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Mayor of Baltimore v. Susquehanna River Basin Comm'n, No. WMN-98-3135, 2000 U.S. Dist. LEXIS 8199 (D. Md. Mar. 30, 2000)

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access to the I-10 interchange, which was specifically built for the development site. The Corps' EA also said the development's infrastructure and the interstate exchange would be able to handle this increased traffic.

Third, the Corps conditioned THC's permit with mitigation. The mitigation required THC to construct a 228-acre marsh open to the lake. The court found the Corps' mitigation requirement reflected consideration of cumulative impacts. However, mitigation alone was not dispositive of sufficient analysis.

In addition, the administrative record contained extensive comments by state and local agencies and private and public interests groups. The Corps reflected on the comments and the court concluded this demonstrated the Corps' analysis of relevant issues.

The court stated SOWL raised many legitimate concerns about the Corps' assessment of cumulative impacts. However, the court concluded that despite SOWL's legitimate, good faith concerns about the Corps' comprehensive assessment of cumulative impacts, these concerns did not create a genuine issue of material fact concerning the propriety of the Corps' issuance of the permit. The court granted the Corps' and THC's motion for summary judgment, denied SOWL's motion for summary judgment, and dismissed SOWL's claims against Corps' and THC without prejudice.

Kirstin E. McMillan

Mayor of Baltimore v. Susquehanna River Basin Comm'n, No. WMN-98-3135, 2000 U.S. Dist. LEXIS 8199 (D. Md. Mar. 30, 2000) (holding the Susquehanna River Basin Commission was within its authority to issue a "Determination Regarding Withdrawals and Diversions by the City of Baltimore" ("the Determination") and denying the City of Baltimore's request for summary judgment that the Determination was null and void).

The City of Baltimore ("City") entered into an agreement in 1960 with the power company building the Conowingo Dam on the Susquehanna River to withdraw water from the Conowingo Pool. The agreement permitted the City to withdraw up to 250 million gallons per day ("mgd") free of charge, with a more limited withdrawal during low flow periods. In 1970, Maryland, New York, and Pennsylvania, the three states within the Susquehanna River Basin ("Basin"), entered into a compact ("Compact") to establish comprehensive planning, programming, and management of the Basin's resources. The Susquehanna River Basin Commission ("Commission") administered the Compact. The Commission's powers included the authority to review and approve projects affecting the Basin's resources.

In 1998, the Commission held hearings on the potential impact of future withdrawals or diversions from the Susquehanna River by the

City. The result was a report entitled, "Determination Regarding Withdrawals and Diversions by the City of Baltimore" ("the Determination"). The City subsequently filed an action for summary judgment with the District Court for the District of Maryland to have the Determination declared null and void. The City based its position on an absolute and unqualified right to withdraw 250 mgd from the Conowingo Pool. The City asserted a preeminent right over of all other Basin users that was not subject to regulation by the Commission. The City raised four arguments in support of its position. First, the "Maryland Reservation," a limitation inserted into the Compact by the Maryland General Assembly, restricted the Commission's authority to regulate withdrawals by the City. Second, the authority of the Federal Energy Regulatory Commission ("FERC") preempted the Commission's authority. Third, the Determination was inconsistent with the Commission's Comprehensive Plan. Fourth, the Commission failed to explain adequately the reasoning upon which they based the Determination. The court disagreed with each of these arguments, denied the City's motion, and granted the Commission's motion for summary judgment.

The court first determined the Maryland Reservation was at best a failed attempt to amend the Compact. The language inserted into the Compact by the Maryland Legislature asserted an unfettered right by the City to withdraw 250 mgd from the Conowingo Pool. The other signatories to the Compact were aware of this provision and did not concur, as was required in order to amend the Compact. Thus, the Maryland Reservation had no legal effect.

The City's second argument regarding preemption of the Commission's authority by FERC asserted that a reservation to the Compact ("reservation (w)"), gave FERC exclusive jurisdiction to determine the appropriate elevations of the Conowingo Pool. However, upon careful analysis of reservation (w) and related congressional reports and documents, the court concluded reservation (w), in fact, recognized the Commission's primary role in approving projects that might affect Basin resources.

The court found some merit in the City's third argument that the Determination was inconsistent with the Commission's Comprehensive Plan. The conflict involved the definition of the City's "existing diversion" in the Determination. Although the City's pipeline system had a designed withdrawal capacity of 250 mgd, lack of installed pumps limited its current withdrawal capacity to 137 mgd. Despite identifying that the City's existing diversion as 137 mgd may be misleading, the court found the definition of "existing diversion" technically accurate as used in the Determination.

Finally, the court found the record did not support the City's fourth argument asserting the Determination was arbitrary and capricious. In fact, the court found the record replete with testimony regarding potential adverse affects to the environment and other Basin

users during periods of low flow, which is when coordinated management of the Basin's resources would be most essential.

The court noted the preliminary nature of the Determination and emphasized it was not the final word on any proposed City project. In reviewing a project, the Commission must consider the City's overall investment in the system, as well as the City's reasonable reliance on the longstanding historic recognition of its anticipated use of 250 mgd. Furthermore, any Commission decision is subject to judicial review. The court determined the Commission would not be able to manage the water resources of the basin effectively if it had no authority over one of the largest users of those resources. Such a result would violate the letter and the spirit of the Compact. Thus, the court held the Commission was within its authority to issue the Determination and denied the City's request for summary judgment that the Determination was null and void.

John A. Helfrich

Purity Springs Resort v. TIG Ins. Co., No. 99-295-JD, 2000 U.S. Dist. LEXIS 10918 (D. N.H. July 18, 2000) (holding an insurance company may not deny coverage based on accidental pollution exclusions in a liability policy when a deliberate release of water not alleged to be a pollutant contaminates another water source).

Purity Springs Resort ("Purity") owned property that encompassed Purity Lake, its outlet, and a dam at the outlet. Freedom Springs ("Freedom") operated a natural spring in Freedom, New Hampshire, which was downstream from Purity. In March of 1997 and 1998, Purity intentionally released water from its lake, which flooded Freedom's springs and caused bacterial contamination. Purity sought coverage for potential damages under its TIG Insurance Co. ("TIG") policy. TIG denied coverage, arguing the policy specifically excluded damage caused by deliberate pollution release. Purity sought a declaratory judgment requiring TIG to provide coverage for Freedom's claims and moved for summary judgment. TIG objected to the summary judgment motion based on the policy exclusion.

At trial, TIG contended the contamination of Freedom's water was not a covered occurrence under its policy. "Occurrence" was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." TIG claimed when Purity released water from its lake in 1998, such a release was with the knowledge that the water would pollute Freedom's water, as it had in 1997. The court found that because Purity had no reason to anticipate damage to Freedom's property when it released water in 1997, that occurrence was an accident within the meaning of the policy issued by TIG. Therefore, the TIG policy covered the damage caused by the 1997 occurrence regardless of whether the