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David L. Markell

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Lessons From the New York City Watershed Agreement

By David L. Markell

This panel of the program is entitled the Safe Drinking Water Act: Preserving Health and Resources at What Cost. The federal Safe Drinking Water Act¹ potentially obligates New York City to install what is known in the vernacular as a “command and control” filtration system to protect its water supply. If required, this filtration system would be installed in the New York City metropolitan area to treat water prior to the water’s distribution to residents and other users in the metropolitan area. The cost of installing such a system is enormous, with estimates ranging from \$6 billion to \$8 billion.²

The dollar amounts reflect that the stakes in protecting New York City’s water supply are high. The tremendous magnitude of the challenge is reflected by other statistics as well. The City relies on the “largest unfiltered water supply in the nation.”² This water supply includes a total of 19 reservoirs which supply “an average of 1.4 billion gallons of water” daily.² Eight million New York City residents and one million suburban residents depend on maintenance of this water supply.²

The question with which the City, the upstate communities that are home to the reservoirs that supply New York City’s water needs, and the State, have wrestled for the past several years is whether there was a way to protect this water supply – to achieve and maintain a high level of environmental and public health protection – in a much more cost-effective way than installation of a filtration system. Put another way, borrowing another commonly-used piece of environ-

mental jargon, these groups faced the question of whether they could find a way to achieve environmental protection not at the “end of the pipe,” after the pollution has happened, but by taking steps to prevent pollution of the water supply in the first place. The latter strategy requires much more of a grassroots-type of environmental protection or stewardship.

The Pataki Administration deserves credit for putting its profile on the line in connection with the negotiations over these difficult issues. Longstanding upstate versus downstate tensions, among a host of others, served as a backdrop to the discussions. Many people thought the conflicts between the different actors were intractable and could never be resolved. Despite the long odds, the Administration decided to dive in head first and see if it could produce a resolution.

The first hurdle in forging the consensus needed to move forward has been negotiated successfully. In November 1995, the parties produced an Agreement in Principle.³ This Agreement represents an understanding among the different interests involved, albeit at a conceptual level. At least in principle, competing interests have been reconciled.

Governor Pataki, in the press release announcing the Agreement, stated that it “reflects a new spirit of partnership to protect New York City’s supply of drinking water into the next century while encouraging environmentally responsible economic opportunity and prosperity in the watershed communities.”⁴ New York City Mayor Guiliani articulated the City’s commitment to make an “investment of unprecedented magnitude,” working with its “upstate partners,” to protect the watershed.⁴ Echoing this theme of partnership, Perry W. Shelton, Chair of the Coalition

David L. Markell is an Associate Professor of Law at Albany Law School.

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of Watershed Towns and a Councilman from the Town of Tompkins, noted that “[f]orming a partnership with New York City to protect the watershed while at the same time protecting the rights of those who live in the watershed area signals the dawning of a new day in the Catskills.”⁵ The environmental community joined in the refrain as well. Robert F. Kennedy, Jr., chief counsel for the Hudson River Riverkeeper, voiced the sentiment that “this agreement provides the framework for a partnership within which we can all work to build an enduring Watershed Protection Program.”⁶

What is the nature of this “investment of unprecedented magnitude” to which New York City Mayor Guiliani has committed? The November 1995 Agreement in Principle (a copy of which follows this paper) identifies the components of this commitment. In total, New York City will invest more than \$1 billion to protect the watershed.² Acquisition of lands critical to watershed protection will be a key feature of the program. New York City will spend a minimum of \$250 million to acquire properties.⁷ In making these acquisitions, the City will “pay fair market value prices, based on independent appraisals;”⁸ it will pay taxes on the properties it acquires;⁹ and it will only buy land from willing sellers.¹¹ Further, the City will consult with local governments before making acquisitions.⁷ New York City’s acquisition program will not include condemnation of properties.¹¹

A second prong of the watershed protection program will have more of a conventional environmental regulatory focus. The Agreement contemplates that existing wastewater treatment plants will be upgraded so that within five years they use the most sophisticated treatment technology available.¹² Any new plants will be required to employ this technology as well before being allowed to commence operations.¹³

A third element of this conceptual Agreement is the introduction of “trading” principles into the regulation of water pollution.¹⁴ The Agreement contemplates that in order to “mitigate the economic impact” of certain prohibitions on development embodied in the Agreement, under limited circumstances new wastewater treatment plants may be permitted to go on line, thereby adding to the loadings of pollutants into the watershed.¹⁴ To go on line, however, these new units must demonstrate that for every unit of raw phosphorus added, three units will be

removed from other sources.¹⁴ This strategy puts the watershed protection approach in the vanguard of efforts nationwide to protect our nation’s waters. EPA has only recently issued a guidance document intended to offer direction on creation of such trading strategies.¹⁵ Only a handful of other communities throughout the nation have attempted to create innovative approaches of this type.¹⁶

While the Agreement contains a number of other important features, one final component that deserves mention is creation of a Watershed Partnership Council.¹⁷ The purpose of the Council will be to monitor progress in watershed protection efforts and to recommend corrective actions when appropriate.

A Watershed Partnership Council will be created to provide a forum to review and assess the ongoing watershed initiatives, make recommendations relating to watershed protection and potential economic development projects, and to report periodically to the Governor, Mayor and the public.¹⁸

In sum, the New York City Watershed Agreement in Principle addresses an environmental issue that is of national, indeed, international significance. The magnitude of the challenge alone makes this an issue worthy of careful attention. What makes this development particularly exciting is that this exploration of new ways to protect our environment while promoting economic prosperity is occurring in our own backyard. The New York City Watershed discussions provide a rare opportunity to evaluate (and shape) some of the cutting-edge approaches that are being used in this country, and globally, to achieve environmental protection in a way that is sustainable.

The participants have overcome a plethora of potential deal breakers to reach a consensus approach for protecting the watershed that relies on a rich blend of environmental regulatory, economic development, market-based, and land use strategies. They now face a similarly substantial challenge of transforming the Agreement in Principle into an enforceable, legally binding blueprint for the future that will assure protection of the watershed in a sustainable way.

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