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## CASE STUDY

### **Avoiding Further Conflict: A Case Study of the New York City Watershed Land Acquisition Program in Delaware County, NY**

JENNIFER CHURCH\*

#### I. INTRODUCTION

Not many people think about where their drinking water comes from when they turn on the tap. Likely, even fewer think about how the government protects their drinking water, never mind the impacts that these rules and regulations have on residents living within our watershed communities. This case study will explore the impact of one such set of regulations by analyzing part of an agreement between the government of New York City (NYC or City) and its upstate watershed communities—the Land Acquisition Program (LAP)—and specifically how environmental dispute resolution (EDR) can be applied to this conflict in order to achieve a long-term positive solution that will benefit the residents of Delaware County, New York.<sup>1</sup>

The dispute between the City and its upstate watershed neighbors, otherwise known as the New York City watershed conflict (NYC Watershed Conflict), is a seemingly endless, intractable argument that is a perfect example of the types of environmental disputes that can benefit from EDR. The heart of

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1. Delaware County is located along the southern border of New York State and Pennsylvania. For more general information about the county, see Delaware County, Home, Welcome to Delaware County, <http://www.co.delaware.ny.us/> (last visited Sept. 25, 2009); see also *infra* Part IV.A.

this conflict lies in the fact that the City's drinking water comes from unfiltered surface water in upstate New York; and in order to meet the standards required by the Safe Drinking Water Act (SDWA),<sup>2</sup> the City must either construct an expensive filtration system or somehow control pollution at the waters source in upstate New York. Here the City has chosen to control the pollution by negotiating agreements with such upstate communities as those in Delaware County in an effort to avoid the burden of filtration. In this case, the 1997 New York City Watershed Memorandum of Agreement (1997 MOA)<sup>3</sup> is the document that generally controls and outlines the procedures for protecting the quality of the NYC water supply and for fostering cooperation between all parties involved. Despite claims in the 1997 MOA indicating that a "new era of partnership" had been achieved and that "the goals of drinking water protection and economic vitality within Watershed communities are not inconsistent;" twelve years later, this era has yet to become a reality.<sup>4</sup> Today, two essential deadlines for ensuring continued avoidance of filtration are fast approaching.<sup>5</sup> And upstate residents are desperate for a process that will allow them to enter into an agreement that will finally address their concerns, and make the promises of 1997 a reality.

This case study will first explore the background and statutory framework of the NYC Watershed Conflict. Next, it will examine the City's implementation of the LAP, as incorporated into the 2007 Filtration Avoidance Determination (2007 FAD),<sup>6</sup>

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2. Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26 (2006).

3. The 1997 New York City Watershed Memorandum of Agreement consisted of four main watershed protection programs, including the Land Acquisition Program, Watershed Regulations, Watershed Protection and Partnership Council and the Watershed Protection and Partnership Programs. This article will focus on the Land Acquisition Program. ENVTL FACILITIES CORP., NEW YORK CITY WATERSHED MEMORANDUM OF AGREEMENT (Jan. 21, 1997) [hereinafter 1997 MOA] available at <http://www.nysefc.org/home/index.asp?page=294>.

4. *Id.* art. 1.

5. To comply with the 2007 Filtration Avoidance Determination, the City must submit a long-term LAP to EPA, for the period from 2012 to 2022 by September 30, 2009, the City must apply for a ten-year water supply permit by January 2010. U.S. ENVTL. PROTECTION AGENCY, NEW YORK CITY FILTRATION AVOIDANCE DETERMINATION 44 (2007), <http://www.epa.gov/Region2/water/nycshed/2007finalfad.pdf> [hereinafter 2007 FAD].

6. *Id.*

and how the program is negatively affecting both the economy and the local character of Delaware County, New York.<sup>7</sup> Lastly, this study will analyze the LAP and how EDR can bring the interested parties closer to a mutually beneficial negotiated agreement that meets the needs of the County residents, while simultaneously minimizing any interference with the City's goal of protecting the quality of its drinking water supply.

## II. STATUTORY AUTHORITY OF THE NYC WATERSHED CONFLICT

### A. Safe Drinking Water Act

The long and troubled relationship between Delaware County and NYC began as early as the 1950s, when the Pepacton Reservoir<sup>8</sup> was built and the 1953 Watershed Regulations came into effect.<sup>9</sup> This conflict was then reinvigorated in 1974, when Congress enacted the federal SDWA<sup>10</sup> under the federal Public Health Service Act<sup>11</sup> to protect the quality of the nation's drinking water by establishing minimum health standards for public water supply systems. The SDWA requires the U.S. Environmental Protection Agency (EPA) to set maximum contaminant level goals<sup>12</sup> "at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety."<sup>13</sup> Under the 1986 Amendments to

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7. DOWNEAST DEV. CONSULTING GROUP, THE NEW YORK CITY WATERSHED ECONOMIC IMPACT ASSESSMENT REPORT: DETERMINING IMPACTS AND DEVELOPING OPTIONS REGARDING NYC'S LAND ACQUISITION PROGRAM IN DELAWARE COUNTY—FINAL REPORT 107, 112, 127 (2009) [hereinafter EIA], available at <http://www.delcowatershed.com/>.

8. The Pepacton Reservoir was "built between 1947 and 1954. The 2,400 foot-long dam at Downsville impounds the largest of the city's reservoirs. Eighteen miles long, it covers nine square miles, has a 55-mile shoreline and a capacity of 140 billion gallons." Catskill Watershed Corp., Watershed History, A Brief History, [http://www.cwconline.org/about/ab\\_hist.html](http://www.cwconline.org/about/ab_hist.html) (last visited Sept. 25, 2009). For a map of the Pepacton Reservoir, see New York State DEC, Division of Fish, Wildlife and Marine Resources, Lake Map Series, Region 4, Pepacton Reservoir, [http://www.dec.ny.gov/docs/fish\\_marine\\_pdf/pepresmap.pdf](http://www.dec.ny.gov/docs/fish_marine_pdf/pepresmap.pdf).

9. EIA, *supra* note 7, at 10.

10. *Id.*

11. 42 U.S.C. §§ 201–300ii-4 (2006).

12. 42 U.S.C. § 300g-1(b)(1) (2006).

13. *Id.* § 300g-1(b)(4)(A).

the SDWA, the EPA was required to promulgate new filtration regulations for water supply systems using surface water reservoirs. Therefore in 1989, the EPA promulgated the Surface Water Treatment Rule (SWTR)<sup>14</sup> that requires “public water system[s] that use a surface water source . . . and do not meet all of the criteria in [the regulation] for avoiding filtration, must provide treatment consisting of both disinfection . . . and filtration treatment.”<sup>15</sup>

Critical to the situation at hand, the SWTR also details criteria for avoiding the filtration requirement, known as a filtration avoidance determination, or FAD.<sup>16</sup> A water provider must also apply to the EPA with a water quality protection program that will ensure the same level of water quality for the water supply without filtration; the EPA must then approve the plan before the provider may then bypass any filtration treatment. If, at any time, a public water system fails to meet the filtration avoidance criteria, it may be required to provide filtration of its surface water source. The SDWA also allows for state primacy upon approval of an application to the EPA.<sup>17</sup> In

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14. 40 C.F.R. § 141.71 (2009).

15. *Id.* § 141.73.

16. The criteria in a FAD includes limits for fecal coliform and turbidity, minimization of the risk of *Giardia lamblia* contamination and most importantly, a demonstration that land owners throughout the watershed have agreed “that [the public water supplier] can control all human activities which may have an adverse impact on the microbiological quality of the source water.” 40 C.F.R. § 141.71(b)(2)(iii) (2009). “Fecal coliforms are bacteria that are associated with human or animal wastes. They usually live in human or animal intestinal tracts, and their presence in drinking water is a strong indication of recent sewage or animal waste contamination.” U.S. Env’tl. Protection Agency, Drinking Water Contaminants, Basic Information about E. Coli 0157:H7 in Drinking Water, <http://www.epa.gov/safewater/contaminants/ecoli.html> (last visited Oct. 23, 2009). While fecal coliforms are not usually harmful by themselves, it is used as an indicator of other potentially harmful contaminants, such as *e. coli*. *Id.* Turbidity is defined as “a measure of the cloudiness of water. It is used to indicate water quality and filtration effectiveness . . . Higher turbidity levels are often associated with higher levels of disease-causing microorganisms such as viruses, parasites and some bacteria. These organisms can cause symptoms such as nausea, cramps, diarrhea, and associated headaches.” U.S. Env’tl. Protection Agency, Drinking Water Contaminants, List of Contaminants and their MCLS, Microorganisms, <http://www.epa.gov/safewater/contaminants/index.html> (last visited Oct. 23, 2009). *Giardia lamblia* is a parasite that can cause gastrointestinal illness, such as vomiting, diarrhea and cramps. *Id.*

17. 42 U.S.C. § 300g-2 (2006).

New York, according to Public Health Law § 201(1)(l), the New York State Department of Health (DOH) has primary enforcement authority for implementing the SDWA and is required to “supervise and regulate the sanitary aspects of water supplies and sewage disposal and control the pollution of waters of the state.”<sup>18</sup> Additionally, Public Health Law § 1100(1) grants the DOH and the New York City Department of Environmental Protection (DEP) shared power to issue rules and regulations for protection of the New York City watershed, subject to the approval of the Commissioner of DOH. Under this regulatory scheme, and in order to protect the City’s water supply from contamination, the DEP has authority: (1) to issue watershed rules and regulations;<sup>19</sup> and (2) to condemn property for the protection of the water supply.<sup>20</sup>

### III. BACKGROUND AND HISTORY OF THE NEW YORK CITY WATERSHED CONFLICT

#### A. The New York City Watershed

The New York City watershed is the largest source of unfiltered drinking water in the country,<sup>21</sup> and serves eight million city residents along with one million residents in Westchester, Putnam, Orange and Ulster counties.<sup>22</sup> A 1,600 square mile stretch in the Catskill Mountains, known as the Catskill / Delaware watershed, provides ninety-percent of the drinking water supply.<sup>23</sup> It is a living watershed, meaning it is both populated and home to various economic activities such as

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18. N.Y. PUB. HEALTH LAW §§ 1100-1109 (2009) (granting the DOH more specific authority relating to potable waters).

19. N.Y. PUB. HEALTH LAW § 1100 (2009).

20. *Id.* § 1104.

21. Abrahm Lustgarden, *NYC Demands Drilling Ban*, TIMES UNION, Aug. 6, 2008, available at <http://timesunion.com/ASPStories/Story.asp?StoryID=709513&LinkFrom=RSS> (indicating that “New York City is one of just four major cities in the United States with a special permit allowing its drinking water to go unfiltered.”).

22. U.S. ENVTL. PROTECTION AGENCY, OFFICE OF POLICY, ECONOMICS AND INNOVATION, EPA-231-F-06-005, SOLVING ENVIRONMENTAL PROBLEMS THROUGH COLLABORATION, A CASE STUDY, NEW YORK CITY WATERSHED PARTNERSHIP (2006), <http://www.epa.gov/ncei/collaboration/nyc.pdf> [EPA NYC Watershed Case Study].

23. *Id.*

farming and manufacturing.<sup>24</sup> Moreover, the primary pollution sources here are discharges from wastewater treatment plants and runoff from agricultural and urban sources, which contribute both phosphorus and microbial pathogens to the water supply.<sup>25</sup>

### B. The Conflict

The passage of the SWTR by the EPA required NYC to build a filtration treatment system that, by most estimates, would cost more than eight billion dollars excluding maintenance and operating costs, unless the City could obtain an FAD from the EPA.<sup>26</sup> NYC chose the less expensive option of applying to the EPA for filtration avoidance, which required the City to show that it could avoid pollution in the drinking water supply by controlling the activities of those who lived in the watershed. In response to this proposal, upstate residents expressed fear, apprehension and anger that any land acquisition would interfere with their autonomous property rights as well as hinder economic growth in the region.<sup>27</sup>

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24. Michael C. Finnegan, *New York City's Watershed Agreement: A Lesson in Sharing Responsibility*, 14 *PACE ENVTL. L. REV.* 577, 585 (1997) (discussing how "the New York City Watershed is indeed a 'living' watershed [which] presents unique challenges not found in any of the larger unfiltered water supply system in the nation. Microbial contaminants and eutrophication due to sewage and septic system discharges and various types of runoff (from lawns, farms, highways, etc.) constitute the major threats to drinking water.").

25. EPA NYC WATERSHED CASE STUDY, *supra* note 22.

26. See Keith S. Porter, *Fixing Our Drinking Water: From Field and Forest to Faucet*, 23 *PACE ENVTL. L. REV.* 389, 403 (2006) (stating that NYC "estimated the capital costs for filters at \$8 billion."); see also *At Last, A Watershed Agreement*, N.Y. TIMES, Nov. 3, 1995, at A28, available at <http://query.nytimes.com/gst/fullpage.html?res=950DEFD81639F930A35752C1A963958260&sec=&spon=>; see also Complaint filed by the Coalition of Watershed Towns, the Town of Roxbury, New York and the Town of Hamden, New York against the City of New York, the New York City Department of Environmental Protection, the New York State Department of Health, and Richard F. Daines, M.D., as Commissioner of the New York State Department of Health ¶ 37 (Dec. 20, 2007) [hereinafter Complaint] (on file with author) (alleging "that it would cost the City several billion dollars to install a filtration plant for its water supply, and hundreds of millions of dollars per year to operate the plant").

27. See, e.g., Andrew C. Revkin, *An Unusual Partnership, Farmers Help Safeguard New York Water*, N.Y. TIMES, Aug. 13, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE7D6153DF930A2575BC0A963958260&sec=&spon=&pagewanted=3>; Merri Rosenberg, *City v. County Over Protection*

However, in January of 1993, the EPA granted NYC a conditional FAD, requiring it to take numerous precautions to prevent the pollution of the water supply. In order to meet these conditions, Governor Pataki of New York convened a meeting of all parties involved and after four years of negotiations, the parties finally reached an agreement and signed the 1997 MOA.<sup>28</sup> Based on this agreement, the EPA issued the DEP a five-year FAD,<sup>29</sup> and in November 2002, extended it for five more years based on the DEP's 2001 Long-Term Watershed Protection Program.<sup>30</sup> In the spring of 2006, the EPA and DOH discussed the 2007 FAD with watershed stakeholders and held public meetings. In August 2006, the EPA and DOH completed an evaluation,<sup>31</sup> which concluded that DEP had "successfully satisfied the obligations specified in the 2002 FAD."<sup>32</sup> On April 12, 2007, the EPA proposed to allow the City to continue to bypass filtration for the Catskill/Delaware system.<sup>33</sup> Then on July 30, 2007, the EPA issued DEP a new ten-year FAD, determining that the City had an adequate watershed protection plan for its Catskill/Delaware water supply that met the requirements of the SWTR.<sup>34</sup>

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*of Watershed*, N.Y. TIMES, Feb. 5, 1995, available at <http://query.nytimes.com/gst/fullpage.html?res=990CE2D7103AF936A35751C0A963958260>.

28. 1997 MOA, *supra* note 3 (signatories to the agreement included, Governor Pataki, the Mayor of New York City, and representatives from DOH, the EPA, the Coalition of Watershed towns, the Catskill Watershed Corporation, Putnam and Westchester Counties, and other upstate communities and environmental groups, including the Clean Drinking Water Coalition, The Catskill Center for Conservation and Development, New York Public Interest Research Group and Riverkeeper).

29. U.S. ENVTL. PROTECTION AGENCY, NEW YORK CITY FILTRATION AVOIDANCE DETERMINATION (1997), available at <http://www.epa.gov/region02/water/nycshed/fadtxt97.pdf>.

30. U.S. ENVTL. PROTECTION AGENCY, NEW YORK CITY FILTRATION AVOIDANCE DETERMINATION (2002), available at <http://www.epa.gov/region02/water/nycshed/2002fad.pdf>; EPA NYC WATERSHED CASE STUDY, *supra* note 22.

31. U.S. ENVTL. PROTECTION AGENCY REGION 2, REPORT ON NYC OF NEW YORK'S PROGRESS IN IMPLEMENTING THE WATERSHED PROTECTION PROGRAM, AND COMPLYING WITH THE FILTRATION AVOIDANCE DETERMINATION (2006), available at [http://www.epa.gov/region02/water/nycshed/documents/epaeval\\_august2006.pdf](http://www.epa.gov/region02/water/nycshed/documents/epaeval_august2006.pdf).

32. *Id.* at 4.

33. EPA NYC WATERSHED CASE STUDY, *supra* note 22. Part of the 2007 FAD is a new \$300 million, ten-year LAP that will begin in 2012. *See also* 2007 FAD, *supra* note 5.

34. *Id.*



#### IV. DELAWARE COUNTY AND THE LAND ACQUISITION PROGRAM

##### A. Delaware County

Delaware County is located within the southern tier of New York State, nestled against the Catskill Mountains. Today, Delaware County is particularly affected by the LAP because it is one of the least affluent counties in the state. According to the latest U.S. Census data, the median household income for the area is \$41,862, and the number of permanent residents in is approximately 46,000.<sup>35</sup> Historically, agriculture was the foundation of the County's economy; it was also known for its dairy products.<sup>36</sup> Agriculture, while still present within the County, has declined to only a fraction of its former prevalence.<sup>37</sup> Moreover, natural resource industries such as bluestone mining and logging, have declined within the region due to the development prohibitions placed on City owned, LAP acquired, land.<sup>38</sup> Today, the economy of Delaware County depends mainly on manufacturing, which contributes 32% of jobs and 40% of the regional earnings.<sup>39</sup> Other major economic sectors are small businesses and government jobs.<sup>40</sup>

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35. U.S. Census Bureau, Delaware County, State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/36/36025.html> (last visited Aug. 30, 2009); Interview with Dean Frazier, Commissioner of Watershed Affairs for Delaware County (Oct. 28, 2008) [hereinafter Interview] (on file with author).

36. EIA, *supra* note 7, at 44. See Tim Duerden, The Delaware County Historical Association Presents: A Brief History of Delaware County, <http://www.dcha-ny.org/history.html> (last visited Nov. 13, 2009).

37. EIA, *supra* note 7, at 44. See Duerden, *supra* note 36 (stating that "the local dairy industry has declined during the last couple of decades.")

38. EIA, *supra* note 7, at 11-12, 15. See Steven Potter, *Bluestone: From Ancient Sea to American Architecture*, N.Y. STATE CONSERVATIONIST (Aug. 2008), <http://www.dec.ny.gov/pubs/46715.html> (discussing how "New York's [bluestone] industry is valued between \$40 and \$100 million annually and it employs more than 700 full- and part-time employees. Most bluestone is quarried within a 90-mile radius of Deposit (Delaware County) and is sold for \$3-10 per square foot."). See also Delaware County, Chamber of Commerce, Delaware County Business Demographics, "Types of Businesses," <http://www.delawarecounty.org/businessdemographics.lasso> (last visited Nov. 13, 2009) (listing natural resource-based industries as "medium-density fiberboard (MDF), bluestone, and engravable wood products")

39. EIA, *supra* note 7, at 46, 74. A pharmaceutical manufacturer and a Kraft plant are two of several large manufacturing facilities within the watershed; while at the County level, 98% of the County's businesses have ten or fewer

## B. SCOPE OF LAP IN DELAWARE COUNTY

It is generally acknowledged that land acquisition is one of the most effective and important tools for watershed protection.<sup>41</sup> The goal of the program is to ensure that undeveloped, environmentally sensitive lands remain protected, preventing future contamination of the water supply and preserving the watershed as a source of high quality drinking water.<sup>42</sup> Although the LAP affects all watershed communities in upstate New York, Delaware County is uniquely affected because it encompasses over half of the land comprising the watershed. The City's goal under the LAP is to acquire fee simple or conservation easements on undeveloped land or property determined to be "water quality sensitive."<sup>43</sup> All purchases are on a willing buyer/willing seller basis for the fair market value of the property while all property taxes are paid by the City,<sup>44</sup> Eminent domain is not used. Through the LAP, the City commits to solicit a certain number of acres in the watershed; however, the City is not required to purchase a certain number of acres but only to meet solicitation goals for specific priority areas.<sup>45</sup> The City must also consult with the town or village before a purchase.<sup>46</sup>

Pursuant to the 2007 FAD, over \$241 million of new funds will be poured into the new LAP, along with \$59 million of prior unused LAP funding, for a total commitment of \$300 million.<sup>47</sup>

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employees. EIA, *supra* note 7, at 35-36; Interview, *supra* note 35. See Delaware County, Chamber of Commerce, *supra* note 38 (stating that "[m]anufacturers of all sizes call Delaware County home, employing over 4,000 people. Goods include components for the aerospace industry, pharmaceuticals, printing, and dairy products.")

40. EIA, *supra* note 7, at 44-50. See Delaware County, Chamber of Commerce, *supra* note 38 (noting that "[s]mall specialty shops, department stores, and restaurants continue to join the ranks of the county's retailers").

41. 2007 FAD, *supra* note 5, at 42.

42. *Id.*

43. U.S. Env'tl. Protection Agency, Region 2 Water, Watershed Protection Programs, <http://www.epa.gov/Region2/water/nycshed/protprs.htm> (last visited Aug. 30, 2009).

44. 1997 MOA, *supra* note 3, at ¶¶ 60, 61, 79.

45. 1997 MOA, *supra* note 3, at ¶ 60.

46. *Id.* at ¶ 71.

47. N.Y. CITY DEPT OF ENVTL. PROTECTION, NEW YORK CITY 2007 DRINKING WATER SUPPLY AND QUALITY REPORT 3 (2007), <http://www.nyc.gov/>

In addition, the City plans to increase its efforts to use land trusts and non-profit organizations to buy land in order to protect a larger geographic area.<sup>48</sup> In 1997, the City owned 45,000 acres of watershed land.<sup>49</sup> Since the LAP began, the City has secured over 92,000 acres in fee simple or conservation easements throughout upstate New York. As of 2008, the City has increased this number to more than 137,000 acres of watershed property.<sup>50</sup> Meanwhile in Delaware County, through December 31, 2007, over 18,949 acres have been purchased by the City in fee simple, with 3,863 acres protected by conservation easements.<sup>51</sup> However, despite the paper success of the program, Delaware County residents claim that they are experiencing significant detrimental economic and sociological effects to their communities because the LAP is driving up land prices, reducing the quantity of developable land, and threatening the County's property tax base.

### 1. Increasing Land Values

Land is a limited resource; the less land available, the higher its price. With the City buying considerable amounts of land, the County has seen a sharp increase in the price of real estate. In 2000, the median value of a single-family, owner-occupied home in Delaware County was \$74,200.<sup>52</sup> Between 2005 and 2007, the median value increased to a striking \$124,500.<sup>53</sup> An influx of second homeowners who are generally wealthier than the average Delaware County resident has further contributed to this

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[html/dep/pdf/wsstate07.pdf](http://dep/pdf/wsstate07.pdf) (indicating that this is the first FAD to be issued for a ten-year period and this FAD is the most expansive to date).

48. *Id.*

49. N.Y. CITY DEP'T OF ENVTL. PROTECTION, NEW YORK CITY 2008 DRINKING WATER SUPPLY AND QUALITY REPORT 3 (2008), <http://www.nyc.gov/html/dep/pdf/wsstate08.pdf>.

50. *Id.*

51. *Id.*

52. U.S. Census Bureau, Delaware County, N.Y. Fact Sheet, Census 2000 Demographic Profile Highlights, <http://factfinder.census.gov> (search "Get a factsheet for your community" for "Delaware County, NY" then click "2000" tab) (last visited Aug. 31, 2009).

53. U.S. Census Bureau, Delaware County, N.Y. Fact Sheet, 2005-2007 American Community Survey 3-Year Estimates, <http://factfinder.census.gov> (search "Get a factsheet for your community" for Delaware County, NY") (last visited Aug. 31, 2009).

problem.<sup>54</sup> Therefore, the LAP has created a positive feedback loop of increasing land prices—the City buys land, land values rise, landowners sell their parcels to the City to take advantage of the rising prices, and so on.

## 2. Reducing the Quantity of Available Land

A related concern to increasing land prices is that the pool of available land is quickly dwindling. Once the City purchases land under the LAP, it becomes unavailable for development and remains vacant; a situation which is compounded by the fact that much of the remaining open land is unsuitable for development due to the presence of wetlands and/or steep slopes.<sup>55</sup> If the City continues buying developable land at its current rate it is likely that land prices throughout the County will continue to rise, further inhibiting development and economic growth. Moreover, limited economic opportunities may exacerbate the recent County-wide pattern of out-migration.<sup>56</sup>

## 3. Future City Challenges to Real Property Tax Assessments

Loss of the County's property tax base is also a serious economic problem created by the LAP. The County depends on property tax dollars to fund government programs, infrastructure improvements, schools and other public services.<sup>57</sup> Even though property taxes are proportionally assessed to the value of land, the City has a history of challenging the tax assessments on their infrastructure properties.<sup>58</sup> The 1997 MOA allows the City to challenge the assessed value of the land for property tax purposes twenty years after acquisition.<sup>59</sup> Accordingly, this means the City could begin challenging assessments as early as 2017. City challenged assessments are a lose-lose situation for the County. Not only would they reduce property tax income for the County,

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54. EIA, *supra* note 7, at 128-29.

55. *Id.* at 89.

56. *Id.* at 26.

57. *Id.* at 107.

58. *Id.* at 107-8.

59. 1997 MOA, *supra* note 3, at ¶ 79(b).

but they could also drain County funds via litigation costs.<sup>60</sup> Potentially, the financial burden of a decreased tax base could fall to small businesses and homeowners, leading to interference with important public services such as police, fire services and public schools.<sup>61</sup> Delaware County residents are also fearful that these challenges will wreak further havoc on the region's already declining economy.<sup>62</sup>

### C. SEQRA IMPLICATIONS OF THE LAP

The City must submit a new LAP to the EPA, the DOH and the DEC by September 30, 2009.<sup>63</sup> All economic and social impacts, including those discussed above, must be analyzed to determine whether the LAP has any significant impact on the "environment" in compliance with the New York State Environmental Quality Review Act (SEQRA).<sup>64</sup> The purpose of SEQRA is "to incorporate the consideration of environmental factors into the existing planning, review, and decision-making processes of the state, regional and local government agencies at the earliest possible time."<sup>65</sup> Here, the approval of the City's application and the implementation of the LAP constitute "actions" subject to SEQRA, which must consider, *inter alia*, the program's impact, not just on the natural environment, but also the,

physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, *existing patterns of population*

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60. EIA, *supra* note 7, at 109-11.

61. *Id.* at 107.

62. *Id.* One recent commenter is quoted as stating "#1—Resolve the tax assessment issues NOW. The 20 year period banning assessment challenges will soon expire on some properties and we expect NYC to act soon after." Down East Group, Feedback & Action Ideas, *supra* note 38.

63. 2007 FAD, *supra* note 5, at 44.

64. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1 (2009). Statutory Authority for SEQRA is found in N.Y. ENVTL. CONSERV. LAW §§ 3-0301(1)(b), 3-0301(2)(m) and 8-0113 (2006) (requiring any action that may have a significant adverse effect on the environment is subject to SEQRA as administered by the DEC).

65. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2009); N.Y. ENVTL. CONSERV. LAW § 8-0109 (2009).

*concentration, distribution or growth, existing community or neighborhood character, and human health.*<sup>66</sup>

When there are no adverse impacts found, a negative declaration is issued and the action can proceed. In the alternative, if a significant adverse environmental impact is found, an environmental impact statement (EIS) must be prepared. The agencies will then use the EIS to determine whether to allow, alter, or to disallow the action altogether. Here, the long-term, short-term, and cumulative effects of the proposed action<sup>67</sup> will then be evaluated by “intelligently assess[ing] and weigh[ing] the environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken in the best overall interest[s] of the people of the State.”<sup>68</sup>

## V. THE CURRENT NYC WATERSHED CONFLICT IN THE ENVIRONMENTAL DISPUTE RESOLUTION CONTEXT

Set against this complex scene, EDR is the best possible solution for achieving the type of long-term mutually beneficial agreement that will address the needs of NYC and the concerns of the residents of Delaware County. Environmental disputes, such as the one at hand, easily lend themselves to alternate dispute resolution processes (ADR);<sup>69</sup> primarily because formal legal processes are often inadequate to prevent or redress environmental plaintiffs’ injuries. The fact that some environmental disputes involve highly technical issues and significant scientific uncertainty, further contributes to this

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66. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(l) (2009) (emphasis added).

67. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(c)(2) (2009).

68. *WEOK Broad. Corp. v. Planning Bd. of the Town of Lloyd*, 79 N.Y.2d 373, 380 (1992).

69. “There are four questions basic to strategic ADR planning: What kind of dispute is it? What kind of outcome does the client need? What process would be most appropriate? What kind of neutral party (if any) could help reach the desired outcome most efficiently?” Ann MacNaughton, *Collaborative Problem-Solving in Environmental Dispute Resolution*, 11-SUM NAT. RESOURCES & ENV'T 3, 4 (1996).

problem.<sup>70</sup> The multi-party<sup>71</sup> and time-sensitive nature of environmental disputes also makes it more suited for ADR than traditional litigation<sup>72</sup> as “ADR encourages timely resolution of controversial issues and will likely yield more satisfying results to all parties involved.”<sup>73</sup>

In this case, despite the recent lawsuit filed by the Coalition of Watershed Towns against the DEC for its issuance of a negative declaration for the City’s Long-Term Watershed Protection Program,<sup>74</sup> the NYC Watershed Conflict is an almost ideal candidate for EDR. Specifically, this conflict is an ideal candidate for EDR because: (1) it is in the early stages of negotiation; (2) the interested parties have been pre-identified through earlier actions; (3) the parties have significant common ground upon which to build a mutually beneficial agreement; and (4) there are both state and federal mandates forcing the parties to act. To this end, small steps have already been taken toward using EDR in this conflict as Delaware County has recently hired a land use planning regulatory expert<sup>75</sup> who provide the County with strategic recommendations for reaching an agreement with

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70. LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 5 (1984).

71. Parties to Environmental conflicts typically include “community residents, interest groups, and public interest law firms.” KIRK EMERSON ET. AL., THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 5 (Rosemary O’Leary & Lisa B. Bingham eds., 2003). The government is also a party in an estimated 78-80% of cases. *Id.* at 4-5. Private interests such as “industry, commercial, and other business people are often involved in environmental conflicts, such as those that involve . . . pollution abatement issues, or granting various permits.” *Id.* at 5.

72. There are numerous advantages of ADR to the parties, including saved time, saved money and more autonomy over the outcome of the dispute. LAWRENCE SUSSKIND, MIEKE VAN DER WANSEM & ARMAND CICCARELLI, MEDIATING LAND USE DISPUTES: PROS AND CONS 10-11 (2000).

73. Elizabeth Donahue, *Environmental Land Use Disputes and ADR*, ABA SECTION OF DISPUTE RESOLUTION, 2000, available at [http://www.abanet.org/dispute/env\\_land\\_use\\_disputes.html](http://www.abanet.org/dispute/env_land_use_disputes.html).

74. See N.Y. State Dep’t of Env’tl. Conservation, Environmental Notice Bulletin—Region 4 Notices, [http://www.dec.ny.gov/enb/20080130\\_not4.html](http://www.dec.ny.gov/enb/20080130_not4.html) (last visited Aug. 30, 2009); see also Complaint, *supra* note 26, at 45.

75. Professor of Law John R. Nolon, Counsel and Faculty Liaison for Pace Law School’s Land Use Law Center and Director of the Kheel Center on the Resolution of Environmental Interest Disputes, has been retained by Delaware County as an expert on land use planning, regulation and process.

the City regarding the LAP, including helping them develop their best alternative to a negotiated agreement, or BATNA.<sup>76</sup>

In addition, the County has recently hired Downeast Development Consulting Group to conduct a full Economic Impact Assessment to document the present and future potential economic impacts of the LAP on the County.<sup>77</sup> The Final Assessment Report, which was completed in May 2009, details the effects of various future scenarios on each economic sector and most importantly, makes recommendations for amendments to the current LAP to abate negative effects.<sup>78</sup> At this early stage, negotiations with the City are expected to begin soon.

Presently, the NYC Watershed Conflict can be defined as an “upstream,” intractable dispute because it is a conflict at the planning stage that involves over twenty parties, including local, state and national government agencies<sup>79</sup> and because it “remain[s] mired in controversy, tied up in litigation, and riddled with long-standing tensions that defy resolution.”<sup>80</sup> This is mainly due to the current “frames” of the parties or the ways that each party views the problem in terms of: (1) why the conflict is occurring; (2) what is keeping the conflict from being resolved and their own roles in the conflict; (3) their opponents roles in the conflict; (4) their personal views of their opponents’ objectives;

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76. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 108 (Bruce Patton ed., Penguin Books 1991) (1983) (coining the term “BATNA” or a party’s best option if negotiations fail). There are three main steps to creating a BATNA: “(1) inventing a list of actions you might conceivably take if no agreement is reached; (2) improving some of the more promising ideas and converting them into practical options; and (3) selecting, tentatively the one option that seems the best.”

77. The Down East Group, NYC Watershed Economic Impact Study—Key Informant Interviews <http://www.downeastgroup.ca/blog> (Oct. 17, 2008, 13:08 EST),

78. EIA, *supra* note 7, at 145.

79. Environmental conflicts can be categorized into upstream disputes that “involve planning or policymaking,” midstream disputes which “involve administrative permitting,” or downstream disputes that deal with “compliance and enforcement.” EMERSON ET. AL., *supra* note 71, at 4

80. Roy J. Lewicki & Barbara Gray, *Introduction to MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS: CONCEPTS AND CASES* 1, 2 (Roy J. Lewicki, Barbara Gray & Michael Elliott eds., 2003) (finding that intractable conflicts are characterized by “considerable intensity, persist indefinitely over long periods of time, and cannot be resolved through consensus-building efforts or by administrative, legal, or political solutions.”)



and (5) how they make sense of their situation within the conflict.<sup>81</sup>

However, just because this dispute can be labeled, “intractable” does not mean that the dispute will be irresolvable in the long run.<sup>82</sup> By employing a consensus-based approach, such as conflict assessment, facilitation, or mediation, with the help of a third-party neutral, the parties could come to a mutually beneficial agreement.<sup>83</sup> Here, the term “consensus-based” refers to a “collaborative decision-making technique[ ] in which a third party neutral . . . assist[s] diverse or competing interest groups to reach an agreement on an environmental conflict.”<sup>84</sup>

Conflict assessment could be the first EDR process involved in the NYC Watershed Conflict because it consists of identifying the issues in controversy, all of the affected parties, and the most appropriate environmental conflict resolution (ECR) method.<sup>85</sup> After the conflict has been assessed, a third party neutral could then help the parties to “reframe,” their perspectives,<sup>86</sup> and to encourage a resolution either through facilitation, where the neutral merely assists in developing a meaningful discussion of the issues in controversy,<sup>87</sup> or through mediation as “a form of facilitated negotiation in which a skilled, impartial third party with neither decision-making authority nor the power to impose a settlement assists the parties in reaching a voluntary, mutually agreeable resolution to all or some of the disputed issues.”<sup>88</sup>

## VI. CONCLUSION

The current state of the NYC Watershed Conflict, the effects of the LAP on Delaware County residents and the opportunities

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81. *Id.* at 2

82. The authors describe intractability as a transient state that “may shift over time and vacillate between tractability and intractability.” *Id.* at 37.

83. *Id.* at 9, 10 (stating that the goals of consensus building are to encourage early participation of all stakeholders, “to produce stable and sensible policies or decisions that have a strong, broad base of support,” and to lessen the chances of subsequent related disputes or legal challenges).

84. *Id.* at 10.

85. EMERSON ET. AL., *supra* note 71, at 10.

86. *Id.*

87. *Id.*

88. *Id.* at 11.

that EDR can provide to the parties involved are only beginning to become clear. However, because this conflict is still in its early stages, there remains great potential for the different interests to be accommodated without the use of any formal adjudicative process. Presently, County residents are fearful that their community character and economic prosperity are being detrimentally impacted by the LAP, even though the City is required to minimize those effects under SEQRA. Meanwhile, the City is chiefly concerned with meeting the EPA's filtration avoidance criteria in the watershed to ensure a continued supply of high quality drinking water for NYC residents. Based on these positions, there is definitely enough common ground to start a productive negotiation.

During the EDR process that lies ahead, Delaware County residents' concerns about real estate price increases and diminishing land availability should be addressed by ensuring that the City agrees to acquire only land that provides the highest level of protection to the watershed.<sup>89</sup> In doing this, the City would increase the amount of potentially developable land, which would hopefully stabilize real estate prices and slow the out-migration that is currently impacting the community character of the County. Moreover, to relieve County residents' trepidation about the loss of their property tax base from challenged assessments, the City should fully fund a tax consulting fund that would provide funding to watershed communities to pay professional consultants and/or attorneys to review and analyze real property taxes paid by the City.<sup>90</sup> Lastly, if the frames of the Delaware County residents can be changed by a third party neutral to see the potential benefits that can be enjoyed by environmentally-friendly economic growth, a huge hurdle in resolving this conflict would be cleared. Of course, this can only occur if the City agrees to make green economic development a more viable option, by possibly allowing tourism and limited recreational use of City land and the reservoirs as long as the environmental impacts are minimized.

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89. EIA, *supra* note 7, at 145.

90. See The Catskill Watershed Corporation, MOA Summary Guide, Protection and Partnerships Program, Can Municipalities Recover Costs for Consultants and Administration?, Tax Consulting Fund, <http://www.cwconline.org/pubs/moa/moaapp.html> (scroll down to view) (last visited Oct. 29, 2009).

Undoubtedly, there is still significant progress that needs to be made before an agreement can be formed. The final agreement depends largely on whether the parties involved, the City, County, landowners, and environmentalists become adversaries or collaborators in the permitting process. The City needs to keep in mind that without the cooperation of the local upstate communities in the Watershed Protection Programs, the City could eventually be denied a FAD from the EPA and be required to build a filtration system. It is therefore in the City's best interest to work as closely as possible with the local residents and to recognize their need for local control of their land while keeping the land uses consistent with the protection of the watershed.