

WATERBURY'S "WATER WAR"

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On July 2, the Connecticut Supreme Court decided the case of *City of Waterbury vs. Town of Washington*, 2002 WL 1340982 (Conn. 2002). With that decision, the Court undertook to resolve a major dispute over the withdrawal and use of water, a dispute involving administrative procedure, the Connecticut Environmental Policy Act ("CEPA"), the state's minimum flow statute, riparian rights, prescriptive rights, breach of contract, and regulated riparianism. In short, the Court found itself enmeshed in the latest expression of the growing struggles over water as demand outstrips supplies throughout the humid eastern states.

The dispute between Waterbury, Washington, and others began before the Superior Court for Litchfield County. Through a complex set of legal maneuvers, the City of Waterbury, eventually joined by the towns of Middlebury, Watertown, and Wolcott, came to be designated as plaintiffs seeking a declaratory judgment in favor of Waterbury's right to continue its withdrawals from the Shepaug. Hereafter they will be collectively referred to as "Waterbury." The towns of Washington and Roxbury, the Roxbury Land Trust, the Shepaug River Association, the Steep Rock Association, and the Connecticut Fund for the Environment appeared as defendants and counterclaimants, seeking to enjoin most of Waterbury's withdrawals from the Shepaug. Hereafter they will be collectively referred to as "Washington." While the state was not listed as a party to the suit, the Attorney General's office also participated in the proceedings, generally in support of the defendants-counterclaimants. The Connecticut Water Works Association (an association of the public water supply systems in the state), while also not a party, submitted written arguments as an *amicus curiae*. On the appeal of the decision below, the Connecticut Water Works Association retained me to prepare an *amicus* brief for the state's Supreme Court. To understand this dispute, one must go back more than a century.

Waterbury lies in the basin of the Naugatuck River in southwestern Connecticut. In the second half of the nineteenth century, Waterbury grew dramatically, as it became a center first of textile mills and later of general manufacturing. As the city spread up the hillsides surrounding the floodplain where it began, the city leaders had to cope with the need for a secure and healthy supply of water for the community. In 1893, Waterbury obtained from the Connecticut legislature a "Special Act" authorizing the city to take as much water as its inhabitants might require from "any and all brooks, rivers, ponds, lakes, and reservoirs" within Litchfield and New Haven Counties. Waterbury thereafter built two reservoirs in the basin of Branch Brook, which feeds into the Naugatuck within the basin of which Waterbury lies. Then, in 1917, Waterbury undertook to import water from the Shepaug River. Although the Shepaug is in a different watershed, it required only a seven-and-a-half mile long tunnel to bring the water from the Shepaug into Waterbury's existing reservoirs.

The Shepaug diversion took place within the Town of Washington in Litchfield County. A "town" in Connecticut is like a township in many other states, including within its territorial

limits a large, and in the 1920s, undeveloped area—including the place on which eventually two dams were to be built and the withdrawals were to take place. Although Washington had a much smaller population than Waterbury at the time, the town sought to persuade the legislature to repeal the 1893 Special Act. Rather than risk a vote in the legislature, Waterbury chose to negotiate an agreement in 1921 with Washington whereby the Washington agreed to withdraw its bill and Waterbury agreed to certain limits on its withdrawals from the Shepaug. In the 1921 contract, Waterbury promised not to reduce the flow of the Shepaug River below the dam to less than 1.5 million gallons per day (mgd) between May 1 and November 1 of each year. Waterbury also agreed not to divert any water from the Shepaug “at any time when the distributing reservoirs into which the city aqueduct shall convey [Shepaug] water ... are full and overflowing.” Finally, Waterbury agreed that it would only divert Shepaug water to the extent as “may be required to supply the actual needs of the customers of said City and to maintain the storage in its potable water supply reservoirs.” The contract did not define what was meant by a “distributing reservoir” or what, if anything, limited the potential users of city water who would count as “customers.”

Pursuant to this contract, Waterbury built the Shepaug Dam, completed in 1933. Waterbury then constructed the Pitch Reservoir, completed in 1943, to receive the Shepaug water. Finally, in 1963, Waterbury completed the Cairns Dam on the Shepaug River to enlarge its withdrawals from that river. That water also went into the Pitch Reservoir. Waterbury did release 1.5 mgd down the Shepaug, and more when it was available.

Over the 70 years after the contract was signed, the situations of Waterbury and Washington underwent a reversal of fortunes. Washington in the later decades of the twentieth century became a well-to-do bedroom community for the greater Hartford area. Waterbury, on the other hand, saw its mill and other factories close as jobs shifted to the southern states or overseas. As Waterbury’s tax base eroded and an ever greater percentage of its population ended up on public assistance, Waterbury undertook to cover some of the costs of its water system by selling water to neighboring communities, including Wolcott, Middlebury, and Watertown. Furthermore, the need to comply with federal standards regarding potable water required Waterbury to construct a new treatment plant. Waterbury completed the new plant in 1988. The plant was located below the Pitch Reservoir and another of the Branch Brook reservoirs, but above the largest one of those reservoirs—the Wigwam Reservoir. In order to avoid the costs of pumping water from the Wigwam Reservoir up to the treatment plant, Waterbury simply substituted Shepaug water (which could reach the plant through gravity flow) for the water formerly taken from the Wigwam reservoir. Waterbury also used water from the Pitch Reservoir to drive turbines to pump water up to the higher elevations in the service area, further necessitating the keeping of the Pitch Reservoir full at all times. As a result, Waterbury usually no longer had a surplus above the 1.5 mgd promised in the 1921 contract and on occasion did not even release that amount.

Because Waterbury owned so much land along the Shepaug both above and below its reservoirs, the riparian areas of the upper regions of the Shepaug basin had remained almost entirely undeveloped. Some miles below Waterbury’s dams, however, the river flowed through the town center of Washington, and what people there saw wasn’t nice. The town leaders, and several groups of town residents and others interested in the preservation of the natural environment in the Shepaug basin, began to demand that Waterbury not take any water from the Shepaug until the resources available from the Branch Brook basin—most pointedly the water in the Wigwam

Reservoir—was exhausted. They also began to challenge the whole scheme of diversion of water from the Shepaug as a violation of the public trust in the waters of the state.

After a trial, Judge Beverly Hodgson largely came down on the side of the defendants-counterclaimants. At the heart of Hodgson's ruling was her reading of CEPA. CEPA declared the air, waters, and other natural resources of the state to be subject to the public trust. Hodgson decided that this vested in her court the authority to set minimum flows independent of the state's minimum flow statute that vested such authority in the Commissioner of Environmental Protection. She also found that Waterbury's withdrawals from the Shepaug violated the riparian rights of downstream landowners and communities, without even bothering to make clear whether she predicated this conclusion on the natural flow theory or the reasonable use theory of riparian rights. She also found that Waterbury's withdrawals violated the 1921 contract with Washington. Finally, after reargument on the point, she found that Waterbury had not perfected a prescriptive right to continue its withdrawals because its withdrawals were not continuous—on some days each year, Waterbury withdrew no water at all from the Shepaug. On February 16, 2000, Hodgson enjoined Waterbury from diverting water from the Shepaug unless certain minimum flows were met each month from May to October.

If Judge Hodgson's decision were to stand, virtually every public water supply system in Connecticut would be vulnerable to similar attacks. Waterbury promptly appealed against the injunction. Given the importance of the questions to the public weal, the Connecticut Supreme Court agreed to hear an immediate appeal of the case without waiting for an intermediate court to review the decision. In its unanimous decision of July 2, 2002, the Supreme Court reversed the Judge Hodgson on the most crucial issues, while clarifying the relationship of the public trust under CEPA to the minimum flow statute and to the state's regulated riparian statute. The case was remanded with directions for the Superior Court to determine the facts necessary to apply the legal standards set forth in the Supreme Court's decision.

The larger part of the opinion dealt with the CEPA issues. Among other provisions, CEPA in C.G.S. § 22a-16 authorizes "any person, partnership, corporation, association, organization or other legal entity" to maintain an action for declaratory or equitable relief for the protection of "the public trust in the air, water, and other natural resources from unreasonable pollution, impairment or destruction." The Court held that this section authorized suits literally by any person without obligation to exhaust administrative remedies and without obligation on the court to refer the matter to a responsible administrative agency. But, contrary to Judge Hodgson's holding, the Court went on to hold that the standard of "unreasonable pollution, impairment or destruction" did not prohibit all such pollution, impairment, or destruction beyond mere *de minimus* effects, but required a weighing of the damage to the environment against the gain to society from the activity in question. Furthermore, the Court went on to hold that legislature has already established that balance in the minimum flow statute, C.G.S. §§ 26-141a through 26-141c. Therefore, the Court held, the Superior Court could only enjoin withdrawals from the Shepaug that violated that statute. Finally, the Court strongly suggested, but did not require, that the Superior Court apply the doctrine of primary jurisdiction to refer the matter to the Department of Environmental Protection—the agency charged by the statute to determine the appropriate minimum flows in rivers like the Shepaug.

Turning to the question of riparian and prescriptive rights, the Supreme Court concluded that, despite certain inconsistencies in the language used in earlier decisions, Connecticut had followed the natural flow theory of riparian rights until 1982. The Court went on to acknowledge that Connecticut's legislature had enacted a regulated riparian statute in 1982, making the Court the first in the country to embrace that description for its water rights law. The Court focused its major concern on the period before 1982 because that was the time when Waterbury could have perfected its prescriptive rights. By reaffirming the natural flow rule, the Court made this part of the case fairly easy for Waterbury. The provision of water to a city entirely outside the watershed from which the water is taken cannot be considered a riparian use under any theory of riparian rights. Therefore from the moment the withdrawals began, they were adverse to the rights of every riparian on the Shepaug, and the very existence of the dam and diversion tunnel were sufficiently open and notorious to give notice of such adverse use to every riparian on the Shepaug. The Court found the 1893 Special Act to be "a claim of right," so all the elements of prescriptive title to water were established. The Court remanded the case to the Superior Court to determine the quantity subject to the prescriptive right. The standard to be applied would be the amount that was "customary" between the parties during the prescriptive period—any complete period of 15 years of continuous use. The Court did not spell it out, but it would appear from the decision that the use was to be determined on an annualized basis; certainly the idea that any single day without withdrawals breaks the period of prescriptive use was rejected.

Turning to the effect of C.G.S. § 22a-368, the Court found that this converted Connecticut's water law from riparian rights (a sort of common property) to regulated riparianism (a sort of public property).¹ That statute, in general terms, requires a state permit for the withdrawal of water within Connecticut. The statute, however, exempted "any person or municipality" from the permit requirement for any withdrawal existing on the effective date of the Act (July 1, 1982) subject to the filing of a registration form with the Department of Environmental Protection. Waterbury had filed such a registration form, and later obtained a permit to extend service to Wolcott, with applications pending at the time of the litigation for the extension of service to Middlebury and Watertown. The Court did not decide the effect of this statutory scheme on Waterbury's withdrawals from the Shepaug, instead remanding the case for the Superior Court to consider these questions first. The Supreme Court specifically instructed the Superior Court to determine whether, after July 1, 1982, the permit scheme provided the sole means by which a party could seek a remedy against excessive diversions, and, if rights of action exist outside the statutory scheme, whether the effect of the statute was to substitute a reasonableness standard for the previous natural flow standard.

Finally, the Supreme Court turned to the 1921 contract between Waterbury and Washington. Because Waterbury had not appealed regarding the validity and enforcement of the contract, the Court held that Waterbury could not claim a prescriptive right to violate the contract. Nonetheless, the Court vacated the injunction even insofar as it purported to enforce the contract because Judge Hodgson in issuing the injunction had so intertwined her decisions regarding the contract with her erroneous decisions regarding minimum flows and prescriptive rights.

¹ Readers seeking further information about regulated riparianism should consult THE REGULATED RIPARIAN MODEL WATER CODE (Joseph Dellapenna ed., ASCE Publications, 1997) Joseph Dellapenna, *Regulated Riparianism*, in WATERS AND WATER RIGHTS ch. 9 (Robert Beck ed. 2001 replacement ed.). Both sources were referred to in the *Waterbury* opinion.

Therefore, the injunction even as regards the contract could not stand. The Court remanded the contract issues for the Superior Court to determine what conduct could be required in order to assure compliance with the contract without regard to the other issues in the case.

The Connecticut Supreme Court's decision of this case does not finally resolve the legitimacy of the current pattern of operation of Waterbury's water supply system. It does go far towards protecting the long established uses of the Shepaug River. If the Superior Court does in fact protect those established uses, it will not preclude the protection of environmental or ecological values in the river. Rather it will cast the burden of paying for such protection on those who seek change in the use of the Shepaug River rather than on those who invested millions over many decades in developing those waters. Given the relative economic position of the two communities, this is not such a bad solution.