



Croton Watershed Clean Water Coalition



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OUR
WATER
OUR
FUTURE

CWCWC's Lawsuit Against DEP A Very Brief Explanatory Guide

(Based on the Brief prepared by James B. Bacon, Esq. and Michael F. Cole, Esq.)

Most of our readers will be aware that CWCWC is suing the NYC Department of Environmental Protection (DEP) for failure to carry out the mandates of SEQRA (the State Environmental Quality Review Act), and CEQR (the City Environmental Quality Review). The purpose of both SEQRA and CEQR is to include environmental considerations in an agency's decision-making process, and to mitigate significant adverse environmental impacts to the maximum extent practicable.



BY Marian Rose, PhD

Department.

The following is a skeleton summary of the two main points in our lawsuit.

Point #1:

CWCWC contends that DEP, as lead agency, pursuant to SEQRA, has a continuing duty to evaluate new information regarding drinking water treatment technology that could reasonably be expected to avoid or minimize the adverse environmental impacts of the lead agency's proposed action.

CWCWC's case is to be heard in the Supreme Court of the State of New York Appellate Division: Second

DEP's proposed action has serious environmental consequences. The

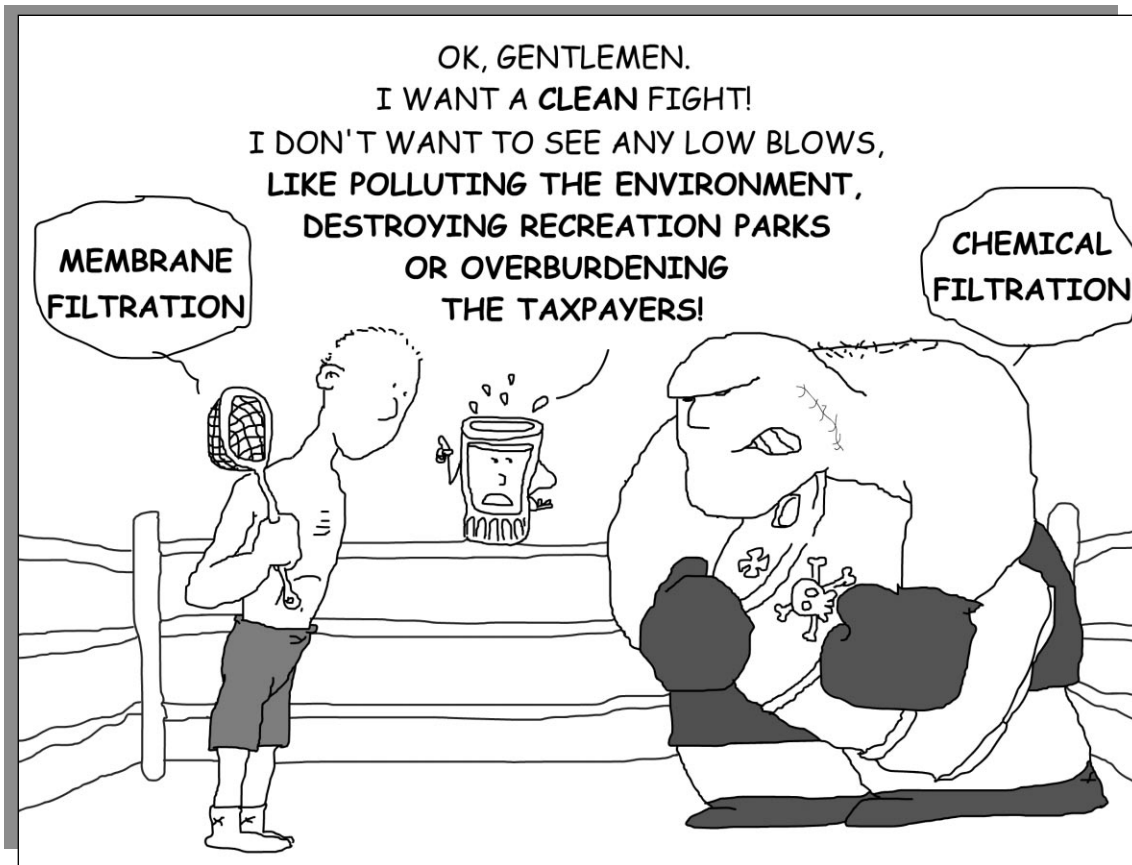


Illustration by Enrique Dura

water treatment includes Dissolved Air Flotation with Filtration (DAF/F) preceded by coagulation and flocculation and followed by UV application and further chemical disinfection. The treatment floor of the plant will cover an area of approximately 9 acres. DEP plans to build most of the plant underground. That will require the excavation of 1,250,000 cubic yards of dirt and rock. The dust and fumes from the construction work will expose the many thousands of residents in close proximity to the plant to increased risk of respiratory problems. As of 1997, asthma hospitalization and mortality rates for children in NYC has almost tripled compared with the rest of the country, with hospitalization and death rates highest in the Bronx. DEP has acknowledged that studies show a corresponding increase in death rates where particulate matter increases and that during the project's construction background particulate concentrations will double.

Also, the total of 11 acres needed for the entire plant will result in the loss of easily accessible and much-needed recreational areas for the elderly and the young.

The plant will use a very substantial amount of potentially hazardous chemicals, subjecting residents to the possibility of spills and air quality diminution. The excavation of the property, and the continuing supply of chemicals will significantly increase truck traffic in the densely populated area surrounding the project for the

foreseeable future.

DEP set in motion the process to pick DAF/F in 1995 when it commissioned an evaluation of treatment methods by Hazen and Sawyer, P.C. and Metcalf and Eddy of New York, Inc. (the Joint Venture). After evaluating four methodologies, the Joint Venture recommended DAF/F in 1997. Membrane filtration was one of the four methodologies tested by the Joint Venture that reported that it produced water that met DEP's water quality goals, despite the fact that it was used with no chemical pre-treatment and with only chlorine as a disinfectant. Membranes were also rated superior in operation, process, and site and environmental criteria. The Joint Venture concluded that membranes required a smaller footprint, used far fewer chemicals and had a lesser potential for contaminant breakthrough.

DEP chose DAF/F in 1999. At that time, membrane technology was relatively new, and continuity of supply was an issue, as well as the ability to treat large volumes of water. Cost was also an issue. CWCWC does not dispute the choice that DEP made in 1999.

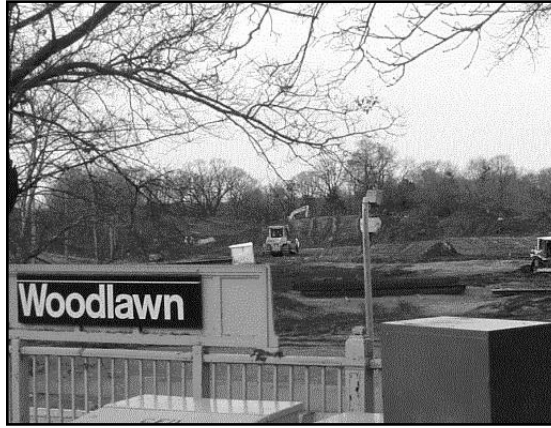
The plant will use a very substantial amount of potentially hazardous chemicals, subjecting residents to the possibility of spills and air quality diminution.

However, CWCWC objects to the fact that DEP did not monitor developments in membrane technology between its selection of DAF/F in 1999 and the publication of its Draft Supplemental Environmental Impact Statement (DSEIS) in 2003, particularly since DEP was on notice that membranes performed well in the pilot testing. In that time period, the use of membrane filtration expanded exponentially. As a result of stricter proposed federal rules governing pathogens and disinfection by-products, drinking water systems operators began to turn to membrane filtration as the method of choice to comply with the rule changes.

The membrane filtration suppliers multiplied, and the number of plants greatly increased. Worldwide, between 1999 and 2004, 336 membrane plants were placed



Old-Growth Trees Marked for Destruction in Van Cortlandt Park



Views of Destruction in Van Cortlandt Park

into operation with a total of more than 700 operating by 2004. As a result of competition, non-proprietary systems and parts standardization started to develop; costs went down dramatically, until membrane filtration became at least comparable and, in many instances cheaper than conventional filtration. Membrane filtration required less electrical power, used fewer chemicals, and had a greater margin of safety since it would achieve greater reduction of pathogens of concern such as cryptosporidium and giardia.

As already noted, CWCWC's case is to be heard in the Second Department of the Appellate Division. Interestingly, the controlling case law in that Department clearly imposes upon a lead agency a continuing duty to assess new information and changed circumstances affecting the environmental impacts of the proposed action and to consider that information or those circumstances in the Environmental Impact Statement (EIS), or in a supplement to it, if necessary.

SEQRA requires that the information must be newly discovered; it must be relevant; it must be important; and it must be reliable. CWCWC clearly shows that all these conditions are being fully met and consequently, the criteria for requiring that DEP do a new supplement to the EIS are being fulfilled.

The last element in the test is whether DEP evaluated the new information. If it did not do so, did DEP make a reasoned determination not to do so, and did it document that reasoned determination

in the Final Supplemental Environmental Impact Statement (FSEIS)? The answer is very simple. DEP did not make any effort whatsoever to evaluate membrane technology from 1997 to the present. DEP did not support its decision in the FSEIS in such a way as to reflect a reasoned determination. DEP simply did not satisfy its duty under either SEQRA or CEQR in the EIS process. It ignored it.

CWCWC wants DEP to satisfy its obligations under the statute,

regulations and case law in this Judicial Department, particularly because a viable alternative exists that could better insure the health and safety of the public.

DEP should be directed to assess membrane technology to determine whether it would be an effective alternate treatment method that would also satisfy SEQRA's mandate that a lead agency act to avoid or minimize to the maximum extent practicable the adverse environmental impacts of its proposed action.

**Membrane
filtration
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Point #2:

CWCWC contends that, pursuant to CEQR, DEP has a duty to project the quality of the Croton water in the year of the build in order to provide a baseline for evaluating the sufficiency of the proposed action.

Also known as the No Action (or No Build) condition, the CEQR Technical Manual as controlling law, describes the function of the No Action Condition as follows:



" The existing environmental setting is used to project the future conditions without the proposed action. The prediction is made for the year the action would be completed...using the data about existing conditions together with information about future growth and developments. The scenario of the future without the proposed action, often referred to as the "no action" or "no build" condition, provides a baseline condition against which the incremental changes generated by the project can be evaluated. This sets the context in which to assess impacts."

CEQR further provides:

"No action analyses must also consider any future changes that will affect the environmental setting, such as changes in technology." (CEQR Technical Manual (2201) Chapter 2(c), #400 pg. 2-7).

At various times during the course of the environmental review process, CWCWC drew attention to the fact that DEP had failed to project the quality of the water in the year of the build. To cite but two examples of such comments by CWCWC:

In its DSEIS comments, CWCWC states: "The DEP does not project what the quality of the Croton water will be in 2011, given growth and other developments that can be reasonably forecast to occur in the interval." In another comments, CWCWC states:

"DEP...failed to set forth in the FSEIS a projection analyzing the condition of the Croton water in the year of the build."

In conclusion, CWCWC states that: "In the absence of DEP's projection of the quality of the Croton water at the time of the build, it is impossible to decide with the requisite certainty whether the proposed action will bring the water into compliance with federal and state rules, and city water quality goals.

The lack of an adequate projection of the quality of the water in the year of the build is a fatal flaw in the DSEIS. The record below contains no reference to a test having been done to project the quality of the water in the year of the build, and no results are presented for any such test. The Joint Venture only tested the water in 1996 projecting whether that water would comply with federal standards in 2011 if DAF/F were used. The Joint Venture did not address whether water quality in 2011 would be so similar to 1996 conditions that the test results on the 1996 water would be controlling. A period of fifteen years will elapse between the time of the testing and the build. Water quality could change substantially in that time period, rendering some or all of the Joint Venture assumptions incorrect.

Such an analysis by DEP was essential in order to have complied with CEQR.

PS Messrs. Cole and Bacon's Brief is 38 pages long. The Appendices accompanying it cover an additional 1,800 pages.



A Dirty Shame: Van Cortlandt Park Before and During Destruction to Make Way for DEP's Plant



**JOIN CWCWC
AT EARTHDAY 2005
CELEBRATIONS**

Join in the all-ages education and fun of
EARTHDAY CELEBRATIONS
with CWCWC at locations
in the Bronx and Lewisboro:

EARTHDAY VAN CORTLANDT PARK, BRONX

APRIL 23, 2005

12:00 NOON - 4:00 PM

EARTHDAY LEWISBORO

APRIL 30, 2005

11:00 AM - 3:00 PM

Why not join in the spirit of activism?
Volunteer some of your time and educate others about the critical issues
that threaten our watershed.

CWCWC BOOTH VOLUNTEERS NEEDED!

Contact CWCWC at (914)234-3179

or

crotonwshed@aol.com

WOULD YOU LIKE TO LEARN MORE ABOUT CRITICAL WATERSHED ISSUES?

**YOU CAN ACCESS EDUCATIONAL MATERIALS
THROUGH CWCWC'S WEBSITE!**

Multi-media educational tools are accessible through our Website, or you can request the same materials to be sent to you from our office!

AVAILABLE PRINTED MATTER:

Can be downloaded from our Website or ordered from our office.

The Real Price of Filtration: Is it Worth it?

By Anthony J. Blackburn

NOTE: Available only from our office.

A Management Plan for the Croton Watershed

Presented by CWCWC

The CWCWC Position Paper

**On the Need for Examination of the Use of Membrane Technology
to Treat the Waters of the Croton System**

By Michael Cole, Esq.

Membrane Water Filtration

By Professor Audrey D. Levine, PhD, PE

NOTE: Available only from our office.

AVAILABLE VIDEOTAPES

Can be viewed on our Website or ordered from our office.

The Fight for the Croton Watershed: Protection Vs. Filtration

Produced by Rose Films, Inc. for CWCWC

Unfiltered Facts

Produced by David Ferguson for CWCWC

VISIT: WWW.NEWYORKWATER.ORG

EMAIL: CROTONWSHED@AOL.COM

CALL: (914)234-6470

THE NEW YORK TIMES
THE CITY WEEKLY DESK

**NEIGHBORHOOD REPORT: NEW YORK TREES;
A Mini-'Gates' Airs a Major Grievance**

By ALEX MINDLIN (NYT)
Published: March 6, 2005

In the southeast corner of Central Park last Sunday, on the last official day of Christo's "Gates," Lyn Pyle rigged up a gate of her own. Ms. Pyle's gate was a rickety collection of poles, held up by three small girls, and hung with an old orange window curtain. A sign on her mock gate read: "What does environmental racism look like?"

Ms. Pyle, a veteran community organizer with a long gray braid, had come down from the Bronx with the three girls and a handful of other protesters, all residents of neighborhoods around Van Cortlandt Park, where the city plans to build a nine-acre underground water-filtration plant.

Residents' groups say that the plant will dirty the park and pollute the surrounding community, and that its construction will mean years of incessant noisy truck traffic. They are also angry about the 40 old oak trees that were cut down by the city on Christmas Eve in preparation for the plant's construction, despite pending lawsuits that sought to block the project.

As a curious crowd gathered, Ms. Pyle's fellow activist, Ibrahim Gonzalez, began beating on a bongo drum and holding up a picture of the felled

trees, some of which were four feet in diameter.

"They cut these down on Christmas Eve!" Mr. Gonzalez shouted to the onlookers. "If they were to do this in Central Park, there would be such an uprising!"

A police officer asked Mr. Gonzalez whether he had permission to do what he was doing.



Christo's "Gates" in Central Park Were Lyn Pyle's Inspiration for Her Protest Against DEP's Plant

"Yes," Mr. Gonzalez said.

"From who?" the officer asked.

"From the Constitution," Mr. Gonzalez replied.

"How did I know you were going to say that?" the officer said.

Mr. Gonzalez, who produces two programs on WBAI, the listener-sponsored radio station (99.5 FM), explained the situation in Van Cortlandt Park.

The officer seemed surprised that the city had cut down the trees. "How come there's no publicity?" he asked.

Mr. Gonzalez made an our-point-exactly gesture.

"Well, bongo away," the police officer said, and left.

PLEASE JOIN US

Through regional action, CWCWC is dedicated to providing alternatives to chemical treatment/filtration, and to protecting and improving the naturally-filtered, high-quality waters of the Croton Watershed for today and for generations to come.

Send in your membership and receive membership mailings, a subscription to CWCWC's newsletter, "Our Water, Our Future" and (at your request) a free copy of the multi-award-winning video, "The Fight for the Croton Watershed."

Most importantly, your membership will help you get involved with the preservation of one of our most precious resources, our water.

Croton Watershed Clean Water Coalition Membership Application

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Email: _____

- Group/Coalition Membership (Voting) \$25/year [For Groups/Assoc. only]
- Individual Membership (Non-Voting) \$10/year [For Individuals only]

Is this a Renewal or a New Membership? (Circle one)

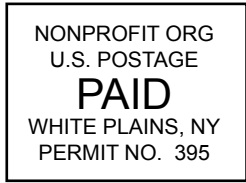
Make checks payable to Croton Watershed Clean Water Coalition and mail, along with your membership form, to:

FAY MUIR, Secretary, CWCWC, INC., 9 OLD CORNER ROAD, BEDFORD, NY 10506



Our Water, Our Future

Croton Watershed Clean
Water Coalition
9 Old Corner Road
Bedford, N.Y. 10506



MARCH APRIL 2005