

TO: FILE

FROM: KEVIN CARACCIOLI

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RE: NEW YORK STATE v. INTERNATIONAL JOINT COMMISSION

On November 21, 2019, I attended a workshop with the staff of the New York State Attorney General's Office in Rochester to be briefed on the legal action filed by the State of New York against the International Joint Commission principally concerning the damage caused by the rising Lake Ontario water levels that the State claims is caused by the IJC's failure to properly implement the provisions contained in Plan 2014, which is designed to control the lake level for commercial purposes while avoiding damage to waterfront property owners.

The lawsuit was filed on November 15, 2019 in the Monroe County Supreme Court. The legal action seeks monetary damages from the IJC payable to the State. Essentially, New York is attempting to recapture money that it has spent for the clean-up of the flooding that occurred in 2017 and 2019. The initial estimates are anywhere from \$50 million to \$100 million dollars. Additionally, the lawsuit attempts to enact changes in the policy so as to prevent the extraordinary flooding that has occurred over the last few years and is likely to continue occurring if the current procedure is not changed.

The general theory behind the legal action involves the non-discretionary obligations of the IJC to utilize the provisions of Plan 2014 without causing damage to riparian (waterfront) landowners. Under International Law and Sovereign Immunity, a nation or one of its recognized legal entities (such as the IJC) are immune from liability if the action taken is determined to be discretionary. The State of New York is arguing that the actions taken by the IJC are non-discretionary and as a result of the actions taken by the IJC the property owned by the State of New York, overseen by the State of New York was damaged. The attorneys representing the State of New York from the Attorney General's Office and the NYS DEC agreed that there is a fair amount of litigation risk in bringing this lawsuit. This is by no means a clear-cut case and does involve highly complex litigation.

There is a role for municipalities to support the lawsuit which include the following:

1. Participate in the lawsuit as a non-party by filing an Amicus Brief on any motions or other legal arguments that are being made by the State of New York.
2. Commence separate and distinct litigation against the IJC as a party, claiming your own damages. Obviously, a lawyer will need to be retained to participate in litigation.
3. Intervene in the State of New York's lawsuit.

As to the last option of intervention, the State of New York is discouraging parties from intervening in their lawsuit. The legal action involves damages being claimed by the

State of New York. Therefore, it cannot assume the legal arguments and seek damages on behalf of individual municipalities, due to constitutional restrictions. Litigation as a new party to a new legal action is a possibility but is a costly option. This may be better addressed by having multiple municipalities join together in a comprehensive lawsuit, hire one attorney, and share the cost of litigation. Ultimately, decision would have to be made as to how much property damage and other costs have been incurred by the municipalities to determine if bringing a separate legal action makes any sense. Participating as a non-party through an amicus (friend of the State) brief may be another option to consider.

There is somewhat of a “wait and see” position to consider. The State of New York will likely know within the next six months whether their legal action will survive a motion to dismiss. If it does, that may give local municipalities a further ability to commence their own separate legal action knowing that the legal theory will hold up in Court and not be dismissed. The risk of waiting does bring the statute of limitations into play, particularly as it relates to any damaged caused in 2017. In New York State there is a 3-year statute of limitations for negligent acts and that would bring the limitation period to a close around March 2020 for the damage caused in 2017. However, the damages caused in 2019 would have another 2 years to pursue legal claims for.

There was a lengthy question and an answer period that was conducted by the attorneys. It should be noted that several communities and representatives of those communities were present for this workshop including the Town of Sterling, the City of Rochester and some of the surrounding towns in Monroe County. I was the only representative there to attend from any municipality located within Oswego County.

Finally, one word of caution in relation to this coming Spring of 2020 and the potential for additional flooding. One of the more active home owners’ associations, who will be commencing a separate legal action against the IJC, shared with the group the research of one of its lake experts who has accurately predicted the rising lake levels over the last several years utilizing data obtained from the Army Corps of Engineers and utilized by the IJC when setting lake levels. The news is not good. According to this expert, based on his calculations, he predicts that the lake levels may reach as high as 250 feet. At that level, portions of the City of Rochester and its highway system will be under water, as an example. At 250 feet, our entire shoreline will move inland and decimate large areas of lakefront property up and down the shorelines of Lake Ontario in Oswego County.

I have attached a copy of the lawsuit that was filed by the State of New York against the IJC. As noted earlier, this initial legal process will play out over the next several months. The IJC may decide to seek the removal of the case from New York State and place it into the federal court system and thereafter may file a motion to dismiss the lawsuit. If the State’s case survives a motion to dismiss there will be a lengthy (years) process of litigation ahead without any indication that the lake levels will be addressed by the IJC so as not to cause further damage to lakefront properties.

KCC/dnp