



New York City's Water Supply

Part II

Introduction

As an attorney for the environmental non-profit Hudson Riverkeeper, Robert F. Kennedy, Jr. had participated in issues related to New York City's water supply for some time. Kennedy had joined Riverkeeper in the early 1980's. In almost 15 years of work, he had compiled a successful record of prosecuting citizen suits against polluters of the Hudson and its tributaries. In the years leading up to the watershed negotiations, Kennedy had been an outspoken critic of upstate development practices and what he considered the City's meek attempts to curtail them.

Prior to 1995, environmental groups were not included in the secret discussions regarding the City's proposed watershed regulations. In the beginning of that year, though, it became clear to the State (the mediator of the new round of negotiations) that excluding environmental groups from the table had the potential to jeopardize the success of any final agreement. In order for a watershed agreement to work, it had to be a consensus between all parties with an interest in the outcome.

The negotiations were conducted pursuant to several ground rules. According to Michael Finnegan,

First, there was to be no negotiating in the press. The parties agreed not to answer any substantive questions from reporters, but were free to talk about the process. Second, the parties were told to prioritize their issues. Prioritization made it possible to achieve consensus because it structured meetings in a way that addressed bridgeable differences at the beginning and end of meetings, thereby avoiding parties walking away

Josh Eagle prepared this case study, under the editorial guidance of Professor Barton H. ("Buzz") Thompson, Jr., Robert E. Paradise Professor of Natural Resources Law, Stanford Law School, solely for educational purposes rather than to illustrate either effective or ineffective handling of an environmental matter. Some or all of the characters or events may have been fictionalized for pedagogical purposes. Copyright © 1999 by the Board of Trustees of the Leland Stanford Junior University. To request permission to use or reproduce case materials, write to Environmental and Natural Resources Law and Policy Program, Stanford Law School, 559 Nathan Abbott Way, Stanford, CA 94305 or visit <http://casestudies.stanford.edu/>.

with a bad taste in their mouth. Third, meetings were conducted at neutral locations, the locations were moved frequently, and casual dress was urged in order to reduce the formality. Fourth, the parties agreed that issues discussed and agreements reached could not be used against a party in later negotiations. By insisting on adherence to these simple rules, tension was reduced, the beginnings of trust were established, and substance began to triumph over rhetoric.

On January 21, 1997, the parties - the City, the watershed counties, the Coalition of Watershed Towns, Riverkeeper (representing itself and several other environmental groups), the State of New York and EPA - signed a Memorandum of Agreement (“Agreement”) setting forth each party’s rights and obligations with respect to the watersheds. As part of the agreement, EPA issued a Filtration Avoidance Determination for the Catskill and Delaware portion of the water supply system. The City agreed to build a filtration plant to treat Croton water. Because the Croton watershed was more densely populated than the west of Hudson watersheds, and because land in the Croton watershed was more expensive than west of Hudson land, the parties agreed that filtration would be a better choice for protecting Croton water.

A summary of the several hundred page Agreement is included in Governor Pataki’s press release, attached as Exhibit A to this part of the case study. The Agreement, while specific in places, left many fine-grained issues to be resolved at an unspecified, later date. According to Finnegan,

[f]lexibility was also engineered in the process to deal with issues that were not capable of being resolved in a timely fashion. For instance, in situations where the scientific evidence is equivocal, the [Agreement] plans to generate the science, make a decision, and if needed to modify the Watershed Regulations.

One part of the Agreement created a Watershed Protection and Partnership Council (“Council”) “to aid in the protection of drinking water quality and the economic vitality of the Watershed communities.” The Council was to be composed of 27 members, including representatives of the State government, the watershed counties, business interests, environmental groups, and the City. An Executive Committee, made up of 16 Council members, was given authority to “[s]erve as a forum where disputes between the Parties may be referred and resolved.” Agreement, Article IV, Para. 105.

The Agreement also contained the following provision:

Mediation of Future Disputes. The Parties agree that . . . they will advise the Executive Committee of the Council of grievances between the Parties concerning the terms of this Agreement or significant programmatic or policy decisions affecting the Watershed and shall make good faith efforts to resolve such disputes prior to commencing litigation. The Council shall have no authority to arbitrate, or to require the arbitration

of, any such grievances without the written consent of all parties to the grievance.

Agreement, Article VI, Para. 177.

The First Dispute

It did not take long for a dispute to arise. Since 1978, the State's health regulations had officially prohibited the installation of Subsurface Sewage Treatment Systems ("septic systems") on slopes greater than 15%. The regulation stated that "[s]lopes greater than 15% are also unacceptable [for on-site septic systems]." 10 N.Y.C.R.R. §75-A.4(a)(1). This regulation applied to septic systems in the watersheds; the City had incorporated the State's regulations, by reference, into its 1953 regulations governing activities in watershed lands. *See* Exhibit B to Part I of this case study.

The rationale for the slope rule was simple. According to Bruce Bell, an environmental engineer and an expert on septic systems,

Septic failure results in large part from the placement of such systems on inadequate or inappropriate sites. Proper treatment comes from the retention of septic waste in suitable soils for an adequate period of time. Certain site conditions, such as wet or impermeable soils, or proximity to groundwater or bedrock are known to increase the likelihood of septic system failure. For this reason, sites of septic systems in steep slopes is [*sic*] regulated in virtually all jurisdictions where septic systems exist. It is generally accepted that steeper the slopes [*sic*], the greater the risk of failure.

Steep slopes increase the risk of septic failure [T]hey can short circuit the flow of septic waste through the soil. Liquid waste flowing through steep terrain often breaks out onto the hillside below the septic systems.

Failure of septic systems in the watersheds had the potential to release pathogens, nutrients and oxygen-depleting substances into the reservoirs.

In 1996, the New York State Department of Health ("DOH") published a guidance document entitled "Individual Residential Wastewater Treatment Systems Design Handbook." In this book, DOH stated that "sites with at least one foot of unsaturated permeable soils and slopes not exceeding 20% may be modified by grading (i.e. cut and/or fill) to meet the maximum 15% slope requirement."

In early 1997, after learning of the State's new position on slopes, Kennedy contacted the United States Environmental Protection Agency ("EPA"). EPA and Riverkeeper then approached the City's Department of Environmental Protection ("DEP") and asked it to affirm that the State's proclamation would not apply with respect to the installation of septic systems in the watersheds. The City conceded to this request, announcing on March 13, 1998 that it would immediately initiate a

moratorium on installation of septic systems in the watershed on slopes of greater than 15%.

Riverkeeper heard nothing more about the issue until September of 1998, when Kennedy learned of an e-mail message that Ed Polese, Senior Environmental Engineer at DEP, had sent to his employees. The e-mail read:

As of September 10, 1998 slopes that are greater than 15%, but less than 20% may be modified to 15% or flatter to meet the requirements of 75A. Modification may be accomplished by fill only. Delegated counties have been notified of this change in policy.

Subsequently, on September 18, 1998, Polese issued a memorandum elaborating on the new policy. See Exhibit B.

Kennedy was “shocked” by this cursory reversal of agency policy. As he stated in his affidavit (which was attached to the Riverkeepers’ eventually-filed complaint), DEP had no justification for the change, but was simply buckling to:

pressure from the Putnam County construction and real estate industry which devoured most of the land suitable for development during the 1980s construction boom, and which now [sought] to move further up the watershed’s steep slopes onto lands properly classified as too dangerous to develop.

In the affidavit, Kennedy placed this particular concession in the context of “DEP’s regulatory history in the New York City watershed,” which was characterized by:

a lengthy pattern of damaging concessions to developers by City officials in the upstate Bureau of Water Supply that have resulted in the precipitous and dramatic decline in the once legendary New York City reservoir water. These concessions have grown from the traditionally cozy relationship between upstate developers, their engineering consultants and local officials who favor growth and the tight engineering clique charged with watershed protection at DEP.

Worse, according to Kennedy, this form of casual rulemaking seemed to flaunt the relevant State and City administrative law:

The text of the new rule issued by Polese and DEP, which applies across the 2,000 square mile watershed area, was never published in the City Record. Members of the public were given no opportunity to comment upon the rule. Furthermore, DEP failed to conduct even the most rudimentary review of the environmental impacts associated with the new rule. It was, quite simply, enacted by e-mail edict.

The City's view was quite different. According to an affidavit later filed by Polese, the moratorium was intended to provide DEP officials with the chance to consider

whether septic systems built on slopes which had been modified down to 15% or less or on slopes of between 15% and 20 % might increase the risk of septic system failure. After discussing these issues with DEP colleagues and representatives from State DOH and county health departments, I and other senior Bureau staff concluded, based on our engineering expertise and long experience with septic systems, that slope modification did not increase the risk of septic system failure.

Kennedy met with his fellow attorneys at Riverkeeper and discussed the possible courses of action. After considering all of the alternatives, Riverkeeper (and several other environmental groups) decided to bring suit against the City for violating the City Administrative Procedure Act, codified in the Charter of the City of New York § 1041 *et seq.*, and the State Environmental Quality Review Act, N.Y. Environmental Conservation Law §8-0101 *et seq.* A copy of relevant provisions is attached to this part of the case study as Exhibit C. The complaint was filed on October 13, 1998. Kennedy spelled out the rationale behind Riverkeeper's actions in an opinion piece for the New York Journal News. A copy of this article is attached to this part of the case study as Exhibit D.

David Gordon, an attorney who works with Kennedy at Riverkeeper, believes that this lawsuit was the first of many that might arise under the Agreement. According to Gordon, the Agreement was based on the concept of "adaptive management," and that many issues - for example, buffer zones around watercourses and reservoirs, septic design, and stormwater planning - were left unresolved when the Agreement was signed. "It's a work-in-progress," he said in an interview.

The Executive Committee's Response

At a February 1999 meeting of the Executive Committee (headed by Bill Harding, former supervisor of the Town of Somers in Westchester County), many parties expressed dismay that the environmental groups did not resort to the mediation power of the Executive Committee before filing the suit.

At the meeting, the Committee voted to allow a Technical Advisory Committee ("TAC") to begin looking into the issue of whether installing septic tanks on slopes greater than 15% posed a threat to the water supply system.

The TAC was not optimistic about its ability to finish this work quickly. According to members of the TAC (three environmental engineers) no conclusive research had ever been done on whether building systems on 15% to 20% slopes (cut and/or filled) in fact raised the threat of failure. In order to conduct such a study, members of the TAC would have to select a sufficient sample of systems installed in New York, collect data on the slopes, and see if that data correlated with a higher rate of

failure. The TAC estimated that its work would take at least a year.

At the meeting, there was a lengthy debate on the issue of how the study should be conducted. A member of the Executive Committee pointed out that the state septic tank rules had been significantly amended in 1990. Thus, she argued, only those systems installed after 1990 should be examined in the study. To do otherwise was “to compare apples to oranges.” Kennedy disagreed. His view was that septic systems, even those on steep slopes, might not show signs of failure for fifteen or twenty years. He insisted that the study look at older systems as well.

Another Committee member suggested that the study consider only failed systems. His view was that a survey of failed systems might show whether failures were more likely on steep slopes. Kennedy disagreed with this approach as well. First, it would be difficult to determine the cause of failure for any given system. Systems can fail for a variety of reasons aside from and in combination with slope, and it can be difficult to identify the exact cause or causes of failure. Second, assuming that one could identify the causes of failure, a study that included only failed systems would not show whether systems installed on steep slopes were more likely to fail than those not on slopes. It would only show what percentage of failures were attributable to site slope. In order for the study to be useful, according to Kennedy, it would have to examine a sample of systems of all ages and on all kinds of slopes - slopes of different grades and slopes that had or had not been modified by filling with dirt. Once the data had been collected, it would be possible, through a regression analysis, to show whether system failure was correlated with the slope of the site. Data might show, for example, that while 3% of systems installed on a 10% slope fail at some point within 15 years, 9% of systems installed on a 15% slope fail in that same time frame. A decision could then be made as to whether to permit installation of systems on particular slopes.

After the Executive Committee approved a preliminary study by the Technical Committee - primarily to assess available data - Kennedy said:

There is a bias in this process. The bias exists because all of the good slopes in Putnam County have been used up. There is pressure from the development community and the state and the counties are caving in to it. We're saying let's do a rulemaking: go through the process and the studies first, before the rule is changed. There is a reason that New York adopted the 15% rule in the first place. There is a reason that many other states have adopted a similar rule.

The Putnam County representative responded:

I detest this harping on the fact that there are changes in the regulations to satisfy the development community. We must trust the engineers [in the DEP] who say this practice does not pose a threat; there is no bias.

The following exchange ended the discussion:

Bill Harding:

Will the litigation be stayed pending the outcome of the TAC's study?

Robert Kennedy:

No.

Questions to Consider

What were the advantages and disadvantages of conducting the watershed negotiations in private? What were the advantages and disadvantages of a consensus solution to the water supply problem?

What were Riverkeeper's objectives in filing the lawsuit? Will the lawsuit, if successful, result in these objectives being met? Was the lawsuit the best, or only, way to resolve the "slope" issue?

What is the role of science in solving the "slope" issue? What is the best way to design the TAC study? What facts are necessary to resolve the issue? Who should have the burden of proof in scientific disputes such as this one? Why?

Case Study Exhibits

Exhibit A. Press Release, Governor of New York, January 21, 1997.

Exhibit B. Memorandum of Ed Polese, September 18, 1998

Exhibit C. New York City Administrative Procedure Act and New York State Environmental Quality Review Act.

Exhibit D. N.Y. Journal News Article, December 27, 1998.