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BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DEARIE, J.

UNITED STATES OF AMERICA,

Plaintiff,

COMPLAINT

POLLAK, M.J.

- against -

Civil Action No.

CITY OF NEW YORK and NEW YORK
CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

CV 19-1519

Defendants.

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The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), for its complaint against defendants avers as follows:

I. NATURE OF THE ACTION

1. This is a civil action pursuant to Section 1414(b) of the Safe Drinking Water Act (the "Act"), 42 U.S.C. § 300g-3(b), against the City of New York and the New York City Department of Environmental Protection (collectively the "City" or "Defendants") for violation of section 141.714 of the Long Term 2 Enhanced Surface Water Treatment Rule ("LT2 Rule"), 40 C.F.R. § 141.714, promulgated under Section 1412 of the Act, 42 U.S.C. § 300g-1, and for failure to comply with an EPA Administrative Order on Consent entered into by the City in May 2010. The violation of the LT2 Rule and the EPA Administrative Order on Consent pertain to the City's obligation to cover the Hillview Reservoir, a component of the City's water supply system.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 1414(b) of the Act, 42 U.S.C. § 300g-3(b).

3. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1395 as the defendants reside in and are found in this district.

III. DEFENDANTS

4. The City of New York is a political subdivision of the State of New York, duly formed under the laws of the State of New York, and is a “municipality” and a “person” within the meaning of Section 1401 of the Act, 42 U.S.C. § 300f.

5. The New York City Department of Environmental Protection (“NYCDEP”) is the City agency charged with responsibility for operating the City’s water supply system and is a person under the Act. NYCDEP’s principal place of business is located at 59-17 Junction Boulevard, Flushing, New York 11373-5108, in the county of Queens, New York.

IV. STATUTORY AND REGULATORY BACKGROUND

6. A “public water system” is defined as “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.” 42 U.S.C. § 300f(4), and 40 C.F.R. § 141.2.

7. A “supplier of water” is defined as “any person who owns or operates a public water system.” 42 U.S.C. § 300f(5).

8. The City, as the owner or operator of a public water system, must comply with all national primary drinking water regulations promulgated under Part B of the Act, 42 U.S.C. §§

300g - 300g-6, except to the extent a variance or exemption under Sections 1411, 1415, or 1416 of the Act, 42 U.S.C. §§ 300g, 300g-4, or 300g-5, is applicable.

9. On January 5, 2006, EPA promulgated the LT2 Rule, 40 C.F.R. Part 141, Subpart W, pursuant to 42 U.S.C. § 300g-1(b)(7)(A). The LT2 Rule supplements existing microbial treatment of drinking water and protects public health from illness due to *Cryptosporidium* and other microbial pathogens in drinking water. Among other things, the LT2 Rule addresses the risks in uncovered finished water storage facilities by requiring public water systems to cover such storage facilities or provide specified treatment to the discharge from such storage facilities.

10. The purpose of covering finished water storage reservoirs is to protect the finished water from being recontaminated with microbial contamination, such as viruses, *Giardia lamblia*, and *Cryptosporidium*, from birds, animals, and other sources while the water sits in the reservoir.

11. The LT2 Rule was published in the Federal Register. 71 Fed. Reg. 654-786 (January 5, 2006). The requirements of the LT2 Rule, which became effective March 6, 2006, constitute a national primary drinking water standard and an applicable requirement of the Act.

12. Section 141.714 of the LT2 Rule, 40 C.F.R. § 141.714, provides that:

(c) Systems [i.e., public water systems] must meet the conditions of paragraph (c)(1) or (2) of this section for each uncovered finished water storage facility or be in compliance with a State-approved schedule to meet these conditions no later than April 1, 2009.

(1) Systems must cover any uncovered finished water storage facility.

(2) Systems must treat the discharge from the uncovered finished water storage facility to the distribution system to achieve inactivation and/or removal of at least 4-log virus, 3-log *Giardia*

lamblia, and 2-log *Cryptosporidium* using a protocol approved by the State.

13. Under the Safe Drinking Water Act and within the meaning of the LT2 Rule, including 40 C.F.R. § 141.714, “State” means the agency with primary enforcement responsibility (“primacy”) for the public water system for the LT2 Rule. 40 C.F.R. § 141.2.

14. Since the effective date of the LT2 Rule, EPA has been the agency with primary enforcement responsibility for the City’s water system with regard to the LT2 Rule. Therefore, EPA is the “State” within the meaning of 40 C.F.R. § 141.714.

15. No variance or exemption is applicable to the City’s obligation to comply with Section 141.714 of the LT2 Rule.

16. Section 1414(g) of the Safe Drinking Water Act, 42 U.S.C. § 300g-3(g), an enforcement provision of the Act, authorizes EPA to issue an administrative order requiring a public water system to comply with an applicable requirement under the Act, as defined in 42 U.S.C. § 300g-3(i), when EPA determines that the public water system does not comply with the applicable requirement.

17. The term “applicable requirement” includes the national primary drinking water regulations, such as the LT2 Rule, promulgated pursuant to Section 1412 of the Act, 42 U.S.C. § 300g-1. Section 141.714 of the LT2 Rule, 40 C.F.R. § 141.714, is an applicable requirement under the Act as defined in 42 U.S.C. § 300g-3(i).

18. Section 1414(b) of the Act, 42 U.S.C. § 300g-3(b), authorizes the Administrator of the EPA to commence a civil action for injunctive relief and civil penalties for violations of any applicable requirement under the Act and for violations of any order issued pursuant to 42

U.S.C. 300g-3(g), if authorized under Section 1414(a)(2) of the Act, 42 U.S.C. § 300g-3(a)(2), or in other specified circumstances.

19. Section 1414(a)(2)(A) of the Act, 42 U.S.C. § 300g-3(a)(2)(A), authorizes the Administrator to bring such an action if the Administrator finds, with respect to a period in which a State does not have primary enforcement responsibility for the public water system for the applicable requirement, that the public water system does not comply with an applicable requirement under the Act.

V. GENERAL AVERMENTS

20. The City owns a “public water system” within the meaning of the Act and the regulations promulgated under the Act. The public water system is operated by NYCDEP.

21. The City’s public water system obtains water from surface water sources in the Catskill/Delaware watersheds and the Croton watershed and distributes water to residential, commercial, and other facilities in the City. The City’s water system regularly serves a population of approximately nine million people and delivers approximately one billion gallons of water each day.

22. The City owns and operates the Hillview Reservoir (the “Reservoir”) in Yonkers, New York. The Reservoir is an uncovered finished storage water facility that is part of the City’s public water system.

23. The Hillview Reservoir serves as a balancing reservoir, used by the City to meet the daily fluctuations in water demand. The Reservoir is downstream of the first application of chlorine and of an ultraviolet treatment facility. The Reservoir’s contents must therefore be considered finished water. Since it is an open storage facility, the water is subject to

recontamination. If the Hillview water were to be recontaminated, public health would be threatened, since sufficient microbial treatment is not available downstream of the Reservoir.

24. In its application for deferral of the Hillview Reservoir cover dated August 6, 2009, the City reviewed possible treatment alternatives and determined that it is not feasible for the City to treat the discharge from the Reservoir in accordance with 40 C.F.R. § 141.714(c)(2). *See Request of the City of New York for a Deferral from the Safe Drinking Water Act (42 USC Section 300(f), Long Term 2 Enhanced Surface Water Treatment Rule Requirement to Cover or Treat the Water Stored in the Hillview Reservoir (40 CFR Section 141.714), Appendix at A-153-154.* Therefore, pursuant to 40 C.F.R. § 141.714, the City is required to cover the Reservoir in accordance with 40 C.F.R. § 141.714(c)(1).

25. Prior to the promulgation of the LT2 Rule, the City was already required to cover the Reservoir pursuant to a State Administrative Order issued by the New York State Department of Health (“NYSDOH”) pursuant to Section 5-1.52 of the New York State Sanitary Code and other authorities.

26. NYSDOH and the City first executed an Administrative Order (“first State Administrative Order”), in NYS Docket No. 940772-CO, in 1996 (signed by the City on January 26, 1996 and effective as of March 1, 1996), under which the City agreed, and was required, to install or construct a cover for the Reservoir by one of the following dates: February 28, 1999, if a temporary cover was selected; June 30, 1999, if a floating cover was selected; or June 30, 2002 if a concrete cover was selected.

27. In July 1997, NYSDOH and the City entered into a modification of the first State Administrative Order (Administrative Order Modification AT 940772-CO), signed by the City

on July 10, 1997, under which the City agreed, and was required, to commence construction of the Reservoir cover by January 31, 1999, and complete construction of the Reservoir cover by December 31, 2005.

28. The City did not commence construction of the Reservoir cover by January 31, 1999.

29. In March 1999, NYSDOH and the City entered into a second modification of the first State Administrative Order (Administrative Order – Second Modification AT940772-CO), signed by the City on February 11, 1999 and by NYSDOH on March 4, 1999, under which the City agreed, and was required, to commence construction of the Reservoir cover on or before April 20, 2002, and complete construction of the Reservoir cover by December 31, 2005.

30. The City did not commence construction of the Reservoir cover by April 30, 2002 and did not complete construction of the Reservoir cover by December 31, 2005.

31. In February 2008, NYSDOH and the City entered into a new State Administrative Order (“second State Administrative Order”) in NYS Docket No. AT 940772-CO, signed by the City on February 13, 2008, in which the City agreed, and was required under State authority, to issue a Notice to Proceed with a contract for the construction of the cover for the East Basin of the Reservoir by March 31, 2011, complete construction of the Reservoir East Basin cover by June 30, 2014, issue a Notice to Proceed with a contract for the construction of the cover for the West Basin of the Reservoir by August 9, 2013, and complete construction of the cover for the Reservoir West Basin by October 31, 2016. The City did not meet any of these milestones.

32. The NYSDOH is not the primacy agency for the LT2 Rule. EPA is the primacy agency and therefore the “State” within the meaning of 40 C.F.R. § 141.714.

33. The City was not in compliance with a State-approved schedule within the meaning of 40 C.F.R. § 141.714 to cover the Hillview Reservoir no later than April 1, 2009.

34. In August 2009, the City submitted a request to EPA for a lengthy schedule for commencement and construction of the Reservoir cover.

35. In May 2010, EPA entered into the EPA Administrative Order on Consent, EPA Docket No. SDWA-02-2010-8027 (the "EPA AOC") with the City.

36. EPA issued the EPA AOC pursuant to its enforcement authority under Section 1414(g) of the Act, 42 U.S.C § 300g-3(g). In the EPA AOC, the City agreed, and was required, to issue a Notice to Proceed under a contract for site preparation work for the cover at the Hillview Reservoir by January 31, 2017, among other requirements.

37. By letter dated September 22, 2010, the NYSDOH incorporated the dates in the EPA AOC into the second State Administrative Order.

38. The City has failed to meet the requirement of the EPA AOC to issue a Notice to Proceed under a contract for site preparation work for the cover at the Hillview Reservoir by January 31, 2017, among other requirements.

39. The City has not commenced or completed construction of the Reservoir cover.

40. The City is not in compliance with a State-approved schedule to cover the Hillview Reservoir no later than April 1, 2009. Therefore, the City is in violation of 40 C.F.R. § 141.714, an applicable requirement of the Act.

41. The City has failed to meet requirements of the EPA AOC. Therefore, the City is in violation of the EPA AOC.

42. The Administrator, or his delegatee, has notified an appropriate local elected

official of the City, as required by Section 1414(a)(2)(B) of the Act, 42 U.S.C § 300g-3(a)(2)(B), of the filing of this action prior to the time of filing of this action.

FIRST CLAIM FOR RELIEF
Violation of the LT2 Rule

43. Paragraphs 1 through 42 are reaverred and incorporated by reference.

44. The City has not covered the Hillview Reservoir in accordance with 40 C.F.R. § 141.714(c)(1) and does not provide treatment of the discharge from the Hillview Reservoir to the distribution system to achieve inactivation and/or removal of at least 4-log virus, 3-log *Giardia lamblia*, and 2-log *Cryptosporidium* in accordance with 40 C.F.R. § 141.714(c)(2).

45. The City is not in compliance with a State-approved schedule to meet the conditions of 40 C.F.R. § 141.714(c)(1) or 40 C.F.R. § 141.714(c)(2) no later than April 1, 2009.

46. Because the City (a) has not covered the Reservoir, (b) does not provide the treatment specified in 40 C.F.R. § 141.714(c)(2), and (c) is not in compliance with a State-approved schedule to meet either of these conditions no later than April 1, 2009, the City has violated and continues to violate 40 C.F.R. § 141.714, an applicable requirement of the Act. The City's violations of 40 C.F.R. § 141.714 constitute violations of national primary drinking water regulations and the Act.

47. The City will continue to violate 40 C.F.R. § 141.714 and the Act unless enjoined. An injunction requiring the City to commence and complete construction of the Reservoir cover is necessary to bring the City into compliance with 40 C.F.R. § 141.714 and the Act. The City is also subject to civil penalties under Section 1414(b) of the Act, 42 U.S.C. § 300g-3(b), for its violations of 40 C.F.R. § 141.714 and the Act.

SECOND CLAIM FOR RELIEF
Violation of the EPA AOC

48. Paragraphs 1 through 47 are reaverred and incorporated by reference.

49. The City failed to issue a Notice to Proceed under a contract for site preparation work for the cover at the Hillview Reservoir by January 31, 2017, as required under the EPA AOC, among other requirements. The City has violated and continues to violate the EPA AOC.

50. The City will continue to violate the EPA AOC unless enjoined. An injunction requiring the City to commence and complete construction of the Reservoir cover is necessary to bring the City into compliance with the EPA AOC. The City is also subject to civil penalties under Section 1414(b) of the Act, 42 U.S.C. § 300g-3(b), for its violations of the EPA AOC.

PRAYER FOR RELIEF

WHEREFORE, the United States of America, respectfully requests that this Court:

1. Enjoin the City from violating 40 C.F.R. § 141.714 and the Act.
2. Order the City, pursuant to 42 U.S.C. § 300g-3(b), to commence and complete construction of the Hillview Reservoir cover in accordance with a judicially required schedule in order to bring the City into compliance with 40 C.F.R. § 141.714 and the Act.
3. Order specific performance of the requirements of the EPA AOC, including the requirements that the City commence and complete construction of the Hillview Reservoir cover.
4. Order the City to expeditiously complete any projects that the City plans to complete prior to covering the Hillview Reservoir.

5. Order the City to implement public notification and interim public health protection measures during the period before the City completes construction of the Hillview Reservoir cover.
6. Order the City to pay a civil penalty not to exceed the statutory maximum per day of violation provided in Section 1414(b) of the Act, 42 U.S.C. § 300g-3(b), as adjusted pursuant to 31 U.S.C. § 3701 *et seq.*, 40 C.F.R. Part 19, 61 Fed. Reg. 69360 (December 31, 1996), 69 Fed. Reg. 7121 (February 12, 2004), 73 Fed. Reg. 75340 (December 11, 2008), 78 Fed. Reg. 66647 (November 6, 2013), 81 Fed. Reg. 43094 (July 1, 2016), 82 Fed. Reg. 3635 (January 12, 2017), and 83 Fed. Reg. 1190 (January 10, 2018).


7. Grant such other and further relief as the Court deems appropriate.


Dated: Brooklyn, New York
March 18, 2019

Respectfully submitted,

JEFFREY BOSSERT CLARK
Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice
Washington, D.C. 20530

RICHARD P. DONOGHUE
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, N.Y. 11201

By: 
DEBORAH B. ZWANY (DBZ-7987)
Senior Litigation Counsel
(718) 254-6010
Deborah.Zwany@usdoj.gov


ELIZABETH YU
Attorney
Environmental Enforcement Section
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
(202) 514-2277

Of Counsel:

PHYLLIS S. KAPLAN FEINMARK
Chief, Water, Grants & General Law Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region II
290 Broadway - 16th Floor
New York, New York 10007

MORGAN E. ROG
Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
Washington, DC 20460