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April 16, 1999

CITY PLANNING COMMISSION
22 Reade Street
New York, NY 10007-1216

Re: C 990237 PSX
CEQR No. 98DEP027X
Calendar Item #3; April 7, 1999
Extended Remarks

Dear Sirs and Mesdames:

On behalf the Croton Watershed Clean Water Coalition (CWCWC), I submit the following extended remarks of my testimony of April 7, 1999 in the above referenced items. The CWCWC's president, Dr. Marian Rose, has also submitted remarks and these remarks may be read as a supplement to hers.

1. Introduction.

The City Planning Commission (the "Commission") is being asked to approve the selection by the N.Y.C. Department of Environmental Protection ("DEP") of the Mosholu Public Golf Course in Van Cortland Park as the site for an industrial facility to filter drinking water from the Croton water supply (the "Croton") of the New York City water system. Water from the Croton currently meets all federal standards for drinking water purity and safety.

The CWCWC opposes the siting of the plant in Van Cortland Park and maintains that the facility is not needed. A vigorous program of watershed protection and enhancement would assure the safety of the Croton for generations to come. A widely praised program for filtration avoidance has been adopted for the two other constituent supplies of the NYC water system: the Catskill and the Delaware. The same regulatory regime applies to all three constituents of the water supply. The principal distinction between the Catskill-Delaware and the Croton systems is a studied determination to abandon the Croton to pressures of development.

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The CWCWC is presently litigating the legality of the Croton filtration determination in both the enforcement action brought by the U.S. Environmental Protection Agency ("EPA") and an action to mandate a "dual track" approach to filtration that it commenced in the U.S. District Court for the Southern District of New York. It's motion to intervene in the EPA action was denied and is currently on appeal to the U.S. Court of Appeals for the Second Circuit. The action in the Southern District is *sub judice.*[1]

2. The Croton determination: Urban Sprawl and the failure of "political will."

One myth that is perpetrated by the DEP and the federal government is that N.Y. City is being forced to filter the Croton because it "failed" to apply for a filtration avoidance determination.

Each of the City Environmental Quality Review law ("CERQ"), the State Environmental Quality Review Act ("SEQRA"), the State Sanitary Code ("SSC"), Safe Water Drinking Act ("SDWA") and the EPA's Surface Water Treatment Rule ("SWTR") require notice to the public of important environmental decisions and the affording to the public of an opportunity to participate in the regulatory process. In the case of the decision to filter the Croton, no such notice was given and no such participation allowed.

To the contrary, the decision to build a filtration was taken in secret and violated applicable laws and regulations. The determination to filter the Croton was, and is, primarily a judgment that the City either lacked the political will to regulate, or was a culpable participant in, rampant development in the Croton watershed that is urban sprawl at its worst.

For all intents and purposes, the City's decision to prepare to filter the Croton was made in November 1991, when the 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:

[1] Information on these law suits may be found on my web page. Included, among other things, are factual affidavits of Dr. Paul Mankiewicz and community activist Karen Argenti, our briefs on appeal to the Second Circuit and our own plenary complaint in the Southern District. The address is http://www.walrus.com/~jklotz/croton.htm

> " . . . 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)

There is no evidence that this Commission played any role in this monstrous decision to abandon the Croton. Nonetheless, in April 1992, the City prepared a contract for the design of a filtration plant at the Jerome Park Reservoir ("Jerome Park").[2] That ought to have trigged ULURP and CERQ reviews. None was conducted at that point in time.

In October 1992, the DEP and the State entered into a stipulation that called for the construction of the Jerome Park filtration plant. On January 13, 1993 – one week before a new national administration was inaugurated – the EPA Region 2 Administrator adopted the stipulation as a formal determination pursuant to the SWTR. Because New York State lacked primary enforcement authority in the watershed at that time, federal action was required.

Later in 1993, when the DEP finally attempted an environmental review of the plan to build a filtration plant at Jerome Park, it withdrew the proposal because of both public clamor and a faulty engineering.

Now it proposes a plant for Van Cortland Park. This time, each of the three Community Boards adjacent to the site, as well as the Bronx Borough Board, have unanimously opposed the present proposal.

[2] The affidavit by Ms. Argenti which details many of these facts may be found on my web page at: http://www.walrus.com/~jklotz/karen.htm

3. The responsibilities of the City Planning Commission.

The Commission is not a detached adjudicatory body in this matter. The issues at bar go directly to the specific functions and responsibilities thrust upon the Commission by the City Charter.

The Charter charges the Commission with the responsibility for "the conduct of planning relating to the orderly growth, improvement and future development of the city, including adequate and appropriate resources for the housing, business, industry, transportation, distribution, recreation, culture, comfort, convenience, health and welfare of its population." City Charter, §192(d). In addition the Commission has the specific obligation to oversee "implementation of laws that require environmental reviews of actions taken by the city." City Charter, §192(e)

The claim of need in the pending matters arises from a consent decree voluntarily entered into by the City. That consent decree was entered in action whose foundation was a 1992 stipulation by the DEP and N.Y. State that the City would filter the Croton supply. The CWCWC maintains that the City's stipulation to filter the Croton and the resultant federal determination based upon the stipulation was in direct, near contemptuous, disregard of specific requirements for public participation through notice of opportunity for a hearing required by the CEQR, SEQRA, SSC, SDWA and the SWTR.

This decision to filter the Croton was as important a planning determination as has been made in the City over the past several decades. It is not only that urban sprawl threatens water quality. Sprawl development denies to central cities needed development opportunities. Sprawl development may have denied the City of New York the tax benefits of the headquarter developments for IBM and Swiss Re among others, as they fled to areas bordering watershed lands. In the watershed, sprawl creates additional problems of traffic congestion and air pollution. Almost all urban planners now realize that limitation of sprawl is central to any sensible urban plan. Yet, in 1991, the DEP decided without any reference to this Commission that they could no longer fight to protect its watershed and instead, decided to abandon the Croton.

In 1991, the DEP decided that the City lacked the "political will" to discharge its responsibilities to its citizens to protect the Croton. The City Planning Commission played no role in that decision. Neither is there any record of its participation in the 1992 City-State stipulation nor 1993 EPA

determination.

The CWCWC maintains that the procedures used in determining that the Croton water supply be filtered were deeply flawed. As a matter of fact the decision to filter the Croton water supply was not a "determination" at all. It was a deal cooked-up by the regulators who found it impossible to publicly defend their plans in the open forums required by the City, State and federal law. There were no findings or admissions of fact. There was no application of law and regulations. The procedure was furtive, secretive and mendacious.

4. The Consent Decree.

The DEP insists that the provisions of the Consent Decree are its justification of "need" as required by applicable regulations.

The Consent Decree makes specific allowance for consensual modifications and excuses the City for failures to meet milestones caused by *force majeur* – such as legal actions. The Decree also specifically provides for the institution and completion of ULURP proceedings. Given the specific notice of, and provision for, ULURP proceedings, it is clearly within the province of the City Planning Commission to address, and exercise, its responsibilities pursuant to ULURP.

There has never been a determination that the City is liable for fines, simply an agreement by the City to perform certain work in lieu of fines. The enforcement statute which allowed the EPA to sue the City specifically grants the court considerable leeway on the issues of fines.[3] The statute provides:

> "The court may enter, in an action brought under this sub-section, 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)

There is nothing in this statute that would compel any court to fine the City for any violation. The DEP's prediction of catastrophic fines is not supported by the law.

[3] 42 U.S.C. § 300g-3(b)

Each member of the Commission has received from Dr. Rose a copy of video produced on behalf of CWCWC dealing with the issue of filtration. It runs about 28 minutes. I ask that when the members view it, they take particular note of the actions of the water authority in Massachusetts which has not supinely rolled over to the EPA but is insisting on its rights, and the rights of the consumers of its water, to pursue filtration avoidance. Please note that by most measures, Croton water quality equals or exceeds that in Massachusetts. Massachusetts water exceeds the water quality of most filtered systems.

In opposing the mandates of the EPA, are the authorities in Massachusetts acting irresponsibility, or are they simply fulfilling their obligation the public which both they and the EPA are expected to serve?

The provisions of the Consent Decree were negotiated in private with any representative of the public being excluded. Moreover, applications to intervene by the CWCWC, the Town of Yorktown and the City of Yonkers were denied.

By long precedent, the denial of the intervention applications was not a determination of the proposed intervenors' claims. The Consent Decree, therefore, has no preclusive effect on those claims. It is not res judicata and does not collateral estop the CWCWC from making its claims here, or in any other forum.

The CWCWC has both filed its own action and appealed the denial of its intervention application. Thus, to a significant degree, the Consent Decree is not yet a "final determination."

Finally, in her decision approving the Consent Decree (without a public hearing), the judge specifically noted the right of any party to seek modification pursuant to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure. That Rule provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. . . . [T]he court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment

> should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . ."

The CWCWC submits that it is the obligation of the Commission to discharge its duties under ULURP by applying sound planning and environmental principles. If it does so, it need not fear the wrath of any judge – or bureaucrat.

5. The EPA's own standards mandate a "hard look" at the need for filtration

The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act ("NEPA"), compiled a list of the forty most asked questions in a memorandum to agencies for the information of relevant officials. In order efficiently to respond to public inquiries this memorandum was reprinted in the Federal Register at 46 Fed. Reg. 18026 (1981). It should be noted that the NEPA is widely regarded as a less stringent review statute than either SEQRA or CERQ.

Of particular relevance to the issue of whether the consent decree bars consideration of a filtration avoidance alternative for the Croton watershed is the following frequently asked question and its response:

> "2b. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?
>
> > "A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a)."

Under the EPA's own guidelines, even if the law did require filtration, a hard look at a no filtration option is required.

6. Conclusion.

The Commission is charged by the Charter with specific responsibilities for planning for the orderly growth of the City and overseeing the implementation of laws that require environmental reviews of actions taken by the City. We only ask that it discharge those responsibilities now.

Until now, the Commission, like the public, has been denied an affirmative role in determining the fate of the watershed and the future degradation of the City through urban sprawl. By law, this is your opportunity – and obligation – to deal with these issues. What you do will be writ large for generations of New Yorkers yet unborn.

Respectfully submitted,

JOHN C. KLOTZ
Attorney for CWCWC

cc N.Y.C. DEP