

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

STATE OF NEW YORK and JAMES V. MCDONALD,
M.D., M.P.H., as COMMISSIONER of the NEW
YORK STATE DEPARTMENT OF HEALTH,

Case No.
7:24-cv-04783-NSR

Plaintiffs-Intervenors,

v.

WESTCHESTER JOINT WATER WORKS,
TOWN/VILLAGE OF HARRISON, VILLAGE OF
MAMARONECK and TOWN OF MAMARONECK,

Defendants.

----- X

COMPLAINT-IN-INTERVENTION

Plaintiffs-Intervenors State of New York and James V. McDonald, M.D., M.P.H, in his capacity as Commissioner of the New York State Department of Health (collectively, the “State”), by their attorney, Letitia James, the Attorney General of the State of New York, file this Complaint-in-Intervention and allege as follows against defendant Westchester Joint Water Works (“Water Works”), the members of which are defendants Town/Village of Harrison, Village of Mamaroneck and Town of Mamaroneck.:

NATURE OF ACTION

1. This is an action for injunctive relief and civil penalties under section 12 of the Public Health Law. The action arises from the ongoing failure of the

Water Works to filter water from Rye Lake before distribution to its drinking water customers, in violation of regulations known as the New York State Sanitary Code (“Sanitary Code”), 10 N.Y.C.R.R. Part 5, which New York State Department of Health (“Department”) administers. In particular the Water Works has failed to comply with a 1992 amendment to the Sanitary Code known as the Filtration Rule that required utilities to filter water from surface water bodies before distributing the water to users.

2. In 1999 the State of New York and the Commissioner of its Department of Health (collectively, the “State”) first sued the Water Works in state court to compel compliance with the Filtration Rule. That action resulted in a June 2004 judgment of New York State Supreme Court, Westchester County (“Judgment”) that ordered the Water Works to construct and operate a water filtration plant to treat Rye Lake water before distribution to consumers. The Judgment directed the Water Works to construct the filtration plant on a schedule, which, as extended, required completion and operation of the plant by December 2008, and imposed daily monetary penalties for non-compliance. A copy of the Judgment is attached as Attachment 1.

3. The Water Works did not meet that deadline and has not yet constructed a filtration plant. To date over \$77.3 million in penalties have accrued.

4. The Water Works is now planning to construct a filtration plant, but a new judicially enforceable construction schedule is needed to replace the

Judgment's now obsolete construction schedule and ensure that the plant is built as promptly as feasible in accordance with that new schedule.

5. The Water Works' failure to filter Rye Lake water has also violated the federal Safe Drinking Water Act, resulting in overlapping federal enforcement. In 2019 the United States Environmental Protection Agency ("EPA") issued an administrative order that similarly required constructing a filtration plant in accordance with a schedule. The United States filed this action, in which the State intervenes, to enjoin the Water Works to comply and construct the now overdue plant, as well as for penalties.

6. In the interest of coordinating state and federal enforcement efforts to mandate construction under a single new construction schedule to address both the state and federal claims, the State files this Complaint-in-Intervention.

7. In addition to this injunctive relief, the State seeks an award of penalties in accordance with the daily penalty provision in the Judgment. The penalties began to accrue when the Water Works failed to meet the December 2008 deadline for construction and operation of the filtration plant.

8. Because the Water Works' failure to filter the Rye Lake water has violated the Filtration Rule independent of, and in addition to, violating the Judgment, the State also predicates its claim for an injunction requiring construction of a filtration plant and for statutory penalties on violation of the Sanitary Code.

JURISDICTION AND VENUE

9. This Court has supplemental jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1367(a) because New York's claims are so related to the claims of the United States in this action that they form part of the same case or controversy.

10. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. §§ 1391(b) and 1395(a) because defendant Water Works resides and is located in this district.

PARTIES

11. Plaintiff State of New York is a body politic and a sovereign entity with authority to protect the health and welfare of the residents and citizens of the New York and to enforce compliance with state laws and regulations. It brings this action on behalf of itself and as *parens patriae*, trustee, guardian and representative on behalf of the residents and citizens of New York, particularly those who obtain their drinking water from Rye Lake.

12. Plaintiff James V. McDonald, M.D., M.P.H., is the Commissioner of the Department, which is the agency of the New York State government responsible for public health. Public Health Law §§ 200, 201. The Department's functions, powers and duties include the authority to "supervise and regulate the sanitary aspects of water supplies and sewage disposal and control the pollution of waters of the state," Public Health Law § 201(1)(l), and to administer and enforce the Sanitary Code, including in particular 10 N.Y.C.R.R. § 5-1.30.

13. Defendant Water Works is a public benefit corporation formed and existing under the laws of New York, with a principal place of business in the Village of Mamaroneck, Westchester County. The members of the Water Works are three Westchester County municipalities: the Town/Village of Harrison, the Village of Mamaroneck and the Town of Mamaroneck.

14. The Water Works owns portions of, and operates the entirety of a water supply system that supplies water on a retail basis to approximately 60,000 residents in its member municipalities, as well as portions of the City of Rye and the City of New Rochelle. The Water Works also supplies drinking water to the Village of Larchmont and, through sales to Veolia Water New York, to other portions of the City of Rye, the Village of Rye Brook and the Village of Port Chester.

15. Defendant Town/Village of Harrison is a municipal corporation organized under the laws of the State of New York having its principal offices at 1 Heineman Place, Harrison, New York 10528. Its chief elected official sits on the Water Works' board of trustees.

16. Defendant Town of Mamaroneck is a municipal corporation organized under the laws of the State of New York having its principal offices at 740 West Boston Post Road, Mamaroneck, New York 10543. Its chief elected official sits on the Water Works' board of trustees.

17. Defendant Village of Mamaroneck is a municipal corporation organized under the laws of the State of New York having its principal offices at 123

Mamaroneck Avenue, Mamaroneck, New York 10543. Its chief elected official sits on the Water Works' board of trustees.

LEGAL AUTHORITY AND FACTS

Public Health Risks of Using Surface Water for Drinking Water

18. The Water Works obtains some of the water it provides to the public from a Westchester County surface water body, Rye Lake.

19. In contrast to groundwater sources of drinking water, surface water sources are, by their nature, open to the environment and more vulnerable to contamination.

20. Among other things, surface waters are susceptible to pollution associated with development, including septic system and wastewater treatment plant discharges, which contain pathogenic organisms that can be dangerous if consumed by humans.

21. More specifically, raw water from surface water sources may contain protozoan microorganisms, such as *Giardia lamblia* and *Cryptosporidium*, which can cause severe gastrointestinal illness in humans, namely giardiasis and cryptosporidiosis. Cryptosporidiosis is especially dangerous, particularly to individuals whose immune systems are compromised.

22. Raw water can also contain particles and organic material that interfere with the normal disinfection practices water suppliers use, making it more difficult to inactivate pathogens such as *Cryptosporidium* or *Giardia lamblia*.

23. Filtration is the only effective, proven method for removing these pathogens.

24. In addition, although some bacteria, protozoans, and viruses can be killed to some degree with disinfectants, those processes become less effective in cloudy or “turbid” water, where these pathogens attach to or are embedded in particles, thereby decreasing their exposure to the disinfectant.

25. Filtration, however, removes particulate matter and attached pathogens.

26. Another drinking water quality problem is disinfection byproducts such as trihalomethanes and haloacetic acids.

27. These chemicals are produced during the water treatment process when chlorine or other chemical disinfectants added to the water to kill certain pathogens react with organic material in the water.

28. EPA has linked the presence of trihalomethanes and haloacetic acids to increased risk of bladder or other cancers, as well as increased pregnancy-related risks such as miscarriage, stillbirth and some birth defects.

29. Filtration reduces trihalomethane and haloacetic acid levels by removing organic material from the water before the water is chlorinated, so there is less organic material to react with the chlorine. Filtration therefore creates lower amounts of trihalomethanes and haloacetic acids in the water.

Relevant Statutory Authority

30. Public Health Law section 225(5)(a) authorizes the Department, through the Public Health and Health Planning Council, to promulgate regulations constituting the Sanitary Code to “deal with any matters affecting the security of life or health or the preservation and improvement of public health in the state of New York.”

31. Public Health Law section 201(1)(l) provides the Department with the authority to “supervise and regulate the sanitary aspects of water supplies.”

32. Public Health Law section 12(5) provides that, upon the request of the Commissioner of the Department, the Attorney General shall “bring an action for an injunction against any person who violates, disobeys or disregards any term or provision of [the Public Health Law] or of any lawful notice, order or regulation pursuant thereto.”

33. Public Health Law sections 12(1) and (4) provide that violations of the Public Health Law are subject to civil penalties that may be obtained in a judicial action referred to the Attorney General.

The Filtration Rule

34. To ensure safe drinking water in the state, the Department has promulgated, pursuant to Public Health Law section 225, regulations setting standards and requirements for treatment of drinking water as part of the Sanitary Code, 10 N.Y.C.R.R. Part 5.

35. The Sanitary Code defines “public water system” to include community water systems that provide water to the public for human consumption through pipes or other constructed conveyances, if such system has at least five service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. 10 N.Y.C.R.R. ¶ 5-1.1(cb).

36. Because of the vulnerability of surface waters to contamination and the resulting risk that the public might drink tainted water, in 1992 the Department promulgated the Filtration Rule, 10 N.Y.C.R.R. § 5-1.30, as part of the Sanitary Code. 14:11 N.Y.S. Reg. 13, 14 (Mar. 11, 1992).

37. The Filtration Rule requires each public water system in the state that draws drinking water from surface water sources to construct and operate a water filtration plant to treat that water, and set a June 29, 1993 deadline for doing so. 10 N.Y.C.R.R. §§ 5-1.30(b) & (c)(7)(ii).

38. The Department adopted the Filtration Rule pursuant to its state-law authority to protect and improve public health and to regulate the sanitary aspects of water supplies. *See* 13:29 N.Y.S. Reg. 14, 14, 15 (May 29, 1991); 14:11 N.Y.S. Reg. 13 (Mar. 11, 1992); Public Health Law §§ 201, 205, 225 & 1125.

39. The Department determined that implementation of the Filtration Rule would reduce 8,900 confirmed waterborne illness cases each year in the State, and observed that its estimate was conservative, since the actual number of waterborne illnesses is generally underestimated. 13:29 N.Y.S. Reg. at 16.

The Water Works' Failure to Construct and Operate the Required Filtration Plant

40. The Water Works did not meet the Filtration Rule's June 1993 filtration deadline. In September 1993 the Department and the Water Works entered into a stipulation extending the Water Works' time to construct and operate filtration (the "Stipulation").

41. The Department subsequently determined that it did not have authority to extend the June 1993 deadline. But in any event, the Water Works did not meet the deadlines set out in the Stipulation.

42. In 1999 the State sued the Water Works in state Supreme Court, Westchester County, for violation of the Filtration Rule.

43. In 2002 Supreme Court granted the State partial summary judgment, holding that the Water Works violated the Filtration Rule because it was not filtering its Rye Lake water. The Appellate Division, Second Department, upheld this award of partial summary judgment on appeal. *State of New York v. Westchester Joint Water Works*, 304 A.D.2d 646 (App. Div. 2d Dept. 2003).

44. On remand to Supreme Court, the State requested, and in June 2004 the Court issued, the Judgment, which containing a permanent injunction setting forth a schedule for the design, construction and operation of the filtration plant. The Judgment also imposed daily penalties in the event of failure to meet various milestone deadlines, including the deadline for construction and operation of the plant. The Appellate Division, Second Department, upheld this judgment on

appeal. *State of New York v. Westchester Joint Water Works*, 17 A.D.3d 665 (App. Div. 2d Dept.), *lv. denied*, 5 N.Y.3d 706 (2005).

45. After losing its second appeal, the Water Works began the process of building the filtration plant, and met most of the schedule's deadlines, as extended by agreement with the Department.

46. But the Water Works stopped progress on the plant after the Town/Village of Harrison Planning Board rescinded certain approvals for the plant as a result of lawsuits brought by a third party.

47. Because the Water Works stopped making any progress toward construction of the plant, it failed to meet the final deadline under the Judgment for completion of the plant by December 4, 2008, triggering the accrual of daily penalties under the Judgment starting from that date.

48. In the years after 2008 the Water Works requested that the Department give it permission to pursue certain alternatives to filtration, such as connecting to the New York City water supply. The Department agreed to consider those alternatives, but the Water Works never followed through on implementing any of them.

The Federal Administrative Order and This Litigation

49. In November 2019, EPA issued an administrative order finding that the Water Works had exceeded federal regulatory limits for haloacetic acids and requiring the Water Works to construct and operate a filtration plant to meet

federal requirements including, among other things, limits on trihalomethanes and haloacetic acids.

50. The administrative order included a schedule with deadlines for construction and operation of a filtration plant, but the Water Works has not met those deadlines.

51. The United States accordingly brought this action to enforce the 2019 administrative order, compel construction and operation of a filtration plant as required, and obtain an award of statutory penalties for the Water Works violations of law and the administrative order. Before commencing this action the United States negotiated the consent decree with the Water Works, as well as the State, that would resolve the action upon approval by the Court.

52. The State has moved to file this Complaint-in-Intervention before the expiration of any applicable statutes of limitation, including, without limitation, that in New York Civil Practice Law and Rules section 211(b).

FIRST CLAIM FOR RELIEF
Violation of the Judgment – Injunction

53. The State repeats and realleges the allegations in the foregoing paragraphs as if fully set forth herein.

54. Paragraph 2 of the Judgment set out a schedule for the Water Works to construct and operate a filtration plant for water the Water Works obtained from Rye Lake, pursuant to which, taking into account extensions agreed to by the State, the Water Works was required to complete construction and begin operation by December 3, 2008.

55. The Water Works did not construct and begin operation of a filtration plant by December 3, 2008, and has not constructed and begun operation to date.

56. The State is entitled to an injunction requiring the Water Works to construct and operate a filtration plant for the water it obtains from Rye Lake according to a new schedule consistent with the milestones imposed by the Judgment.

SECOND CLAIM FOR RELIEF
Violation of the Judgment – Penalties

57. The State repeats and realleges the allegations in the foregoing paragraphs as if fully set forth herein.

58. Paragraph 3.C of the Judgment provides that if the Water Works did not meet the deadline for construction and operation of the filtration plant, it owes daily penalties in the following amounts:

1 st to 30 th day of noncompliance	\$5,000/day
31 st to 60 th day of noncompliance	\$7,500/day
61 st to 90 th day of noncompliance	\$10,000/day
91 st and subsequent days of noncompliance	\$13,750/day

59. The Water Works did not construct and begin operation of a filtration plant by December 3, 2008, and has not constructed and begun operation to date.

60. The State is entitled to an award of penalties for each day of violation since December 4, 2008 in accordance with Paragraph 3.C., in a total amount to be calculated at the time this Court enters judgment in favor of the State in this action.

THIRD CLAIM FOR RELIEF
Violation of the Sanitary Code – Injunctive Relief

61. The State repeats and realleges the allegations in the foregoing paragraphs as if fully set forth herein.

62. The Water Works is a “person” within the meaning of the State Sanitary Code, 10 N.Y.C.R.R. § 5-1.1(bp).

63. The water system owned and/or operated by the Water Works is a public water system, as that term is defined in the Sanitary Code, 10 N.Y.C.R.R. § 5-1.1(cb). The system is thus subject to the Sanitary Code, including the Filtration Rule, 10 N.Y.C.R.R. § 5-1.30.

64. Separately and independently from violating the Judgment, the Water Works has violated and is in violation of the Filtration Rule by providing unfiltered surface water to its users.

65. The State is entitled, pursuant to Public Health Law section 12(5), to an injunction compelling the Water Works to comply with the Filtration Rule.

FOURTH CLAIM FOR RELIEF
Violation of the Sanitary Code – Civil Penalties

66. The State repeats and realleges the allegations in the foregoing paragraphs as if fully set forth herein.

67. Because the Water Works has been in violation of the Filtration Rule since at least December 4, 2008, the State is entitled, pursuant to Public Health Law section 12(1), to an award of civil daily penalties for each day of violation since December 4, 2008, in an amount to be determined by the Court.

PRAYER FOR RELIEF

WHEREFORE, the State respectfully requests that this Court award judgment:

1. Permanently enjoining the Water Works to construct a filtration plant for the water it obtains from Rye Lake on a schedule to be entered as an injunctive judgment and order by the Court;
2. Entering judgment awarding the State daily penalties under the Judgment as well as statutory penalties against the Water Works for its failure to construct and operate the filtration plant, starting December 4, 2008, and
3. Granting the State such other and further relief as this Court deems just and proper.

Dated: New York, New York
September 20, 2024

LETITIA JAMES
Attorney General of the State of New York

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*Attorneys for Plaintiff-Intervenors State of
New York and James V. McDonald*

Attachment 1

RECEIVED
JUN 1 2004

CLERK OF THE SUPREME COURT
WESTCHESTER COUNTY

At a Trial/Special Term Part of the Supreme Court of the State of New York, in and for the County of Westchester, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd. White Plains, New York, on the

9th day of May, 2004

June

FILED
AND
ENTERED
ON 6/9 18 2004
WESTCHESTER
COUNTY CLERK

P R E S E N T: Hon. Louis A. Barone
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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STATE OF NEW YORK and :
ANTONIA C. NOVELLO, M.D., M.P.H., in her :
capacity as COMMISSIONER of the NEW YORK :
STATE DEPARTMENT OF HEALTH, :
:
Plaintiffs :
:
-against- :
:
WESTCHESTER JOINT WATER WORKS, :
:
Defendant. :
-----X

Index No. 13364-99

Assigned Judge:
Hon. Louis A. Barone

**JUDGMENT ON SEVERED
FIRST CAUSE OF ACTION
(Declaratory and Injunctive Relief)**

WHEREAS, plaintiffs, the State of New York and Antonia C. Novello, M.D., M.P.H., in her capacity as Commissioner of the New York State Department of Health (collectively, the State), filed a complaint against defendant, Westchester Joint Water Works (WJWW), on or about September 9, 1999, alleging that WJWW had failed, and continues to fail, to construct and operate a water filtration plant, in violation of the State Sanitary Code and a Stipulation entered between the parties whereby WJWW consented to construction of such a plant;

WHEREAS, the State sought a judgment declaring WJWW to be violation of the State Sanitary Code and the stipulation, enjoining WJWW to construct a water filtration plant, and

awarding penalties against WJWW, as provided by the State Sanitary Code and the stipulation;

WHEREAS, WJWW served and filed a verified answer denying liability and raising certain affirmative defenses;

WHEREAS, the State filed a motion for partial summary judgment, on or about August 21, 2001, on the issue of whether WJWW had, and continues, to violate the State Sanitary Code by failing to construct and operate a water filtration plant;

WHEREAS, the Court issued an Order, which was filed and entered by the Westchester County Clerk on January 23, 2002, granting the State's motion for partial summary judgment, and declaring WJWW to be in violation of the State Sanitary Code for failing to construct and operate a filtration plant;

WHEREAS, on or about April 14, 2003, the Appellate Division, Second Department, unanimously affirmed the Court's January 23, 2002 Order. State of New York v. Westchester Joint Water Works, 304 A.D.2d 646 (2nd Dep't 2003);

WHEREAS, on or about October 30, 2003, filed a motion for severance of the equitable relief from the legal relief, and implementation of a judgment enjoining WJWW to construct and operate a water filtration plant in accordance with a schedule proposed by the State;

WHEREAS, on or about December 31, 2003, the State filed a motion requesting leave to file an amended complaint.

WHEREAS, the Court issued an Order, which was filed and entered by the Westchester County Clerk on February 3, 2004, granting the State's motion to sever and motion for implementation of a judgment in all respects;

WHEREAS, the Court issued an Order, which was filed and entered by the Westchester

County Clerk on February 4, 2004, granting the State's motion to amend its complaint.

WHEREAS, Attorney General Eliot Spitzer, attorney for the State plaintiffs, having made an application for the entry of a judgment consistent with the Court's February 3, 2004 Order;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Defendant WJWW violated, and continues to violate, the State Sanitary Code, 10 N.Y.C.R.R. § 5-1.30, by failing to construct and operate a filtration plant to filter the potable water that it sells to its customers from the Rye Lake system.
2. Defendant WJWW shall:
 - A. No later than August 11, 2004, submit to the New York State Department of Health (the Department), plans and specifications for construction of the filtration plant that are 50% complete.
 - B. No later than March 3, 2005, submit to the Department final plans and specifications for the construction of the filtration plant. The Department will promptly review the plans and specifications submitted by WJWW and inform WJWW if the plans and specifications, as submitted, are acceptable, or if revisions are required for them to be acceptable. In the event that the Department notifies WJWW that revisions to the plans and specifications are required for them to be acceptable, within 30 days of the date of such notice, WJWW shall submit to the Department amended plans and specifications that incorporate the revisions required by the Department.
 - C. No later than 90 days from the date that the Department approves WJWW's final plans and specifications for constructions of a filtration plant, WJWW shall

solicit bids for construction of the filtration plant.

D. No later than 30 days from the date that WJWW is required to solicit bids for construction of the filtration plant, WJWW shall award the contract for construction of the filtration plant.

E. No later than 30 days from the date that WJWW awards the contract for construction of the filtration plant, construction shall commence on the filtration plant.

F. No later than 730 days from the date that WJWW awards the contract for construction of the filtration plant, construction of the filtration plant shall be completed and WJWW shall commence operation of the filtration plant.

3. If WJWW fails to meet any milestone set forth above in paragraph 2 above, WJWW shall pay a penalty, as follows, for each day for each violation:

A. For failure to comply with any milestone set forth in paragraphs 2A, B, C or D, WJWW shall pay the following penalty for each violation:

<u>Days of Non-Compliance or violation</u>	<u>Penalty per Violation Per Day</u>
1 st to 30 th day	\$500
31 st to 60 th day	\$1500
After 60 days	\$2500

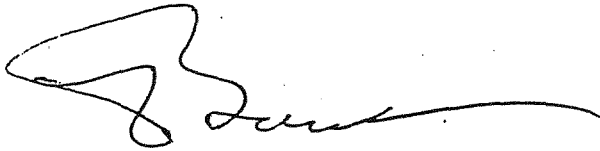
B. For failure to comply with the milestone set forth in paragraph 2E, WJWW shall pay the following penalty:

<u>Days of Non-Compliance or violation</u>	<u>Penalty per Violation Per Day</u>
1 st to 30 th day	\$2500
31 st to 60 th day	\$3750
After 60 days	\$5000

C. For failure to comply with the milestone set forth in paragraph 2F, WJWW shall pay the following penalty:

<u>Days of Non-Compliance or violation</u>	<u>Penalty per Violation Per Day</u>
1 st to 30 th day	\$5000
31 st to 60 th day	\$7500
61 st to 90 th day	\$10000
After 90 days	\$13750

ENTER,



Hon. Louis A. Baron, J.S.C.