UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

	:	CV 97-2154
UNITED STATES OF AMERICA,	:	**GERSHON, J.**
	:	**GOLD, M.J.**
Plaintiff,	:	
	:	
STATE OF NEW YORK and BARBARA DEBUONO, M.D., as COMMISSIONER of the NEW YORK STATE DEPARTMENT OF HEALTH	:	
	:	
Plaintiff-Intervenors,	:	
	:	
- against -	:	
	:	
CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
	:	
Defendants,	:	
	:	
CROTON WATERSHED CLEAN WATER COALITION, INC.; *et al*,	:	
	:	
Defendants-Intervenors,	:	
	:	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENTION BY THE CROTON WATERSHED CLEAN WATER COALITION

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BY THE CROTON WATERSHED CLEAN WATER COALITION

Introduction

This memorandum is submitted in reply to the answering memoranda of the plaintiff United States suing on behalf of the Environmental Protection Agency ("EPA"), plaintiff-intervenor the Attorney General of New York State suing on behalf of the N.Y.S. Department of Health (the "DOH") and defendant New York City (the "City").

In sum, the City opposed intervention because it claims to act as *parens patria* for the intervenors. The DOH does not oppose intervention but attacks the legal sufficiency of the proposed intervenors' answer on the grounds of statute of limitations and that it has only made a ministerial decision.. Finally, the EPA opposes intervention on the principal grounds that it is performing only ministerial acts not subject to environmental review but also repeats the statute of limitations argument.

1. In determining this action, the District Court must make an independent determination of what public health requires in the Croton watershed.

The EPA has invoked the jurisdiction of this 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 forum. That section provides in pertinent part:

> The court may enter, in an action brought under this subsection, <u>such judgment as protection of public health may require</u>, 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)

This is sharp contrast to the normally limited power of Courts when dealing with administrative determinations in enforcement proceedings. Contrast the statutory injunction that the Court enter "such judgment as protection of public health may require" with the enforcement provisions of the Clean Air Act contained in 42 U.S.C. § 7524:

> " (b) Civil actions
>
> "The Administrator may commence a civil action to assess and recover any civil penalty under subsection (a) of this section, section 7545(d) of this title, or section 7547(d) of this title. Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred or in

> which the defendant resides or has the Administrator's principal place of business, and the court shall have jurisdiction to assess a civil penalty. In determining the amount of any civil penalty to be assessed under this subsection, the court shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require. In any such action, subpoenas for witnesses who are required to attend a district court in any district may run into any other district."(Emphasis supplied)

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).

> "It is a 'familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980); United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981). Moreover, when a court finds the language of a statute to be clear and unambiguous, 'judicial inquiry is complete, except in 'rare and exceptional circumstances.' Garcia v. United States, 469 U.S. 70, , 83 L. Ed. 2d 472, 105 S. Ct. 479, 53 U.S.L.W. 4016, 4017 (1984) (quoting TVA v. Hill, 437 U.S. 153, 187 n.22, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978)); Ex Parte Collett, 337 U.S. 55, 61, 93 L. Ed. 1207, 69 S. Ct. 944 (1949); Gramaglia v. United States, 766 F.2d 88, slip op. 4843, 4850 (2d Cir. 1985); Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (5th Cir. 1985). 'Only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language.' Garcia, 53 U.S.L.W. at 4017." 768 F.2d 57 at 62.

By stating that the court may enter such order as the protection of public health may require, Congress has plainly manifested that it enforcing the Pure Water Act, the 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.

2. The governmental parties have ignored the variety of interests represented by the intervenors. The issue on this application is whether they have asserted interests which support justiciable claims. A determination of the merits of their claims must await litigation.

The governmental parties have treated this application as an intervention by a single entity: the Croton Watershed Clean Water Coalition ("CWCWC"). As a matter of fact, individual groups of intervenors advance five distinct interests, each of which individually are sufficient to base justiciable claims. They include:

1) Water rate payers for water supplied by the City of New York and who shall be forced to pay exorbitant, unjustified water rates if filtration is ordered by this Court. The costs of filtration are staggering.

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) Consumers of water supplied from the Croton watershed who shall suffer adverse health effects if the Croton water is filtered while development in the watershed continues unfettered;

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.

Intervenor CWCWC is an organization acting on behalf of members interested in the controversy in the manner indicated. Sierra Club v. Morton, 405 U.S. 727 (1972); Friends of

Earth v. Conrail, 768 F.2d 57 (2d Cir. 1985). The individual intervenors each represent cognizable justiciable interests.[1] With the exception of the City's *parens patria* argument (see Point 5, infra), there is no serious attempt to gainsay the status of the individual intervenors.

In its opposing memorandum, the EPA correctly states the applicable principle:

> "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. ... "Willaims & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd., 940 F.2d 72, 75 (D.C. Cir. 1988). (Emphasis supplied)

The issue resolves to this: are the interests of the intervenors justiciable. It is submitted that there can be argument but that they are. In fact they are so justiciable, that they could support separate actions by the intervenors. However, that would fly in the face of judicial economy which is one of the prime reasons for intervention in the first place. Wilder v. Bernstein, 965 F.2d 1196, 1202 (2d Cir. 1992).

> "*** [I]n addition to permitting non-participants to protect their implicated interests, intervention furthers the goals of efficiency and uniformity. To forbid the shifting of attorneys' fees to intervenors, who could otherwise bring a separate action later as plaintiffs alleging the same civil rights violations--even, as in this case, those that persist after entry of a proposed consent settlement--defeats the goal of judicial economy ***" 965 F.2d at 1202.

[1] The authorities are cited on page initial memorandum of Points and Authorities dated June 16, 1996. (Memo I). They include 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).

3. The decisions of both the plaintiff EPA and intervenor State were based upon a determination by the defendant City that had been not subjected to an environmental Review. No timely notice of the City's determination or the decisions of the plaintiffs was given to defendant-intervenors.

The enactment of the National Environmental Policy Act and its state and local equivalents, manifested a legislative intent that important environmental decisions be made in an open process in which the public could participate. While the EPA and the State vigorously contest whether these statutes govern their own actions, there can be no disputing this simple fact: given the importance of the decision not to seek filtration avoidance to the a variety of interested citizens, the City's own regulations required the commencement of a stringent environmental review pursuant to the provisions of the City's own

> "The initial determination to be made under SEQRA and CEQR is whether an EIS is required, which in turn depends on whether an action may or will not have a significant effect on the environment (ECL 8-0109 [2]; CEQR 7 [a]). In making this initial environmental analysis, the lead agencies must study the same areas of environmental impacts as would be contained in an EIS, including both the short-term and long-term effects (ECL 8-0109 [2] [b]) n5 as well as the primary and secondary effects (CEQR 1 [g]) of an action on the environment. The threshold at which the requirement that an EIS be prepared is triggered is relatively low: it need only be demonstrated that the action may have a significant effect on the environment (see, Oak Beach Inn Corp. v Harris, 108 AD2d 796, 797; H.O.M.E.S. v New York State Urban Dev. Corp., 69 AD2d 222, 232, supra)". Chinese Staff and Workers Association et al., v City of New York et al., 68 N.Y.2d 359, 364-365

It is uncontested that the Croton System meets the criteria for filtration avoidance. The decision has enormous environmental and financial implications for each of the intervenors. Yet no EIS was prepared and neither did any of the governmental agencies involved take the slightest steps to inform the intervenors and other stakeholders in the watershed that the Filtration Stipulation had been made. Indeed, the stipulation was kept a secret from the public until well after the four month period for any review of that determination. See Affidavit of Karen Argenti, dated July 16, 1997.

In appears from Ms. Argenti's affidavit that the Jerome Park Community first became aware of the plans to build a filtration plant at Jerome Park in 1990. After protest were made to then Commissioner Albert Appleton about those plans, he stated he work with the Westchester Community to avoid the construction and asked the residents of the Community to withhold their organizing efforts.. They complied with his request, but the result was an effort to avoid filtration but the secret Filtration Stipulation between the City and State. They did not become aware of it for nearly a year. (Karen Argenti, p.4, par. 14)

The City and State having closely held the stipulation among themselves, it then became the basis for the EPA's decision to order filtration of the Croton water supply. That determination appears as Exhibit B of the EPA's memorandum. Exhibit B recites the receipt by the EPA of the Filtration Stipulation and then states:

> "Based on the representations in the Stipulation and the City's failure to demonstrate to EPA that the Croton Supply complies with the avoidance criteria of the SWTR, as well as to ensure that there is no uncertainty as to the City's obligation to provide filtration and disinfection to the Croton Supply under the SDWA, I determine ..." EPA Memorandum, Exhibit B, p. 1.

According to the EPA's complaint in this action, it gave notice to the City of its determination and granted the City the right to request a hearing within fourteen days but that it failed to do so. (EPA Complaint, p. 8-9. par. 25.)

Totally missing from the Filtration Stipulation (Exhibit A), the EPA determination (Exhibit B) and the pleadings in this case is any allegation that the Croton water supply does not <u>in fact</u> meet filtration avoidance requirements. All the evidence indicates that it does <u>in fact</u> meet those criteria.

Statute of limitations

4. The issues of filtration and watershed protection are inextricably linked to the failure of the City and State to control rampant development in the watershed and enforce sanitary codes.

Whatever the claims of the governmental parties, intervenors assert that as a matter of fact the failure of the City and State to pursue filtration avoidance was a failure of governmental will to do what interests of public health demanded. Filtration is a dangerous placebo. Improperly maintained filtration plants concentrate contaminants and pause grave health risks. Those familiar with the City's maintenance record – not only in the watershed, but in water pipes, the streets and the schools of New York City – can only have the gravest doubts about the ability of the City to safely maintain such a delicate system.

That filtration is in fact inextricably linked to development is demonstrated by the Catskill-Delaware compact entered into by the City, State and EPA. That agreement provides strict controls of development as one of the prices the City and State must pay for filtration avoidance in the Catskill-Delaware system.

Query: If there is no direct relationship, between development and filtration avoidance, why were stringent limitations on development negotiated as a part of the Catskill-Delaware agreement?

Query: If filtration is such an unadulterated boon to public health, why negotiate a filtration avoidance agreement at all?

What the queries demonstrate is that filtration avoidance is a legitimate public health goal and that failure to control development is a principal cause of the conditions that in the future may require filtration.

In addition, the relationship is demonstrated by the very regulations that the EPA purports to enforce. See 40 C.F.R. § 141.71 (b)(2).

5. The City is not *parens patria* for intervenors because misconduct by the City lies at the heart of this controversy. In addition, in the variety of interests represented by intervenors, some of those interests asserted are by non-residents of the City.

In its Memorandum, the City argues that the intervenors rights were adequately represented by the City as *parens patria* of the intervenors.

At the outset, it is common sense that City can not be parens patria for the residents of Westchester and Putnam Counties who claim damage to their environment because of the City's failure to protect the watershed.

City is estopped from representing interests of Intervenors.

The crux of this case is a stipulation entered into on October 30, 1992 between the City and the State DOH.("Filtration Stipulation").[2] That stipulation provided in paragraph 10 (pp. 5-6) that:

> "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, as detailed in paragraph 8 of this Stipulation."

A fair reading of all the papers submitted thus far leads to the inescapable conclusion that the Filtration Stipulation lies at the heart of this controversy. The City is estopped <u>in this action</u> from challenging the stipulation's terms and conditions. Intervenors maintain that this stipulation was improper and illegal in that it was clearly subject to the provisions of both SEQRA and CEQR. It was in fact hidden from the public and not properly promulgated.

Because of the stipulation is at the heart of the issues before the court, and because the City is constrained in attacking its validity, it goes without saying that the City can not

[2] The stipulation appears as Exhibit A of the both the EPA's Memorandum of Law and the State's Complaint.

adequately represent the interests of the any of the intervenors.

The Courts have recognized that there are many occasions where the claim of *parens patria* can not be used to deny justifiable intervention by parties who interests do not coincide with the government body. COMMACK ANGELICA NRDCXXXXXXX

In addition, wrongful conduct by the City in not exercising its legitimate powers to protect the watershed similarly prevents the City from representing their interests. Finally, taxpayers suits – against the City by its taxpayers – are a traditional method of protecting the rights of the taxpayers against the City and that standing has been recognized in federal court. United States v. City of New York *et al* (Maloney), 972 F.2d 464 (2d Cir. 1992).

6. The failure of the City, State and EPA to protect adequately the Croton Watershed from unfettered development and the refusal to undertake a program of filtration avoidance have a "disparate impact" on persons of color and implicate both Title VI and 42 U.S.C. § 1983.

At first blush, intervenors' claim that the decision to filtrate the Croton water supply constitutes environmental racism is counter-intuitive. It's only when the total controversy is examined that the environmental "injustice" aspect of the filtration decision emerges. Put in starkest terms: development in the watershed has caused the human waste of predominantly white communities to degrade the water supply of consumers who are predominantly people of color while governmental institutions dominated by a white governmental power structure refuses to exercise its power to stop it. It is clearly a "disparate impact."

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (42 USC §2000d)"

While disparate impacts of governmental policies on racial minorities do not in themselves create justiciable rights, they can however be evidence of an actionable denial of

due protection of the law.

Guardians Associations v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983); New York Urban League, Inc. v. New York, 71 F.3d 1031(2d Cir. 1995). Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984), Campaign For Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565, 1995 WL 356855, *8 (New York Ct. App.) (1995). Scelsa v. City University of New York, 806 F. Supp. 1126, 1139 (S.D.N.Y. 1992)..

Where a disparate impact standard is applied, if a party demonstrates that a facially neutral practice or policy produces a racially disproportionate effect or impact, the burden shifts to the defendant to show a legitimate non-discriminatory justification or business necessity for the controversial action. If the defendant succeeds, the plaintiff may still prove its case by showing that other non-discriminatory means to achieve the same purpose are available to the defendants. Scelsa v. City University of New York, supra, 806 F. Supp. at 1139.

In Guardians, the Supreme Court held that while disparate impact did not create any redressable rights in itself, regulations by administrative agencies might do so. In the instant matter, the EPA, while not adopting Title VI regulations per se, has in fact, since 1991 made "environmental justice" an object of all it established on November 6, 1992 an Office of Environmental Equity with "a specific directive to deal with environmental impacts affecting people of color and low-income communities." [3] Moreover, the EPA site on the World Wide Web of the Internet has several links to documents proclaiming policies and programs of environmental justice.[4]

Intervenors do not seek any affirmative relief such as a preliminary injunction at this time. It is submitted that given the stated environmental justice policies of the EPA as well as the provisions of Title VI and 42 U.S.C. § 1983, the claim of environmental racism is at least justiciable and that intervenors ought to be afforded an opportunity to move forward on their claim. New York Urban League, Inc. v. New York, supra at 1040.

[3] EPA: Environmental Justice Initiatives, 1993, EPA 2000-R-93-001 (February 1 994), p. 1.
[4] http://www.epa.gov/

7. Given the provisions of Title VI, when this court determines the public health interests at issue, it ought to include in that determination an examination of the environmental justice impact of filtration.

For all reason discussed in Point 6 above, it is submitted that when the Court makes its determination of what "protection of public health may require," it ought take into account the interests of environmental justice and the disparate impact of filtration and unfettered development of the watershed on people of color.

CONCLUSION

The application of the defendant-intervenors is timely made, demonstrates justiciable interests that are not adequately represented by the current parties and ought to be granted in all respects.

Dated: New York, New York
July 17, 1997

Respectfully submitted,

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