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Avoiding the Path of Good Intentions-Protecting the Watershed through Better Enforcement

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COMMENT

AVOIDING THE PATH OF GOOD INTENTIONS: PROTECTING THE WATERSHED THROUGH BETTER ENFORCEMENT

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They say the road to hell is paved with good intentions. Similarly, the road to dirty drinking water is littered with well-meaning laws, regulations and standards, all of which are designed to ensure a clean

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and drinkable water supply.[1] The problem exists because many of those measures are not enforced.[2] Drinking water—easy to pollute although difficult to protect—is a harsh taskmaster and demands rigorous upkeep and supervision.[3]

While the New York City system[4] is a marvel of natural processes and human foresight, the quality of its water is under stress from many sides.[5] Recent development in the Watershed has created more impervious surfaces, the common examples of which are roofs, concrete and blacktop,[6] that cover soil, which had previously absorbed greater quantities of rain and snowmelt.[7] The rainwater and snowmelt now rush across the concrete, sweeping up contaminants such as gasoline and oil, road salts, pesticides and

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1. It is the stated purpose of the federal Clean Water Act to restore and maintain water quality, 33 U.S.C. § 1251 (2001), of the federal Safe Drinking Water Act to ensure healthy drinking water, 42 U.S.C. § 300(f), and of the New York Environmental Conservation Law to protect water quality. N.Y. ENVTL. CONSERV. LAW § 17-0103 (McKinney 1997); *see also* N.Y. CITY R. & REGS. tit. 15, § 18-11 (Supp. 1999); *see generally* JAMES M. TIERNEY, THE REGULATION AND PROTECTION OF WETLANDS WITHIN THE NEW YORK CITY WATERSHED 1 (1999); *see, e.g.,* Stephanie Perez, *New York City's Drinking Water–Champagne or Beer?*, 12 PACE ENVTL. L. REV. 859, 864-67 (1995).

2. *See generally* TIERNEY, *supra* note 1.

3. *Id.*

4. DEP'T OF ENVTL. PROT., CELEBRATING NEW YORK CITY'S CLEAN DRINKING WATER, *available at* http://nyc.gov/html/dep/html/celebrate.html (last visited Jan. 21, 2002); *see also* Jayne E. Daly, *The Protection of New York City's Drinking Water*, 1995 PACE L. REV. 63, 67. The New York City system is comprised of the Croton, Catskill and Delaware reservoir systems, which comprise, in total, "nineteen gravity fed reservoirs and three controlled lakes," to service well nearly half of New York State, including all of New York City. *Id.*

5. *See generally* Daly, *supra* note 4.

6. N.Y. CITY R. & REGS. tit. 15, § 18-11(a)(48) (Supp. 1999). "Impervious means resistant to penetration by moisture. Impervious materials include, but are not limited to, paving, concrete, asphalt, roofs, or other hard surfacing material." *Id.*

7. Daly, *supra* note 4, at 67.

industrial chemicals, washing them into the streams of the Watershed.[8]

Other human activities, besides increasing impervious surfaces, also contribute to the pollution of a water supply. Development in the Watershed has increased the production of residential and industrial waste.[9] These activities "introduce microbial and chemical contaminants into the water supply and threaten the quality and safety of New York's drinking water."[10] Microbes, are both a short and long-term threat "responsible for more deaths than any other single drinking water contaminant," and cause diseases such as cholera, typhoid fever, dysentery and giardiasis.[11] Chemical contaminants include chlorides, such as road salt; heavy metals, such as lead and iron, oil and grease; and suspended solids, such as human waste, naturally decomposing materials and paper.[12] "Many of the heavy metals have been found to cause kidney tumors in laboratory animals and, at high levels, brain damage and mental retardation in children."[13] Oil and grease may, in high levels, "interfere with the ability of fish to reproduce, grow and resist disease."[14] Finally, synthetic organic contaminants—pesticides, petroleum products and wastes, for example—cause skin irritations, liver disorders and possibly cancer.[15] In order to keep drinking water clean, we must return to the original source of the problem and regulate potentially polluting human activities.

The need to protect the New York City Watershed presents an important opportunity to prevent pollution as opposed to the traditional practice of permitting degradation and then struggling to rectify the contamination.[16] On the whole, a high-intensity effort, involving city, state, and county officials, to rescue these valuable

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8. *Id.* at 69.
9. *Id.* at 69-75.
10. *Id.* at 70.
11. *Id.*
12. *Id.* at 72-73.
13. Daly, *supra* note 4, at 73.
14. *Id.*
15. *Id.*
16. *See, e.g.,* ROBIN MARX & ERIC A. GOLDSTEIN, UNDER ATTACK, NEW YORK'S KENSICO AND WEST BRANCH RESERVOIRS CONFRONT INTENSIFIED DEVELOPMENT (1999), *available at* http://www.nrdc.org/water/ drinking/attack/intro.asp.

watersheds has not yet been launched.[17] Instead, the authorities too often rely on the sheer size of the water supply to dilute or neutralize any threats. Size alone, however, is not enough.

There exists no shortage of New York State regulations that have been designed and drafted to keep New York State's drinking water supply clean and safe.[18] Federal legislation further supports New York State's efforts at achieving clean water by regulating such substances as stormwater and the filling of wetlands.[19] The federal laws also set guidelines for State rules and regulations governing sewage and other discharges, hazardous wastes, septic systems and other activities.[20] New York City regulations address septic systems, roads and runoff.[21] Finally, the local ordinances of the towns located in the Watershed address land use and other issues concerning community economic development,[22] thus both directly and indirectly affecting water quality.

Despite legislators' attempts to guarantee clean water, regulations alone have not proven effective in achieving these goals. The Croton Water Supply system provides an example. The Croton System, located in the east of the Hudson Watershed, contains ten reservoirs and three controlled lakes, supplying ten to fifteen percent of New York City's water.[23] Despite decades of regulations intended to protect water quality, many of the Croton System's reservoirs contain more pollutants than they can handle.[24] While the recently

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17. *Id.*

18. *See, e.g.*, ENVIRONMENTAL LAW AND REGULATION IN NEW YORK §§ 7.2, .4 (William R. Ginsberg & Philip Weinberg eds., 1996) [hereinafter Ginsberg & Weinberg].

19. *See, e.g.*, 33 U.S.C. §§ 1342(p), 1344 (2001).

20. *See, e.g., id.* § 1314 (2001); Ginsberg & Weinberg, *supra* note 18, § 7.2.

21. N.Y. CITY R. & REGS. tit. 15, §§ 18-11–19-10 (Supp. 1999).

22. *See, e.g.*, Ginsberg & Weinberg, *supra* note 18, § 7.4.

23. Envtl. Prot. Agency, *New York City Watershed: Filtration Avoidance* [hereinafter *Filtration Avoidance*], *at* http://www.epa.gov/region02/water/nycshed/filtad.htm (last modified Aug. 21, 2001).

24. *See, e.g.*, OFFICE OF N.Y. STATE ATT'Y GEN., REDUCING HARMFUL PHOSPHORUS POLLUTION IN THE NEW YORK CITY RESERVOIRS THROUGH THE CLEAN WATER ACT "TOTAL MAXIMUM

recommended pollution limits—the TMDLs (total maximum daily loads)—for the source water reservoirs is 15 micrograms per liter (ug/l) of phosphorus and the average level for some already reach 17 ug/l.[25] Phosphorus "promotes algae blooms that result in poor water taste, odor and color," and leads to "increased levels of the heavy metal pollutants iron and manganese, and increase[d] levels of organic carbon."[26] Due in part to these excessive levels of phosphorus, the Croton reservoirs are regularly taken off line for months after the water quality degrades, an event that usually occurs during the summertime.[27]

The New York Watershed as a whole demonstrates other signs of stress. The Cannonsville Reservoir, a part of the Catskill/Delaware section of the Watershed, is plagued by eutrophication—low levels of dissolved oxygen due to excess algae.[28] The Ashokan Reservoir, has suffered from high turbidity—high levels of suspended solids.[29] There also exists evidence of persistent toxic chemicals in reservoir sediments.[30] The unfortunate reality is that current regulations have not adequately protected the water supply, proving that existing legislation that is not fully implemented or enforced cannot lead to a supply of clean drinking water.

A regulation on the books means little unless it is enforced. Indeed, it may lure people into complacency, thinking the problem has been addressed. A non-enforced regulation can distract attention from where it is needed. And, while the reasons for a lack of enforcement or implementation are varied—lack of resources, difficulty in obtaining evidence, higher priorities elsewhere, lack of willingness to offend, concern for increased costs—the result is the

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DAILY LOAD" REQUIREMENTS (2001) [hereinafter REDUCING HARMFUL PHOSPHORUS].

25. *Id.* at 1.

26. *Id.* at 2.

27. *Id.*

28. *Id.* at 3 n.4.

29. KIMBERLEE KANE, PROPOSED PHASE II PHOSPHORUS TMDL CALCULATIONS FOR ASHOKAN RESERVOIR 11 (1999).

30. *See generally* ROBERT L. JAFFE, DRINKING WATER TOXICITY IN NEW YORK CITY RESERVOIR AND TAP WATER SAMPLES (2000).

same. In all cases, it is a lack of on-the-ground environmental improvement.[31]

In contrast, fully implemented and enforced regulations offer a positive and safe water supply and a healthy watershed community. Such enforcement keeps pollution discharges at levels the system can naturally accommodate. The long-term positive effects of fully enforced laws and programs are numerous. First, they dramatically reduce future clean up costs.[32] Pollution prevention is far more cost-effective than cleaning up after the fact.[33] Second, well-implemented rules are also the surest protection of public health by using, not fighting, natural systems and ensuring multiple barriers to disease. Third, fully enforced regulations will lead to better site design of upstate developments.[34] Improvements in site design, as demonstrated by numerous studies pointing to the tax, property value, and community benefits of sustainable land use patterns will lead to healthier watershed communities.[35] Finally, full

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31. *See generally* ROBERT F. KENNEDY, JR. ET AL., WATERSHED FOR SALE: EXPLOSIVE DEVELOPMENT THREATENS NEW YORK CITY'S DRINKING WATER SUPPLY (1999) [hereinafter WATERSHED FOR SALE], *available at* http://www.pace.edu/lawschool/envclinic/report.htm.

32. *New York City Watershed Program Integrates Local Economy, Voluntary Participation, and Clean Water*, NOTES ON RIPARIAN & WATERSHED MGMT., (Assessment & Watershed Prot. Div., EPA, Washington, D.C.) Nov.–Dec., 1993, at 4, *available at* www.epa.gov/owow/info/NewsNotes/issue33/nnd33.htm.

33. *See, e.g.*, ENVTL. PROT. AGENCY, POLLUTION PREVENTION, *at* http://www.epa.gov/p2/ (last visited Jan. 21, 2002); NATURAL RES. DEF. COUNCIL, PREVENTING INDUSTRIAL POLLUTION AT ITS SOURCE: A FINAL REPORT OF THE MICHIGAN SOURCE REDUCTION INITIATIVE, *available at* www.nrdc.org/cities/manufacturing/msri/execsum.asp (last visited Jan. 21, 2002).

34. *See, e.g.*, F. KAID BENFIELD ET AL., ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA'S ENVIRONMENT, ECONOMY AND SOCIAL FABRIC 89-116 (1999).

35. *See, e.g.*, CHESAPEAKE BAY COMM'N & THE TRUST FOR PUB. LAND, KEEPING OUR COMMITMENT: PRESERVING LAND IN THE CHESAPEAKE WATERSHED (2001); BUILDING GREEN INFRASTRUCTURE: LAND CONSERVATION AS A WATERSHED PROTECTION STRATEGY (William Poole ed. 2000).

implementation of clean water regulations levels the playing field between those communities that take the initiative to protect the water supply and those that need more of a nudge before doing so. Traditional concepts of fairness demand that federal, state and local governments require similar measures from similarly situated persons. In short, full enforcement of existing rules is the key to the future of the New York City drinking water supply.

Enforcement of clean water regulations was critical in getting New York City successfully started on its own filtration avoidance path.[36] In early 1993, the United States Environmental Protection Agency ("EPA") made the first filtration avoidance determination under the Safe Drinking Water Act.[37] At that time, New York City was doing extensive planning to implement a program,[38] but no land had been purchased and no new regulations promulgated to further the endeavor. The whole farm program (the City's agricultural pollution prevention effort)[39] was still just a good idea. Despite these difficulties, the City embarked on an aggressive effort to enforce the State Environmental Quality Review Act ("SEQRA"),[40] Clean Water Act, and the National Environmental Policy Act ("NEPA").[41] At the same time, it used its own regulations—dating from to the 1880's to the 1950's—to challenge failing septic systems and other problems.[42]

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36. *See* ENVTL. PROT. AGENCY, NEW YORK CITY FILTRATION AVOIDANCE DETERMINATION 4, 5 (1997).

37. 42 U.S.C. §§ 300(f)-(j) (2001).

38. *See supra* note 36.

39. MICHAEL A. PRINCIPE, NEW YORK CITY'S WATERSHED PROTECTION PROGRAM (1996), *available at* www.epa.gov/OWOW/watershed/Proceed/principe.html.

40. N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (McKinney 1997); *see generally* N.Y. STATE DEP'T OF ENVTL. CONSERVATION, WHAT IS SEQR? (rev. Nov. 1997) (a pamphlet produced by the N.Y. State Department of Environmental Conservation discussing the State Environmental Quality Review Act).

41. 42 U.S.C. §§ 4321-4370(e) (2001); *see, e.g.,* United States v. 27.09 Acres of Land, 760 F. Supp. 345 (S.D.N.Y. 1991) (action filed by New York City to enforce NEPA with respect to proposed post office facility near Kensico Reservoir).

42. *See, e.g.,* City of New York v. Mancini-Ciolo, Inc., 591 N.Y.S.2d 518 (App. Div. 1992), 188 A.D.2d 633 (affirming New York City's independent regulatory authority); *In re* City of New

This enforcement effort, which many people were a part of, led to the improvement or upgrade of numerous sewage treatment plants, septic systems, and other activities.[43] The City stopped merely talking about taking action and supported their statements by undertaking dozens of enforcement actions.

As has been said before, the New York City water supply will not become degraded by one dramatic event.[44] If it goes, it will be by the death of a thousand cuts. To prevent that, every septic system must be correctly designed and installed.[45] Wetlands and streams must be protected to the fullest extent of the law.[46] Pollution discharge limits must be scrupulously imposed and monitored[47] while runoff controls have to be taken seriously, carefully designed and fully installed.[48] SEQRA must be conscientiously used to ensure full consideration of long-term and cumulative impacts.[49]

To date, the watershed protection efforts have been far too heavily concentrated on paper protections—terrific-sounding regulations and great programs that have been only half-heartedly implemented or enforced.[50] For example, the Attorney General's office conducted a study on wetland protection and found the staffing of the New York State Department of Environmental Conservation, the United States Army Corps of Engineers and the New York City Department of Environmental Protection were all too low to ensure careful consideration of all permit and wetland delineation applications as

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York v. Callahan, 618 N.Y.S.2d 418 (App. Div. 1994), 209 A.D.2d 409 (action brought by New York City using independent authority).

43. PRINCIPE, *supra* note 39.

44. *See, e.g.*, Press Release Envtl. Prot. Agency, EPA Issues Interim Filtration Avoidance Determination to NYC for Its Catskill-Delaware Water System (Jan. 21, 1997), *available at* www.epa.gov/region02/ epd/97043.htm.

45. WATERSHED FOR SALE, *supra* note 31, at recommendation #1.

46. *Id.* at recommendation #2.

47. *See generally id.*

48. *Id.*

49. *Id.*

50. *See generally* Robert F. Kennedy, Jr., *A Culture of Mismanagement: Environmental Protection and Enforcement at the New York City Department of Environmental Protection*, 15 PACE ENVTL. L. REV. 233 (1997) [hereinafter *A Culture of Mismanagement*].

well as sufficient inspection and enforcement.[51] Neither watershed streams nor watershed wetlands have been upgraded. There are also innumerable examples of polluted runoff or contaminated discharges that are being allowed to continue by governmental enforcers.[52] Even the new attention that is being paid to the Watershed has not significantly improved most enforcement efforts. It is even possible that the recent attention, instead of really helping the situation, has lured New York into complacency. From certain angles, it looks as if the City and others have substituted paper regulations that look good but do not bring results—or at least have not yet done so—for real enforcement actions that achieve improvements.[53]

Fortunately, protection of the Watershed is not impossible. We have time to convert the paper promises to reality and good intentions to action. To do this, however, every level of government—federal, state, and local, both upstate and down—must commit resources and the will to act. That may entail some actions that will at first appear difficult, such as national, regional and local departments of transportation designing road projects and constructing roads in ways to minimize polluted runoff;[54] and local governments using the SEQRA process to ensure that development projects are designed to minimize impacts and storm water.[55] Additionally, the New York City Department of Environmental Protection and local health departments must ensure that septic systems are adequate,[56] and the New York State Department of Environmental Conservation must fully protect streams and wetlands.[57] The benefits of doing these things are clear and worthwhile—a safe drinking water supply for over nine million people at an affordable price and with a thriving watershed community.[58] Actions truly are better than words.

The engineers who designed and built the Delaware Watershed system were motivated by their breadth of vision and a spirit of

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51. *See generally* TIERNEY, *supra* note 1.

52. *See generally, A Culture of Mismanagement, supra* note 50.

53. *Id.*

54. WATERSHED FOR SALE, *supra* note 31, at recommendation #20.

55. *Id.* at recommendation #8.

56. *Id.* at recommendations #1-3.

57. *Id.* at recommendation #2.

58. *See generally id.*

public service. These values inspired bold engineering, which made this marvel a reality. Today, we owe it to those who designed and built the system, to those who rely on it today, and to those who will rely on it in the future to ensure that we do not allow good intentions or mere paper protections to lead us astray to unsafe water or filtration.