

LEVELER

E-Newsletter from the Lake Ontario Riparian Alliance

Issue 15 December 18, 2012

**Grassroots Public Advocacy for the Protection, Restoration and Conservation
of Lake Ontario Beaches and Riparian Property**

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Justices Broaden The Basis For Damages Over Floods

By [ADAM LIPTAK](#) Published: December 4, 2012 New York Times

WASHINGTON — The Supreme Court on Tuesday ruled that people whose property was damaged by intermittent flooding caused by the government may seek compensation. The decision, which was unanimous, reversed a lower court ruling that had barred claims for flood damage unless the flooding was “permanent or inevitably recurring.”

The case arose from the activities of the [Army Corps of Engineers](#), which periodically flooded 23,000 acres along the banks of the Black River in northeastern Arkansas. The Arkansas Game and Fish Commission managed the land, harvesting timber and operating a wildlife and hunting preserve.

From 1993 to 2000, in response to requests from farmers, the corps changed its pattern of releasing water from the Clearwater Dam, which is 115 miles upstream from the commission’s land. The flooding destroyed timber and altered the character of the terrain, requiring expensive reclamation efforts.

The commission sued the federal government under the Constitution’s takings clause, which says that property cannot “be taken for public use, without just compensation.” A lower court awarded the commission \$5.7 million.

The United States Court of Appeals for the Federal Circuit reversed that decision, saying that the takings clause did not cover damage from such intermittent flooding. Justice Ruth Bader Ginsburg acknowledged that stray comments in earlier Supreme Court decisions provided some support for that view.

But she said that “no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking.”

“No decision of this court,” she continued, “authorizes a blanket temporary-flooding exception to our takings clause jurisprudence, and we decline to create such an exception in this case.”

In general, she said, two things are clear: permanent physical occupation of property by the government and regulations that forever make all valuable uses of land impossible are takings requiring compensation. In the context of flooding, she went on, a dam that permanently submerged a plaintiff’s land was a taking, and so was damage caused by seasonally recurring flooding.

Beyond that, Justice Ginsburg wrote, things get murkier, requiring case-by-case judgment. She listed several factors to be balanced in the analysis.

The length of the government's interference with private property matters, she said. So does "the degree to which the invasion is intended or is the foreseeable result of authorized government action."

"So, too," she went on, quoting from an earlier decision, "are the character of the land at issue and the owner's 'reasonable investment-backed expectation' regarding the land's use." Finally, "severity of the interference figures in the calculus as well."

Justice Ginsburg said the court would not address a new distinction proposed by the federal government when [the case was argued in October](#): that downstream flooding should never count as a taking, whether permanent or temporary. That question, along with whether Arkansas law has a role to play in the analysis, should be considered in further proceedings before the appeals court, she wrote.

Justice Elena Kagan was disqualified from the case, *Arkansas Game and Fish Commission v. United States*, No. 11-597, presumably because she had worked on it as solicitor general.

Justice Ginsburg wrote that courts should be judicious in allowing takings claims for flood damage. "To reject a categorical bar to temporary-flooding takings claims," she wrote, "is scarcely to credit all, or even many, such claims."

"Today's modest decision," Justice Ginsburg wrote, selecting the apt metaphor, "augurs no deluge of takings liability."

A version of this article appeared in print on December 5, 2012, on page A23 of the New York edition with the headline: Justices Broaden the Basis For Damages Over Floods.

From the LORA Directors:

Justice Ginsburg speaks of regulations that forever make all valuable uses of land impossible. NYS DEC (Article 34, NYS DOS and USACE Article 15) regulations do that to us. They put nearly total control of areas of private property in the hands of State and Federal governments.

If you think it is bad now, wait until BV7 is in operation.



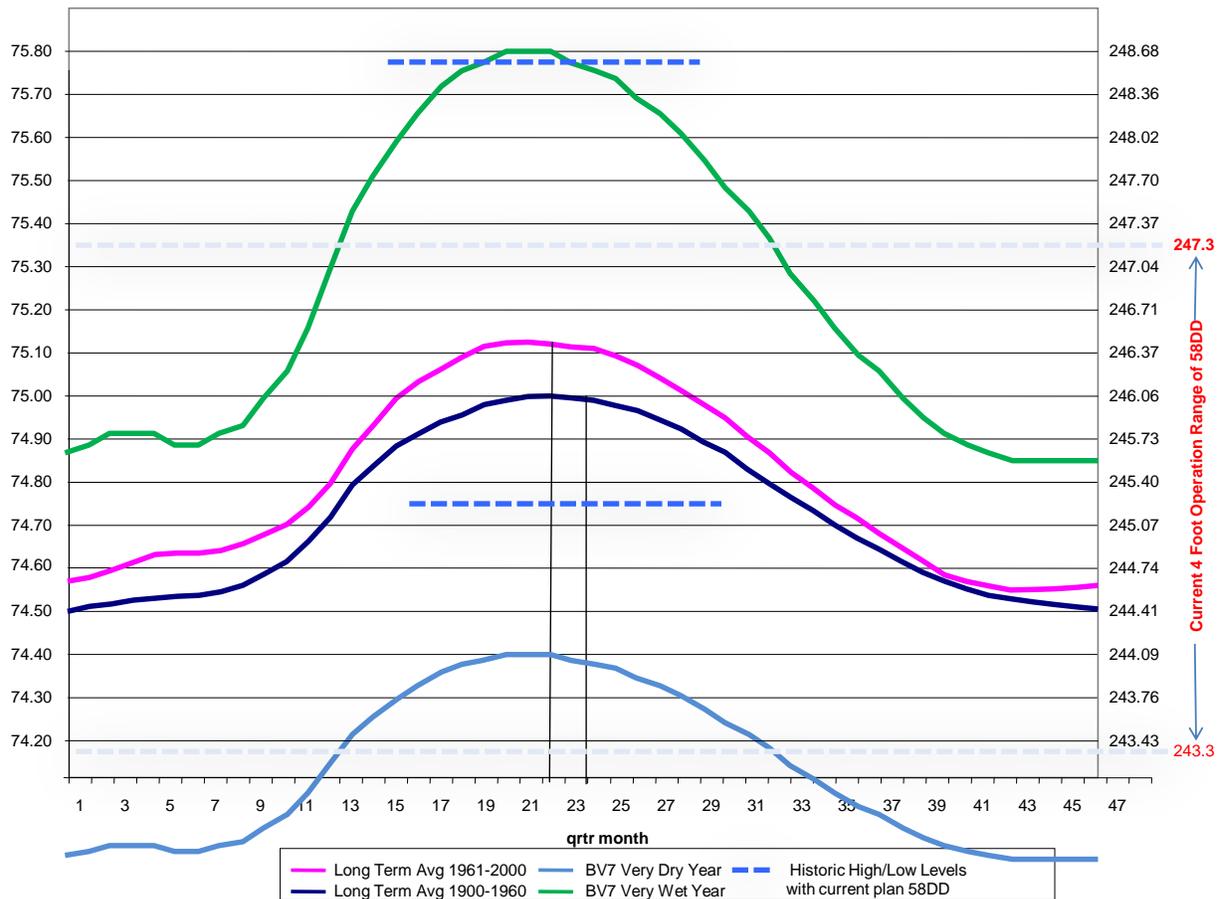
The Lake Ontario Riparian Alliance (LORA) has been getting some very disconcerting reports regarding conditions with the current Lake Ontario regulation plan, 58DD, and how these problems may be exacerbated if Plan BV7 is enacted.

Wilson Harbor - Wilson Harbor is an economic generator for the town of Wilson New York. Many restaurants and small businesses will be harmed if the harbor cannot function. Under BV7, the Harbor will be flooded out in the spring high water and will not function for boats in the low range.



The accompanying photographs were sent to LORA by one of our members from the Wilson Harbor area. The question that arises from seeing these is: if we were operating with BV7 as the Lake Ontario Regulation Plan, by which the lake would be approximately **5 to 6** inches lower than it is now, how would the harbor function if the summer levels were only a foot above current Lake Ontario levels as projected for BV7 under similar conditions in the middle of the summer?

Wilson Harbor December 4, 2012. "Right Click" on either photo; open hyperlink to enlarge



Lake Ontario Water Levels compared to Long-Term Averages and Historic High and Low Levels Under Current Regulation Plan 58DD (Data adapted for IJC and USACE sources)

Online Petition

LORA, along with the Save Our Sodus (SOS) organization, has created an online petition @

<http://www.STOPplanBV7.com> . Please sign our petition! Send it to your friends and ask them to sign.

- 1) If you have multiple family members, have them sign the petition individually.
- 2) Please tell your friends and neighbors that this is not just a shoreline issue. Email them the link.
- 3) Ask your friends who are boaters, fishermen and marina owners to sign the petition.
- 4) Inform your friends who do not live near the Lake that their parks, beaches, and water, sewer and other utilities could be affected by BV7.

The petition in its entirety is listed on the above website.

Great Lakes Water Level Fluctuations Drive Nutrient Release from Coastal Wetland Sediments

Ann Arbor, MI — Great Lakes water levels fluctuate over regular cycles, periodically exposing coastal wetland sediments to periods of desiccation and inundation. These wet-dry cycles can influence nutrient exchange between the sediment and the overlying water column. Experimental desiccation, followed by inundation, of coastal wetland sediment cores from five drowned river mouth wetlands along the eastern Lake Michigan coastline and three coastal wetlands in Saginaw Bay revealed significant release of nutrients, especially from sites already above the ordinary high water mark. This suggests that an increase in water levels in Lakes Michigan and Huron, resulting in flooding of these exposed sediments, would lead to substantial nutrient exchange with the water column, and create ecological hot spots. For more information, please review the following links:

http://www.iaglr.org/jglr/release/38/2012.09.020_steinman.php
<http://www.sciencedirect.com/science/article/pii/S0380133012001955>

Final Thought

The current plan of regulation for Lake Ontario has a list of criteria that the International St. Lawrence River Board of Control needs to evaluate before making any changes to the flows and levels for Lake Ontario and the St. Lawrence River. If the International Joint Commission (IJC) decides to adopt any new plan, these criteria will also change, which will most likely eliminate protections placed to protect Lake Shore residents. The 58D criteria that are listed on www.loranet.org.