

03-7203

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

<hr/>)
CATSKILL MOUNTAINS CHAPTER OF))
TROUT UNLIMITED, INC., et. al,))
))
Plaintiffs, Appellees,))
Cross-Appellants,)	CASE NO. 03-7203
))
v.))
))
CITY OF NEW YORK AND NEW YORK))
CITY DEPARTMENT OF))
ENVIRONMENTAL PROTECTION,))
))
Defendants,))
Third-Party Plaintiffs,))
Appellants, Cross-Appellees.))
<hr/>)

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS CITY OF NEW YORK AND NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

The National League of Cities (NLC), the New York State Conference of Mayors and Municipal Officials (NYCOM), the Association of Metropolitan Sewerage Agencies (AMSA) and the Association of Metropolitan Water Agencies (AMWA) (collectively “*amici*”) respectfully move this Court for leave to file a brief as *amici curiae* in support of Appellants City of New York and the New York City Department of Environmental Protection (“Appellants”) seeking reversal of

the lower court's decision dated February 6, 2003, as modified by its order dated March 12, 2003. In support thereof, *amici* state as follows:

1. The members of *amici* represent local governments, public utilities, water suppliers, and local water management agencies having direct roles in ensuring clean and safe water in our country, as well as an interest in ensuring that suitable laws and regulations apply to their activities.

2. NLC is the country's largest and oldest organization serving municipal governments, comprised of 1500 member communities and 49 state municipal leagues which collectively represent more than 18,000 municipalities and more than 135,000 local elected officials throughout the United States.

3. NYCOM is a not-for-profit, voluntary membership association consisting of 566 of New York State's 616 cities and villages, thereby representing the overwhelming majority of such municipalities. NYCOM's mission is to "improve the administration of municipal affairs in New York State by providing courses of training for municipal officials in service in New York State cities and villages." NYCOM's educational component, the Municipal Training Institute (MTI), was granted a provisional charter by the Regents of the University of the State of New York in 1935. An absolute charter was granted in 1940. Additionally, NYCOM provides its members with legislative advocacy at both the state and federal levels on issues of concern to local government. A critical component of

NYCOM's annual legislative program has been the support of state and federal legislation that protects public health, ensures the high quality of drinking water in New York State, and includes adequate funding for local implementation. NYCOM believes that while certain regulation may be necessary to protect the public health, the cost of such regulation should not outweigh the benefits. Any additional and necessary regulation must include a cost-benefit analysis and funding for implementation – anything less is an unfunded mandate on local governments. Furthermore, in its nearly 94-year existence, NYCOM has consistently been granted permission to submit briefs amicus curiae to the New York State Court of Appeals, the four New York State Appellate Courts, the Federal Courts in New York State, and the Supreme Court of the United States.

4. AMSA represents the interests of nearly 300 of the nation's wastewater treatment agencies. AMSA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. Numerous AMSA members are regulated by the Clean Water Act's permit program for municipal separate storm sewer systems.

5. AMWA represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities

created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another.

6. *Amici* have an interest in this litigation because District Court's ruling impermissibly interferes with local water management decisions. Transfers and diversions of untreated water are essential to the design and operation of public water supply systems, municipal and regional flood control and water management efforts, and structures designed to assist in inland navigation. All surface water supply systems involving more than a single source rely fundamentally on local governments' ability to move water from one source to another to meet local water supply and safety needs. Countless water management systems throughout the country transfer water to areas that need water, or away from areas in danger of flooding. Operation of canals, locks, and other structures involves movement of water from one body – whether natural or constructed – to others. *Amici* support Appellants' request that the Court reverse the District Court's decision because it

threatens the operation of all such systems and is inconsistent with the language and intent of the Clean Water Act (CWA).

7. *Amici* also have an interest in this litigation because the Court's earlier decision in Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir. 2001), might be interpreted to change the regulatory structure for local governments and other water managers by holding that all transfers of natural water, in the context of routine water management activities, can only be authorized by National Pollutant Discharge Elimination System (NPDES) permits. Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments and public utilities for ordinary management of water, for public water supply, flood control, navigation, and other governmental and public purposes, currently operate pursuant to such a federal permit. Based on the numerous water management structures that predate the enactment of the Clean Water Act in 1972, it was clear to Congress at that time the statute was developed that the nation depended on such facilities. There is no indication in the language or history of the Clean Water Act that Congress intended the new law to adversely interfere with these structures' basic functions. The statute was comprehensively amended in 1987, and has been surgically amended several times since. At no time has Congress given any indication that it believed the NPDES program should apply to these water

management structures. The District Court's interpretation of this Court's earlier decision would burden tens of thousands of water authorities and municipal water departments and agencies with unnecessary, and in many cases unattainable, regulatory requirements. In perhaps the majority of cases, local water management agencies would be unable to obtain or comply with NPDES permits for facilities that are essential to many public safety and uses, including flood control, to ensuring a reliable supply of water for domestic, commercial, and industrial uses, and fire suppression. Further, the issue of whether active transferring of water from one area to another needs an NPDES permit could have serious financial consequences for municipalities in New York State, especially in the context of newly developed stormwater management programs.

8. *Amici's* brief is desirable in order for the Court to weigh the impacts that the District Court's ruling will have on those most directly affected: local governments, public utilities, water suppliers, and local water management agencies. The matters asserted in *amici's* brief are directly relevant to the disposition of the case and *amici's* interests are aligned with those asserted by Appellants. As more fully explained in the appended brief, *amici* support the position of Appellants that the District Court's decision should be reversed and that a ruling should be issued that water quality impacts of water transfer systems such

as the one at issue in this case are not required to be regulated through the NPDES permit program.

Based on the foregoing, *amici* move this Court for leave to file the appended Brief as *Amici Curiae* in Support of Petitioners City of New York and New York City Department of Environmental Protection.

Respectfully submitted,

David W. Burchmore
Squire, Sanders & Dempsey LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
Telephone: (216) 479-8500
Fax: (216) 479-8779

ROBERT J. SANER
General Counsel for Association of
Metropolitan Water Agencies
Powers, Pyles, Sutter & Verville, P.C.
1875 Eye Street N.W.
Washington, DC 20006
Telephone: (202) 466-6550

ALEXANDRA DAPOLITO DUNN
General Counsel, Association of
Metropolitan Sewerage Agencies
1816 Jefferson Place, NW
Washington, DC 20036
Telephone: (202) 533-1803

DONNA M. GILIBERTO
General Counsel, New York State
Conference of Mayors and Municipal
Officials
119 Washington Avenue
Albany, NY 12210
Telephone: (518) 463-1185
Fax: (518) 463-1190

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion for Leave to File Brief as Amici Curiae in Support of Petitioners City of New York and New York City Department of Environmental Protection* was served via regular first class mail, postage prepaid on this 21st day of June, 2004, upon the following parties:

Karl S. Coplan, Esq.
Pace University School of Law
Environmental Litigation Clinic
78 N. Broadway
White Plains, NY 10603

Leonard Koerner, Esq.
Corporation Counsel's Office
City of New York
100 Church Street
New York, NY 10007

James M. Tierney, Esq.
Attorney General's Office
Environmental Protection Bureau
The Capitol
Albany, NY 12224

David W. Burchmore