UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, 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,	CV 97-2154 **(NG) (SG)**

INTERVENORS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	CV 97-2154 **(NG)(SG)**
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,	:	

INTERVENORS' REPLY MEMORANDUM

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Introduction

This memorandum is submitted in reply to the memorandum of the City of New York dated May 27, 1998 (served May 28th) and the United States (EPA) dated May 28, 1998 (and received May 29, 1998) submitted in opposition to Intervenors' motion for reconsideration of this Court's Memorandum and Order entered May 6, 1998 (the "Court's Memorandum"). Because of the limited issues raised by the governmental parties, Intervenors will respond without needless differentiated points.

ARGUMENT

Responses of governmental parties.

The EPA only raises an issue of whether the motion for reconsideration is appropriate and does not discuss the merits of the intervenors' arguments. The City also attacks the appropriateness of the motion but does discuss to a limited extent the merits of the point advanced by Intervenors: that the Court erred in its determination that water rate payers lacked standing to intervene in this action.[1]

Manifest error

Each of the government parties cites to the court a few district court decisions that outline the stringent requirements for a motion to reconsider. The intervenors have no quarrel with those decisions and recognize the burden they face in convincing the Court to reconsider. However, it is intervenors' contention that by holding that water rate payers lacked sufficient interest to support intervention as of right, the Court committed an error that can be properly described as "manifest" when considered in light of the *NYPIRG v. Regents*, supra, n.1 which is authoritative precedent in the Second Circuit.

Interest of water rate payers

The Court's holding on the insufficient interest of water rate payers is not the only difference of view between Intervenors and the Court. Intervenors believe that the Court's constrained reading of its power pursuant to 42 U.S.C. § 300g-3(b) (Court's Memorandum, p. 12) is a matter appropriate for appellate review. However, that matter was thoroughly briefed and argued before the Court. That was not the case with the standing of water rate payers.

In briefing for the principal motion, the emphasis by the governmental parties was a

[1] The City seems to argue that the Court's decision is not a judgment and therefore FRCP Rule 59 has no application. However, the rule is quite clear that the denial of intervention 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.*

claim that the City of New York was acting *parens patria* for the intervenors. The very distinction made by the Court, that standing to sue is not the same as standing to intervene was not briefed and was not the subject of colloquy or question on oral argument of the motions. *NYPIRG v. Regents,* supra, was cited by the Intervenors only on the issue of the City's claim of *parens patria*.[2] The clear distinction drawn by the Court between standing to sue and standing to intervene was not drawn by the governmental parties in their memorandum. The interest of taxpayers and water rate payers to seek relief in federal court seemed beyond dispute in this Circuit. See *United States v. City of New York et al (Maloney),* 972 F.2d 464 (2d Cir. 1992) cited by Intervenors in both its brief in chief and its reply brief for the motion to intervene.

Intervenors' interests not contingent

As the City notes in its memorandum, the Intervenors did cite *Herdman v. Town of Angelica,* 163 F.R.D. 180 (W.D. N.Y. 1995) in their principal brief. However, it was cited on the issue of timeliness and not for its digression on a case that was only cited by the Court in its memorandum after briefing had closed and oral argument conducted.

Similarly, the City Memo notes the Court's citation of *U.S. v. 27.09 Acres of Land*, 737 F. Supp. 277, 288-289 (S.D.N.Y. 1990) (Memorandum, p. 9). However, that discussion by the Court resolves to the heart of the manifest legal *and factual error* the Court has made. This Court said in pertinent part:

> "… That is, this 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)

As to the issue of siting, the 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

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British Law Insurance Co., 426 F.2d 186, 189 (2 Cir. 1970); *Nuesse v. Camp*, 128 U.S. App. D.C. 172, 385 F.2d 694, 699 n. 2 (D.C. Cir. 1967).

rate payers. Whatever current costs will also be borne by the water rate payers. Yet, in another sense, it may be correct to say that the issue of who pays will not be decided *by this action*, but only because it was decided before this action was even commenced.

The City attempts to categorize water rate payers as "consumers." However, the water rate is a tax set by a governmental body and collected as a tax. There are many millions of water consumers who do not pay water rate taxes. As a general rule, it is paid only by owners of real estate.[3] It is also "taxation without representation" in that rate payers have no voice in selecting the New York City officials who set the water rate except in so far as some (but not all) are residents of the City.

The purpose of the complaint filed by the EPA was to collect millions of dollars in fines and enforce the construction of a billion-dollar filtration plant that will cost as much as one hundred million dollars annually to operate. The people who will pay those fines, finance the construction of the plant and pay to operate it are the water rate payers – and no one else. Neither the City nor any other party has disputed that fact. Noticeably absent from the City's answering memorandum is any discussion of the simple fact that by operation of law, the water rate payers will in fact be financially responsible for all the expenditures resulting from the consent order. N.Y.S. Public Authorities Law § 1045-j. Moreover, this is one of those pleaded allegations that in the context of this motion must be regarded as true.[4] Not one

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[3] N.Y. Public Authorties Law §1045-j(5) provides in pertinent part:

> 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. …"

[4] The proposed answer served with the original notice of motion to intervene and the restated proposed answer served with the intervenors' reply papers each contained the following allegation:

> "5. Each of the Defendants-Intervenors whose names and addresses appear on Schedule ONE hereof, has an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, as follows:

word has been written or spoken denying the truth of that allegation other than the Court's unsupported statement in its Memorandum.

The Intervenors submit that it would be manifest error to hold the interests of the water rate taxpayers less vital than the interests of the pharmacists in *NYPIRG v. Regents.* The Intervenors further submit that *NYPIRG* is controlling precedent in this Circuit. There is no indication in its decision that the Court considered *NYPIRG* when it held that the water rate payers lacked sufficient interest to intervene as of right.

Adequacy of representation: the City's inability to defend action

In its memorandum (p. 8) the City argues that to recognize the financial interests of the water rate payers is to "abandon the very concept of civil litigation between interested parties." The error of this argument is threefold. First it applies a justiciability standard to intervention that this Court has itself found to be inappropriate (Court Memorandum, p.6-7). Second, it ignores the clear precedent in this Circuit for action by taxpayers who are in analogous situation with water rate payers See *United States v. City of New York et al (Maloney),* supra. Finally, it totally elides the distinct objective of the Intervenors which is to avoid filtration.

The criteria for intervention as of right are set forth in FRCP 24(a)(2) which provides:

> "(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties*." (Emphasis supplied)

The issue is whether the rights of the water rate payers in avoiding filtration can be adequately represented by the City in this case. Omitted from the City Memorandum is a discussion of the undisputed fact that the crux of this case is a stipulation to filtrate entered into on October 30, 1992 between the City and the N.Y.S. State Department of

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a) Dart Westphal, Jesse Davidson, David Ferguson, Darnley E. Beckles, Jr., Karen Argenti and Tina Argenti are 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 (referred to hereinafter collectively as “rate payers”);"

Health ("Filtration Stipulation").[5] 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."

This stipulation was the basis of the determination that is the subject of the EPA complaint and is alleged in paragraph 23 of the complaint. It was annexed to the EPA's answering memorandum to the motion in chief. Thus by reason of the stipulation that lies at the heart of the complaint, the City is estopped from challenging the validity of what Intervenors allege is a clearly illegal covenant. As evidence of the City's compliance with this covenant, it is noted that the City never answered 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 Commissioner of January 13, 1963 adopting it violate the Safe Drinking Water Act.

The illegality of the agreement is 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 seems to be clearly not. Contrast the present situation with that described in *U.S. v. Brennan Postal Serv. v.. Brennan*, 579 F.2d 188, 1991 (2d Cir. 1978) where there was no question but that the unions that sought intervention shared the same litigation objectives as the Postal Service:

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b)

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

> "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)

In the instant case, its abundantly clear that the City does not share the litigation objectives of Intervenors and it has not "advanced all the appropriate arguments" for filtration avoidance in this litigation, including the illegality of its own stipulation.[6] Because its objectives are different, it can not adequately represent the interests of Intervenors. See *NYPIRG v. Regents*, supra, at 352; *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); *Edwards v. City of Houston*, 78 F.3d 983, 1005-1006 (5th Cir. 1996).

The City agreed to filter the Croton water supply because despite the fact the water met current quality standards its lack of the "political will" made it unlikely that it would be able to meet water quality standards in the future. Affirmation of John C. Klotz dated 6/11/97, p. 4, par. 14. See also Kennedy, A Culture of Mismanagement, *15 Pace Envtl. L. Rev. 233* (Winter, 1997). It is not just that the water rate payers bear the burden of the City's lack of will to employ its own powers. Neither is it just for each of the interests represented by CWCWC, HFDC COALITION and the individual Intervenors.

[6] That illegality is clearly pleaded in the Intervenors' proposed answer and ought to be presumed for the purposes of this application. (Court Memorandum, p. 6; *Sackman v. Ligget Grp., Inc*., 167 F.R.D. 6, 20 (E.D.N.Y. 1996).

Relief.

Finally, Intervenors commend to the Court one of the cases cited by the City in its memorandum: *Atlantic States Legal Foundation v. Karg Brothers*, 841 F.Supp. 51 (N.D.N.Y. 1993). In that case, Judge McAvoy of the Northern District of New York, granted a motion to reconsider and upon deeper reflection granted extensive relief he had previously denied.

CONCLUSION

Because of the demonstrated interests of Intervenors as supported by current judicial authority in the Second Circuit, the Court ought reconsider its Order of May 4, 1998 and grant the motion to intervene.

Dated: New York, New York
June 5, 1998

Respectfully submitted,

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