transfers of water from the Catawba River reduce water flows to South Carolina and exceed North Carolina's equitable share of the river. North Carolina's response reveals that Charlotte, one of the fastest growing cities in the country, increasingly will rely on Catawba water supplies both to meet its future demands and those of nearby communities. The battle is joined. Without studies in the record, one can only wonder whose needs are higher valued: South Carolina's or North Carolina's.

North and central Florida are debating the merits of a plan to provide water from the northern St. Johns and Ocklawaha rivers to central Florida's ever-growing central region. "It is madness," according to officials who do not believe surplus water exists in the river. "Withdrawing water from the rivers and treating it is less expensive than desalinating sea water," argues an official of a midstate water management district. "We just passed a crossroads. The chief water sources are basically gone," according to John Mulliken, director of water supply for the South Florida Water Management District. "We really are at a critical moment in Florida history."

The State of Mississippi filed a lawsuit against the City of Memphis in February 2005 in the Federal District Court of Northern Mississippi asserting ownership of the groundwater under northern Mississippi. The state complained that the City of Memphis has wrongly diverted and misappropriated groundwater owned by the State for at least 40 years. Evidence filed with the court shows that City of Memphis has been diverting over 20 million gallons per day (mgd) of groundwater from the Memphis Sands Aquifer beneath northern Mississippi since 1970. Values including interest claimed as damages by Mississippi range upwards to $900 million to $1.2 billion. The District Court on the first day of trial February 4, 20008, *sua sponte* ruled that the State of Tennessee should be joined in the case, which would shift jurisdiction to the U. S. Supreme Court. State of Mississippi appealed the decision May 2008 citing errors.

Lake Lanier, the main source of water for Atlanta, is still too much a lake bed. While up six feet since end of 2007, lake level is still nearly 15 feet below the rule curve for this time of year. "We have an ongoing water crisis in Metro Atlanta. And it is the biggest and most imminent economic threat to our region," said Sam Williams, the Atlanta Chamber of Commerce president. The record setting drought worsened Georgia, Florida and Alabama's feud over how the Army Corps of Engineers manages water stored in the reservoir.

Negotiations have collapsed in the two decades old three-state dispute for water that originates in north Georgia and flows south over two river systems, known as the ACF and ACT. Litigation is moving forward in U. S. District Courts in Florida and Alabama. The dispute hinges on the imbalance between the original Congressional authorized purposes for the reservoir, which Florida and Alabama argue exclude drinking water supplies for Atlanta, and Atlanta's reliance on the water supplies from Lake Lanier. The value of the water for each of the authorized purposes has changed over time. Navigation values have decreased while values for urban water supply have dramatically increased. This has heightened the tension among the multiple purposes of Lake Lanier. The February 5, 2008 appellate decision of the Court of Appeals for the D.C. Circuit shows that Florida and Alabama so far have successfully blocked reallocation of 241,000 Acre-Feet of storage for local water supply, even if Georgia provided compensation for the lost hydropower generation. No economic values for water supply storage or releases for original authorized purposes are found in the record.

The Plains

The most recent Eastern water conflict is Kansas' complaint that Nebraska has not complied with the Republican River Compact for years 2005 and 2006. Kansas Republican River Compact Administration Chief Engineer's April 22, 2008, letter to Nebraska DNR seeks compensation for Nebraska's noncompliance. Kansas demonstrated no actual harm in its letter. Instead it claimed to be entitled to $72 million based on the alleged benefits Nebraska derived from its claimed overuse of the water. Losses represent alleged Nebraska agricultural values related to the water plus the ripple effect thru the Nebraska economy. Negotiations are on-going.

Unreliable Water Supplies Impose Regional Costs to Consumers

Rising demands for limited natural water supplies increase the risk of supply shortfall. Inadequate water supply reliability imposes a number of costs on a region. Water shortages reduce the quality of life in a region, can affect industrial output, and ultimately can erode the economic potential of the region. The long-term economic consequences of water supply unreliability affect business decisions to make investments in the area. Businesses may relocate out of area, drop product lines, expand elsewhere or reduce local production due to inadequate water supply reliability. Because of their backbone importance to the region, basic industries' water use is typically protected.

Such supply allocation policies shift larger shortages to residential exterior and commercial landscaping use and away from industrial use, commercial non-landscaping use, and residential interior use. This strategy worsens the effects on outdoor vegetation values and losses. In urban areas, trees, shrubs, and lawns, as well as parks and golf courses, provide habitat for birds and small mammals. Wildlife and habitat values are another source of urban drought losses.

Protecting regional industrial water use leads to lower residential quality of life. If resultant residential-borne shortages are large enough to affect indoor water use—if flushing is curtailed and reuse of laundry water is imposed (*e.g.*, California in the 70s and early 90s), residential shortage costs sharply rise.

Urban water shortages can have serious impacts on businesses that depend on water for landscaping, such as golf courses and resorts, and on businesses dependent on establishing and maintaining residential landscaping. Shortages can be very costly to businesses and homeowners who have to replace lawns, shrubs, and trees.

Property values for residential users may be lower in an area with less reliable water supplies. Land that could support residential development to serve a growing region can be rendered of little value if water hook-ups are severely limited. Alternatively, expensive conservation investments by both the builders and the water supply agency can be factored into the price of a hook-up and cost of the new home, thereby raising the cost of housing to residents.

Water supply agencies typically are heavily invested in fixed infrastructure. Reduced water sales during drought can put a financial strain on water agencies with large fixed costs. Reduced water agency revenues occur at a time when increased costs are required to promote conservation awareness. Bond coverage can become an issue.

Value of Reliable Water Supply Varies among Applications

No resource is more important to people's economic and social well-being than a reliable water supply. Turn on the tap; flip the switch; pick up the handset. You expect flawless service. Electricity and telephone utilities meet extremely high—and regulated—standards of reliability: Well over 99.99 percent. Yet, water supply reliability, one of the essential infrastructure utilities on which our society depends, is not typically regulated.

Water has different values based on the services it provides as consumed by residential, commercial, industrial and governmental users. Residential users have different values for different uses for household water. Households value basic necessities—drinking, cooking, basic sanitation—higher than indoor or outdoor discretionary uses. Most people value more highly the ability to shower every day than to have water to fill and maintain a swimming pool. Thus, residential consumers are willing to pay more for water for drinking and basic sanitation, less for water to wash clothes, and a smaller amount for water for washing cars, filling swimming pools and outdoor irrigation.

Industrial uses and applications of water typically have higher economic values than both residential and irrigation uses. The values of water in industrial applications vary widely among manufacturing plants depending mostly on whether the water in-plant is used merely for employee sanitation or becomes an essential part of the final product, such as in beverages. Industrial water use serves four typical functions that overshadow employee sanitation: (1) heating and cooling, (2) processing (*e.g.*, paper and pulp); (3) washing, rinsing, diluting and (4) ingredient in the product (*e.g.*, beverages, paints, chemicals, *etc.*)

Industrial water is valued differently from the way households value water. Industrial water use is valued as an input to the plant production. Its value is determined with reference to the plant's profit maximization objective keyed to the value of the

marginal product (VMP) of the input, water, for specific industries. Unlike residential water values, which mostly can be estimated over the entire sector, industrial water values will vary by industry and possibly by plant.

Instream flows of water provide ecological services that people value. These values create a tension between the need to divert the water to satisfy human and economic requirements or leave the water in-stream to satisfy environmental needs. Recreational uses of both impounded water in reservoirs and natural flows need to be considered in weighing alternatives to manage watersheds in the 21st century. Pictures of Lake Lanier marinas and docks sitting in the mud during the 2007 drought suggest that property owners and commercial establishments in the vicinity suffered millions of dollars of recreation drought losses.

Determinants of Value of Urban Water Use

Economic values of a reliable urban water supply become the cost of water shortages when drought threatens or water supply limits are reached. These shortage costs are essential input information to guide water supply planning. They also serve to value the damages claimed in interstate disputes. This article discusses determinants of value for urban water use and explains how to estimate the cost of residential water shortages within individual service areas.

An essential element of water supply planning is an estimate of the economic benefits of increasing urban water service reliability, or the costs and losses of a range of shortages. The magnitude of the economic benefits of increasing regional urban water service reliability is the essential determinant of the amount of limited resources to spend developing new sources of supply.

Water is not a homogeneous commodity with a single source of value. Location, climatic conditions, timing and quality, at least, figure into the valuation of water. Water uses matter greatly to its value. Outdoor residential water use varies greatly depending on geographic location and usage during the summer season. Per capita use of public water is about 50 percent higher in the West than the East mostly due to the amount of landscape irrigation in the West and persistence of dry weather during hot summer months. The national average for residential outdoor water use is 32 percent, but that is heavily influenced by California, where average outdoor use amounts to 44 percent of residential demand. For example, average outdoor water use in Pennsylvania represents only about seven percent of the residential demand; outdoor usage in the City of Memphis is below 15 percent of residential usage.

The economic analysis of water shortage costs broadly hinges on:(1) cost of replacement water; *i.e.*, conservation activities and hardware, agency shortage management program costs and costs of emergency water supplies; and (2) cost of shortages; *i.e.*, lost industry profits; reduced commercial and residential well being; lost agency revenues.

Agency costs of shortage management including education programs, conservation and reclamation, or emergency replacement water are equally important but will not be discussed in this article. Determining alternative programs and options entails a large planning effort that requires input and direction by agency management. Abundant information about Best Management Practices is available in the literature.

Well-Established Methods Support Residential Water Valuation

The economic value of residential water use varies with the type of use, season, and geographic location. Indoor residential use, which includes essential services to survival and quality of life, are higher valued than outdoor water uses for landscape, pools, and car washing. Household size and income, housing characteristics and related landscape water uses lead to differences in the values held by residents. Some residential characteristics vary by geographic location.

Human beings satisfy part of their needs and wants by consuming goods and services that each individual demands to enhance his or her quality of life. Economists trace this relationship along demand curves such as the curvilinear downward sloping curve shown below. Readers probably are clear that demand and supply conditions act to reveal market prices in competitive markets. Less clear is the fact that while the value and price of water supply are related they are equal at only one point on the demand curve. At other points moving up the demand curve value exceeds price. (*See* figure 1.)

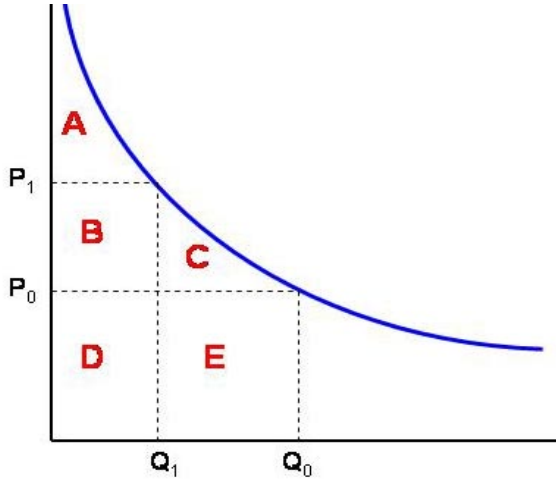

Figure 1.

Water Demand Curve

Demand curves reveal that people demand less of a good as its price increases and more as the price declines. How much more or less is measured by the price elasticity of demand. Price elasticity governs the shape of the water demand curve. The shape and elasticity of the demand curve govern the value of the water supplied. Price elasticity measures how much more or less people will consume in relation to a price change. For instance, a price elasticity of -0.2 means that if price were to go up ten percent, people would consume two percent less of the good. Price elasticity measures the steepness of the demand curve.

The value of residential water is determined from the water demand curve. Knowledge about the entire demand curve is not necessary. It is sufficient to know the demand curve in the local area of the incremental amount of water at issue. This information can be derived from the steepness (elasticity) of the demand curve, which measures the incremental change in water use for an incremental change in price, at some position on the curve.

Demand curves are sometimes referred to as willingness to pay curves because that is what they measure. Economists label the difference between willingness to pay observed from a demand curve and the good's market price as consumer surplus, a technical economic term generally referring to consumer well being, and tantamount to value.

The consumer surplus measure is used widely to value residential water and the cost of water shortages in the water resource literature; it is the correct measure of value according to established economic theory, agency guidelines and legal mandates. Residential consumer surplus is typically a large part of the total benefit values of supply reliability enhancement to be compared to cost in classic benefit-cost analysis. Figure 1 can be used to illustrate how to estimate the residential value of water supply reductions. Abundant economic literature elucidates this method.

Conceptual Discussion of Residential Valuation Method

Consumer surplus, the key measure of residential value of water, is easily explained. Assume, for example, that your water agency sells water at price P_0 shown on the above figure. At this price, the quantity consumed is Q_0. Economists label the area above the price (A+B+C) as consumer surplus. Consumers would be willing to pay this amount above their actual payment (D+E) to consume Q_0. Consumer surplus is nothing more than a measure of the income that people get to keep while consuming water at the level Q_0 in the example.

Consider the value of the decremental unit of water from Q_0 to Q_1 during a drought or perhaps due to some upstream user's unlawful overuse. Water shortage costs begin by asking the question: What is the value to customers, residential customers in this example, of the quantity of water between Q_1 and Q_0 that cannot be obtained due to drought or tort. This value is measured as the area under the curve between Q_1 and Q_0—the area equal to (C+E). This value includes the amount of revenue the agency will not receive (E) by not selling the amount of water between Q_1 and Q_0 plus the amount of consumer surplus residential customers will lose due to drought (C).

While this is one correct answer to the question, (C+E) is the value of the tap water, which is pumped, treated, stored and delivered to customers, not the value of the raw water *per se*. Raw water refers to water in its natural state—in streams or aquifers untreated. Consumer expenditures represented by (E) are matched by the agency's cost of service for providing and managing the water pumped from the source, including all infrastructure costs. The value represented by (E) is subtracted to isolate the value of the raw water or cost of the water shortage because

consumers will not be paying for the agency-upgrading services. Recognizing that humans have values for resources, the valuation of raw water begins with the finished tap water and subtracts the value added by the water agency to provide the water.

The cost of the water shortage to consumers is equal to the small triangle, (C), the consumer surplus. The amount of revenue lost by agency is the rectangle (E). So, the sum of the consumer surplus (C) across users is the cost of water shortage to people, or the value of the raw water. The sum of lost agency revenues (E) less out of pocket costs saved represents agency lost income.

The steepness of the water demand curve determines the size of the triangle, measured by the price elasticity. The smaller the absolute value of the elasticity, the steeper the curve, the larger the value. People have different elasticities for different end uses of the water depending on their ability to do without the water for the application. For instance, indoor water use for sanitation and cooking is essential. Typically, indoor water use elasticity estimates for water demand curves are low. Outdoor water use elasticities are higher, depending on the climatic region of the United States. Where seasonal outdoor water use is a significant amount of residential water use, the split of water use by agency customers indoors and outdoors is important to account for.

Marginal Values of Water Guide Water Supply Planning and Measure Damages

Knowledge of water values gives rise to a number of policy applications. With that the information, policymakers would become interested in the following non-exhaustive list of ten relevant questions:

- How valuable is the water quantity at stake?
- Does its value depend on seasonally availability?
- Does its value increase in sequential years of drought?
- Does its value differ significantly among classes of end-users?
- Are the values of certain end-users so high that their supplies must be protected?
- How does its value compare to the cost of supply options under consideration?
- What supply alternatives are justified given the water's value?
- How do the water supply values at stake compare to other natural resource values impacted by specific supply alternatives?
- What are the revenue effects to individual agencies of supply shortfalls?
- Do supply shortfalls affect agency debt coverage?

The obvious planning role for the value of the incremental quantity of water is comparison to the incremental cost of that water. Water supply planning methods have advanced over recent decades to the point that simply forecasting future demands and building some sort of storage facility to meet demand is no longer acceptable policy—or perhaps no longer even possible. Accepted practice is to determine increments of policy or physical supply enhancements (including demand reductions by conservation), estimate their marginal costs including the costs of environmental externalities, and rank order the costs of alternatives. Societal values for enhancing and conserving natural resources have risen sharply since the epoch of dam building in the first half of the twentieth century. The marginal costs are then compared to their marginal value as determined above. Supply augmentation proceeds so long as the marginal value of shortage avoidance is greater than the marginal cost of supply. The critical element in this planning process is knowledge of the marginal value of the water. The economic amount of supply enhancement is indeterminate without reference to the value of the water.

With knowledge of the residential, commercial, industrial and institutional demand curves for water, water agencies can allocate drought reductions among sectors in ways to minimize shortage costs. Information about relative shortage costs among user groups and agencies is the starting point.

Another key application of urban water supply values amounts to understanding the trade-offs between holding water in storage to mitigate uncertain precipitation during drought conditions or releasing the water to benefit hydropower generation, instream flow ecological services, other downstream recreation users and downstream local water supplies or wastewater assimilation. Information about values of impounded water and downstream uses are the starting point.

As seen in the *Mississippi v. Memphis* lawsuit and *Kansas v. Nebraska* complaint under the Republican

River Compact, estimated water values also measure damages where lawsuits allege and courts confirm that one party has used another party's water unlawfully.

Conclusion

In conclusion, it is useful to emphasize that the purpose of water supply planning is to develop a comprehensive water resource strategy that will provide the region with a reliable and affordable water supply for the next 50 years. Many factors are involved, including the demand for and baseline supply of water resources; the likelihood, duration and size of shortage events; the costs of facilities and policies to mitigate shortages broadly including conservation, reclamation, and water transfers; and the costs of environmental externalities. Water supply reliability enhancement proceeds until the marginal cost of new supply options equals the marginal value of shortage avoidance. In the 21st century eliminating all risk of shortage events may no longer be feasible.

William Wade, Ph.D, is a water resource economist who has worked in water policy and litigation arenas since 1986. He participated in a number of studies in California that pioneered approaches to estimate the cost of water shortages. Subsequently, he has conducted related research in the Midwest and Southeast.

EASTERN WATER NEWS

INTERNAL U.S. EPA MEMO DETAILS CLEAN WATER ACT ENFORCEMENT PROBLEMS: CONGRESS ASKS QUESTIONS

An internal U.S. Environmental Protection Agency (EPA) memorandum has surfaced that details impacts to EPA's Clean Water Act enforcement program resulting from guidance issued by EPA and the U.S. Army Corps of Engineers (Corps) directing the agencies' application of the Supreme Court's decision in *Rapanos v. United States*. The memo, which shows that the *Rapanos* decision, as applied by the EPA and Corps, has significantly affected enforcement of the Clean Water Act, has some powerful Congressmen asking questions about the efficacy of EPA's enforcement program.

Background

The Clean Water Act generally prohibits the discharge of pollutants into "navigable waters," which are defined simply as the "waters of the United States." 33 U.S.C. § 1362(7). In 2006, the Supreme Court issued its decision in what is perhaps the most significant case interpreting the Clean Water Act since its enactment, *Rapanos v. United States*. In that case, the Court was presented with the question of whether and to what extent wetlands constitute "waters of the Untied States." The Court fractured badly, however, producing five separate opinions—one plurality opinion, two concurrences, and two dissents—with no one opinion commanding a majority of the Court. Because the Court failed to provide a clear answer on this most fundamental question, both the public and the very agencies tasked with enforcing the Clean Water Act have struggled to make sense of its reach.

In *Rapanos*, Justice Scalia, writing for a four-Justice plurality, interpreted the Clean Water Act narrowly, holding that the phrase "waters of the United States" includes only "those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes,' " and "those wetlands with a continuous surface connection to [such] bodies." 547 U.S. 715, 739-42.

Justice Stevens, joined by Justices Breyer, Souter, and Ginsburg, dissented. These four Justices would have affirmed the exercise of Clean Water Act jurisdiction based upon the hydrologic connection between the wetlands and traditionally navigable waters.

Casting the deciding vote, Justice Kennedy concurred in the judgment and held that the Court of Appeals had misinterpreted the scope of the Clean Water Act's jurisdiction. He disagreed, however, with both the plurality and the dissents' interpretation of the act. According to Justice Kennedy, Clean Water Act jurisdiction extends only to those waters and wetlands with a "significant nexus" to traditionally navigable waters—that is to say, waters that are navigable in fact or that could be made so with reasonable effort. A "mere hydrologic connection," in and of itself, is not sufficient to establish jurisdiction. Rather, according to Justice Kennedy:

> wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'

547 U.S. at 780.

The EPA Guidance

On June 5, 2007, the EPA and Corps issued a joint memorandum (Guidance) to guide the respective agencies' application of the Supreme Court's *Rapanos* decision. The Guidance by its terms applies only to the § 404 programs, which are jointly administered by the two agencies. It states that the agencies will

continue to assert Clean Water Act jurisdiction over traditional navigable waters and their adjacent wetlands, "relatively permanent" non-navigable tributaries (*i.e.*, they have at least seasonal continuous flow), and wetlands with a continuous surface connection with those "relatively permanent" tributaries. These waters, according to the Guidance, are clearly within the Clean Water Act's jurisdiction.

When it comes to other wetlands and non-navigable tributaries are that are not "relatively permanent," the question of whether Clean Water Act jurisdiction exists is much more complicated. Under the Guidance, these waters are subject to jurisdiction only if they have a "significant nexus" to traditional navigable waters. This requires a resource and fact-intensive inquiry in which the agencies must evaluate and document in the record whether the tributary (which the Guidance notably defines as the entire reach of the stream that is of the same order) and its adjacent wetlands have a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. In making this determination, the Guidance requires the agencies to consider factors such as the volume, duration, and frequency of flow; the proximity to a traditional navigable water; and the capacity to carry or mitigate the flow of pollutants or flood waters; and the ecological functions performed, such as the capacity to transfer nutrients to support downstream foodwebs, provide habitat services, and to maintain downstream water quality.

The Guidance presumptively excludes swales or other erosional features such as gullies, small washes, which are characterized by low volume, infrequent, or short duration flow. Similarly, the Guidance states that upland ditches (including those along roadsides) that do not carry a relatively permanent flow of water are generally not subject to Clean Water Act jurisdiction.

Finally, the Guidance requires the agencies to fully document and support their jurisdictional determination. Thus, to the maximum extent practicable, the agencies are required to explain the rationale for the determination, disclose the data and information relied upon, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.

The Nakayama Memo and Congressional Response

In a March 4, 2008 memo to Benjamin Grumbles, EPA Assistant Administrator for Water, the head of EPA's Office of Enforcement and Compliance Assurance offered a detailed evaluation of the impacts of the Rapanos decision and Guidance. The memo was subsequently leaked to the environmental group Greenpeace and provided to Representatives James Oberstar and Henry Waxman, Chairmen of the House Committees on Transportation and Infrastructure and Oversight and Government Reform respectively.

In his memo, Granta Nakayama concludes that "a significant portion of the [Clean Water Act] enforcement docket has been adversely affected" by the *Rapanos* decision and its associated Guidance. He states that between July 2006 and March 2008, approximately 500 enforcement cases were negatively affected, which is to say that they were either abandoned, given reduced priority, or defended on grounds of jurisdictional uncertainty. As he points out, this constitutes significant portion of the approximately 1,000 civil administrative and judicial enforcement cases under §§ 311, 402, and 404 of the Clean Water Act resolved by EPA in fiscal year 2007.

According to Assistant Administrator Nakayama, the Guidance suffers from three principal flaws. First, he argues that it contains an "implied presumption of non-jurisdiction for the most common types of waters in our country, intermittent and ephemeral tributaries to traditionally navigable waters and headwaters wetlands." This presumption can only be overcome by undertaking the "resource-intensive 'significant nexus analysis' described in the Guidance." This, in his view, has had "a detrimental impact" on enforcement under § 404 of the Clean Water Act due to the increased resources required to gather jurisdictional evidence, the reduced predictability of those determinations, and the delay associated with conducting the required analyses.

Second, he notes that the *Rapanos* decision and Guidance "have created uncertainty about EPA's ability to maintain an effective enforcement program" with respect to other Clean Water Act obligations such as the NPDES and Oil Pollution programs. He explains that, although the Guidance is technically limited § 404, other provisions of the act employ

the same jurisdictional definition. Thus, it is unclear whether and to what extent the jurisdictional analyses required in 404 cases should be applied to other programs.

Finally, he notes that the Guidance "redefines the word 'tributary' by restricting the definition of a tributary to a single stream segment of the same stream order," a concept known as the "relevant reach." This limitation, he argues, is not mandated by Rapanos and should be abandoned, as it "artificially isolates each element of a watershed into numerous individual and seemingly independent tributaries," and "ignores the nexus of the tributary system as a whole to the traditionally navigable water."

The Nakayama memo has some powerful congressmen asking tough questions. In response to the memo, Chairmen Oberstar and Waxman sent a letter to EPA Administrator Stephen Johnson on July 7, 2008 expressing their "grave concerns" over EPA's implementation of the Clean Water Act. In it they request that EPA provide detailed information relating to its Clean Water Act enforcement program, including copies of internal communications relating to the Guidance and the Nakayama memo, as well as answers to two pages of specific questions about the impact of the Guidance on EPA's enforcement program. EPA Administrator Johnson's responses to this letter are due within the month.

Conclusion and Implications

The Nakayama memo details many of the challenges associated with applying the Supreme Court's fractured opinion in *Rapanos*. It also provides a number of suggestions concerning potential changes to the Guidance that would most certainly enhance EPA's enforcement capabilities. Given the upcoming change in administration, as well as the move by some in Congress to legislatively modify the Clean Water Act's jurisdictional scope, it will be interesting to see whether the changes proposed in Nakayama memo are adopted. (J. Fortuna/L. Jones)

U.S. COASTLINES AND ESTUARIES THE FOCUS OF PUBLIC INTEREST GROUP REPORT

A June report released by an environmental group in has argued that the health of coastal areas and estuaries to be at risk. The concern raised by the group over protecting coastal areas and estuaries was reflected in a hearing conducted by the House Water Resources and Environment Subcommittee on June 26, 2008.

The report, entitled "The Economic and Market Value of Coasts and Estuaries: What's At Stake?" was issued by the public interest group, Restore America's Estuaries. It argues that the U.S. has had a "poor track record when it comes to taking care of our coasts and estuaries."

Pointing out that coastal areas and estuaries are "essential to ocean fisheries and aquaculture," the report stated "years of badly planned coastal housing have lead to heroic, and sometimes desperate, measures to hold back the forces of nature by using engineering rather than ecological stewardship." In addition, estuaries have been "under siege" with once fertile bays now "dead zones filled with excess nutrients, chemical wastes and harmful algae" and coastal salt marshes dwindling.

Assessing Economic Productivity

Arguing in support of the economic importance of coastal areas and estuaries, the report stated that:

> with only 13 percent of the land area of the continental U.S., the estuary regions of the U.S. comprise a hugely disproportionate share of the national economy, 40 percent of employment and 49 percent of output.

The report stated that estuary regions comprise 80 percent or more of the local economies of eight states, and that the regions accounted for more than half of the economic life of fourteen states. The report also pointed out that population growth between 1998 and 2004 in estuary regions was significantly less than in non-estuary regions (5.2 percent in estuary regions compared to 9.3 percent elsewhere), but that economic growth in both types of areas was almost the same (29.1 percent in estuary regions compared to 29.8 percent elsewhere).

The report emphasized the economic importance of coastal recreation, explaining that more than 43

percent of adult Americans visit a coast or estuary at least once per year. The report pointed out that "people tend to value these experience well beyond what they pay—a concept known as non-market value." The report estimated that beach going likely contributes between $6 billion and $30 billion per year to "economic wellbeing," that fishing contributes between $10 billion and $26 billion, and that coastal wildlife viewing generate between $4.9 billion and $49 billion annually.

The report also asserted that some 30 percent of the United States' crude oil production and more than 45 percent of petroleum refining capacity is located within the coastal zone of the Gulf of Mexico. According to the report, the coasts are also becoming locations for new forms of energy, including wind, wave and tidal power.

The report also emphasized the importance of commercial fishing species dependent on estuarine conditions for at least some state in their life cycles, which it asserted accounts for over $3.8 billion unprocessed. The report stated that studies have placed the share of estuarine-dependent commercial landings between 50 percent and 75 percent of total fishing productivity.

In addition, the report stated, studies have shown that beachfront proximity has increased the value of homes by 207 percent compared to properties just two blocks away and that bayfront proximity increases values by some 73.2 percent.

Threats to Economic Productivity

The economic value and productivity of coastal and estuarine areas, however, is dependent upon the health of their ecosystems. The report argued that the economic costs of environmental change have been severe.

"During the last two centuries, much of the environmental change in coastal America has been in the form of habitat loss, fecal and nutrient contamination, and sedimentation," the report stated. The report illustrated ways in which environmental degradation has been detrimental to the economic health of coastal areas—including lower housing values, damages to trade by dredging, and loss of important wetland habitats.

But there has been some progress:

> More recently, the coastal environment has started to change for the better—restoration programs, conservancies, and improved coastal management have helped to protect pristine areas and restore those that have been degraded.

Conclusion and Implications

The report issued by Restore America's Estuaries in June made a concerted effort to quantify some of the economic benefits of promoting and maintaining healthy coastal areas and estuaries. Although some of the "non-market values" may be subject to debate, there is little room to argue with the basic conclusion that coastal and estuarine areas are economically important and that the ecological health of those areas should be promoted. The report concluded that:

> we are only beginning to understand the full economic value of estuaries and coasts and how these values depend upon environmental and ecological conditions.

But, the report continued "even with limited knowledge, one thing is clear— the value of coasts and estuaries is high, perhaps much higher than previously imagined." (W. Wilcox)

NEWS FROM THE WEST

This month, News from the West looks at recent water decisions in California, Nevada, and Washington. The first analyzes an environmental analysis of a large-scale project designed to address water issues in California's Bay-Delta. The second involves a successful claim made against the federal government for the taking of surface water rights in Nevada, and the third section, covering two cases, involves the partial invalidation of a municipal water law in Washington State.

California Supreme Court Finds Bay–Delta Programmatic EIR Complied with California Environmental Quality Act

In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, ___Cal.4th___, Case No. S138974 (Cal. June 5, 2008).

In Re Bay Delta involved a large-scale project to develop and implement a long-term solution to water supply and water quality problems in the Sacramento San Joaquin Bay-Delta area of northern California. In a unanimous decision, the California Supreme Court determined that the programmatic environmental impact statement/environmental impact report (PEIS/EIR) prepared for the project complied with the California Environmental Quality Act (CEQA), a California law similar to, but generally stricter than, the federal National Environmental Policy Act.

The Sacramento and San Joaquin Rivers meet to form a delta near Sacramento, California, that flows through the San Francisco Bay to the Pacific Ocean. This water system is the center of California's two largest water distribution systems and supplies drinking water for two-thirds of California residents and irrigation water for millions of acres of farm land. Long-term diversion of the Bay-Delta water, continued competition for the Bay-Delta resources, and pollution has resulted in degradation of the Bay-Delta as a reliable source of water, as well as wildlife habitat loss. In 1994, CALFED, a conglomerate of 18 federal and state agencies, was formed to develop a long-term, comprehensive plan to restore the Bay-Delta's ecological health and to improve its water management. CALFED developed a multi-phased project to address these issues and prepared a comprehensive PEIS/EIR to analyze possible environmental impacts of the project.

After CALFED issued its final PEIS/EIR in 2002, petitions for writ of mandate were filed alleging that the PEIS/EIR did not comply with CEQA in a number of areas. Although the California Court of Appeal had upheld the project and the analysis in the PEIS/EIR on most grounds, it ultimately struck down the project approvals, finding the PEIS/EIR defective because it failed to analyze an alternative to requiring reduced water exports from the Bay-Delta and did not discuss certain aspects of the project in adequate detail.

The California Supreme Court concluded that the PEIS/EIR was not defective, however. With respect to the reduced exports alternative, the Court of Appeal had found that a reduced export alternative would have been feasible even though it did not meet CALFED's water supply objective, reasoning that an alternative need not meet all of a project's goals to be feasible. The Supreme Court rejected this conclusion finding that, in the CALFED program, feasibility was explicitly linked with achievement of the primary program goals. The Court reasoned that because CALFED had determined that a reduced export alternative would seriously compromise the program's water supply objective, CALFED properly exercised its discretion in declining to analyze a reduced export alternative in its final PEIS/EIR.

The California Supreme Court also rejected the Court of Appeal's holdings regarding the required particularity of the PEIS/EIR. The Supreme Court explained that because the PEIS/EIR was a first-tier program EIR, project specifics did not need to be discussed in detail and that it is proper for a program EIR to discuss parts of a project generally and leave specific project details to subsequent EIRs.

Federal Claims Court Finds Governmental Actions Amounted to Taking of Ranchers' Water Rights

Estate of Hage v. U.S., Case No. 91-1470L (Fed. Claims June 6, 2008).

The U.S. Court of Federal Claims recently ended a 17-year dispute between a ranching family and

the federal government. On June 6, 2008, the court issued a judgment favoring the family, ruling, among other things, that the family owned the right to use the water flowing to their land and that the federal government had taken the Hages' water rights without just compensation.

Pine Creek Ranch was purchased by Wayne and Jean Hage in 1978. Located in south-central Nevada, it consists of approximately 7,000 acres of land used primarily for grazing cattle. In order to raise cattle on such arid land, the Hages depended upon access to large quantities of land, including federal land, and to the limited water supply in the Toiyabe National Forest. Ditch rights-of-ways, which are easements on federal land, transported water to their property. In 1979, the Nevada Department of Wildlife, with the approval of the U.S. Forest Service (Forest Service), released elk into the area of the Toiyabe National Forest. Following the introduction of elk, the Forest Service fenced off certain meadows and spring sources in the area, which excluded the Hage's cattle from waters to which the Hages had rights.

An overgrowth of vegetation and the existence of dozens of beaver dams upstream from the Hage's land resulted in a reduction of water flow to their land. The Hages claimed that the government threatened prosecution for trespassing if they entered federal lands to maintain their ditches. It was noted by the court that these were not empty threats of prosecution, as the government had attempted to prosecute Hage for clearing trees around one of his ditches.

The Fifth Amendment to the U.S. Constitution provides that if private property is taken by the government for public use, those citizens must be justly compensated. Based on this right, the Hages filed a claim in 1991 against the U.S. containing a number of allegations, including that the government took compensable property interests in their water rights.

Under Nevada law, the Hages would own the right to use the water in question if they could show that the water is put to a "beneficial use." The Hages were able to claim a right to use the water by successfully convincing the court that the water had been and would be put to the beneficial use of irrigation and other agricultural purposes. The Hages then asserted that because the government constructed fences around streams to which the Hages had an established right to use, this amounted to a taking. The Hages further argued that because of the policies and procedures employed by the government, vegetation and beaver dams were allowed to proliferate upstream, which effectively shut off water flow to their property and amounted to a taking of their water right. In addition, the reduced water flow was further aggravated by the government because it denied the Hages access to stream channels and ditches for clearing and maintenance purposes.

The court found that the Hages clearly had expectations in the right to use the water, and they had purchased those rights with the property. The court further held that the economic impact of the governmental actions weighed decidedly against the government, as the significant reduction in water flow to the Hage's property made their ranch unviable. After considering all relevant factors, the court held that the government's actions rose to the level of a taking and, despite the fact that both Hages were deceased by the time the judgment was entered, just compensation was required.

Washington Court Partially Invalidates Law—Developers not Entitled to Municipal Water Supplier Exemption

Lummi Indian Nation v. Washington, Case No. 06-2-40103-4 SEA (June 11, 2008) and *Burlingame v. Washington*, Case No. 06-2-28667-7 SEA (June 11, 2008)

A Washington state trial court has invalidated portions of a highly controversial state municipal water law. In an order filed June 11, 2008, the court ruled, among other things, that the legislature violated the state constitution by including developers in the definition of "municipal water suppliers," which entitled them to an exemption from Washington's "use it or lose it" relinquishment laws.

Under Washington law, relinquishment refers to a process under which a water right may be wholly or partially lost through extended periods of non-use (use it or lose it). Washington law creates an exception to the relinquishment statute for municipal water suppliers. The law in question, passed in 2003, defines "municipal water suppliers" to include entities that supply water for residential, commercial, and industrial uses, as well as any other beneficial use generally associated with the use of water within a municipality. Opponents asserted that the definition for municipal water supplier included non-municipal

entities, and this improperly entitled developers and private entities to gain protection from the state's statutory relinquishment provisions.

Although the court upheld many of the provisions of this law, it invalidated the definitions associated with "municipal water supplier." The court held that the legislature's actions were unconstitutional and violated the separation of powers between the courts and the legislature because the definitions had retroactive effect and attempted to overrule previous judicial interpretations of the water code. (J. Willis)

REGULATORY DEVELOPMENTS

U.S. EPA REISSUES CONSTRUCTION GENERAL PERMIT AS AN INTERIM STEP IN ANTICIPATION OF NEW EFFLUENT STANDARDS

On July 2, 2008, the U.S. Environmental Protection Agency (EPA) reissued the general permit for authorizing discharges of pollutants in stormwater associated with construction activity (Construction General Permit or CGP). The CGP requires operators of construction sites larger than one acre to implement stormwater controls and develop stormwater pollution prevention plans (SWPPP) to prevent sediment and other pollutants from being discharged in stormwater runoff. In large part, the 2008 CGP mirrors the 2003 version that expired on July 1, and EPA has made it clear that the purpose of this reissue is to provide a bridge between the existing regulatory framework and a new scheme that will include updated effluent limitation guidelines. The few changes between the two permits are primarily organizational; the agency kept most of the permit's substantive requirements the same. There are some minor new logistical hurdles for permittees to overcome to ensure they remain covered by this national program, and EPA reissued the permit for only a two-year period, as opposed to the five-year period that the 2003 CGP provided, but these changes could have little impact. On the other hand, many stakeholders are concerned that the 2008 permit retains an aspect of the 2003 version that tacitly suggests that CGPs must be obtained for all construction sites irrespective of whether they discharge stormwater. This latter point may prove of some moment if EPA does not take steps to address it in the future.

Background

The Clean Water Act (CWA) charges EPA with the responsibility to restore and maintain the integrity of the nation's waters and to protect the species that depend on them. One of the ways EPA exercises this authority is by issuing National Pollutant Discharge Elimination System (NPDES) permits.

Section 402(p) of the CWA requires NPDES permits for stormwater discharges associated with industrial activity that discharge into the waters of the United States. EPA published regulations in 1990 (revised in 1999) that interpreted this requirement to include discharges from construction activity (which disturbs one or more acres of total land area, and smaller areas that are part of a larger common plan of development of sale that will disturb at least one acre). The 1999 revision also allowed certain sources to be excluded from permit coverage if the operators of those sources could demonstrate that there would be no impact on water quality, and the same revision required the inclusion of other sources based on a higher likelihood of localized adverse impact on water quality. Additionally, § 402(a)(1) of the CWA mandates that NPDES permits include technology-based effluent limits established under §§ 301 and 306.

Realizing that resource constraints would make it impossible to issue individual permits for every relevant construction project, EPA issued a nationwide Construction General Permit to provide coverage for all construction projects located on land under EPA's permitting authority. In areas of the country where EPA maintains permitting authority, the 2003 CGP established standards for operators of covered construction activities to follow to comply with the requirements of the NPDES permit. Among these standards were the development and implementation of SWPPPs, incorporation of technology-based effluent standards (according to EPA's best professional judgment) and obtaining permit coverage from EPA. The 2003 CGP expired on July 1, 2008, and EPA reissued the permit the following day.

The 2008 CGP operates in much the same way as its predecessor. Like the 2003 CGP, the 2008 permit requires construction operators to submit a "notice of intent" (NOI) to be covered by the CGP and certify that they meet the eligibility requirements outlined in the permit. Additionally, the operators must install and implement control measures to meet their applicable effluent limits and ensure that their stormwater controls satisfy the CGP's requirements. Finally, the operators must create a SWPPP that identifies all sources of pollution on a construction site and

describes control measures that will be implemented to limit pollutant discharges from the site.

Analysis

While overall the 2003 and 2008 CGPs are quite similar, the 2008 version institutes several notable changes to the permitting scheme. First, the 2008 CGP only covers construction projects that either begin after the new permit's effective date or projects that began before the effective date but were never authorized under the 2003 permit. There are two slight caveats to this general rule. If a project originally permitted under the 2003 CGP transfers ownership to a new operator, the new operator must submit a new NOI for a permit under the 2008 CGP. In addition, to maintain a permit under the 2003 CGP, the operator of the permitted ongoing project must have submitted an NOI to do so.

The second notable change between the 2003 and 2008 permits is that the 2008 CGP has been reorganized to eliminate confusion over which requirements pertain to effluent limitations, which are inspection requirements, and which relate to the SWPPP documentation. In the 2008 CGP, each set of requirements has its own section. EPA made this change to clarify, which requirements apply to all permittees (those connected with effluent limitations) and those that apply only to construction operators (those associated with generating a SWPPP).

In the 2008 CGP, EPA also included a pair of new operational requirements of which permittees should be aware. Pursuant to the new permit, an operator must educate employees and subcontractors about their roles in stormwater control. Additionally, the operator is responsible for removing sediment from silt fences before the deposit reaches fifty percent of the above-ground fence height.

Finally, EPA is issuing the 2008 CGP for a period of no more than two years, a significant reduction from the five-year period that the 2003 CGP was in effect. According to EPA, this difference primarily reflects the need to bridge the gap between the expiration of the 2003 CGP and the agency's forecasted completion date for the national effluent limitation guidelines that will standardize stormwater discharge requirements across all types of relevant industrial activities. These guidelines and standards will replace the current "best professional judgment" standard for technology-based effluent limits and will require EPA to develop and issue yet another CGP once they are in place. EPA predicts that its final rule setting the new effluent limitation guidelines will be published by the end of 2009, allowing, in their view, a sufficient overlap in coverage with the current CGP.

Although the differences between the 2003 and 2008 CGPs are relatively minor, the similarities they share may prove far more significant. One of the more controversial, albeit discrete, aspects of the 2003 permit was that it lacked a framework for construction operators who design their sites to eliminate offsite stormwater runoff altogether by capturing and retaining potential runoff onsite. Because federal jurisdiction under the CWA extends only to activities that discharge pollutants into navigable waters, stakeholders had hoped that EPA would address this issue in the 2008 permit. Much to their consternation, the agency did not do so, and the 2008 CGP continues to reflect a policy of permitting all construction activity irrespective of an actual discharge.

Conclusion and Implications

In general, the implications of EPA's decision to reissue a CGP significantly similar to the 2003 version are not overwhelming. But they should not be overlooked either. EPA's decision to limit the duration of the 2008 CGP to two years may become problematic if propagation of the rule setting national effluent limitations guidelines is delayed—a prospect that is not out of the realm of possibility given the agency's track record with other recent CWA rulemakings. If the forthcoming effluent limitation guidelines rule is delayed and the 2008 CGP expires before its publication, EPA will be in same the position it was before reissuing the new permit, facing either a gap in regulatory coverage or the need to expend limited agency resources to reissue another temporary permit. Lengthening the duration of the 2008 CGP would have lessened the risk of facing this unfortunate scenario and provide some additional assurance to members of the regulated community that they will not be subjected to this process again unnecessarily.

Perhaps more troubling to permittees is the continuation in the 2008 CGP of EPA's unofficial policy of requiring operators of all construction activities to obtain permits regardless of whether stormwater actually discharges from a construction site. Such a policy, and a permit that supports it, may be difficult to reconcile with the CWA's jurisdictional scope, which

Congress limited to actual "discharges" to navigable waters. The statute does not, and arguable could not under Congress' commerce authority regulate potential discharges that do not come to pass. Yet, the 2008 CGP does not exclude operators on construction sites that are designed to prevent stormwater discharges from the permitting process. Nevertheless, the agency's decision to bypass this issue in the 2008 permit, does not necessarily suggest that EPA has not taken stakeholders' concerns to heart. EPA has stated that it is treating this reissued permit as a stopgap measure in anticipation of releasing the new national effluent limitation guidelines in the near future, and the opportunity will again present itself for the agency to consider expressly excluding zero discharge sites from the CGP. (G. Goode/P. Moore/R. Davis)

GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT GETS APPROVAL OF ALL NEEDED STATES

The long awaited adoption of the Great Lakes-St. Lawrence River Basin Water Resources Compact (Great Lakes Compact) by all eight states needed for ratification has occurred. Although prospects in some states were in some doubt due to various arguments about local rights and sovereignty interests, the Great Lakes Compact may now be submitted to Congress for approval. Congressional approval of compacts among the states is expressly required by Article I, § 10 (clause 3) of the Constitution. Six of the eight states passed the needed legislation and obtained gubernatorial signatures during the first seven months of this year, with the signatures of Governor Granholm of Michigan and Governor Rendell in Pennsylvania coming in early July.

The Great Lakes Compact is the latest of a series of Federal, state and Canadian federal and provincial cooperative efforts and agreements since at least the Boundary Waters Treaty of 1909 that concern regulation of water withdrawals and water diversions from the Great Lakes-St. Lawrence basin. Since the Great Lakes contain about 90 percent of the surface freshwater in the United States, and constitute the largest system of surface freshwater in the world, their management and use is extremely important. More than ten percent of the population of the United States and 25 percent of the population of Canada lives within the basin. The importance of the lakes to commerce, industry and public welfare in the region is enormous.

A Brief History

The withdrawal of water from "boundary waters," which are essentially all of the Great Lakes except Lake Michigan, plus most of the St. Lawrence River, are subject to the Boundary Waters Treaty of 1909, between Canada and the United States. This treaty established the International Joint Commission, which meets to deal with joint concerns of the two nations over use or abuse of the Boundary Waters. Any diversion that may affect the level and flow of the Boundary Waters is prohibited unless jointly approved. This treaty sets priorities for water use, with consumption and sanitation first, navigation second, and power or irrigation third.

In the 1950s there were a number of proposed diversions of Great Lakes water that motivated the Great Lakes state governors to sign and form an additional compact, called the Great Lakes Basin Compact (1955). This "Basin Compact" set up an intergovernmental agency known as the Great Lakes Commission. Cf. http://www.glc.org/. The Basin Compact was originally set up to include the provinces of Ontario and Quebec. However, Congress did not approve formal provincial membership, apparently because complications were foreseen for the control of foreign policy. The provinces were thus seated as non-voting participants in the Great Lakes Commission. The commission has engaged in numerous studies of best practices and environmental and water management issues.

In 1985, a further protocol was entered into, which is deemed a "gentlemen's agreement," because it is not a formal binding compact. This protocol, called the Great Lakes Charter, prohibits any diversion of Great Lakes waters of more than 5 million gallons in a 30-day period without the review, consultation and approval of all signatories. The charter added explicit environmental protection provisions, and extended

the protection to all of the Great Lakes, including their tributaries.

In 1986, Congress included within the Water Resources Development Act of 1986 an express provision requiring that diversion of water from the Great Lakes Basin could not occur unless such diversion is approved by all of the Great Lakes state governors. Cf. P.L.99-662, §1109.

Despite all of these efforts, concern remains that there are 'loopholes' in the present framework for water withdrawal and diversion control from the Great Lakes-St. Lawrence Basin. This vulnerability was highlighted when, in 1998, the province of Ontario granted permission to a Canadian based company to ship as much as 159 million gallons of water to Asia from Lake Superior on an annual basis. The amount of water was significant, but was apparently not enough to trigger the "consultation" requirements of the Boundary Waters Treaty or the Great Lakes Charter. As a result, Canada and the Untied States conferred on efforts to strengthen the system of water protection. Among other things, the Water Resources Development Act of 2000 included express provisions banning 'export' of water. (PL 106-541) 42 U.S.C. §1962d-20.

The WRDA 2000 encouraged the Great Lakes states and the Canadian provinces to jointly develop a conservation standard for making decisions on withdrawals and diversion of water form the basin.

The New Great Lakes Compact

The Great Lakes governors and the premiers of Ontario and Quebec agreed in 2001 to develop a new common resource-based conservation standard for future water withdrawals. That agreement has led to the development of two documents: The Great Lakes-St. Lawrence River Basin Water Resources Compact, and the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (Water Resources Agreement). It is this Great Lakes Compact, which has just received the binding consent of all eight Great Lakes states. The Water Resources Agreement includes the Great Lakes states and also the Canadian provinces as signatories. It is described as "a good faith agreement" to implement the standards in a uniform manner, although in Canada they are implemented through provincial law, while in the United States they are to be implemented through the Great Lakes Compact. The objective is that all decisions be by consensus. (Cf. http:www.cglg.org, for more detailed information.)

How Will the New Compact Work?

The new Great Lakes Compact sets up a water resources council as a body politic and corporate that is an instrumentality of the signing states. The council consists of each state's governor. The jurisdiction of the council is basin-wide. The council will serve as the mechanism for the joint exercise of state sovereign powers over the waters and water dependent natural resources of the basin. The council is given broad powers to study and investigate issues and to encourage programs relevant to its purpose. It may adopt and enforce rules and hold hearings.

There are provisions for the development and integration of data and water resource management systems among the Great Lakes Compact members. Each state is to submit reports to the Great Lakes Compact for review of its water management and withdrawal programs. The council may make suggestions for improvements.

Diversion and Withdrawal Provisions

The power of the Great Lakes Compact lies in its express provisions regarding diversions, withdrawals and for a decision making standard. The Great Lakes Compact prohibits all new or increased diversions, including bulk water transfers, with quite limited exceptions. The main exceptions deal with withdrawals for consumptive use by "straddling" communities, *e.g.* cities or counties that are only partly within the basin boundaries, and "intra-basin transfers," *i.e.* removal from one lake basin to another, where there is exceptional need and no good alternative. Generally, all diverted water must be returned to the basin, subject to an allowance for consumptive use. There are limited emergency and humanitarian response exceptions.

Withdrawals are regulated by a notice, review and hearing process. Once fully implemented, significant withdrawals (five million GPD or more, or in containers of 5.7 gallons or more) must receive Council review and approval. There is an express Decision Making Standard for withdrawals at § 4.11 of the Great Lakes Compact. In addition to demonstrating compliance with all applicable laws and treaties, the withdrawn water must be returned to the basin, subject to an allowance for consumptive use. The allow-

ance for consumptive use must assure against adverse impact to the quality and quantity of the waters and dependent resources of the watershed. The withdrawal must also incorporate environmentally sound and economically feasible water conservation measures.

While major existing withdrawal arrangements, such as the Supreme Court decision regarding withdrawals by Chicago, are grandfathered, the Great Lakes Compact will clearly call for more careful and deliberative consideration by all affected states and provinces of any major new withdrawal. The Great Lakes Compact should also effectively prevent the diversion of Great Lakes water to other states or abroad. Thus, despite the ceding of some authority over individual applications in individual states to the Council, the Great Lakes states will reasonably assure and protect the resource on a joint basis, assuming Congressional approval of the Great Lakes Compact is forthcoming.

Conclusion and Implications

Throughout the process of consideration by the states, various critiques of the Great Lakes Compact emerged, some of which asserted that the Great Lakes Compact would actually weaken the power of states to veto diversions. Others have raised questions about the reach of international trade agreements like the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT), and whether they could possibly trump the provisions of the Great Lakes Compact by deeming water to be a product or good which cannot be regulated in a discriminatory way. Generally, the various state legislatures and governors resolved these issues in favor of the Great Lakes Compact, feeling that there was more safety and security for management of the resource in a mutual compact than by inviting federal preemption, and believing that the international trade challenges are likely less viable with the Great Lakes Compact in place than without it, due to its environmental and sustainability requirements.

Since Congress has encouraged the development of the very standards and process that are embodied in the Great Lakes Compact, and since the Great Lakes Compact avoids formal Canadian membership that might raise foreign affairs concerns, it is more likely than not that there will be approval of the Great Lakes Compact by Congress. However, given the increasing sensitivity of the American people to issues of climate change and possible water resource shortage, approval will require devoted attention of the Congressional delegations of the Great Lakes Compact states. Once adoption is formal, then the attention of many will turn to the development of regulations for hearings and review of proposals for withdrawal an diversion. The Great Lakes Compact provides for transparency and availability of data to the public, and for public comment, although the exact nature of the process and procedures remains undefined. (H. Sheldon)

JUDICIAL DEVELOPMENTS

NON-SETTLING PARTIES FAIL TO UPSET CONSENT DECREE REGARDING PENOBSCOT RIVER TO PROOF ON SITE

City of Bangor v. Citizens Communication Company, ___F.3d___,
Case Nos. 07-2193, 07-2255, 07-2759, 07-2777 (1st Cir. July 9, 2008).

The City of Bangor, Maine (Bangor) filed a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cost recovery action in 2002 against Citizens Communication regarding the remediation of a discharge to the Penobscot River. Non-settling potentially responsible parties (PRP's) attempted to upset a consent decree entered into between Citizens Communication and Bangor as well as the State of Maine but the First Circuit refused to allow the consent decree to be upset and found that it was validly entered in place.

Background

In 2002, the City of Bangor filed a cost recovering action under the private plaintiffs' provision of CERCLA against Citizens Communication (Citizens). Bangor complained that Citizens is a potentially responsible party as a result of a manufactured gas plant (MGP), which operated in Bangor from 1851 to 1963. In 1948 Citizens merged with the Bangor Gas Company, but Citizens sold the site to the Maine Utility Gas Company in 1963. The MGP discharged tar, tar-laden waste water, and other bi-products in the Penobscot River through a stone sewer that ran beneath the site and entered into the Penobscot River. These hazardous waste created a tar slick on the bottom of the Penobscot River that began at the outfall of the stone sewer and extended for at least fifteen-hundred feet downstream.

Citizens filed an answer the day after Christmas in 2002 and argued that Bangor is also a potentially responsible party and therefore it could not maintain an action under CERCLA § 107. (Under a confusing set of cases issues by the Supreme Court of the United States, it is arguable in 2002 that there was no direct cause of action by a PRP against another through CERCLA but that this subsequently changed by a further ruling from the Supreme Court to the contrary.)

Citizens also filed third-party complaints against numerous PRP's seeking contribution and/or indemnification for any environmental cleanup costs for which Citizens might ultimately be held liable. In 2004, a magistrate judge ordered the stay of discovery effecting any third-party claims and the court recommended that the matter be bifurcated so that the matter would solely proceed initially between the City of Bangor and Citizens. That bifurcation order was then modified into a three-part order, with part one being a trial between Bangor and Citizens regarding Bangor's liability claims, phase two being a determination of the appropriate remedy to address any tar in the Penobscot River, and phase three being a determination of the third party's liability to Citizens and indemnification or contribution. Although the parties had agreed that the matter proceed in three phases, Citizens subsequently took the position that the findings and determinations in the first two phases of the case should be binding upon the third phase parties as well.

At the Trial Court

After a 12-day trial of September 2005, in which trial the third and fourth parties did not participate, the District Court issued its findings of fact and conclusions of law. The court found *inter alia* that Bangor had incurred approximately $1 million in cost during the course of investigation of the tar contamination of Dunnett's Cove. Further, the court found that the primary source of hazardous levels of polycyclic aromatic hydrocarbons (PAH's) in Dunnett's Cove was tar and that this had occurred as a result of discharges from the Bangor MGP plant. The court concluded that Citizens was liable under RCRA as a generator of the solid waste and that this discharge had affected the inter-tidal zone in the northern portion of Dunnett's Cove. The court then issued an affirmative injunction compelling Citizens to abate any eminent

and substantial endangerment that existed in Dunnett's Cove as a result of Citizen's discharge of PAH's. Notably, the court also found that Bangor was liable under RCRA because it had contributed to the past handling and disposal of solid waste in the inter-tidal zone as well as in the northern portion of Dunnett's Cove. Accordingly, the court found that under RCRA that Citizens and Bangor were jointly and severally liable to carry out the directives of a mandatory injunctions that would abate the substantial and eminent endangerment presented by tar contamination in Dunnett's Cove. Having considered all the evidence at trial, the trial court considered that Citizen's was responsible for sixty (60 percent) percent of the remedial costs and Bangor for the remaining forty (40 percent) percent.

The matter was then stayed for several months while Bangor and Citizens attempted to create joint status report, settlement agreement, and ultimately a consent decree with themselves and with the State of Maine, and the State of Maine Department of Environmental Protection. Having decided the matter, the District Court ultimately considered a consent decree and entered the decree without adjudicating the relative rights and responsibilities of the third party defendants, which had initially been phase three of the contemplated litigation structure.

In the First Circuit Court of Appeals

Third party defendants complained on appeal that it was inappropriate for the trial court to determine this matter in its entirety without ruling upon their challenges to the settlement between Citizens and Bangor or upon the defensives available to and plead by third party defendants. The First Circuit Court of Appeals was unimpressed by the third party defendants claims because the trial court had expressed its view that it contemplated an entirely new litigation solely for the purposes of addressing the claim by third party defendants. That is, that there would be a forum in which third party defendants could assert their claims and defendants, as well as their arguments of any inappropriate action by Citizens and settling with Bangor, but they would not be in the initial action. Rather it would be in a second litigation. The First Circuit felt that this complete severance of one claim from another fell within the discretion avail which the Magistrate Court therefore that trial court could rule upon the relative rights and responsibilities of Bangor and Citizens and the State of Maine without adjudicating the rights of third party defendants at that juncture. Because the manner in which the Magistrate proceeds on litigation insofar as scheduling claims of parties falls largely within the discretion of the magistrate, the First Circuit found that the District Court and Magistrate acted appropriately in putting the claims and requiring separate litigations as to any third party defendants rights and responsibilities.

Conclusion and Implications

Obtaining a complete release by Citizens without litigating the rights of the third parties is certainly rare in the CERCLA area as typically the court wishes to dispose of all claims as to all parties in one matter. A second issue which was relatively unaddressed is whether natural resource damage claims are in fact several or joint and several under both federal and state law. This appears to be one of the issues that third party defendants need to argue before the trial court judge. In any event, Citizens' counsel accomplished a major feat in navigating a resolution of its claims without being held hostage to the pressure and litigation that would have ensued with third party defendants. In this regard, the resolution is extremely favorable to Citizens and that they have now accomplished protection of their rights and responsibilities under a consent decree which will limit the risk to Citizens and any third party discovery in litigation that may ensue. (J. Pollock)

U.S. EPA'S FINAL RULE AMENDING FEDERAL UNDERGROUND INJECTION CONTROL REQUIREMENTS MEETS ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS

Miami-Dade County v. U.S. Environmental Protection Agency, ___F.3d___,
Case Nos. 06-10579, 06-10583, 06-10576, 06-10575, 06-10574, 06-10551 (11th Cir. June 6, 2008).

Several municipalities and the Sierra Club petitioned for review of a "final rule" promulgated by the U.S. Environmental Protection Agency (EPA) amending the current federal Underground Injection Control (UIC) requirements for Class I municipal disposal wells in Florida. Petitioners argued that the EPA gave insufficient notice of certain aspects of the final rule in violation of the Administrative Procedure Act (APA), that the final rule conflicts with the plain language of the Safe Drinking Water Act, and that EPA's approach to UIC regulation was arbitrary and capricious. The Eleventh Circuit denied the consolidated petitions.

Background

For over 20 years, municipalities in Southern Florida have been using underground injection as an alternative to the surface disposal of treated domestic wastewater. Evidence suggested that injected fluids were migrating upward into underground sources of drinking water (USDW). Regulatory requirements for disposal wells vary by well class. However, no injection well may cause the:

> movement of fluid containing any contaminant into [USDWs], if the presence of that contaminant may cause a violation of any primary drinking water regulation…or may otherwise adversely affect the health of persons.

(*Id* at 2, citing to 40 C.F.R. § 144.12(a).) This so-called no-fluid-movement standard was intended to keep injected wastewater from coming into contact with USDWs. Under this no-fluid-movement standard, any evidence indicating the movement of any contaminant into a USDW would require the EPA to issue additional requirements. These requirements included bans on certain types of wells and activities, waste isolation, and waste treatment.

EPA applied this no-fluid-movement to Class I wells since 1980, as it was deemed to be "operationally meaningful" in that it can be measured or otherwise determined. However, the EPA recognized the importance of considering alternatives to the no-fluid-movement standard. As the operation of Class I wells with fluid movement into an USDW is prohibited by UIC regulations, these Class I wells would be forced to cease injecting and adopt an alternative method to handle their wastewater. Alternatives could jeopardize surface water and coastal ecosystems.

Geologic conditions played a key role in motivating EPA to consider alternatives to the no-fluid movement standard. Florida municipalities have injected large quantities of treated domestic effluent into deep underground caverns as an alternative to surface disposal. The Florida Department of Environmental Protection administered Class I underground injection wells through a permitting program. When these permits were first issued, the consensus was that these cavernous formations would adequately confine the wastewater, keeping it from intruding into USDWs. Revisions to UIC requirements on July 7, 2000 included the installation of groundwater monitoring wells, which detected unpermitted fluid movement that has, in some instances, reached USDWs. Investigations showed that this violation was a function of geology (*i.e.* aquifers were too porous to contain wastewater), and therefore, not amenable to technological correction. Absent some alternative, these affected wells would be unable to comply with the statute and would be forced to cease operating. In some instances, that would leave municipalities without any means for the disposal of millions of gallons of treated wastewater.

As an alternative to the non-fluid-movement standard in these geologically compromised counties of Florida, EPA chose an approach that involves control over the quality of the fluids by requiring these Class I wells to treat their municipal wastewater with pretreatment, secondary treatment, and high-level disinfection before injection. Under this approach, EPA believed the movement of fluids into USDWs,

whether known or suspected, would not endanger the USDWs because the quality of the wastewater had been treated to a level that no longer posed a threat to the health of persons.

EPA's Risk Notice

EPA issued a "notice of data availability as to the risk assessment" and its underlying data on May 5, 2003 (Risk Notice), and requested public comment. EPA published the final rule on November 22, 2005.

An initial group of petitioners (Sierra Club and Municipalities) filed for review of this final rule on January 19, 2006, and were then followed the next day by additional petitioners (additional municipalities). The Sierra Club alleged that EPA impermissibly considered the utility of underground injection of waste in comparison with other disposal options, and EPA failed to address the existence of several potential threats to human health posed by pathogens, nutrients, and other contaminants. The municipalities and the county alleged that the final rule failed to take into account differences in Florida geology and hydrogeology. The county also alleged that the final rule's imposition of a high-level disinfection requirement as opposed to some other, lower level of disinfection, was arbitrary and capricious.

The Eleventh Circuit's Decision

As an initial matter, the court addressed allegations that petitioners received insufficient notice of certain components of the final rule. The APA requires that an agency publish notice of its proposed rule and afford the public an opportunity to comment. An agency satisfies this requirement "and need not conduct a further round of public comment, as long as its final rule is a 'logical outgrowth' of the rule it originally proposed.'" (*Id* at 7 [citation omitted].) A rule is deemed a logical outgrowth if those interested parties should have anticipated that the change was possible.

Elimination of the Demonstration Requirement

The Sierra Club challenged the final rule's elimination of any demonstration requirement that could have, presumably, pointed to alternatives. However, EPA's risk notice specifically requested comment on whether the type of hydrogeologic demonstration set out in its Option 2 of the proposed rule was practical and feasible. All parties were provided sufficient time to comment, and the resulting commentaries listed all of the technical challenges and factual uncertainties that would prevent a meaningful hydrogeologic demonstration of wastewater movement, as originally suggested in Option 2. Therefore, EPA's elimination of the demonstration requirement in its final rule, as first suggested by Option 2, was a logical outgrowth of the proposal and comment. The "logical outgrowth" requirement was met.

The Sierra Club also alleged a lack of notice regarding the elimination of the "non-endangerment" demonstration that was part of the proposed rule's Option 1. However, the final rule was, again, a "logical outgrowth" of the proposed rule. First, all petitioners commented on the unreliability of the hydrogeologic demonstration proposed for Option 2, and in so doing, commented on its insufficiency as a means for protecting USDWs. Second, the advanced wastewater and disinfection treatment methods proposed in the risk assessment would eliminate pathogens; therefore, it would be logical to assume that the rather simplified non-endangerment demonstration had become irrelevant.

Definition of Endangerment Inconsistent with Safe Drinking Water Act

Petitioners then alleged that the final rule's definition of endangerment of USDWs is inconsistent with what is outlined in the Safe Drinking Water Act. Issues of statutory construction require a two-step approach first outlined in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* [Citation omitted.] The first step of the *Chevron* test requires a determination of whether Congress unambiguously spoke to the issue in dispute, and, if so, Congress' intent governs. Under the second step, if Congress did not express its intent unambiguously, then court's will defer to an agency interpretation if it is statutorily based.

Here, the Safe Drinking Water Act did not directly speak to precisely how EPA should balance risks in promulgating regulations protecting USDWs. Instead, Congress made EPA responsible for regulating underground injection, to include instances involving the presence of contaminants that may result in a violation of drinking water standards or otherwise affect public health. So, Congress deferred to the EPA to give meaning to the endangerment standard.

As to the second level of inquiry, the court held that EPA's final rule was rationally based, and that the court would properly defer to EPA's technical expertise in such matters involving the evaluation of complex scientific data.

On that basis, the court held that EPA could properly rely on its risk assessment that modeled the potential final concentrations of certain representative non-biological and pathogenic contaminants. The risk assessment concluded that no non-biological contaminants migrated to USDWs, and that pathogens were the only threat that would not be addressed by the lower treatment requirements in place at the time of the study. EPA's final rule raised the treatment requirements to address this problem, specifically by requiring Municipalities to use high-levels of disinfectants to kill any pathogens. The court held that EPA's response bears a rational relationship to the data.

In response to challenges that the final rule does not address non-biological contaminants, the court cited petitioners to the rule's pretreatment requirements. The final rule would require facilities with industrial uses to pre-treat its waste to Florida's reclaimed water standards.

Regarding Municipality challenges based on geological variation, the court held that EPA properly considered such variations, as evidenced by its restriction of the final rule to those counties characterized by the type of underground geology that would not adequately confine and isolate injected wastewater from USDWs.

Finally, the court rejected the county's challenge that the final rule's imposition of a high-level disinfection requirement was arbitrary and capricious, noting that the high-level disinfection standard is the same one imposed by the State of Florida upon any wastewater that might come into contact with drinking water.

Conclusion and Implications

In such disputes, as exemplified in this case, tracer studies that track water injected into the facility's alluvial basin and then extracted out again are key to determining the basin's ability to confine wastewater within the facility's limits. Tracer studies are also an important model to defend against claims regarding the spread of endocrine disruptors. (T. Montoya)

DISTRICT COURT ALLOWS ARMY CORPS TO WITHDRAW PRIOR OPINION OF ISOLATED WETLANDS IN FAVOR OF U.S. ASSERTING CLEAN WATER ACT JURISDICATION

Acquest Wehrle v. U.S., ___F.Supp.2d___, Case No. 06-CV-654C(SR)(W.D. NY June 20, 2008).

Plaintiff Acquest Wehrle in Amherst, New York, wanted to develop an office park but needed approvals from the U.S. Army Corps of Engineers (Corps) and from the Town of Amherst. After Acquest Wehrle had obtained these approvals, including a letter determination from the Corps that wetlands identified on the property were isolated, non-navigable water, intrastate waters, Acquest Wehlre obtained the necessary rezoning approval and was prepared to proceed. At the last minute, however, certain neighbouring individuals opposed the office park project and saw a re-classification of the proposed project has been within a protected wetlands area. The Corps subsequently cleanly withdrew its declaration that the wetlands located in the Acquest Wehrle property were not subject to its jurisdiction. Further, approval for the project was not forthcoming. Acquest Wehrle sought to enforce the right to proceed, which it had once been told it had, but failed to persuade the U.S. District Court that those prior approvals were binding upon the Corps and the Town of Amherst.

Background

In 1983 the U.S. Environmental Protection Agency (EPA) approved a $5.8 million grant to the town of Amherst to assist the town in constructing a sewer project known as the Southeast Amherst interceptor and collectors sewer project. The nearly $6 million grant was conditioned upon a moratorium agreement, which provided that for a period of 50 years the town would not allow any development on property located wholly or partially within state or federally designated wetlands. In 1995, a former owner of one

portion of the property acquired by Acquest Wehrle petitioned the town of Amherst to rezone a parcel from residential to office building in order that the property can be converted to an office park with approximately 175,000 sq. ft. of office building space.

In connection with the proposed development, Acquest applied to the Corps for a permit to place fill in wetlands located on the property. A letter dated June 29, 2001, the Corps of Engineers onsite inspection identified that wetlands on the property were isolated, non-navigable, intrastate waters and not subject to the regulations under the requirements of § 404 of the Clean Water Act. Based upon that determination by the Corps, Acquest petitioned the town board to rezone the property from residential to office building. The town granted the petition and approved the plan for the office park subject to certain conditions including obtaining a waiver from EPA for a sewer tap-in in the § 404 permit from the core. The town also adopted a state environmental quality review (SEQR) negative declaration notice of determination and non-significance, declaring that the proposed rezoning and development would not have any significant adverse effect on the environment.

What Was Once Dry is Now Wet

In November of 2001, however, several individuals brought an action in federal court against the Corps pursuant to the citizens supervision of the Clean Water Act and sought to overturn the determination that wetlands on the property owned by Acquest Wehrle or not subject to federal regulation. In response to that suit, the U.S. sought to vacate the Corps' jurisdictional determination and to remand the issue for further reconsideration. Subsequent field investigation by the Corps and EPA in July of 2002 revealed a large area of wetlands of approximately 9.5 acres on the project site. Despite the Corps' earlier determination that this property did not have any wetlands subject to the Clean Water Act, EPA now determined that the wetlands was soaked to the jurisdictions of the Clean Water Act because it had a surface hydrological connection through a watercourse originating in the wetland through ditches and a culvert into Ellicott Creek to the Niagara River, a traditional navigable water.

Following this determination, Acquest submitted a revised site plan for the office part in which you propose to mitigate the potential effect on the identified wetlands. On June 28, 2005, EPA informed the town board that it would accept a waiver request from the town for a sewer tap-in based upon the revised site plans submitted by Acquest. Several months later, in March of 2006, the Corps transmitted to Acquest a provisional permit to place fill in approximately 2.9 acres of wetlands. Notably, the provisional permit to place still in the wetlands stated that this did not authorize a quest to do any work. In July of 2006 the Corps notified Acquest that it had conducted an inspection of the property and that this inspection revealed that Acquest had performed mechanized land clearing resulting in an unauthorized discharge of fell materials and impacts to the federally protected wetlands. As a result, the Corps rescinded the provisional permit, withdrew Acquest's permit application, and referred them to EPA for potential enforcement.

EPA then conducted its inspection of the property and observed that at least seven acres of land had been completely cleared of all woody and herbaceous vegetation, including an excess of 3.5 acres of land falling within the wetlands of jurisdiction. EPA issued an administrative compliance order compelling the developer to cease discharges of dredged or fill materials and to the wetlands and to restore portions of the wetlands affected by fill activity.

In the District Court

Although the parties attempted to mediate a result, this was unsuccessful. Having failed to reach an accord, Acquest filed an action against the federal defendants, town of Amherst, and the individuals who had successfully persuaded the court to change its mind that the property was not subject to the Clean Water Act. Specifically, Acquest sought a declaration that the efforts to enforce the Clean Water Act was a taking without compensation and violation of the federal and state constitutions.

In response to Acquest's claims, the U.S. argued that the matter should be dismissed because the challenge wetlands designations was not final agency action subject to administrative procedures act review. The court found here that the complex historical facts in this matter revealed that there had been no final agency action, but the matter was still in the stage of pre-enforcement, and that there was no final agency action subject judicial review.

Acquest also moved to bar the Corps precision of its provisional permit. The court noted that the

provisional permit issued in March of 2006 contained explicit language prohibiting any work on the site which would have an impact on wetlands. The court noted that the Corps had conducted an inspection of the property and that this inspection based upon direct physical observation revealed that Acquest had violated the terms of the provisional permit. Because the provisional permit did not authorize any work or otherwise determine any rights or obligations in favour of the developer, the Corps' precision of the provisional permit could not be considered to determine any rights or obligations possessed by the developer. That is, Acquest had only the rights the Corps gave and having violated the conditional permit, the Corps was within its rights to withdraw that permit.

Conclusion and Implications

Acquest has definitely learned that "you cannot count your chickens before they are hatched." Although they initially had received every conceivable sign that their development project would be approved, they ultimately became embroiled in litigation. It appears that they may have successfully grabbed the seat right out of the jaws of victory by proceeding to clear land prior to the time that they had their final permits in place. Given the contentious nature of development and wetlands, especially where a citizen's suit group is involved, the prudent developer or counsel can simply derive from this case the lesson that they should take nothing for granted and always operate within the lines of the permit or act at their risk. (J. Pollock)

NEW YORK TRIAL COURT FINDS NEW YORK CITY HAS RIPARIAN RIGHTS THROUGH INDUSTRIAL PARK

City of New York v. Gowanus Industrial Park, Case No. 19083/05
(N.Y. Supreme Court, Kings County, June 27, 2008).

Defendant Gowanus Industrial Park (GIP) became embroiled in a dispute with the City of New York over a fence that defendant constructed to prevent vandals from entering its property. Defendant had obtained approval from the city and writing in both October of 2005 in May of 2006 and struck the fence. Defendants view is that the fence is and appropriate improvement prevents trespassers as well as safeguards against a "attractive nuisance." The city claimed in response that constructing the fence unreasonably interfered with the city's riparian rights by preventing access to the Red Hook Recreation Area, a city owned and operated public park. Although the court expressed a clear preference for a mediated resolution, neither party would budge. The court held that the city does have rights, that a fence approved by the city wrongfully and unreasonably interfered with the city's rights, and that the fence was a public nuisance.

Background

In 1997 GIP purchased in L–shaped parcel of property that was improved by a grain elevator and several two-story buildings. In addition, the land had access to water in the Henry Street Basin. GIP constructed a fence as the owner of the bulkhead. The city of New York disagreed with GIP's asserted right to build the fence and to advise GIP that the fence interfered with the city's rights and the public's right of access to the Henry Street Basin. In seeking to compel GIP to remove the fence, the city asserted six causes of action for declaratory and injunctive relief. Amongst those claims was a declaration but the city possesses riparian rights, that the fence failed to comply with city's rules and regulations, and, inter alia, that the fence was both a public and private nuisance.

In the State Trial Court

Before addressing the substantive legal arguments raised by the parties, the court noted that the parties have addressed this matter as a riparian dispute but that this in fact addresses the rights of an owner of land along a river. As this case focuses on a navigable water way, the proper term is littoral, which addresses the rights of an owner whose land is bounded by the seashore. The court conceded that the terms are often used interchangeably by the courts and were used interchangeably by the parties but nonetheless

pointed out that the proper issue here was the relative littoral rights and not the relative riparian rights of the parties.

In its defense, GIP adduced proof from the city's building department that construction of the fence had been approved by the city. Although the court acknowledged this proof, the court also found that this is not the end of the inquiry. Rather, a fence constructed on a bulkhead is also subject to regulations by other departments within the city as well as by the New York State Department of Environment Conservation (NYSDEC). GIP had not received approval from these additional entities. In fact, NYSDEC ultimately require the removal of the fence for failure to obtain a permit pursuant to New York State Navarro conservation laws and New York State's Coastal Zone Management Program.

Rather than focus upon a failure to obtain appropriate permits and the NYSDEC order compelling GIP to remove the fence, the court addressed first whether the city had a right of access to the waterfront. Under common law, the court found that the foreshore (or land lying between the high and low watermarks of navigable water) is subject to three classes of persons. First, *jus publicum* which is the right shared by all to navigate upon the waters, covering that for sure at high tide and at low tide to have access across the foreshore to the waters for fishing, bathing, or any other lawful purpose. Second, *jus privatum* which is the right of the owner have access to the water. And, third, there are the rights of riparian owners which is the owner of upland fronting on navigable tidal waters. One of the most important rights of a riparian owner is that of access to and from the sea.

GIP contended that the city had no riparian rights because GIP owned a thin strip of upland between a city park and the Henry Street Basin. In opposition, the city submitted a survey of relevant properties and the city survey disagreed with GIP's survey. The city survey stated that the fence and concrete footers supporting it were built beyond the pier head/bulkhead line. The court concluded that the city had made out a *prima face* the case that it possessed riparian rights with respect to the Henry Street Basin.

Addressing the nature of the riparian rights, the city's status as a riparian owner encompassed the right to reasonable access subject to the rights of GIP. As the owner of the Henry Street Basin, the city's riparian rights are not unlimited, but rather must be exercised isn't in a reasonable way relative to the rights of the owner of the foreshore. Neither riparian owner nor the underwater landowner has an unfettered veto over the reasonable land uses necessary to the other's acknowledged rights end where the rights conflict the court must strike the correct balance. GIP asserted that the fence was the best alternative to protect its property and to prevent an attractive nuisance. The court dismissed the second argument quickly and found the New York had failed to adopt the concept of an attractive nuisance.

The court next addressed whether the fence was in fact either a private or public nuisance. A private nuisance threatens one person or relatively few and interferes with the use or enjoyment of land. Because the alleged nuisance is not focus upon one or a few individuals but rather the entire Redhook community, the court dismissed the city's cause of action for a private nuisance because it failed to state a *prima facie* case. A public nuisance, however, is a common nuisance that exist when there's an interference with a general public right period the court found that GIP had substantially interfered with the public's right of access to the waterfront by maintaining the fence that was constructed without any prior authorization from the state or city. As a result, GIP's fence was found to be a public nuisance.

Conclusion and Implications

This case is noteworthy in that GIP had a legitimate interest in protecting its tenants and land by use of a fence and, further, the fence had been approved by the city's engineering department. Unfortunately for GIP, a fence built on a bulkhead is a far more complex undertaking than would initially appear. Because bulkheads fall within the coastal zone management act as well as several other regulations, one lesson learned here is that bulkheads are unique pieces of property that require a detailed analysis of all legal rights. Had GIP properly obtained approval for the fence in advance, it may well have prevailed in this litigation. Unfortunately, it apparently was unaware that building a fence on a bulkhead, as opposed anywhere else on its property, was it thorny regulatory issue. Having failed to obtain the proper permits, the city of New York was able to construct an argument that it's riparian rights had been violated and therefore the fence was required to be removed. (J. Pollock)

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