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

BRIEF OF PROPOSED-DEFENDANTS-INTERVENORS-APPELLANTS

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Preliminary Statement

This is an appeal from the judgment entered May 6, 1998 of the Honorable Nina Gershon, U.S.D.J. of the U.S. District Court for the Eastern District of New York denying Proposed-Intervenors-Defendants-Appellants application for intervention as of right pursuant to Federal Rules of Civil Procedure ("FRCP"), Rule 24(a)(2).

Statement of Jurisdiction

1. Subject Matter Jurisdiction

This is an action pursuant 42 U.S.C. § 300g-3(b) to enforce a filtration determination of the United States Environmental Protection Agency ("EPA") requiring the City of New York to provide filtration for its Croton water supply. Jurisdiction is founded upon 28 U.S.C. §§ 1331, 1345 and 1355 and 42 U.S.C. § 300-g-3(b) (Section 1414(b) of the Safe Drinking Water Act ("SDWA")).(Complaint, A-10, A-11).

2. Appellate Jurisdiction

The Croton Watershed Clean Water Coalition Inc. and related individuals (the "Clean Water Coalition")[1] appeal from a final judgment of the U.S. District Court entered May 6, 1998 denying their application to intervene as of right pursuant FRCP 24(a)(2) (A142) The District Court's judgment is appealable as a matter of right pursuant to 28

[1] 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.,

U.S.C. § 1291.[2] Notice of Appeal was filed June 25, 1998.(A156)[3]

On May 12, 1998 a timely motion for reconsideration of the judgment entered May 6, 1998 was served. That motion was denied by order entered July 2, 1998 (A158) and notice of appeal was filed by the Clean Water Coalition on July 9, 1998.[4](A160) The appeals are proceeding on a consolidated basis under Docket No. 98-6146.

Issues Presented for Review

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?

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[2] The denial of intervention as of right is a final determination or judgment appealable as of right. 28 U.S.C. § 1291; NYPIRG v. Regents, 516 F.2d 350, 351 n. 1(2d Cir. 1975); SEC v. Everest Management Corp., 475 F.2d 1236, 1238 n.2 (2 Cir. 1972); Ionian Shipping Co. v. British Law Insurance Co., 426 F.2d 186, 189 (2 Cir. 1970); Nuesse v. Camp, 385 F.2d 694, 699 n.2 (D.C. Cir. 1967).

[3] Pursuant to Federal Rules of Appellate Procedure ("FRAP") Rule 4, the appellants had 60 days from date of entry to file their notice of appeal because the United States is a party.

[4] Because the application for reconsideration was made on grounds not applicable to the entire group of individual intervenors, counsel for appellants decided that prudence dictated that the first, probably premature, Notice of Appeal be filed. As a result, the second Notice of Appeal is probably redundant.

Statement of the Case

1. The Croton Watershed

A 2,000 square mile watershed and reservoir system in upstate New York supplies drinking water for New York City and many residents of the suburbs north of the City.[5] The watershed is divided into three discrete systems: the Croton, Catskill and Delaware. The east of Hudson Croton reservoir system (presently about 350 square miles), was put on line in 1842 by John Jervis. It was arguably the greatest engineering feat of its time. (Affidavit of Dr. Paul Mankiewicz ("Dr. Mankiewicz"), ¶ 14, A92)

While John Jervis had planned for the growth which New York City has undergone, and scaled the Croton system accordingly, he could not plan for a technological innovation, the flush toilet, imported to the US in the 19th Century. This greatly increased water demand, and necessitated the building of the west of Hudson Catskill and then Delaware systems, which were constructed and put on line in a series of projects spanning several decades.(Id.)

There have been intermittent proposals to filter the New York water supply beginning as early as 1917. (Affidavit of Karen Argenti ("Argenti") ¶ 4, A102). However, there is no empirical evidence that the Croton Water Supply has degraded in quality and what evidence there is indicates that water quality may actually be improving (Dr. Mankiewicz, ¶ 17, A93).

[5] A map of the reservoir system appears at A100.

Water quality has varied inversely with agricultural use, especially dairy farming of the Croton Watershed. Cows and calves create pathways to existing water bodies, disturb vegetation, and produce pathogens. It is unlikely that farming practices of decades back would have protected water quality. (Dr. Mankiewicz, ¶ 19, A93).

The EPA has asserted that Croton water has decreased in quality, but has provided no coherent data on this matter since none exists. Historical information indicates that the Croton Watershed was intensively farmed on settlement by Europeans, and then gradually left fallow as farming and animal husbandry moved West. This would lead us to expect that water quality would improve as farming diminished, and as natural buffers developed around receiving bodies of water. Id. at ¶ 22, A-94.

The most significant problem alleged with the Croton watershed is its color or turbidity. Turbidity is an index of non-point pollution, eutrophication, and/or erosion. Clearer water is both less likely to be a source of pathogens, and easier to treat for pathogenic agents. (Dr. Mankiewicz, ¶¶ 20-21 A93-94)

But the facts are not what one might suppose. While the population in the Croton Watershed roughly doubled between 1900 and 1940, again between 1940 and 1960, and a third time between 1960 and 1990, over the same period, turbidity decreased by a factor of five. The five-fold decrease in turbidity while population was increasing eight-fold, indicates that buffering capacities of ecosystems in the watershed de-

veloped, coinciding with a decline in intensive farming and animal husbandry, and the redevelopment of biogeochemical buffers around waterbodies. (Dr. Mankiewicz, ¶¶ 18-21, A94-95)

There is evidence that some water complaints relate not to the quality of the water in the watershed, but to degradation of the water as it travels through an improperly maintained distribution system. (Argenti, ¶21, A107)

2. Financing the Watershed

The administration and financing of the New York City water system is divided among three agencies: (1) the N. Y.C. Department of Environmental Protection ("NYC DEP")(NYC Charter § 1043); the N. Y.C. Water Board ('Water Board") (N. Y.S. Pub. Auth. Law § 1045-j) and the N. Y.C. Municipal Water Finance Authority ("Water Finance Authority") (N. Y.S. Pub. Auth. Law § 1045-c).

The Commissioner of the NYC DEP is responsible for administering the water supply. However, the costs of such administration are borne by the Water Board. In addition to current costs (N.Y.S. Pub. Auth. Law § 1045-j(1)(ii)), the Water Board is also responsible for other liabilities allocable to the water system and the payment of principle and interest of outstanding notes and all expenses of the Water Finance Authority.

All of these expenses are then passed on to the water "rate payers" through a charge that is collected in the same manner as a tax:

> "5. Such fees, rates, rents or other charges, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as would unpaid taxes of the city. Such lien shall take precedence over all other liens or encumbrances, except taxes, and may be foreclosed against the lot or building served in the same manner as a lien for such taxes. The amount which remains due and unpaid for sixty days may, with interest thereon at the same rate as unpaid city taxes and with reasonable attorneys' fees, be recovered by the water board in a civil action in the name of the water board against such owners. "N. Y. Pub. Auth. Law §1045-j(5) (Emphasis supplied).

While the NYC DEP Commissioner is a City official answerable to the Mayor of New York City, many rate payers are not residents of New York City and have no voice in the election of the Mayor or the selection of the Commissioner. (N.Y.S. Pub. Auth. Law § 1045-j (5))

3. The filtration determination

(a) The statutory framework

The regulatory framework for insuring the safety of drinking water was established by Congress in the Safe Drinking Water Act ("SDWA") (42 U.S.C. § 300g et seq.). Where state authorities have demonstrated sufficient regulatory powers and procedures to ensure the safety of the drinking water supply within its jurisdiction, the EPA is allowed to cede to the state primary enforcement authority for that water supply. (42 U.S.C. § 300g-2}. Where a state has primary authority, it is empowered to make 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 as-

> sist 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).” (Emphasis supplied) SDWA §1412(b)(7)(C)(ii) [42 U.S.C. §300g-1(b)(7)(C)(ii)]

Prior to 1997, the EPA had denied primary enforcement responsibility to New York State. Among other reasons, the state's submissions to the EPA had not: "described 'how the State will provide for notice and opportunity for public hearing on its filtration and avoidance determinations, as required by §1412(b)(7)(C)(ii) of the Safe Drinking Water Act (“SDWA”).'" (EPA Internal Memorandum, Argenti, Ex. B, A-120)

Because New York State did not have primary enforcement authority, the SDWA empowered the EPA to make such determinations:

> "(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." (Emphasis supplied). SDWA § 1412(b)(7)(C)(iv) [42 U.S.C. §300g-1(b)(7)(C)(iv)]

However, the same internal memorandum which noted New York State's deficiencies under the SDWA mandate for notice and hearing, also noted the failure of EPA's own procedures to meet that mandate:

> "[U]nfortunately, our SWTR regulations, as well as our program review “checklists”, did not address this notice and opportunity for hearing requirement and many states, while trying to promulgate SWTR regulations which, 'are no less stringent than the national primary drinking water regulations (NPDWRs) in effect under part 141 of this chapter,'

40 CFR § 142.10(a), ignored this clear statutory requirement." (Emphasis supplied)(A-120)

(b) The City's action

New York City actions which impact on the environment are subject to the New York City Environmental Review Act, 43 RCNY, Title 43, Chapter 6 (“CEQR”). While the City has floated proposals to build a filtration plant at the Jerome Park Reservoir for years, no environmental review of such plans had ever been completed (Argenti, ¶¶ 4-6, A-102). In 1990, when the NYC DEP for the first time unveiled plans for the construction of filtration plant at the Jerome Park site, members of the community formed the "Friends of Jerome Park Reservoir" ("Friends") and sought meetings with City officials, proposing among other things a regional solution to water supply issues including alternatives to filtration. (Id. ¶ 7, A-103)

In July 1991, DEP Commissioner Appleton wrote Friends, stating among other things that the City would study alternatives to filtration but that the study would take a year to complete. He requested and asking Friends to desist agitating against filtration. (Id. Argenti, Exhibit A, A-117).

The proposed study did not take a year. Less than six months later, in November 1991, without any notice to Friends, NYC DEP issued a report entitled "New York City's Long-Range Water Quality, Watershed Protection and Filtration Avoidance Program". The report noted that the City had concentrated on engineering solutions to the City's water supply problems and neglected to protect adequately the watershed from

incursion. It concluded that:

> " . . . 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 foreseeable cumulative impact of the by products 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, A59)

The report was subject to neither public hearings nor environmental review. Nonetheless, in April 1992, the City prepared a contract for the design of a filtration plant at the Jerome Park Reservoir. (Argenti, par. 8(b, A-103)). The subsequent environmental review of that determination created a great deal of public interest and the proposal was brought to a standstill when both the technology and proposed location of the plan proved untenable. (Argenti, ¶¶ 12-31, A109-110)

(c) New York State's action

On October 30, 1992, without any notice to anyone, the City and the NYS DOH entered into a stipulation for the construction of a filtration plant at Jerome Park by 1999 (A46-A51). Among other things, the City agreed not to challenge the legality of the stipulation to filter

the Croton supply in any court proceeding:

> "10. It is further stipulated and agreed by the City and the Department that there exist valid and sufficient grounds as a matter of law for this Stipulation, and the City accepts this Stipulation, and the City accepts its terms and conditions and waives any right to challenge this Stipulation in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules, or in any other action or proceeding, except to the extent applicable to events beyond the City's control detailed in paragraph 8 of this Stipulation." Stipulation, (A50-51)

This stipulation represented a variance from the NYS Sanitary Code (SSC), and as such required public circulation of a notice of opportunity for hearing (SSC §§ 5-1.92, 5-1.93 and 5-1.94). (10 NYCRR HEALTH, SubPart 5) No such notice was given. (Argenti, ¶ 9, A-104)

(d) The federal determination

On January 13, 1993 - the same day as the internal memorandum discussed above rejected New York State's primacy application - the EPA approved the stipulation and issued a determination "pursuant to Section 1412(b)(7)(c)(iv) of the SDWA" that New York City must provide filtration and disinfection of the Croton Supply." (Emphasis supplied)(Determination, A52-53) No predetermination notice of opportunity for a hearing was issued by the Regional Administrator and, after determination, no public notice of opportunity for a hearing was published.

4. No Notice of opportunity for hearing

As noted above, on January 13, 1993, it was the view of the EPA staff that neither the NYS DOH, when it executed the stipulation on

October 30, 1992, nor the EPA, when the EPA Administrator issued his determination on January 13, 1993, had in place congressionally mandated provisions for notice and opportunity for hearing for filtration determinations.(Memo, A120)

The only notice of any opportunity for a public hearing of the filtration determination was made to the NYC DEP in the last paragraph of the determination itself which was specifically addressed to the NYC DEP. That paragraph stated:

> "The NYCDEP may request a public hearing on this filtration determination. Any request for a public hearing shall be made in writing to Dr. Richard L. Caspe P.E., Director, Water Management Division at 26 Federal Plaza Room 805, New York New York, 10278 within fourteen (14) days of NYCDEP's receipt of this filtration determination." (Emphasis as in original)(A53)

Concurrently with its determination to order filtration of the Croton supply, the EPA issued a filtration avoidance determination for the Catskill-Delaware supplies. On February 3, 1993, the EPA caused publication of a formal notice regarding its Catskill-Delaware determination. (*New York Newsday*, February 3, 1993, A83) While explaining in detail provisions for notice and hearing on the Catskill-Delaware determination, the EPA made the following reference to the Croton water supply:

> "New York City's water supply, which is operated by the New York City Department of Environmental Protection consists of three unfiltered water systems: the Croton, Catskill and Delaware. The City is already planning and under state mandate to build a Jerome Park filtration plant in the Bronx by the end of 1999 to filter its Croton system which

> supplies about ten per cent of the City's drinking water. The Croton System in Westchester and Putnam Counties is characterized by suburban development. The Catskill and Delaware systems cover an area of about 2,000 square miles. While much less developed than the Croton system, they are threatened by contamination resulting from such human activities as dairy farming and discharges from 29 wastewater treatment plants that serve the area's population." (Emphasis supplied)(A83)

Completely elided from the publication was any mention of the federal Croton determination, nor was any notice of opportunity for hearing or comment made in relation to the Croton.

5. Commencement of the action at bar

On April 24, 1997, the United States commenced this action pursuant to SDWA § 1414(b), to enforce its filtration determination. Among other relief, the EPA sought to:

> "2. Order the City to site, design, construct, and operate a filtration plant on an expeditious schedule …"
>
> * * *
>
> "4. Order the City to pay a civil penalty … of up to the statutory maximum of $25,000 for each day of each violation…"

The case was assigned to Judge Nina Gershon and Magistrate Stephen Gold. The City appeared but did not answer. Sixteen (16) stipulations were entered extending the City's time to answer. In fact, it never did answer. (Docket, A1-8)

New York State was allowed to intervene as party plaintiff. The matter was assigned to Magistrate Gold for the conduct of confidential settlement negotiations. When an attorney representing "Friends of Van Cortland Park" sought permission to attend the negotiations as an

interested observer, his request was denied (A54-56). Among the matters considered for inclusion in the consent decree were "supplemental environmental projects ("SEPs") that would normally be subject to public review and hearing under state law. (Letter with endorsed order, A-140-1)

6. Intervention

(a) The Clean Water Coalition

The Clean Water Coalition is a membership corporation that includes consumers of drinking water from the Croton watershed including people of color from New York City, water rate payers, taxpayers and residents of New York City and the watershed counties of Westchester and Putnam, and many other individuals interested in the preservation of water quality in the Croton Watershed. Among the member organizations of the Coalition are: the New York City Friends of Clearwater; Yorktown Land Trust; Friends of Jerome Park Reservoir; Housing Development Fund Coalition ("HDFC"); Northwest Bronx Community & Clergy Coalition; Citizens for Parklands; Huntersville Association; Friends of Croton Watershed; and the Amalgamated Housing Corporation (the oldest limited dividend housing company in the United States); Coordinating Council of Cooperative, Coordinated Housing Services; Scarsdale Audubon; Central Westchester Audubon; Friends of Van Cortlandt Park and the Atlantic Chapter (New York State) of the Sierra Club and its Lower Hudson, New York City, Ramapo-Catskill and Mid-Hudson Groups.

(Klotz, ¶ 2, A-56)[6]

(b) Application

On June 6, 1997, the attorney for the Clean Water Coalition wrote Judge Gershon and counsel for the government parties advising them that the Coalition would seek to intervene in the action. (Docket #14, A2). On June 16, 1997, the Coalition moved to intervene by motion returnable July 17th, 1997 (Docket #36, A4).

(c) Interests represented

In paragraph "5" of their proposed answer, the Coalition and certain individuals seeking intervention with the Coalition set out five interests represented by the members of the Clean Water Coalition and the individuals seeking intervention:

1. water rate payers resident of both Westchester County and New York City who object to paying exorbitant, unjustified water rates if filtration is ordered by this Court;

2. residents and real estate taxpayers of Westchester or Putnam counties who will be subject to increased taxes and adverse environmental impacts because of the unfettered development being fostered by the City, State and EPA in the Croton watershed by reason of their decision to filter Croton water;

3. residents and taxpayers of the City who will be subject to increased taxes and diminished income on account of the City's reduced capacity to compete for development if the Croton water is filtered and be further damaged by a reduction of the City's bonding capacity resulting in further degradation of its infrastructure;

4. water consumers resident in Westchester County and New York City who shall suffer adverse health effects if the Croton water is filtered while development in the watershed con-

[6] The Sierra Club itself has not applied for intervention.

tinues unfettered; and

5. persons of color resident in the City of New York and water consumers who are being discriminated against by a policy of the City, State and EPA that fosters development in the watershed and unduly burdens residents of the City who are predominantly persons of color.

(Intervenors' Answer, ¶5, Schedule One, A127, A134)

In addition to the Clean Water Coalition intervenors, the City of Yonkers and the Town of Yorktown filed motions for intervention, which the District Court read as being principally concerned about the location of the proposed filtration plant within their respective territorial jurisdiction.(A150)

7. Reasons for opposing filtration.

The opposition of the intervenors to filtration is based upon scientific and environmental concerns that have nothing to do with opposition to a specific site. As set forth in their answer and supporting affidavits of Dr. Mankiewcz and Ms. Argenti, filtration will cost in excess of a billion dollars, foster dangerous development of the watershed and pose new, potentially deadly health threats. The fact is that the most widespread, deadliest water supply contamination in recent years occurred in Milwaukee's filtered water system. (A89-121)

Mechanically engineered solutions require well trained, vigilant technicians and engineers along with constant maintenance. Human error precipitated the Milwaukee disaster. Watershed protection and enhancement is maintained safely by nature itself. At a fraction of the

cost, protection and enhancement of the watershed could provide purer, safer water than any filtration system. (Dr. Mankiewicz, ¶¶ 23 -32, A94-97)

8. Decision of the District Court

Although briefing for the Coalition motion was complete on August 11, 1997, argument on the motion did not occur until February 5, 1998. The District Court entered its opinion on May 6, 1998. On May 27, 1998, a consent decree was lodged by the United States to which all three governmental parties of record consented. (Docket # 85, A-8)

The District Court denied all applications to intervene. As to Yonkers and Yorktown, it denied intervention as of right on the ground that since the action would not decide where the filtration plant would be built, the interest of the municipalities are premature.[7] As to the interests of the Clean Watershed Coalition, the court found those interest also premature since the action would not decide "[h]ow the construction of the plant will be financed. . . ." (Emphasis as in original) (A-150).

The District Court also denied all the motions for permissive intervention on the grounds that the issues raised by the intervenors would unnecessarily complicate the litigation and hinder its resolution.(A155)

Because the intervenors believed that the District Court had over-

[7] The municipalities have not appealed the District Court's determination.

looked the clear pecuniary interest of rate payers in this action, and the holding of this court in NYPIRG v. Regents, 516 F.2d 350 (2d Cir. 1975), they moved pursuant to Rules 59(e) and 60(b) for reconsideration.

The motion for reconsideration was denied.

Summary of Argument

Clean Water Coalition intervenors possess cognizable interests at risk in this litigation. All of the expenses of filtration will be charged to intervenors. Once the District Court orders filtration, neither the Water Board nor the intervenors can avoid this financial obligation.

Because misconduct by the governmental authorities is at the heart of the intervenors claims, they can not be adequately represented by the existing governmental parties. In 1992, New York City entered into an stipulation in which it agreed not to oppose or seek review of the filtration determination. Moreover, it is the City's failure to protect the watershed which is the precipitant cause of the filtration determination. The only governmental authority to which the intervenors have privity is the Water Board, which is not a party to this action.

No issue of timeliness was raised in the District Court and under the facts of this proceeding, there is no issue of timeliness.

In the Safe Drinking Water Act, Congress gave the District Court

broad discretion to determine the interests of public health. Because the District Court read its statutory mandate narrowly, its denial of permissive intervention should be remanded for further consideration as to all the classes of intervenors.

The procedures used by the three governmental parties in reaching the filtration determination contravened the mandate of the SDWA for an open process subject to public scrutiny and participation. The negotiation of a consent decree by the same three parties behind closed doors continues that error.

Argument

Standard of Review

An applicant for intervention pursuant to Rule 24(a)(2) must 1) timely file an application, 2) show an interest in the action, 3) demonstrate that the interest may be impaired by the disposition of the action, and 4) show that the interest is not protected adequately by the parties to the action. Rule 24(b)(2); Catanzano by Catanzano v. Wing, 103 F.3d 223, 232 (2d Cir. 1996).

While the total issue of intervention as of right pursuant to Rule 24(a)(2) has been held subject to an "abuse of discretion" standard, the issues of interest and standing which were the bases of the District Court's determination are issues of law. The District Court's denial was based upon a finding that the Clean Water Coalition lacked sufficient interest to intervene as of right. That is an issue of law subject to *de novo* review in this Court. The Fund For Animals v. Bab-

bitt, 89 F.3d 128, 132 (2d Cir. 1996); Comer v. Cisneros, 37 F.3d 775, 787 (2d Cir. 1994); Catanzano by Catanzano v. Wing, supra.

POINT FOUR will discuss denial of permissive intervention (FRCP 24(b)) and as to that issue, the standard of review is abuse of discretion. However, the Court of Appeals will review the exercise of discretion for the appropriate application of the law.

POINT ONE

Water Rate Payers who by operation of law will pay for more than one billion dollars in expenditures and fines sought by the United States in this litigation have a direct interest at stake in this litigation. Each of the other interests represented by intervenors is similarly at risk.

1. Water rate payers.

The beginning point of any analysis of the intervenors' right to intervene pursuant to FRCP Rule 24(a)(2) is the interest they claim to give them standing.

> "[T]he various components of the Rule are not bright lines, but ranges -- not all "interests" are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness. Application of the Rule requires that its components be read not discretely, but together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for granting intervention. CF. 3B Moore's Federal Practice, supra, para. 24.07[1] at 24-51 ("the requirements of interest, impairment and inadequacy of representation are but three facts of the same problem"). The requirements for intervention embodied in Rule

> 24(a) (2) must be read also in the context of the particular statutory scheme that is the basis for the litigation and with an eye to the posture of the litigation at the time the motion is decided. Finally, although the Rule does not say so in terms, common sense demands that consideration also be given to matters that shape a particular action or particular type of action." United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984).

The District Court's sole basis for denying intervention as of right to water rate payers was the District Court's determination that the interests claimed by the Clean Water intervenors were not sufficient to sustain intervention pursuant to Rule 24(a)(2).(A153-154) There was no discussion of either timeliness or adequacy of representation of the Coalition's interests.

The District Court found that any changes in rates could be challenged in state court proceedings independent of the enforcement action. (Original Order, A151; Memorandum on Reconsideration, A158). However, once the mandate to build the plant is issued by the District Court, there is no way a state court could prevent the building of a plant. Any such dispute would be referable to the District Court under the All Writs Act, 28 U.S.C. § 1651. United States v. City of New York et al (Maloney), 972 F.2d 464 (2d Cir. 1992); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 865 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989).

In Yonkers Racing Corp., this Court stated that a district court may remove a state court action where "removal was necessary to protect the integrity of the Consent Decree" and where "the issues raised

by the [state court action] cannot be separated from the relief provided by the consent decree."

It is impossible to hypothesize a circumstance where a state court could in fact bar construction of a filtration plant mandated by federal decree without running afoul of the All Writs Act.

What the District Court failed to take into account was that by operation of law whatever expenditures were ordered by the court in this enforcement action would be born the ratepayers and no one else. The principal thrust of the EPA's posture in this action is to force the construction of a billion-dollar filtration plant and the payment of millions of dollars of fines. By operation of law, if a filtration plant is built or fines paid, they will be paid by the water rate payers who seek to intervene in this action. There is nothing contingent about it (N.Y.S. Pub. Auth. Law § 1045-j).

If the City builds it, they will pay.

The Court of Appeals has readily recognized the right of those with a financial stake in the proceedings to intervene as of right. See NYPIRG v. Regents, supra. In that case individual pharmacists and a pharmacist association sought to intervene in an action in which plaintiff NYPIRG sought to have declared unconstitutional a New York State law banning the advertising of prescription drug prices. Noting that such a ban was of financial benefit to the pharmacist and the fact that lifting the ban would undoubtedly cost them money, the Court of Appeals said:

> "Clearly the pharmacists have an interest in the transaction which is the subject of the action regardless of the intent of the Regents in promulgating the regulation. There can be little doubt that the challenged prohibition against advertising the price of prescription drugs, which is claimed to result in consumer ignorance as to where such drugs can be purchased at the cheapest price, affects the economic interests of members of the pharmacy profession. Pharmacists also have an interest in a regulation that they claim is designed to encourage "the continued existence of independent local drugstores by the prevention of destructive competition through advertising.
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> * * *
>
> "[I]t is likewise clear that the pharmacists and the association are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interests. We are not persuaded by the contention of plaintiffs that the pharmacists may protect their interests after an adverse decision in the instant case by attacking any new regulation on constitutional, antitrust or unfair competition grounds. Such contention ignores the possible stare decisis effect of an adverse decision.". (internal citations omitted) (Emphasis supplied). 516 F.2d at 351-352

The District Court's error was its conclusion that somehow the interests of the appellants were "contingent." In this regard, it lumped their interests together with those of the proposed intervenors Yonkers and Yorktown who primarily were opposed to siting of the proposed filtration plant in their communities. Thus the District Court stated:

> "… [T]his action will not decide where a filtration plant for the Croton watershed will be built, nor will it decide how the construction of the plant will be financed. *Compare United States v. 27.09 Acres of Land,* 737 F. Supp. 277, 289 (S.D.N. Y. 1990) (condemnation action concerning land within municipality that U.S. had chosen as future site of mail processing plant; municipality's motion to intervene granted)." (Emphasis as in original) (A150)

As to the issue of siting, the District Court is absolutely correct. As to issue of financing, the court is simply wrong. Whatever

money is borrowed will be repaid with interest by the water rate payers. Any current filtration costs will also be borne by the water rate payers. They have no legal recourse from these charges.

The District Court in its decision relied on a distinction between sufficient interest to provide standing to commence an action and sufficient interest in the controversy to support intervention as of right, citing among other cases United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985). However, 36.96 Acres is a narrowly drawn decision that has not been consistently followed in the Second Circuit, and has been found by at least one District Judge to be "unpersuasive" when sought to be applied outside the parameters of a condemnation action and in the context of condemnation action has been on at least one occasion ignored altogether.

What the Seventh Circuit said was:

> "There is a qualitative difference between the "interest" which is sufficient for standing to bring an action under the APA and the 'direct, significant legally protectable interest' required to intervene in a condemnation action." (Emphasis supplied) 754 F.2d 855 at 859.

In Herdman v. Town of Angelica, 163 F.R.D. 180, 188 (W.D. NY. 1995), 36.96 Acres was cited to the court in opposition to the intervention of an environmental organization as a defendant in an action involving the legitimacy of an ordinance banning an ash land fill. Noting that 36.96 Acres, was a condemnation proceeding, the court found its application to the land fill dispute "unpersuasive." 163 F.R.D. at 188.

Even in a condemnation proceeding, Judge Lasker of the Southern District has permitted intervention by both a local town and an environmental organization where the dispute revolved around a new federal facility at the Westchester County Airport. U.S. v. 27.09 Acres of Land, 737 F. Supp. 277, 288-289 (S.D.N. Y. 1990). Although a case in which permissive intervention was allowed, Judge Lasker had this to say about the "interests" of the intervenors before him:

> "[M]oreover, both PEPA and Harrison have primary interests in this action which differ from the County and which could not be adequately represented by the County or each other. Harrison is primarily interested in preserving the integrity of its zoning and planning scheme and town water supply and enforcing its local wetlands ordinance. PEPA's primary objective is to address the very specific environmental concerns of its members, some of whom live outside of Harrison. In contrast, the County is primarily interested in preserving the property for potential future use by the neighboring Westchester County Airport and in maximizing the amount of the compensation it will receive. . . . " (Emphasis supplied) 737 F. Supp. at 288-289.

Given the holdings by the Court of Appeals in NYPIRG v. Regents, supra; and the district courts in Herdman v. Town of Angelica, supra; and U.S. v. 27.09 Acres of Land, supra, it is clear that interests much less direct than the water rate payers have been recognized as sufficient to support intervention in the Second Circuit.

In this case, it is absolutely certain that the goals of the intervening ratepayers differ markedly from those of the three governmental parties. Each of the three support filtration that will impose unneeded costs on the intervening rate payers. Intervenors maintain that their position is in the best interest of the environment and the

watershed. Yet, the fact that their interests may include economic self-interest does not defeat but justifies their intervention. NYPIRG v. Regents, supra.

2. Other interests

The other interests of the intervenors are also sufficient to sustain intervention in light of decisions such as NYPIRG. As will appear in POINT TWO, infra, the issue which the District Court ought to have addressed, was not so much whether an interest existed, but whether, given the strength of interest, is it was adequately represented. United States v. Hooker Chemicals & Plastics Corp., supra, 749 F.2d at 983.

POINT TWO

Because of differing constituencies, the City's agreement not to contest the filtration determination and the misconduct of the governmental parties, the intervenors' interests are not adequately represented by existing parties.

1. Standard of adequate representation in general

Having found that the intervenors lack cognizable interests to intervene, the District Court did not reach the issue of adequacy of representation. The determination of "adequate representation" involves consideration of the directness of the interest at stake. United States v. Hooker Chemicals & Plastics Corp., supra, 983. If the interests of the intervenors are most directly implicated, the burden of demonstrating inadequacy will be less. If the interests are more remote, the burden will be heavier.

In it’s denial of the motion for reconsideration, the court adopted

an argument of the City of New York:

> "Here, it is the City which is the regulated entity. That the City's water rate payers have an interest in water rates does not mean that they can intervene as a matter of right in any lawsuit in which the possibility of higher water rates may arise. As the City points out, if the law were as the Coalition argues, water rate payers could intervene in any case where, to take one example, the City sued to collect unpaid water bills on the ground that failure to collect on these bills would result in higher costs to other rate payers. This would extend the concept of interest in "the subject of the action" beyond any reasonable interpretation of Rule 24(a)(2)." (Decision, A-159)

But the issue raised is not determined by "interest" but by adequacy of representation. The City's same argument could be made as to New York City tax payers suits or derivative actions by shareholders of corporations. The issue in tax payers suits, derivative suits and intervention as of right is adequacy of the representation by the designated legal representatives of the interests involved. Thus, a shareholder may not sue derivatively without showing "the efforts of the plaintiff to secure the initiation of such action by the board [of directors] or the reasons for not making such effort." N. Y. Business Corp. Law § 626(c).

Similarly, pursuant to N.Y.S. Gen Municipal Law § 51, taxpayers may stand in a municipality's stead when the municipality fails to properly administer its powers:

> "The effect of the legislation [Section 51] is to enable the taxpayers to accomplish 'by action not more than the proper municipal authorities can at all times accomplish, but such results as the municipal authorities can and should, but, because of carelessness or willful purpose, will not.' Weston v. City of Syracuse, 158 N. Y. 274"

Herder v. Clifford, 252 N. Y. 141, 144 (1929)

In Herder, the N. Y. Court of Appeals recognized the right of tax-payers to pursue claims against a defalcating town official after the town itself had discontinued its action against the same official. The municipality's control of the litigation could not be used to bar the tax payers from pursuing the municipality's interests where it is pleaded the municipality had defaulted in its obligations.

In this case, the City is seeking to bar rate payers and others from raising claims involving its own misconduct. Whatever privity or representative capacity the City may claim in relation to the intervenors, that capacity can not be used to prevent the rate payers from pursuing claims the City should pursue, but does not. Nor can that capacity be used to shield the City from the effects of its own misconduct. Herder v. Clifford, supra.

2. The illegality of the State-City stipulation and the federal filtration determination are at the core of intervenors' claims.

The illegality of the City-State stipulation and the filtration determination are clearly alleged in the proposed answer of the intervenors. This Court is being asked to enforce an agreement that individuals who have a specific monetary interest in the outcome maintain is illegal. Its equitable powers are being invoked. Can it really be said that the illegality of the agreement is irrelevant to its enforceability? Can a party to the illegal agreement adequately represent those who maintain its illegality?

The answer, clearly, seems to be not. NYPIRG v. Regents, supra, at 352; U.S. Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978); Sackman v. Ligget Grp., Inc., 167 F.R.D. 6, 22 (E.D.N. Y. 1996);. CBS v. Snyder, 136 F.R.D. 364, 368 (S.D.N. Y. 1991).

Contrast the present situation with that described in U.S. Postal Serv. v. Brennan, supra, where there was no question but that the unions that sought intervention shared the same litigation objectives as the Postal Service:

> "An applicant for intervention as of right has the burden of showing that representation may be inadequate, although the burden "should be treated as minimal." *Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972).* The applicant must at least overcome the presumption of adequate representation that arises when it has the same ultimate objective as a party to the existing suit. *Commonwealth of Virginia v. Westinghouse Electric Corp., 542 F.2d 214, 216 (4th Cir. 1976); Ordnance Container Corp. v. Sperry Rand Corp., 478 F.2d 844, 845 (5th Cir. 1973).* The issue before the district court was strictly one of law - either the challenged statutes were constitutional or they were not. The Postal Service has been represented throughout by the United States Attorney for the Western District of New York pursuant to *39 U.S.C. § 409*(d). n2 Appellants did not contend that the United States Attorney's Office would not advance all of the appropriate legal arguments in favor of constitutionality. Moreover, the Postal Service, a semi-private corporation, had as direct a legal and economic interest in the constitutionality of its monopoly as did NALC." (Emphasis supplied) 579 F.2d at 191

Because the illegality of the agreement is at the heart of intervenors' claims, the conflict with the City's position is direct and irreconcilable. The City can not represent those claims.

3. The City has previously stipulated not to oppose filtration.

The crux of this case is the filtration stipulation entered into on October 30, 1992 between the City and the State DOH. In that stipulation, it is recited that the City "expressly waives any right to challenge this Stipulation in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules, or in any other action or proceeding,. . ." (A50-51) Given the stipulation of NYC DEP not to oppose the filtration determination, it could not effectively represent the interests of intervenors opposed to filtration.

As evidence of the City's compliance with this covenant, it is noted that the City did not answer the complaint in this action. Because of the covenant and the City's failure to defend this action, it can not be said that City can adequately represent those who maintain that the stipulation of October 30, 1992, and the order of the EPA Administrator of January 13, 1963 adopting it, violate the Safe Drinking Water Act.

In Herdman v. Town of Angelica, supra, the court examined in depth the precedents in the Second Circuit as to the assertion of parens patriae rights for a municipality and drew the following rule clearly applicable to the case at bar:

> "The cases cited above indicate that in considering a motion to intervene as of right on the side of a government entity in an action in which the government entity is not suing as parens patriae, but rather is defending the legality of its actions or the validity of its laws or regulations, courts should examine both (1) whether the govern-

> ment entity has demonstrated the motivation to litigate vigorously and to present all colorable contentions, and (2) the capacity of that entity to defend its own interests and those of the prospective intervenor. Herdman v. Town of Angelica, supra, at 190

In this case, the City not only demonstrated no motivation to litigate vigorously, it failed to even answer the complaint.

4. The City and DEP can not act as parens patriae for the intervenors who are from a different constituency.

The defendant in this proceeding is the City of New York and its Department of Environmental Protection. The Water Authority which must pay to build the filtration plant is not a party. The Board is the only agency in privity with intervenor rate payers.

Each of the classes of intervenors include individuals who are not residents of the City of New York and do not participate in the election of the New York City Mayor. They have no relationship to the City of New York.

The doctrine of *parens patriae* is based upon the duty of a sovereign state to protect its citizens (67A C.J.S Parens Patriae, p. 159). However, a state has no sovereign authority in the territory of another. {81A C.J.S. States § 16). Common sense dictates that City can not be *parens patriae* for rate payers resident in Westchester and Putnam Counties or those suburban residents who claim damage to their environment because of the City's failure to protect the watershed.

Moreover, in supplying water to those not resident in the City, the NYC-DEP is performing a function that can, and has, been performed

by private corporations and utilities. This is especially so in relation to those intervenors who reside outside the City. The SDWA applies equally to municipal and private utility water suppliers.

Thus in performing its proprietary function, it may not lay claim to a *parens patria* mantle which must per force spring from only a governmental function.

5. The City is responsible for its failure to protect the watershed.

Whatever degradation of the Croton water supply that may have occurred, it is clear that primary responsibility for the degradation is with the NYC DEP which is charged with administering New York City's water supply. See Robert F. Kennedy, Jr., A Culture of Mismanagement, *15 Pace Envtl. L. Rev. 233* (Winter, 1997).[8] These same regulatory authorities contrived a filtration determination for the Croton water supply that has blatantly violated the congressional mandate for an open public process.

Because their misconduct is at the heart of the intervenors claims, it is self-evident that they can not represent intervenors' interests. NYPIRG v. Regents, supra; U.S Brennan Postal Serv. v. Brennan, supra; Sackman v. Ligget Grp., Inc., supra; CBS v. Snyder, supra.

[8] While this law review article is uniquely fact oriented, it was cited to the District Court by the Intervenors and is a part of the argument before that court. (Docket #89, A-8)

POINT THREE

The motion for intervention was timely made.

There was no discussion of the issues of timeliness in the District Court's memorandum. This action was commenced on April 24, 1997. On June 6, 1997, counsel for the appellants corresponded with the District Court, informing the court of the appellants intention to seek intervention. (Docket # 14). The Intervenors Notice of Motion was served on Monday, June 16, 1997 (Docket # 16). Negotiations between the governmental parties continued another eleven (11) months.

There has not been, nor could there be, any allegation of lack of timeliness of this application.

POINT FOUR

The District Court's overly constrained view of its authority pursuant to the Safe Drinking Water Act, resulted in an inappropriate exercise of its discretion in denying intervention by leave to all the classes of proposed intervenors.

While the review of the Court's District Court's denial of permissive intervention is subject to an "abuse of discretion" standard, abuse of discretion can be found "if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law." Nikon Inc. v. Ikon Corp., 987 F.2d 91, 94 (2d Cir. 1993); Catanzano by Catanzano v. Wing, supra at 232 (2d Cir. 1996).

The District Court rejected intervenors' contention that the SDWA

placed upon the court's shoulders the obligation of determining what the "interests of public health require" and viewed its mandate as fashioning relief "specifically for the purpose of ensuring compliance." (A153) However, intervenors' basic claim is that the three governmental parties have not complied with the SDWA in that the governmental authorities cooperated in promulgating an illegal filtration determination. The intervenors are seeking compliance with the statute.

The EPA has invoked the jurisdiction of the District Court to enforce a determination that is the result of a deeply flawed process. Its complaint cites 42 U.S.C. § 300g-3(b) as its authority for seeking relief in this action. (Complaint, ¶ 1, A10) That section provides in pertinent part:

> "The court may enter, in an action brought under this subsection, such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies; and, if the court determines that there has been a violation of the regulation or schedule or other requirement with respect to which the action was brought, the court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty of not to exceed $ 25,000 for each day in which such violation occurs." (emphasis supplied)

Congress has not constructed a uniform scheme for the enforcement of environmental laws. In some, like the Endangered Species Act ("ESA"), the court in which the agency seeks enforcement is left with little discretion. TVA v. Hill, 437 U.S. 153 (1978). In others, Congress allows the court room to exercise its discretion. Weinberger v.

Romero-Barcelo, 456 U.S. 305 (1982). The statute at issue in the case at bar clearly grants, if not requires, the District Court to exercise its – not the regulators' – discretion in fashioning an appropriate decree.

In Weinberger, the Supreme Court dealt with enforcement of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (FWPCA). An injunction was sought enjoining the Navy from continuing pollution violations at a small island off the coast of Puerto Rico.

The enforcement statute at issue provided:

> "(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State." (Emphasis supplied)

In Weinberger, the Court of Appeals had reversed a refusal of the district court to enjoin unpermitted discharges into the water that violated the FWPCA but did not harm the quality of the water. (456 U.S. at 305).

The Supreme Court reversed the Court of Appeals on the grounds that it had read too narrowly the power of the district court when asked to enforce an administrative order of the EPA.

The Supreme Court stated that by providing for an equitable remedy,

Congress had adopted a practice with a background of several hundred years of history:

> "[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." (Citations omitted) 456 U.S. at 311 - 313

In the case at bar, the applicable statute is much more explicit in its grant of discretion than that in Weinberger. The SDWA mandates the district court make "such judgment as protection of public health may require."

We must presume that Congress intended the ‘plain meaning’ of its enactments. American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Friends of the Earth v. Consolidated Rail Corporation, 768 F.2d 57, 62 (2d Cir. 1985)

By stating that the court may enter such order as the protection of public health may require, Congress plainly manifested that in enforcing the SDWA, the district court determine what those interests are. Moreover, unlike some environmental enforcement statutes, there is no stated limitation of the district court’s determination to evidence adduced in any administrative proceedings.

A narrow reading of its equitable powers is not in accord with the clear mandate. Because of the District Court's constrained view of its mandate under Section 300g-3(b), this Court, if it does not grant

intervention as of right on this appeal, should remand the issue of permissive intervention to the District Court for reconsideration.

POINT FIVE

The secret negotiation of a consent order continues the error of the original determination, which violated the clear mandate of Congress in the SDWA for public participation prior to filtration determinations.

1. Turning one question into two.

The governmental parties each have regulations and procedures describing how such a notice ought to have been given. In the case of the City, it involves at the very least notice to the local Community Board and public officials as well as publication in newspapers of general distribution in the affected areas. 43 RCNY § 6-10.

Both the State Environmental Quality Review Act (SEQRA) and the regulations of the EPA similarly require notice to interested parties by among other things publication in newspapers in the areas affected by the proposed actions: SEQRA: N.Y.S. Env. Con. Law § 8-0109, subd 4; 6 NYCRR 617.10 [d]; La Verne Bliek et al. v. Town of Webster et al, 104 Misc. 2d 852; 429 N. Y.S.2d 811 (Sup. Ct., Monroe Co., 1980); EPA: 40 CFR 142.44(b)(1).

Similarly, the N.Y.S Sanitary Code requires public notice in situations such as the stipulation in this case: SSC §§ 5-1.92, 5-1.93, 5-

1.94.

The failure of the EPA, the State and the City to give notice to interested parties of the Croton filtration determination renders that determination void and unenforceable as to those parties who did not receive notice. Greene v. Lindsey, 456 U.S. 444, 455 (1982).

The EPA claims a distinction between notice required to be given when filtration avoidance is sought and notice to be given when filtration is the determination. The position of the EPA is that when a water supplier seeks to filter its water supply, the only person entitled to notice is the water supplier itself. However, when the water supplier seeks to avoid filtration, public notice is required pursuant to its detailed regulations.

This is utter sophistry. The SDWA makes no such distinction and refers only to filtration determinations. SDWA §1412(b)(7)(C)(ii) [42 U.S.C. §300g-1 (b)(7)(C)(ii)]. Indeed, in the EPA's Newsday notice of the Catskill-Delaware filtration avoidance determination, it cited as authority for its action that very same provision as it cited for its Croton filtration determination. Compare the Croton determination – "pursuant to Section 1412(b)(7)(C)(iv)[9]" – and the notice of the Catskill-Delaware determination – "under the authority of Section 1412(b)(7)(C)(iv)."[10]

[9] Filtration Determination, A-52

[10] Newsday Notice, A-83

2. Governmental Mendacity

When an aroused citizenry protested preliminary plans to filter Croton water at a Jerome Park Reservoir site, the Commissioner of NYC DEP promised them a year long study of the possibility of filtration avoidance. (Argenti, Exhibit A, A-117) Six months later, DEP issued a report that because of a "lack of political will," the City had decided to build a filtration plant. (Klotz, ¶ 15, A-59) No notice of that report was given to the Jerome Park Community.(Argenti, ¶ 8(a), A-103).

Later, a contract to design the plant was let in secret. (Argenti, ¶8 , A-103). In October, 1992, a secret stipulation to build the filtration plant at Jerome Park was entered into between the City and the State. All such secret actions violated the plain meaning of SEQRA, CEQR and the State Sanitary Code, respectively.

Finally, on January 13, 1993, the Regional EPA Administrator adopted the fruits of this secret tree by determining to filter the Croton Water supply and then keeping his determination secret from the public by not publishing a notice of opportunity for a hearing as required by the SDWA.

What EPA's Newsday February 1993 notice demonstrates is that the EPA did know how to give effective public notice when the spirit moved it. The bulk of that notice describes in detail how interested parties could in fact comment on the decision not to filter the Catskill-Delaware supplies. But most striking, is its description of the na-

ture of the Croton filtration determination. It makes no mention of the EPA's determination of January 13, 1993 but states only that: "The City is already planning and under state mandate to build a Jerome Park filtration plant." (A-83)

Nonfeasance where a duty exists is malfeasance. Omission of a material fact is a misrepresentation. Given the fact that the EPA's internal memorandum demonstrated specific knowledge by the EPA that both its and New York State's procedures failed the SDWA mandate for public participation, this notice by the EPA is not merely deficient, it is mendacious.

3. The procedures adopted by the District Court further the error of the EPA.

The District Court has now before it a proposed consent decree that if adopted will establish a new judicial regime for the watershed, superior to, and separate from, the SDWA. It was negotiated in secret and all interests other than the governmental regulators were excluded.

For example, millions of dollars of SEPs were negotiated in a process that will completely supplant New York City and State's environmental quality review laws. (Letter, A-140-1)

Comments on a consent decree are no substitute for party status when a vital interest is at stake. United States v. City of Niagara Falls, 103 F.R.D. 164, 166 (W.D.N. Y. 1984). The ability to conduct discovery, cross-examine witness – and appeal an adverse determination

– are essential safeguards that are available to a party, but not a commentator. On the other hand, it may very well be that intervenors' ultimate goal, a hard look at a filtration avoidance option, is not so far removed from the present status, that a reasonable settlement (known as "dual track") could be made.

Intervenors concede that intervention will raise issues that the regulatory authorities do not want to address. A litigation settled by negotiation behind closed doors is certainly a neater process. It is not, however, how Congress intended filtration determinations be made.

"Democracy," Winston Churchill once remarked, "is the worst form of government, except for all the others."

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.

Dated: New York, New York
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