Westchester
gov.com

Robert P. Astorino
County Executive

Office of the County Attorney
Robert F. Meehan
County Attorney

September 3, 2013

Honorable Nelson S. Román
U.S. District Court
300 Quarropas Street
White Plains, NY 10601-4150

Via Fax: 914-390-4179

Re: Request for Pre-Motion Conference in *United States v. The County of Westchester, New York*, 13-cv-5475 (NSR) (LMS)

Dear Judge Román,

I am counsel for defendant County of Westchester ("County"). I write to request a Pre-Motion Conference pursuant to paragraph (3)(A)(ii) of this Court's Individual Practices in Civil Cases. The County intends to file a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. Background

The Kensico Reservoir, located in central Westchester County, is owned and operated by the City of New York. Prior to 1964, New York City owned and utilized, among other conveyance structures, a forty-eight (48") inch diameter pipe line from the Kensico Reservoir to the Bronx ("KB Pipe Line"). About that time, New York City determined that it no longer required the use of the KB Pipe Line. Also at around that time, the cities of Yonkers, Mount Vernon, White Plains and the village of Scarsdale ("Four Municipalities") were taking (or planning to take) a supply of water from the water supply system of the City of New York through the KB Pipe Line.

In 1964, and pursuant to Article 5-A of the New York County Law, Westchester County Water District No. 1 ("District No. 1") was established at the request of the Four Municipalities in order to purchase the KB Pipe Line from the City of New York. Shortly thereafter, District No. 1 purchased the KB Pipe Line.

On January 5, 2006, the Environmental Protection Agency ("EPA") promulgated the Long Term 2 Enhanced Surface Water Treatment Rule ("LT2"). *See* 40 C.F.R. Part 141, Subpart W. One of the purposes of LT2 was to supplement existing federal regulations by requiring public water systems ("PWS") that use an unfiltered surface water source to implement certain water treatment protocols, which can include the use of ultraviolet light, to prevent Cryptosporidium contamination.

On August 6, 2013, the United States of America, on behalf of the EPA, filed the Complaint in this action, alleging that District No. 1 is a "public water system and community

water system" as defined in the Safe Drinking Water Act ("SDWA") and its implementing regulations, and has failed to comply with LT2. (Compl. ¶¶ 11, 13.)

II. Summary of Motion to Dismiss Argument

Under the SDWA, 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)(A); 40 C.F.R. § 141.2. Further, "the term 'community water system' means a public water system that–

> (A) serves at least 15 service connections used by year-round residents of the area served by the system; or
>
> (B) regularly serves at least 25 year-round residents."

42 U.S.C. § 300f(15); 40 C.F.R. § 141.2.

Although the Complaint alleges that District No. 1 is a "public water system and community water system," (Compl. ¶¶ 11, 13), the Complaint provides no factual support for this contention. On the contrary, the Complaint's meager factual allegations actually disprove the notion that District No. 1 is a "public water system and community water system." Therefore, as set forth in greater detail below, the Government has failed to plausibly allege that District No. 1 is a "public water system and community water system" and the Complaint should be dismissed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (It is well settled that courts are free to disregard legal conclusions which are couched as factual allegations.).

a. Service to Residential Connections

The Complaint fails to allege that District No. 1 provides water to a service connection (let alone fifteen[1] such connections) that is "used by year-round residents." In fact, the Complaint alleges that District No. 1 serves the cities of White Plains, Yonkers, Mount Vernon, the village of Scarsdale, and the town of North Castle ("Local Municipalities"), rather than their residents, who then "in turn, distribute the water they receive from District No. 1 to approximately 175,000 individuals." (Compl. ¶ 5.) Indeed, the Court could easily take judicial notice of the fact that each of the Local Municipalities has its own independent public-water supply system,[2] which issues its own Annual Water Supply Report[3]. Such an indirect provision of water for human consumption by District No. 1 simply does not count as a "service connection." Although there is no affirmative definition of "service connection" in the relevant SDWA statutes or regulations, the EPA's own guidance states:

---

[1] The Complaint only alleges "fifteen service connections" in the vaguest of terms. (Compl. ¶ 13.) The Complaint contains no factual matter to support a plausible inference that District No. 1 actually provides water to fifteen service connections. The Complaint merely alleges that District No. 1 provides water to White Plains, Yonkers, Mount Vernon, Scarsdale and North Castle. (Compl. ¶ 5.)

[2] District No. 1 (N.Y.S. Public Water Supply ID #5903488); White Plains (N.Y.S. Public Water Supply ID #5903464); Yonkers (N.Y.S. Public Water Supply ID #5903465); Mount Vernon (N.Y.S. Public Water Supply ID #5903441); North Castle (N.Y.S. Public Water Supply ID #5903445); Scarsdale (N.Y.S. Public Water Supply ID #5903457).

[3] District No. 1 issues no such reports.

> It does not count as a "service connection" where a water supplier indirectly provides water for human consumption to a municipality or pass-through entity which actually provides the water to end users, and which is itself a PWS that must meet SDWA requirements.

See EPA, *Guidance on Public Water System Definition*, http://water.epa.gov/lawsregs/guidance/sdwa/pws-definition.cfm (last visited September 3, 2013). Thus, the Complaint fails to plausibly allege that District No. 1 provides water to fifteen residential connections.

b. Regular Service to Twenty-Five Year-Round Residents

The Complaint also fails to allege that District No. 1 "regularly serves at least 25 year-round residents" of the Local Municipalities. As discussed above, the Complaint concedes that District No. 1 does not serve individuals at all, as it actually alleges that the Local Municipalities deliver water to their residents through their own independent water systems. (Compl. ¶ 5.) Thus, the Complaint fails to plausibly allege that District No. 1 provides regular water service to twenty-five year-round residents.

III. <u>Conclusion</u>

In sum, Plaintiff has failed to adequately allege in its Complaint that District No. 1 is a "public water system and community water system" under the SDWA. Because District No. 1 is not a PWS, the requirements of LT2 do not apply to it, and the EPA lacks jurisdiction to commence the instant action. As such, the County submits that the Complaint fails to state a claim upon which relief can be granted, and is therefore subject to dismissal under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

Robert F. Meehan

Cc: Plaintiff's Counsel, Natalie N. Kuehler,
Assistant United States Attorney, via e-mail

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

September 4, 2013

By Fax - (914) 390-4179
Hon. Nelson S. Román
United States District Judge
United States Courthouse
300 Quarropas Street
White Plains, New York 10601

Re: United States v. Westchester County, No. 13 Civ. 5475 (NSR)

Dear Judge Román:

I write respectfully to request a two week extension of the deadline provided by the Court's individual practices for the United States to respond to the pre-motion letter submitted by defendants yesterday. The current deadline is Friday, September 6, 2013. The requested new deadline is Friday, September 20, 2013. The reason for this request is that the attorney assigned to this case in our Office is unavailable due to an unanticipated family medical emergency of unknown, but potentially lengthy, duration. This two week extension will ensure that our Office is able to respond to the pre-motion letter properly while also making adjustments to the staffing of this case as necessary. Defendant consents to this request.

Notwithstanding the requested extension until September 20, 2013, our Office will endeavor to submit its letter as soon as possible prior to that date, to ensure that the public health issues raised by this case are promptly put before the Court for resolution.

I thank the Court for its consideration of the request.

Respectfully,

PREET BHARARA
United States Attorney

By: ______________________
ROBERT WILLIAM YALEN
Chief, Environmental Protection Unit
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2722

cc (by email): Adam Rodriguez (aqrc@westchestergov.com)
Counsel for Defendant

FACSIMILE COVER SHEET

U.S. ATTORNEY'S OFFICE, SDNY
86 Chambers St.
New York, NY 10007

****

To:	**Chambers of Hon. Nelson S. Román**
Fax:	(914) 390-4179
Tel.:	(914) 390-4177
From:	**Robert William Yalen, U.S. Attorney's Office**
Fax:	(212) 637-2702
Tel.:	(212) 637-2722
Date:	September 4, 2013
Pages (incl. cover):	2
Remarks:	**Ortiz v. United States**, 06 Civ. 1853 (TPG)

****

CONFIDENTIAL U.S. ATTORNEY FACSIMILE COMMUNICATION

The information contained in this facsimile message, and any and all accompanying documents, constitute confidential information. This information is the property of the U.S. Attorney's Office. If you are not the intended recipient of this information, any disclosure, copying, distribution, or the taking of any action in reliance on this information is strictly prohibited. If you received this information in error, please notify us immediately by telephone at the above number and destroy the information.