

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	:	Index No. 99 Civ 0222 (KMW)
CROTON WATERSHED CLEAN WATER	:	
COALITION, INC. <i>et al</i> ,	:	
	:	<b>ANSWERING AFFIDAVIT</b>
Plaintiffs,	:	<b>IN OPPOSITION TO</b>
	:	<b>MOTION TO CHANGE VENUE</b>
-against-	:	
	:	
CAROL BROWNER, <i>et al</i> ,	:	
	:	
Defendants,	:	
-----X	:	

JOHN C. KLOTZ, affirms the truth of the following statements under penalties of perjury:

1. I am the attorney for plaintiffs herein. This affidavit is submitted in opposition to the motions to change venue brought on by defendants Carol Browner (sued as Administrator of the United States Environmental Protection Agency, hereinafter "EPA") and Joel A. Miele Sr, (sued as Commissioner Of The New York City Department of Environmental Protection, hereinafter the "City;"

*Nature of action.*

2. This action challenges the joint decision of the City, State an federal regulators to require the building of a chemical filtration plant for Croton water supply of the New York City water system.<sup>1</sup>

3. The Complaint charges EPA, New York State Department of Health ("the "State") and the New York City Department of Environmental Protection ("NYC DEP") with continuing violations of the Safe Drinking Water Act (the "SDWA") and the Surface Water Treatment Rule (the "SWTR") promulgated by the EPA under Section 1412 of the Act, 42 U.S.C. § 300g-1, and codified in 40 C.F.R. §§ 141.70 -141.75. The action is a "citizen suit" brought pursuant to the provisions of 42 U.S.C. § 300j-8.

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<sup>1</sup> A copy of the Complaint is submitted herewith. Annexed to the complaint as "Exhibit A" is a stipulation dated October 30, 1992 executed by the NYC-DEP and the State in which the City agreed to build a filtration plant at the Jerome Park Reservoir to filter the Croton water supply. Annexed as to the Complaint as "Exhibit B" is a letter dated January 13, 1993 denominated "Filtration Determination" from the EPA Regional Administrator addressed to the NYC-DEP. That letter purports to be a determination by the EPA that Croton water supply be filtered.

4. Plaintiff CROTON WATERSHED CLEAN WATER COALITION, INC. ("CWCWC"), is a membership corporation representing 51 organizations with more than 400,000 members who are interested in the Croton Watershed of the New York City water supply system. Additionally organizations representing as many as two million more individuals are seeking to join with the CWCWC in its work. That work is the preservation of the water quality of Croton Watershed in order to prevent needless, extravagantly expensive, potentially dangerous filtration of the Croton water supply.

5. The membership of CWCWC and its affiliate organizations includes consumers of drinking water from 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.

6. As set forth in Complaint, the decision of the EPA and the State to mandate filtration of drinking water from the Croton water supply is a matter of great environmental impact having serious consequences. (Complaint, par. 56, p. 11)

7. In their complaint, the plaintiffs ask that the Court (1) enjoin the filtration of water from the Croton System until such time as a filtration determination pursuant to the SDWA and the SWTR is made and (2) direct that a complete environmental review including an EIS be performed before any filtration determination is made. (Complaint, p. 15) What plaintiffs ultimately seek is a "dual track" approach allowing planning for filtration to proceed while a determined effort is made to protect the watershed so that filtration itself becomes unnecessary.

8. The complaint sets forth in some detail the process by which the purported filtration determination was made. According to both the SWDA and SWTR, public notice of opportunity for a hearing was required for any determination. Also, state and city laws require detailed environmental impact reviews of such decisions. (Complaint, paras. 21-30, pp. 4-6)

9. However, with out any compliance with the local laws, as well as the federal SDWA and SWTR, on October 30, 1992, the City and State stipulated to filter the Croton and the City agreed to not to oppose filtration in any resulting litigation. Then, on January 13, 1993, one week before President Clinton was inaugurated, the stipulation was adopted as a SWTR determination by the Regional Director of the EPA. (Complaint, par. 38, p. 8)

*No notice to the public or other interested parties*

10. The only notice of any opportunity for a public hearing of the EPA filtration determination was made to the City 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) (Complaint, par. 40)

11. Concurrently with its determination to order filtration of the Croton supply, the EPA issued a filtration avoidance determination for the Catskill-Delaware water supplies. On February 3, 1993, the EPA caused publication of a formal notice regarding its Catskill-Delaware determination. 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) (*New York Newsday*, February 3, 1993) (Complaint, par. 41)

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

*The Consent Decree*

13. Subsequent to the issuance of EPA filtration determination on January 13, 1993, officials of New York City and the DEP including the Mayor of New York and the DEP Commissioner assured the public including plaintiffs that New York City was still examining a filtration avoidance option for the Croton water supply.

14. On April 24, 1997 the United States on behalf of the EPA commenced an action in the U.S.

District Court for the Eastern District of N.Y, Index No. 97 CV 2154, against the City to enforce the EPA filtration determination (the "US action"). Shortly thereafter in May, 1997, the State joined the action as a plaintiff-intervenor and filed a complaint seeking to enforce the City-State filtration stipulation.

15. The plaintiffs herein applied to join the US action as intervening defendants and raise, inter alia, the issue of the illegality of the filtration decisions in June 1997. Among other things, they argued that judicial economy dictated a joint hearing of their claims.

16. On May 6, 1998, an order was entered in the US action denying the motion for intervention and specifically declining to reach the merits of plaintiffs claims.<sup>2</sup> Thereafter, on May 25, 1998, a consent decree agreed to among the EPA, the State and the City was lodged with the court in the US action and on November 27, 1998 the consent decree was entered.<sup>3</sup>

17. The consent decree mandates filtration of the Croton water supply and establishes mileposts for mandatory action by the City in meeting that goal. As a result of the consent decree, the City DEP has informed the public, including the plaintiffs, that filtration avoidance is no longer a true option for the Croton water supply and has circulated documents labeled Preliminary Draft Environmental Impact Statement (PDEIS) and Draft Environmental Impact Statement (DEIS) for the construction of a filtration plant. In violation of NEPA, SEQRA and CEQR, these documents do not fully describe and compare the "no action, no build" alternative or filtration avoidance for the Croton water supply with the preferred action. These alternatives are not studied in detail. No true comparison as required by the applicable law is made.

18. Upon entry of the consent decree, the docket of the US action in the Eastern District was marked closed. (See EXHIBIT ONE, annexed)

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<sup>2</sup> *United States v. New York City*, 179 F.R.D. 373 (S.D.N.Y. 1998).

<sup>3</sup> *United States v. New York City*, 30 F.Supp.2d 325 (S.D.N.Y. 1998).

*Motions to change venue.*

19. In their moving papers, neither the City nor the EPA make any showing of how the convenience of witnesses and parties would be served by a transfer to the Eastern District except for the consent decree being entered in that district. In its memorandum, the EPA makes the frank admission that:

"[M]oreover, given the proximity of the United States Courthouses for the Southern and Eastern Districts of New York, the convenience of parties and witnesses is a non-factor on this motion. Accordingly, the sole remaining inquiry in this action is whether the "interests of justice" require transfer of this case to the Eastern District of New York." (US Memorandum, p. 4)

20. The only documentation submitted by either moving party, is a copy of the Consent Decree annexed to the declaration of Assistant Corporation Counsel Inga Van Eysden. The only substantive fact discussed on the declaration is the statement that plaintiff's counsel "would not consent to change venue to the Eastern District of New York" (VAN EYSDEN, par. 2, p. 2). Omitted was any recitation of the second part of plaintiffs' position: that the proper procedure would be an application to Judge Gershon to protect her decree pursuant to the *All Writs Act*. If there is to be a determination that this action must be joined to the EPA's action in order to protect the consent decree, then that determination ought to be made by Judge Gershon.

21. For these reasons, and the legal principles set forth in plaintiffs' MEMORANDUM IN OPPOSITION TO MOTIONS TO CHANGE VENUE submitted herewith, plaintiffs request that the Court deny the motions for a transfer to the Eastern District.

Dated: New York, New York  
May 21, 1999

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JOHN C. KLOTZ (JK 4162)

**EXHIBIT ONE**

**E X T R A C T**

Docket as of January 4, 1999 7:49 pm

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Proceedings include all events.

1:97cv2154 United States of v. City of New York, et al

APPEAL

APPEAL

U.S. District Court  
New York Eastern (Brooklyn)

CIVIL DOCKET FOR CASE #: 97-CV-2154

United States of v. City of New York, et al

Filed: 04/24/97

Assigned to: Judge Nina Gershon

Referred to: Magistrate Steven M. Gold

Demand: \$0,000

Nature of Suit: 893

Lead Docket: None

Jurisdiction: US Plaintiff

Dkt# in other court: None

\* \* \*

11/27/98 --        Endorsed Consent Decree dtd 11/25/98 ( Signed by Judge Nina  
                         Gershon, dated: 11/25/98) See endorsement on document #86,  
                         page 64. (jag) [Edit date 12/03/98]

11/27/98 --        Case closed (ajl)

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