**98-6146(L), 98-6162(CON)**

# United States Court of Appeals

*for the*

# Second Circuit

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

— and —

STATE OF NEW YORK and BARBARA A. DEBUONO, M.D., as COMMISSIONER of the NEW YORK STATE DEPARTMENT OF HEALTH,

*Plaintiffs-Intervenors-Appellees,*

— against —

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

*Defendants-Appellees,*

CROTON WATERSHED CLEAN WATER COALITION, INC., HDFC COALITION, MARIAN ROSE, JESSE DAVIDSON, DAVID FERGUSON, MARIE RUNYON, FRANCIS A. CHAPMAN, MICKIE GROVER, PAUL MOSKOWITZ, EDITH T. KEASBEY, DART WESTPHAL, HOWARD JACKSON, BRIAN JACKSON, TINA ARGENTI, KAREN ARGENTI, DOROTHY VAUGHN, HELEN C. REED, STEVEN B. KAPLAN, AARON BOCK, and DARNLEY E. BECKLES, JR.,

*Proposed-Defendants-Intervenors-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**REPLY BRIEF OF PROPOSED-DEFENDANTS-INTERVENORS-APPELLANTS**

JOHN C. KLOTZ, ESQ.
Attorney for Proposed-Defendants-Intervenors-Appellants
885 Third Avenue, Suite 2900
New York, New York 10022
(212) 829-5542

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## Preliminary Statement

This brief is submitted in reply to the answering briefs of the Plaintiff-Appellee United States ("US brief") and the Defendant-Appellee City of New York ("City brief"). The Plaintiff-Intervenor-Appellee State of New York has taken no position on this appeal. The decision of the District Court has now been reported: United States v. City of New York, 179 F.R.D. 373 (E.D.N.Y. 1998).

## Statement of the Case

Appellants ("Clean Water Coalition") believe an understanding of the following factual matters is essential in evaluating the legal arguments of the appellees.

*1. The was no finding in 1993 that the Croton water supply did not meet avoidance criteria.*

On page 2 of its brief, the United States states:

> "The Coalition sought to intervene as a defendant to defeat enforcement of the SDWA [Safe Drinking Water Act] and SWTR [Surface Water Treatment Rules]. As the district court correctly stated, '[the Coalition] does not seek relief under SDWA, but seeks to negate the process pursuant to which the United States has determined that the City is in violation of the statute.'. . ." (emphasis supplied)

This is simply not true on two counts. First, the Clean Water Coalition seeks to enforce provisions of both the SDWA and the SWTR insofar as they mandate public participation in the regulatory process. Second, there has been no determination that the Croton water supply failed to meet filtration avoidance criteria. The foundation of this action is a stipulation between the City and New York State on

October 30, 1992 (A46-51) and a purported determination of the EPA Regional Administrator on January 13, 1993 taking note of the City-State stipulation and thus determining that the City filter the Croton water supply (A52-53). While the application of the SWTR will be discussed infra in POINT TWO, it is important to note, as a factual matter, that neither the City-State stipulation nor the federal determination contains any finding, determination or admission by the City that the City did not, in fact, meet the criteria for filtration avoidance.

The City's consistent position has been that the Croton water supply met filtration avoidance criteria and that position continued through the commencement of this action in April 1997. (Affidavit of Karen Argenti ["Argenti"], ¶ 30, A109).

*2. Contrary to the assertion of the United States, the City never determined the Croton water supply was degraded and needed to be filtered.*

The City discussed filtration of the Croton water supply as early as 1917 and some planning for filtration has occurred since that date. However, the City never completed a required environmental review necessary to implement that determination.(Argenti, ¶ 4-8, A102-103[1]) In fact, in a letter dated July 9, 1991, the then Commissioner of defendant-Appellee N.Y.C. Department of Environmental Protection ("DEP") wrote community leaders advising them that:

"We have just completed a special review of Croton's water

[1] Statutory Appendix in this Appeal, filed August 28, 1998.

> quality in light of these requirements and commitments. Croton water currently meets the avoidance criteria. However, the margin is small, and we clearly cannot guarantee that we would meet the criteria in even the short term future. We have now initiated a full scale review of what might be required to attain guaranteed long term compliance with the avoidance criteria and whether we would have any realistic hope of doing so. That review will probably take a year to complete. Frankly, at this point we do not see a very likely probability that we could avoid filtration, but we want to take one final updated look at the issue with our state and Federal regulators before we make final commitments."(A103)

Less than five months later, without any notice to those same community leaders, the City concluded an eleven volume study entitled New York City's Long-Range Water Quality, Watershed Protection and Filtration Avoidance Program. That report concluded:

> " . . . Unfortunately, this focus on engineering resulted in a failure to grasp the significance for the water quality of the suburbanization of Westchester and Putnam Counties. Lacking both the appropriate staff and the political will to assert its authority to protect the watershed, the City allowed land use changes in these counties, where the Croton reservoirs are located, to proceed largely unchallenged. The City did not attempt in any systematic way to limit the size and nature of residential and commercial activity near the Croton tributaries or to protect Croton water from the effects of environmentally insensitive development. Consequently, though the quality of Croton water is currently high and basically meets the avoidance criteria, the forseeable cumulative impact of the byproducts of development -- runoffs from roads and lawns, discharges from sewage treatment plants and failed septics -- has forced the City to prepare to filter Croton water. . ." (emphasis supplied) (Affidavit of John C. Klotz ("Klotz"), ¶ 15, A-59)

This was not an admission by the City that current conditions require filtration or that the water supply was (or is) currently degraded. As a matter of fact, in some respects, the Croton supply is

currently in its best historical condition. (Affidavit of Dr. Paul Mankiewicz ("Mankiewicz"), ¶¶ 17-22, A93-94).

Page 10 of the US Brief repeats a factual error intrinsic to the government position when characterizing the November 1991 report:

> ". . . In a November 1991 report entitled New York City's Long-Range Water Quality, Watershed Protection and Filtration Avoidance Program, the City stated that the Croton System watershed is too degraded due to extensive development and other factors to avoid filtration. The City stated that it planned to provide filtration treatment for its Croton System. A.17."

The reference "A.17" refers to paragraph 22 of the U.S. complaint. That paragraph was denied in paragraph 2(h) of the Coalition's answer:

> "As to paragraph 22: on information and belief denies that the City stated in the document cited that the Croton System was too degraded to avoid filtration and affirmatively alleges that the City stated that it lacked the political will to avoid filtration;"

Nowhere in this record is there any evidence or admission that the City has ever considered the watershed so degraded as to require filtration.

After the 1991 Report, the City attempted an environmental review of its decision to build a filtration plant at the Jerome Park Reservoir but beat a hasty retreat when both its technology and environmental analysis proved faulty. (Argenti, ¶12- 19, A105-106).

N. Y. State was keenly aware of the necessity for the City to conduct a thorough public review of its filtration determinations. On July 28, 1992, a scant three months before the execution of the secret

stipulation to filter the Croton water supply, the NYS Department of Health wrote DEP Commissioner Appleton of the necessity for a public process in determining whether to avoid filtration for the Catskill/Delaware water supplies:

> "Before the Department can act on the City's filtration avoidance application submitted in 1991, it must provide an opportunity for a public hearing pursuant to the provisions of the federal Safe Drinking Water Act *(42 U. S.C.* 301 g-1(b)(7)(c)(ii)). Upon the completion of the public hearing, compliance, with appropriate State Environmental Quality Review Act (SEQRA) requirements, and resolution *of* any related issues, the Department will determine whether to grant the City a new filtration avoidance approval.
>
> "A decision relating to filtration avoidance approval is likely to result in significant environmental impacts. Thus, the preparation of an Environmental Impact Statement (EIS) will probably be a condition of such decision. The Department would expect the City, as the applicant, to complete such an EIS. Since most significant environmental issues are associated with filtration avoidance are related to watershed protection, in the event that this EIS is required, the City should be able to incorporate any additional issues into its proposed watershed protection program EIS now under development." (emphasis provided) (Argenti, EX. D, A122)

None the less, three months later in October 1992, rather than submit its plans to filter the Croton for appropriate environmental review, the City entered into the stipulation with the State to filter the Croton supply.

Since the stipulation set forth a schedule for filtration, the NY State Sanitary Code ("SSC"), required notice to the public of opportunity for hearing.[2] No such notice was given.

[2] See SCC 5-1.94 (Statutory Addendum to Appellant's Brief, page ADD-3)

*3. Appellants have not abandoned intervenor classes other than rate payers.*

A footnote on page 13 of the US Brief states:

> "On this appeal, the Coalition has abandoned all but its ratepayer interest claim and its assertion that EPA and the State failed to provide notice and an opportunity to be heard regarding the Croton Filtration Determination. Issues not raised in Appellant's opening brief are deemed waived. See Norton v. Sam's Club, 145 F.3d 114, 117-118 (2d Cir. 1998); Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir. 1993).

However, neither case is applicable to the matter at bar. The portion of appellants' brief entitled "Issues Presented for Review" lists the following issues:

> "Do water rate payers who by operation of law will pay for the filtration plant and fines that are the object of this action have sufficient interest to intervene as of right pursuant Rule 24(a)(2)?
>
> "Do intervenors with other interests who challenge the filtration decision have the same standing?
>
> "Did the District Court take an artificially constrained view of its equitable jurisdiction pursuant to the SDWA to determine what the interests of public health require?" (emphasis supplied)(Appellant's Brief, p. 2)

In neither Norton nor Knipe had the appellant listed the disputed issue in its brief's required statement of issues. In this case, page 25 of Apellants' brief, under the heading "*2. Other interests*", the Clean Water Coalition argued that the other interests of intervenors "are also sufficient to sustain intervention in light of decisions such as NYPIRG." While not discussed as extensively as that for the rate payers, clearly the statement of issues for review and Point One put the issue of other interests in play. Indeed, the City had no

problem addressing the status of interests other than rate payers in its brief. (City Brief, pp. 16-19)

*4. The Giardia and Crytosporidia red herrings.*

In a note on page 5 of its brief, the United States once again raises a total red herring in a discussion of potential contamination by Giardia and Cryptosporidium.

As a matter of fact there is no evidence that the Croton water supply violates any federal standards for these micro-organisms. In fact, the Croton water supply has the SWTR required treatment for these micro-organisms -- disinfection by chlorine. As noted in the affidavit of Dr. Mankiewicz, the 1993 incidence of deadly contamination of the Milwaukee supply occurred in a filtered water supply.(¶9, A91) While some may attempt to dismiss the Milwaukee contamination as the result of transient human error, that's the problem with mechanically engineered solutions to complex environmental problems: what works on the drawing board fails when put into practice by error-prone human beings.

## POINT ONE

**Each of the classes of intervenors has cognizable interests. Rate payers have no available remedy to challenge expenditures which are the object of this action. Rate payers, as a class, will pay for each and every dollar the EPA seeks in the instant action.**

*1. The rate payers have no remedy in state court to set aside the determination that the Croton water supply be filtered. In the absence of such a remedy, this action will determine their collective liability for the expenditures the United States seeks.(City Brief, p. 15, U.S. Brief, pp. 20-24)*

In their brief, appellants have demonstrated that every charge for the construction of the filtration plant will be paid by the rate payers.(Appellants' brief, pp. 5-6, 21). The United States and the City answer by urging upon the court the proposition that rate payers can obtain relief from these expenses by challenging the rate increases in state court. It just isn't so.

The Water Board is responsible for levying water rates. All expenses of maintaining the water supply are paid by it. The Water Board's only source of income is the water rates. The water rate payers, as a class, are responsible for those costs.

Whatever review that water rate payers may obtain in state court could only shift expenses among differing groups of rate payers. Such review can not decrease the liability of rate payers as a whole for the expenses.

In neither Village of Scarsdale v. Jorling, 91 N.Y.2d 507, 673 N.Y.S.2d 32 (1998) nor New York City Water Board v. Zagata, 659

N.Y.S.2d 138 (3d Dept. 1997) was the total liability of rate payers decreased one whit. Each case only resulted in adjustment of charges among rate payers.

In Jorling, the New York State Court of Appeals described the Water Board's function as to communities outside of N.Y. City in these words:

> "[C]harges are determined on the basis of the actual total cost of the water to New York City, after deducting from the total costs all construction costs and expenses of operation, maintenance and carrying charges incurred in connection with the distribution and delivery of the water within City limits (see Administrative Code § 24-360[c])...
>
> "The Authority's function is to provide revenue bond financing for improvements to the City's water and sewer system while the Water Board's main function is to "provide sufficient funds - through fixing and collecting water and sewer charges and other revenues - for the City to operate and maintain the Water System and for the Authority to service water and sewer debt" ( *Giuliani v Hevesi, 90 N.Y.2d 27, 34, 659 N.Y.S.2d 159, 681 N.E.2d 326).* Thus, Public Authorities Law § 1045-j(1) states that "the water board shall establish, fix and revise, from time to time, fees, rates, rents or other charges" for use of the water system in such amounts as shall be sufficient to pay obligations on bonds issued by the Authority. The Water Board is also granted the power 'to establish, fix, revise, discharge and collect and enforce the payment of all fees, rates, rents and other service charges for the use of, or services furnished by the * * * water system' (Public Authorities Law § 1045-g[4]). Prior to setting a rate, the Water Board must hold a public hearing and afford the affected public an opportunity to be heard (Public Authorities Law § 1045-j[3])" 91 N.Y.2d at 514, 515

Nowhere in Jorling is there any discussion of any remedy for any rate payer to challenge the charges to the Water Authority by the City DEP or the Water Finance Authority. So too, in Zagata, 659 N.Y.S.2d at 139.

Finally, of the individual rate payers who have joined in this action, Jesse Davidson, David Ferguson, Dart Westphal, Tina Argenti, Karen Argenti, Helen C. Reed and Darnley E. Beckles, Jr., are in fact residents of the City. Nothing in Jorling or Zagata concerns the setting of their water rates.

The decree which is the object of this action will require the direct expenditure of hundreds of millions of dollars. Those dollars will be paid by the rate payers and no one else.

On page 24 of its brief, the United Staes maintains that the availibity of an alternate remedy mandated denial of the intervenors' motion. However, in none of the federal cases it cited is there direct prejudice from the action in which intervention was denied and in each there was in fact an available remedy that went to the heart of the intervenor's proposed interest: Chapman v. Manbeck, 931 F.3d 294 (Fed Cir. 1991)(No practical conclusive effect to prevent litigation of patent issue in another action); H.L. Hayden Co. v. Siemen, 797 F.2d 349 (2d Cir. 1986)(New York State could not intervene as of right to obtain benefits of sealed discovery in an action in which it otherwise had no interest. It retained the power of subpoena in its own right); Shea v. Angulo, 19 F.3d 343 (7th Cir. 1994)(where law suit brought in individual capacity, alleged partner of plaintiff retained right to sue in partnership capacity).

*2. The other intervenors represent classes whose interests in environmental litigation are clearly justiciable.*

The other classifications of interest fall well within those

recognized by the federal courts as justiciable in litigation involving the environment. See for example: Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1977) (Persons living in the vicinity of a nuclear power plant under construction); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689-90 (1973) (tenuous claim of environmental damage from railroad rate increases); United States v. City of New York *et al* (Maloney), 972 F.2d 464 (2d Cir. 1992) (taxpayers); Rockford League of Women Voters v. United States Nuclear Regulatory Commission, 679 F.2d 1218, 1221-22 (7th Cir. 1982) (organization with members living in vicinity of unlicensed nuclear plant has standing to challenge NRC refusal to revoke construction permit); Stow v. United States, 696 F. Supp. 857, 862 (W.D.N.Y. 1988) (residents living near proposed dam with fears for safety).

Because the interests are justiciable and relate directly to the issue at bar in this action, the issue to be addressed is the adequacy of the representation of those interests in this action.

*3. The City's brief cogently demonstrates its inability to provide adequate representation to rate payers.*

Nowhere in the City brief is there any discussion of the simple fact that the danger to the watershed arises from the failure of the City to carry out its statutory duties to protect the Croton water supply from contamination. Neither is there any explanation for the City's duplicity in promising a year-long filtration review and then secretly executing a stipulation to filter the Croton without any

public notice whatsoever.

These omissions are important because the City can not lay claim to a representative capacity where its own misconduct is at issue. None of the cases its cites to support its role as parens patriae hold to the contrary.

Delaware Valley Citizens' Council For Clean Air v. Commonwealth of Pennsylvania, 674 F.2d 970, (3d Cir. 1982), involved an arcane attempt by a group of Pennsylvania legislators to intervene in an action and challenge a consent decree that they believed impinged on their legislative prerogatives. They were denied because the Commonwealth of Pennsylvania was already represented by its Attorney General. The only allegation of misconduct by the legislators was that the Attorney General had agreed to the consent decree. The proposed intervenors made no other allegation of collusion or misconduct by the Attorney General. Orange Environmental Inc. v. County of Orange, 817 F.Supp. 1051 (S.D.N.Y. 1993) was a squabble between Orange County and the Orange County Executive over a decision not to appeal an adverse determination. The interests involved were identical.

In the instant case, the proposed intervenors have made specific allegations of misconduct by the City in the neglect of the watershed and the promulgation of the so-called filtration determination which lies at the heart of this litigation. For the purposes of their application to intervene, those allegations must be regarded as true. Williams & Humberdt v. W & H. Trade Marks (Jersey) Ltd., 840 F.2d 72,

75 (DC Cir. 1988).

Most importantly, the evidence of City duplicity -- or ineffectiveness -- continues. The United States has made it absolutely clear that the proposed consent decree will not allow for any modification for filtration avoidance. (US Brief, p.9)

However, in an affidavit to the District Court, Mr. Hoffer of the N.Y.C. D.E.P. stated:

> "5.The City is currently examining the environmental, health, and technical issues related to its management of the Croton water supply and the construction and operation of a filtration plant. The City has not selected a site for the construction of a filtration plant for the Croton system. The City has committed to prepare a Draft Environmental Impact Statement, pursuant to the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR), which will examine multiple potential sites for a filtration plant and which, in keeping with the requirements of SEQRA and CEQR will also examine not constructing a filtration plant The City expects to begin the environmental review process later this year." (A87-88)

Something is askew here. The City is still talking about a no filtration option while the United States insists there is no option but filtration. The parties to the consent decree have each told, and are telling, a different story.

As noted in Appellants' Brief, the interests they represent go beyond the borders of New York City. The rate payers privy is the Water Board, not the City. The City has no responsibility for financing the filtration plant, only the rate payers do.

## POINT TWO

**The SWTR did not mandate filtration unless the City in fact did not qualify for filtration avoidance. A determination that the City did not qualify has not been made.**

As noted above, there was never a finding that the City did not meet the criteria for filtration avoidance. Unless the filtration requirement is self-executing, it would have been necessary for such a determination to be made. While the United States in its brief (pp. 5 -7) attempts to demonstrate such a self-executing filtration requirement, the simple fact is that neither the SDWA nor the SWTR provides for such.

The SDWA did provide for primacy of state regulatory agencies under certain conditions and in respect to such states provided specifically as to filtration determinations:

> "(ii) In lieu of the provisions of section 1415 [42 U.S.C. @ 300g-4] the Administrator shall specify procedures by which the State determines which public water systems within its jurisdiction shall adopt filtration under the criteria of clause (i). The State may require the public water system to provide studies or other information to assist in this determination. The procedures shall provide notice and opportunity for public hearing on this determination. If the State determines that filtration is required, the State shall prescribe a schedule for compliance by the public water system with the filtration requirement. A schedule shall require compliance within 18 months of a determination made under clause (iii)." [42 U.S.C. §300g-1(b)(7)(C)(ii)] (emphasis supplied).

In footnote 3, page 6 of its brief, the United States admits that in 1993 New York did not qualify for primacy. (US Brief, p. 6, nte. 3) Thus any filtration determination was to have been made by the EPA

pursuant to §1412(b)(7)(C)(iv). That section provides that:

> "(iv) If a State does not have primary enforcement responsibility for public water systems, the Administrator shall have the same authority to make the determination in clause (ii) in such State as the State would have under that clause. Any filtration requirement or schedule under this subparagraph shall be treated as if it were a requirement of a national primary drinking water regulation." [42 U.S.C. §300g-1(b)(7)(C)(iv)](emphasis supplied)

The plain meaning of the statute was that whatever the primary regulatory agency, a formal filtration determination was necessary. The statute made no provision for self-execution of any filtration requirement. Moreover, the SDWA clearly mandated that, in connection with such determination, notice and opportunity for a public hearing be given.

While it is doubtful that a regulation could abrogate such a clear statutory mandate, it is also clear that -- despite claims by the United States -- the SWTR did not in any way violate the plain meaning of the statute. Thus the same introduction to the SWTR cited by the United States on page 7 of its brief specifically states:

> "In lieu of provisions for obtaining a variance from the filtration requirements under section 1415 of the Act, EPA must instead specify procedures which the State is to use to determine which public systems must use filtration based on the criteria that EPA establishes in this regulation.
>
> **"Note:** Throughout this preamble, the term **"State"** is used to mean a State with primary enforcement responsibility for public water systems or "primacy." and to mean EPA in the case of a State that has not obtained primacy.
>
> "States may require the public water system to provide studies or other information to assist in this

> determination. The procedures for determining whether filtration is required must provide notice and opportunity for public hearing." (emphasis supplied) 54 Fed. Reg. 27487 (June 29, 1989)

Furthermore, in explaining the necessity and impact of reporting requirements in the SWTR, the EPA explained:

> "To obtain the information necessary to determine whether an unfiltered system is meeting the criteria for avoiding filtration in § 141.71 (a) and (b), the rule includes monitoring and reporting requirements for unfiltered systems (see §§ 141.74(b) and 141.75(a) respectively). These requirements go into effect 18 months after promulgation of this rule, unless the State has already determined that filtration is required." (emphasis supplied) 54 Fed. Reg. 27510 (June 29, 1989)

It is further evident from the introductory explanation of the SWTR that states with primacy (and the EPA where a state lacked primacy) retained considerable discretion in making its filtration determinations:

> "In some respects, the State implementation of the regulations in 40 CFR Part 141, Subpart H—Filtration and Disinfection, is different from implementation of other NPDWRs. The surface water treatment requirements promulgated today consist of both objective, uniform criteria and criteria that provide the primacy State broad discretion to decide whether to implement them (and if so, how), considering the objectives of the regulations and the variability encountered in surface water treatment throughout the diverse geographical areas of the United States." 54 Fed. Reg. 27513 (June 29, 1989)

Where there is a filtration determination, the state (or EPA) must establish compliance schedule. Those schedules, like the determination itself are subject to notice of opportunity for public hearing. (40 CFR § 142.44, ADD-1)

## POINT THREE

**The issues raised by intervenors' proposed answer address the legitimacy of the "determination" that the U.S. seeks to enforce. These issues merit litigation in this action.**

*1. The likelihood of intervenors prevailing on the merits is not at issue in their application to intervene.*

In its decision which is at issue on this appeal, the District Court held the "[W]hen considering an application for intervention, the court must accept the applicant's well pleaded allegations as true and make no determination as to the merits of the issues raised." (A147). The United States on page 19 of its brief cites Williams & Humberdt v. W & H. Trade Marks (Jersey) Ltd., supra, for the proposition that "An application to intervene should be viewed on the tendered pleadings -- that is, whether those pleadings allege a legally sufficient claim or defense and not whether the applicant is likely to prevail on the merits."

Intervenors have no quarrel with these propositions. The important point is that intervenors' pleadings determine the factual reality that must be used to determine the motion to intervene. As already noted, at least one important "fact" is contrary to those pleadings: that the City decided to filter the Croton water supply because it was too degraded. (See this brief, supra, pp. 1-4)

On the same page 19 of its brief, the United States also cites Rhode Island Federation of Teachers, AFL-CIO v. Norberg, 630 F.2d 850 (1st Cir. 1980). However, that case, which involved a defense by

parents of state legislation providing funding for parochial schools, offers no succor to their position. The Court said that, even if it accepted the allegations of the intervenors as true, it was "unable to perceive in the parents' proffered defense a colorable defense to the statute." 630 F.2d at 854 - 855 (citations omitted, emphasis supplied) In the case at bar, the answers do in fact set forth defenses that go to the merits of the plaintiff's complaint.

*2. The EPA violated the SDWA and its own rule.*

In their answer, (A123) intervenors maintain that the Administrator erred in issuing his determination that the Croton water supply must be filtered without notice of opportunity for a public hearing. It also appears that there were no factual findings that the Croton water supply did not meet filtration avoidance criteria. (Administrator's Determination, A52-53)

The facts in this record demonstrate that the City made a determination to filter the Croton water supply and then avoided the required environmental review by making a stipulation with N.Y. State setting out a schedule for Croton filtration. Although the clear provisions of the N.Y.S. Sanitary Code mandate notice of opportunity for a public hearing to be broadly circulated, no such notice was given -- broadly or otherwise.

The deficiencies in N.Y. State procedures were well known to the EPA. In fact, the same day that the determination was issued by the Administrator, an internal memorandum of the EPA recommended denial of

"primacy" to New York State because of its failure to provide "for notice and opportunity for public hearing on its filtration and avoidance determinations, as required by § 1412(b)(7)(C)(ii) of SDWA. (Argenti, Ex. B-1, A120)

There was not any notice of opportunity for a public hearing issued by the EPA in this case except by private letter to the City of New York. There is no statutory or regulatory support for the proposition that this is sufficient. Because the determination included a schedule that varied the terms of the SWTR, it required notice of opportunity for hearing in accord with either N.Y. State Sanitary Code § 5-1.94 (ADD-3) or 40 CFR §142.44 (ADD-1).

Significantly, both the public notice published in Newsday (A84) and the notice and the notice included with water bills (A85) made no mention of an EPA determination that the Croton water supply be filtered. Both documents referred to a voluntary decision by the City to filter the Croton water supply and a state -- not federal mandate -- to build a filtration plant.[3]

There is no record supporting the EPA action other than the stipulation entered into by the City and the State. Thus, as in Buckeye Power, Inc. v Environmental Protection Agency 481 F2d 162 (6th Cir. 1973) later app 523 F2d 16 cert den 425 US 934 (1976):

[3] The two exhibits submitted to the District Court by the United States are in places illegible. They appear in the Appendix as the United States submitted them.

> "The Administrator built no record in approving or disapproving the state plans. He took no comments, data, or other evidence from interested parties, nor did he articulate the basis for his actions. This failure contravenes the explicit dictates of Section 553 of the APA and renders meaningless the judicial review provisions of Section 706." 481 F.2d at 171.

The failure of the Administrator to hold appropriate pre-determination hearings and his reliance upon a stipulation entered into by the City and State without notice and hearing to anyone constitutes both a violation of the SDWA and a failure to perform a non-discretionary duty. As a result, the determination must fail.

*3. It can not be said that as a matter of law the affirmative defenses proffered by proposed intervenors are time barred.*

This is an action in equity and the intervenors' affirmative defenses address the equity of the relief sought by the plaintiff United States. They would not be time barred even as affirmative actions at law.

*(a) Citizens' suits not barred at law.*

The United States has claimed that the filtration determination was a non-discretionary ministerial act. In any event, intervenors do not seek to "review" that determination but attack instead its legality. The applicable statute of limitations to the affirmative defenses of the intervenors is six years. 5 U.S.C. §§ 701-706; 28 U.S.C. § 2401(a); Blassingame v. Secretary of the Navy, 811 F.2d 65, 70 (2d Cir. 1987); NRDC v. Fox, 909 F. Supp. 153 (S.D.N.Y. 1995)

The reason this standard applies was discussed in Sierra Club v.

Hodel, 857 F.2d 1307, 1315 (9th Cir. 1987):

> "The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, governs judicial review of agency actions. Section 702 grants standing to challenge an agency action to anyone adversely affected by such action, except where the statute under which the action was taken precludes judicial review or where the action is committed to agency discretion by law. 5 U.S.C. § 701(a); see also Wallace v. Christensen, 802 F.2d 539, 1556 (9th Cir. 1986) (en banc) (Hall, J. concurring in the judgment). NEPA itself authorizes no private right of action. See Noe v. Metropolitan Atlanta Rapid Transit Authority, 644 F.2d 434, 439 (5th Cir. 1981). But, the APA provides for judicial review of agency action. 5 U.S.C. § 702. Neither NEPA nor the APA contain a specific statute of limitation. The question therefore is whether a general statute of limitation applies to bar Sierra Club's procedural challenges to the 1980 rulemaking."

In addition, the first affirmative defense is directly founded upon the rights of a citizen suit against the EPA, City and State. Such an action may be maintained against the EPA where there is alleged a failure of the Administrator to perform any non-discretionary act or duty under the SDWA. In this case, the requirement that the EPA insure that proper notice was given to interested parties was such a non-discretionary duty. There was neither notice nor findings. There was no determination.

*(b) Limitations do not apply to equitable defenses.*

In seeking to enforce the EPA's purported order, the United States invokes the District Court’s equitable powers. Because of this, its claims are subject to equitable defense. Weinberger v. Romero-Barcero, 456 U.S. 305 (1982); NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887, 890, 892-893 (7th Cir. 1990).

> "The statutory scheme interposes a court between the Board and the respondent, empowering the Board to seek the aid of equity but not disabling the equity court from exercising a complementary power of equitable restraint and forbearance. Continental Web Press, Inc. v. NLRB, 742 F.2d 1087, 1095 (7th Cir. 1984); NLRB v. Greensboro News & Record, Inc., 843 F.2d 795, 798 (4th Cir. 1988); C-B Buick, Inc. v. NLRB, 506 F.2d 1086, 1092 (3d Cir. 1974). The principles of equitable jurisprudence are not suspended merely because a government agency is the plaintiff. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982); Amoco Production Co. v. Gambell, 480 U.S. 531, 542-45, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987)." NLRB v. P*I*E Nationwide, Inc., supra, (887 F.2d at 893)

In P*I*E Nationwide, the Court of Appeals examined certain equitable defenses as they applied to the attempt by the NLRB to enforce its order. In this case, the intervenors raise as defenses the illegality of the order of which the EPA seeks enforcement. The order to filtrate was founded upon a stipulation executed by the City in blatant disregard of its legal obligations under its own laws. The EPA made no reasonable effort to inform interested parties of its actions even though such obligation was explicit in the statute and its regulations. It is not only inequitable to enforce such an administrative order, it is a violation of the intervenors' Constitutional rights. Moreover, insofar as it involves state and city action, the N.Y. S. CPLR § 203(d) specifically provides that claims which arise from the same transactions or series of transactions upon which a claim is asserted in the complaint are not barred.

Moreover, the record demonstrates that despite the signing of the stipulation and the EPA's determination, N.Y. City continued to

maintain that the Croton water supply met avoidance criteria and that it was still pursuing a filtration avoidance option. (Argenti, ¶¶ 27-30 (A108-110); Hoffer,¶5 (A87-88)) It was not until this action was filed by the United States that the anyone could have regarded the determination as final. Indeed, to this day, the City insists it may yet seek filtration avoidance.

**POINT FOUR**

**While the Court may conduct closed-door negotiations, the record in this case discloses that the regulatory authorities subverted the congressional mandate for public participation in the regulatory process. The only way to vindicate this statutory interest is to allow intervention by interested parties. Public comments are no substitute for participation as a party.**

Perhaps the most important statement in either appellees' brief is contained in footnote 17, page 30 of the U.S. brief which states in part:

> "[I]n any event, the Consent Decree filed in this action supercedes the State Stipulation, and thus, the argument as to its legality is not only wrong, but irrelevant."

The SDWA and the SWTR each provide for maximum public participation including provisions for notice of opportunity for hearing at the proverbial "drop of a hat." This is in keeping with the strong public policy favoring citizen participation in the environmental regulatory process.

Intervenors maintain with considerable factual support that the procedures used in determining that the Croton water supply be filtered were deeply flawed. As a matter of fact the decision to filter the Croton water supply was not a "determination," "variance" or "exemption." It was a deal cooked-up by the regulators who found it impossible to publicly defend their plans in the open forums required by the City, State and federal law. There were no findings or admissions of fact. There was no application of law and regulations. The procedure was furtive, secretive and mendacious. (See Appellants' brief, pp. 38-39)

Now the United States informs us, that none of the notice provisions required for filtration determinations matter any more because the same regulatory authorities that so blatantly violated the law and the public trust in the first instance have secretly negotiated a consent decree that will become the regulatory regime for the watershed.

On page 31 of its brief, the United States cites Cronin v. Browner, 898 F.Supp. 1052, 1064 (S.D.N.Y. 1995) for the proposition that intervention should not be allowed to occasion prejudicial delay.[4] However, the precise holding of Cronin was that the proposed intervening electric power companies had no interest at risk: "[T]he

[4] The United States concedes that the motion for intervention was timely filed. (U.S. Brief, pp. 16-17). The criterion of hindering delay is reserved for motions seeking permissive intervention pursuant to FRCP 24(b).

proposed Consent Decree simply cannot be found to impair the foregoing, or any other legally protectable interests that Proposed Intervenors might have in this action" 898 F. Supp. at 1061. Because the consent decree at issue in Cronin only required the EPA to consider issuing regulations and in no way impinged upon the right of the proposed intervenors to participate in the regulatory process, the Cronin consent decree in no way impaired intervenors' ability to protect their legitimate interests.

That is not true in this case. Once filtration is ordered, the rate payers will pay and the dangers to the environment proffered by other intervenors will come to pass. The damage in this case will be complete on ordering the filtration of the Croton supply.

## CONCLUSION

**The order denying the application to intervene of the Croton Watershed Clean Water Coalition must be reversed and the matter remanded for a determination of the merits of the matters set forth in appellants' answer.**

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**JOHN C. KLOTZ**
Attorney for Appellants
885 Third Avenue, Suite 2900
New York, NY 10022-4834
(212) 829-5542