03-7203

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiffs-Appellees-Cross-Appellants,

-against-

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

Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

DEFENDANTS-THIRD-PARTY-PLAINTIFFS-APPELLANTS-CROSS-APPELLEES RESPONSE AND REPLY BRIEF

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Dated August 6, 2004

JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

-against-

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES, REGULATIONS, and RULES

MISCELLANEOUS

New York State Department of Environmental Conservation

PRELIMINARY STATEMENT

Defendants-third-party-plaintiffs-appellants-cross-appellees City of New York and New York City Department of Environmental Protection ("DEP"), and Defendant-Appellant-Cross-Appellee Joel A. Miele, Sr., Commissioner of DEP (collectively, the "City") respectfully submit this brief in response and in reply to the briefs of plaintiffs-appellees-cross-appellants ("plaintiffs") and third-party defendants-appellees ("State").

In their appeal from the District Court's February 6, 2003 order, plaintiffs argue that the District Court's assessment of $5.749 million for the continued operation of a water supply facility that has been operating since 1924, apparently the largest penalty ever assessed against a municipality under the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, should have been even higher. Memorandum-Decision and Order, and Civil Judgment, dated February 6, 2003 (Scullin, Jr., U.S.D.J.) (N.D.N.Y. 2003) (SPA 7-32).[1] They propose a penalty of $27 million, based on expert testimony they offered at trial about the theoretical costs of operating a treatment plant, although the District Court (and the City's expert) questioned such a plant's feasibility. They further question the District

Court's finding that there were no serious environmental impacts from the Tunnel, although they offered no expert testimony that there were such impacts. Finally, plaintiffs suggest that the City could not possibly have believed in good faith that the Tunnel did not require a permit, even though the Chief Judge of the United States District Court for the Northern District of New York had held that no permit was required, based on his consideration of precisely the same case law that plaintiffs assert makes a good faith belief impossible. As set forth below and in the City's Initial Brief, the District Court's assessment of $5.749 million against the City was too high rather than too low.

In response to the City's appeal, plaintiffs and the State argue that the issues raised by the City do not support reconsideration of the prior panel's decision reviewing the District Court's dismissal of the case under Fed. R. Civ. P. Rule 12(b)(6). *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001). Under the law of the case doctrine, however, reconsideration is appropriate based on the Supreme Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, __ U.S. __, 124 S. Ct. 1537 (2004), which held that discharges to the same water body from

[1] Numbers contained in parentheses indicate pages of the Joint Appendix when they are preceded by "A" and pages of the Special Appendix when preceded by "SPA," unless otherwise indicated.

which the water originated (intra-basin transfers) are not regulated under NPDES, and the factual record developed on remand of this case, which shows, among other things, that such discharges have no less impact on water quality than discharges of water from different water bodies (inter-basin transfers). For these reasons, this Court should reconsider the decision of the prior panel.

ARGUMENT IN RESPONSE TO CROSS APPEAL

POINT I

THERE IS NO BASIS FOR ASSESSING MORE THAN $5.749 MILLION IN PENALTIES AGAINST THE CITY; RATHER, IF PENALTIES ARE ASSESSED AT ALL, THEY SHOULD BE *DE MINIMUS*

For the reasons set forth in Point IV of the City's Initial Brief, the City maintains that the penalties assessed against the City, even assuming that the City should be held liable for simply moving natural, untreated water from one drinking water reservoir to another, are excessive.[2] As set forth below, plaintiffs' arguments for even higher penalties should be rejected.

[2] Indeed, as noted by plaintiffs, the District Court assessed penalties for 131 days at a rate higher than was authorized by law. Plaintiffs' Brief at n. 1. Even if the District Court's penalties are upheld by this Court, the total amount should be reduced accordingly, by $524,000.

A. The City believed in good faith that the Shandaken Tunnel did not require a SPDES permit.

The District Court found that the City "reasonably believed that they did not need a SPDES permit to operate the Shandaken Tunnel prior to the Second Circuit's decision on October 21, 2001."[3] (SPA 24.) The District Court further noted that "neither the EPA nor DEC [had] ever indicated that [the City] needed such a permit." (SPA 25.)

Plaintiffs contest the District Court's findings that the City had acted in good faith by asserting, incorrectly, that it had not sought the advice of counsel about the need to obtain a SPDES permit for the Shandaken Tunnel. Plaintiffs' Brief at 9, 60. Dr. Michael A. Principe, Deputy Commissioner, DEP Bureau of Water Supply, testified at trial, that in a discussion with both the DEP General Counsel DEP and attorneys from the City Law Department that took place shortly after this litigation was commenced, he had been informed that counsel did not believe that a permit was required for the Shandaken Tunnel (A937-38).[4] Dr.

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[3] As explained in detail in the City's Initial Brief, section 302 of the Clean Water Act establishes the National Pollutant Discharge Elimination System, or "NPDES," a permit program for discharges of pollutants to waters of the United States. 33 U.S.C. § 1342. That program is implemented in New York as the State Pollutant Discharge Elimination System, or "SPDES," program, by the State Department of Environmental Conservation ("DEC").

[4] Plaintiffs make much of the fact that Dr. Principe had not recalled that conversation two and a half years later, when plaintiffs deposed him on October

Continued…

Principe further testified that neither EPA nor DEC had ever suggested that the Tunnel – which is extensively regulated by both agencies – required a SPDES permit (A938-39).[5] Dr. Principe also stated that he is a member of the Association of Metropolitan Water Agencies and the American Water Works Association, and that he was not aware that transfers of untreated water in any of the water supply systems with which he is familiar through those associations are subject to NPDES permits (A972-73). Based on this testimony, the District Court properly found that the City had a good faith belief that a SPDES permit was not required for the Shandaken Tunnel.

Plaintiffs also suggest that in light of *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088 (S.D.N.Y. 1990), *aff'd without opinion*, 940 F.2d 649 (2d Cir. 1991), "the City was previously on notice that the Clean

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10, 2002 (A675-706). As Dr. Principe testified, however, his recollection was refreshed upon review of the General Counsel's notes from that meeting. That people cannot be expected to remember every conversation they are involved in forever is the reason that the Rules of Evidence allow for refreshing witnesses' recollections. Plaintiffs' attempt to call that recollection into question is particularly unwarranted given that Chief Judge Scullin specifically noted that Dr. Principe was a "very credible and forthright witness" (SPA 23).

[5] The District Court could reasonably have based its finding of good faith on these inactions on the part of EPA and DEC. *See, e.g., Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 80 (3d Cir. 1990) (District Court appropriately reduced penalties where EPA and state environmental agency had not prosecuted violations diligently).

Water Act permitting requirements apply to discharges from its water supply tunnels." Plaintiffs' Brief at 60. The determination in *Hudson River Fishermen's Ass'n* that a permit was required, however, turned on the addition of chlorine and alum to the water. 751 F. Supp. at 1102. It is disingenuous for plaintiffs to suggest that the case has any bearing on the transfer of untreated water.

Finally, in connection with their challenge to the City's good faith belief that no permit was required, plaintiffs note that in January 1999, the Law Department sent a copy of *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) to the General Counsel of DEP. Plaintiffs' Brief at 60. It is not entirely clear what plaintiffs are trying to suggest. Lawyers for the City would have been thoroughly incompetent not to have identified the only appellate case at that point in which a transfer of untreated water – albeit in the context of commercial exploitation of that water – had been held subject to the NPDES permit requirements. It would have been irresponsible not to have brought the case to DEP's attention. To suggest that in light of *Dubois*, the City could not have believed in good faith that the Tunnel did not need a permit is essentially to suggest that the District Court could not have analyzed the law in good faith in its October 6, 2000 decision dismissing this action. *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, No. 00 Civ. 511 (N.D.N.Y. Oct. 6, 2000).

B. The District Court's finding that there were no serious environmental impacts from the releases from the Shandaken Tunnel is supported by the record.

Plaintiffs argue that it was "clearly erroneous" for the District Court, in assessing the evidence introduced at trial, to find that the lack of serious environmental impacts resulting from the releases from the Shandaken Tunnel was a mitigating factor. Plaintiffs' Brief at 52. Citing *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc.,* 786 F. Supp. 743, 747-49 (N.D. Ind. 1992), the District Court found:

> although there was some evidence at trial that the trout below the Shandaken Tunnel were smaller than the trout above the Shandaken Tunnel, there was no evidence of a significant decrease in the number of trout or of any trout kill as a result of the discharges. In fact, there was evidence that without the discharge of the water through the Shandaken Tunnel, there would [be] less habitat for trout because of low water levels.

(SPA 19.) As in *Universal Tool*, the evidence in this case demonstrated that "sufficiently high water quality existed in the lower portions of [the Esopus Creek] to support a permanent community of aquatic biota." 786 F. Supp. at 748. (*See, e.g.*, A775-76, 812-15, 845, 876-77.)

Indeed, two of plaintiffs' fact witnesses testified to the environmental benefits provided by the Tunnel: without the releases from the Tunnel, particularly during the late summer, the carrying capacity of the Esopus Creek would be

reduced (A822); and the Tunnel generally provides sufficient volumes of cold water to support the trout habitat in the summer (A884-86).

Plaintiffs offered no expert testimony at trial to support any claim of adverse impacts (*see, e.g.*, A824-25). Accordingly, far from being "clearly erroneous," the District Court's finding that the lack of environmental harm should be a mitigating factor in assessing penalties was appropriate.

C. The District Court properly disregarded testimony about hypothetical costs of operating an infeasible treatment plant in determining the amount of penalties.

Plaintiffs suggest that the District Court should have assessed penalties of at least $27 million, based on testimony they offered concerning operation and maintenance costs of an alum treatment plant posited by their expert.[6] The District Court did not take plaintiffs' expert's estimates into account in assessing penalties, questioning the "feasibility" of such a plant, as the expert had not considered the environmental impacts or duration of construction (SPA 20-22; A319-23). Moreover, three of plaintiffs' fact witnesses testified that they were opposed to alum treatment at trial (A819, 839, 884).

[6] Plaintiffs also implicitly suggest that the assessment of penalties should take into account the $366 million in revenues associated with the ratio of water from the Schoharie reservoir to the City's total distribution of water between 1995 and 2001. Plaintiffs' Brief at 7-8; A1218. The City does not sell water for profit. A931.

Plaintiffs are correct that avoided costs are often used as a measure of penalties in Clean Water Act cases. Plaintiffs' Brief at 54-55. In none of the cases they cite, however, nor in any others that the City has found, are penalties based on theoretical costs associated with facilities that do not currently exist and about which there are serious questions of feasibility and desirability. *See, e.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 574-76 (5th Cir.) *cert. denied* 519 U.S. 811 (1996) (some question about whether defendant would need to construct new re-injection well rather than use existing wells, but no question of feasibility in either event); *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80 (3d Cir. 1990) (calculation of avoided costs based on costs of treating wastewater at existing facility); *United States v. Allegheny Ludlum Corp.*, 187 F. Supp.2d 426, 437-40 (W.D. Pa. 2002), *aff'd in relevant part, vacated in part, and remanded* 366 F.3d 164 (3d Cir. 2004) (penalties based on avoided staffing costs and delays in implementing upgrades and other initiatives later undertaken at facility).

Plaintiffs note that violators should not "escape civil penalties on the ground that such penalties cannot be calculated with precision," Plaintiffs' Brief at 55, quoting *United States v. Municipal Authority of Union Township*, 929 F. Supp.

800, 806-807 (M.D. Pa. 1996), but that has no bearing on whether civil penalties should be calculated based on an unrealistic facility.[7]

REPLY ARGUMENT

POINT II

THE LAW OF THE CASE DOCTRINE SUPPORTS RECONSIDERATION

After this Court's October 2001 decision, the Supreme Court established that intra-basin transfers are not subject to NPDES permits. *Miccosukee*, 124 S. Ct. at 1547. On remand, the City developed an uncontested factual record showing that there is no basis for distinguishing between inter- and intra-basin transfers. Accordingly, under the law of the case doctrine, this Court should reconsider its earlier decision and conclude that inter-basin transfers, such as the Shandaken Tunnel, are not subject to the NPDES provisions.

As this Court has stated, "the law of the case doctrine does not deprive an appellate court of discretion to reconsider its own prior rulings, even when the ruling constituted a final decision in a previous appeal." *Rezzonico v. H&R Block,*

[7] Quoting a response in a deposition out of context, plaintiffs note that Dr. Principe stated "you can build a treatment plant." Plaintiffs' Brief at 56. Dr. Principe was responding to a question – to which counsel for the City properly objected – that was focused on the hypothetical treatment capability of a plant: "Would a treatment plant be capable of insuring that the discharges from the Shandaken Tunnel would on a regular basis not be substantially, visibly more turbid than the receiving water in the Esopus?" (A648.)

Inc., 182 F.3d 144, 149 (2d Cir. 1999) *cert. denied* 528 U.S. 1189 (2000); *see also United States v. Fernandez*, 506 F.2d 1200, 1203 (2d Cir. 1974) ("An issue decided on a prior appeal is not foreclosed with all the finality of *res judicata* when the case comes back to this court").

Although plaintiffs and the State have presented the law of the case doctrine as a rigid principle, this Court recognizes that "the law of the case doctrine is discretionary, not mandatory." *Rezzonico*, 182 F.3d at 149. It is even less controlling in this case, where this Court initially addressed the issues in the context of an appeal of a dismissal under Fed. R. Civ. P. Rule 12(b)(6), with no factual record to guide its decision. In *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003), when addressing the same issue in an appeal of summary judgment that it had already decided on an appeal of a preliminary injunction, this Court stated:

> The *Brody I* panel's holding on standing was based only on the limited record before it on the motion for preliminary injunction. Now presented with a fuller record for purposes of the motion for summary judgment, we are free to revisit the issue…

Id. at 110. Like a motion for preliminary injunction, a motion under Rule 12(b)(6) is decided on a limited factual record, and the principle supporting reconsideration set forth in *Brody* should be applied to this case in light of facts developed on remand.

This Court has established that "[t]he major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000). As shown below, each of those factors applies to this case.

A. The decision in *Miccosukee* supports reconsideration of this Court's prior decision.

Plaintiffs contend that the Supreme Court's decision in *Miccosukee* supports the distinction between inter- and intra-basin transfers. This is incorrect. The *Miccosukee* decision establishes that intra-basin transfers are not subject to NPDES permitting, a concept that this Court called into question. 124 S. Ct. at 1547; *Catskill*, 273 F.3d at 492. Because there is no basis for a distinction between inter- and intra-basin transfers, *Miccosukee* supports reconsideration.

It is true that in *Miccosukee*, the Supreme Court remanded the case for further factual development as to whether the transfer at issue there involves the same body of water or distinct water bodies. This question had not been resolved by the lower courts. However, plaintiffs give more significance to that question than is warranted.

The Supreme Court considered that distinction to be significant only because it has conclusively held that transfers within the same water body are not subject to NPDES, presumably based on the long-established rule from *Nat'l*

Wildlife Fed'n v. Gorsuch, 862 F.2d 156 (D.C. Cir. 1982) and *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). If *Miccosukee* could be classified within the rule, it should be decided in that context. The Supreme Court specifically left open the question whether inter-basin transfers are similarly not subject to NPDES permitting – a question that has only recently been addressed by Courts of Appeals.[8] The Court recognized that the issue of whether all waters should be treated as unitary, for purposes of the NPDES program, was too important to be decided in a case where the facts (to be developed on remand) might make it factually irrelevant.

Because the record in this case has already been developed and, as shown below, demonstrates that there is no basis to distinguish between inter- and intra-basin transfers, *Miccosukee* supports reconsideration in light of what the Supreme Court has established as controlling law: that intra-basin transfers are not subject to NPDES permits.

B. New evidence in this case supports reconsideration.

Reconsideration of a prior panel's decision is appropriate where new evidence is available. *Tenzer,* 213 F.3d at 39. Most significant to the issues raised

[8] As the Supreme Court stated, "[i]ndeed, we are not aware of any reported case that examines the unitary waters argument in precisely the form that the Government now presents it. As a result, we decline to resolve it here." 124 S. Ct. at 1545.

here, the record now shows that: water released from a dam is likely to be as different from the downstream receiving waters, in terms of pollutant levels, as waters from distinct watersheds (A337); operation of the Shandaken Tunnel is essential to the supply of sufficient quantities of safe water to the nine million people who drink it (A323-25, A910-12, A915-18) and regulation through NPDES will curtail this supply as there is no feasible means to ensure that the releases will meet water quality standards in the Esopus Creek (A334, A963-65, *see also* draft permit, http://www.dec.state.ny.us/website/dcs/eisanddp/ shandakpermit.pdf at p.2, Note 2; p.3 "Interim Permit Limits, Levels, and Monitoring – Turbidity" and "Final Permit Limits, Levels, and Monitoring – Turbidity"; p.4, fn. 3F; and p.5, fn.7);[9] and DEC specifically requires the City to make releases through the Shandaken Tunnel because of environmental benefits (A922-25). Each of these facts, none of which was available to the prior panel, supports reconsideration.

1. **Water quality impacts from dams affect water quality as much as releases of water from different watersheds.**

The uncontested evidence demonstrates that water quality impacts from releases to the same water body can affect water quality as much as releases from one watershed to another (A337). Plaintiffs contend that this evidence is not

[9] As noted below, DEC released a revised draft SPDES permit for public comment on August 4, 2004.

new, that the evidence does not contradict any of the conclusions of the prior ruling, and that it is not competent evidence. Plaintiffs are incorrect.

First, although as plaintiffs point out, the *Gorsuch* decision contains a discussion of dam induced water quality changes, that case did not demonstrate that those changes had as much impact to water quality as changes resulting from a discharge of water originating in another watershed. As Dr. Principe explained, "In particular, the difference between the chemical make-ups of an impoundment and its downstream lotic receiving water may well be as significant as the difference between the flow from the Shandaken Tunnel and the upper Esopus Creek" (A337). This very important fact – that there is no basis to distinguish, in terms of impacts to water quality, between releases to the same water body and inter-basin transfers and, specifically, transfers through the Shandaken Tunnel – was not considered by the prior panel. The evidence is relevant to contradict a factual premise underlying the prior decision. It is therefore new evidence supporting reconsideration.

Moreover, plaintiffs' contention that this is somehow not competent evidence because it was presented in an affidavit in opposition to summary judgment is without merit. This sworn testimony is no less competent merely because plaintiffs did not consider these facts to be material; they had the opportunity to oppose them, either in their reply papers or at trial, but declined to

do so. Moreover, that the City did not present this evidence again during the trial on penalties, after liability had already been determined, is irrelevant to its competence. While that evidence is critical to liability, it has no bearing on penalties. Finally, plaintiffs' claim that the City agreed not to present Dr. Principe as an expert witness at trial is specious. The Principe affidavit was submitted on April 18, 2002, long before the October 25, 2002 pretrial conference at which the City represented that Dr. Principe would not testify as an expert at trial. That Dr. Principe testified at trial as a fact witness does not diminish his expertise in limnology and water quality. The evidence showing that water quality impacts from dams have as much impact on water quality as transfers from other watersheds is competent evidence supporting reconsideration under *Tenzer*.

2. Under Clean Water Act section 101(g), new evidence showing the City's reliance on the releases and showing that water allocation rights will be affected by a SPDES permit support reconsideration.

As discussed more fully below, Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), provides that the authority of states to allocate water, and the rights of parties who have received such allocations, shall not be superceded or abrogated by the Act. The evidence developed below shows the importance of the transfer at issue to providing a safe and adequate supply of drinking water to City residents. That evidence also shows that regulating the transfer under NPDES will supercede or abrogate the City's right to quantities of

water necessary to maintain that supply. In *Miccosukee*, the Supreme Court indicated that the question whether regulation under the Clean Water Act runs afoul of water allocation rights is a factual inquiry.

> Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g).

Miccosukee, 124 S. Ct. at 1545. Thus, in circumstances where the NPDES requirement would prevent a state from exercising its right to allocate water, or would abrogate the rights of a party to quantities of water, as established by a state, the Supreme Court has indicated that NPDES should not apply.

The evidence in this case demonstrates that the NPDES requirement will abrogate the City's right to transfer water within its supply system in response to water management needs – a right which was established by the State Legislature. 1905 N.Y. Laws Ch. 724. If the City is required to restrict the flow from the Tunnel to prevent violations of water quality standards, a SPDES permit will necessarily abrogate the City's right to Schoharie water, a right which is essential to the water supply needs of nine million residents of New York State.

The draft SPDES permit, cited above, speaks for itself, as it contains many provisions restricting Tunnel flow. This new evidence demonstrates that applying NPDES to the Shandaken Tunnel violates section 101(g), and this Court should reconsider its prior decision in light of these facts.

3. The evidence showing that DEC requires releases to advance environmental benefits and recreational use of the Esopus supports reconsideration.

The record now demonstrates that the discharges at issue, far from causing any material environmental harm, are actually required by NYSDEC to sustain a trout habitat and advance other water recreation activities. *See* N.Y. Comp. Codes R. & Regs. tit. 6, Part 670; A924. Even plaintiffs' witnesses testified to the environmentally benefits of the releases (A822, A884-86). Thus, the evidence demonstrates that the releases advance the Clean Water Act's stated goal of attaining "water quality which provides for the protection and propagation of fish … and provides for recreation in and on the water.…" 33 U.S.C. § 1251(a)(2).

The NPDES program was not intended to regulate discharges that are desired, and actually required, for their beneficial effects. The fact that regulation under NPDES will actually curtail releases that benefit the environment shows that the program is too rigid when applied to the Shandaken Tunnel. Congress (and EPA) geared the NPDES provisions toward industrial and wastewater point source discharges. The unintended results that have arisen in this case demonstrate the

problem of opening the door to NPDES regulation of transfers within water supply systems.

This new evidence supports the reconsideration of the panel's decision in order to correct a clear error, and prevent the manifest injustice that has arisen since that decision. To restrict releases that are both necessary for the City's water supply needs and beneficial to the environment through the application of the unyielding NPDES regulations is unjust. To order the City to pay over $5 million in penalties for those releases is unfair.

POINT III

NEITHER THE PLAIN LANGUAGE OF THE CLEAN WATER ACT, NOR ITS STATED PURPOSE, NOR ITS LEGISLATIVE HISTORY SUPPORTS A DISTINCTION BETWEEN INTER- AND INTRA-BASIN TRANSFERS

A. The plain language of the Act does not distinguish between inter- and intra-basin transfers.

The Clean Water Act does not contain any language supporting the inter- and intra-basin distinction for purposes of NPDES permitting requirements. If such a distinction had been intended by Congress, it would have been articulated either in the NPDES permitting section or in the definition of "navigable waters." Moreover, the legislative history cited by plaintiffs does not suggest that Congress intended such a distinction.

In connection with certain provisions other than NPDES, Congress made clear its intent that the Act would regulate specific water bodies or segments of water bodies separately. For example, for implementation of Total Maximum Daily Loads (TMDLs), Congress required each state to establish water quality standards for individual segments of water bodies. 33 U.S.C. § 1313(d); Plaintiffs' Brief at 35. Therefore, in provisions governing water quality standards and the establishment of TMDLs, where it is appropriate to distinguish between water bodies, Congress did so in the statute. No such distinction exists under the NPDES program.

As water quality standards and use designations are assigned to *segments* of water bodies, rather than an entire basin or water body, it is irrational to base the NPDES requirement on a distinction between inter- and intra-basin transfers. *See* 40 C.F.R. § 131.1 ("A water quality standard defines the water quality goals of a water body, or *portion thereof*…") (emphasis added). For the creation of TMDLs, the regulations define a "water quality limited segment" as "[a]ny segment where it is known that water quality does not meet applicable water quality standards…). 40 C.F.R. § 130.2(j). Far from supporting the notion, as plaintiffs and the State contend, that NPDES turns on whether the release at issue transfers water to the same water body, these regulations show that the inter-, intra-

basin, or same/different water body analysis, has no relation to the NPDES program.

Plaintiffs and the State also look to the Act's definitions of "discharge of pollutant," "navigable waters," and "point source" in support of requiring a NPDES permit for the Shandaken Tunnel.[10] Plaintiffs' Brief at 26-28. In their discussion of these terms, however, plaintiffs do not explain why the plain meanings of these terms do not cover intra-basin transfers if, as plaintiffs argue, they cover inter-basin transfers.

In addition, plaintiffs look to the regulation of "dredged spoil" under the Act. *See* Plaintiffs' Brief at 29. Although it is not clear what plaintiffs intend

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[10] The Clean Water Act regulations demonstrate that regulation of point source discharges was not intended to cover the mere transfer of water. 40 C.F.R. Parts 401-471 meticulously set forth the requirements that apply to an elaborate list of specific point sources, from the "Dairy products processing point source category" to the "Nonferrous metals forming and metal powders point source category." *See* 40 C.F.R. §§ 405 and 471. All regulated point sources fall within only two categories: industrial dischargers and wastewater treatment plants. The only discharges covered are discharges into water for the first time. Water transfers are noticeably absent from this list. Neither the law nor the regulations indicate any intention to regulate transfers of water through the NPDES program. For this reason, the State's citation to *Northern Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir.), *cert. denied sub nom. Fidelity Exploration and Prod. Co. v. Northern Plains Res. Council,* __ U.S. __, 124 S. Ct. 434 (2003) is irrelevant, as that involved a transfer of nonjurisdictional groundwater, which was "industrial waste water," to waters of the United States. *Id.* at 1162. That discharge is clearly regulated under NPDES, and bears no resemblance to the transfer of drinking water from one surface water to another.

to argue, these provisions undermine any basis for distinguishing between inter- and intra-basin transfers under the NPDES program, and support the unitary waters concept. A permit to redeposit dredged material is required under Section 404, 33 U.S.C. § 1344, regardless of whether the material is returned to the same water body from which it came, or whether it is returned to a different water body. To use this Court's soup analogy, 273 F.3d at 492, Section 404 provides that when noodles are lifted from a pot of soup with a ladle, a permit is required to return those noodles to any soup, whether it is the same pot or a different pot.

As section 404 treats all discharges of dredged spoil the same, regardless of where the material is discharged, section 402 should not be interpreted any differently. Now that the Supreme Court has established that transfers within the same water body are not subject to NPDES, there is no basis to require NPDES permits for transfers between water bodies.

B. The purpose of the Clean Water Act does not support a distinction between transfers to the same water body and to different water bodies.

Absent plain language or legislative history supporting the distinction, plaintiffs argue that the distinction supports the purpose of the Clean Water Act – "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. This proposition is false. As demonstrated by the Principe Affidavit, intra-basin transfers can be *more* harmful to water quality than inter-basin transfers (A337, ¶ 67).

Nowhere is this more evident than in comparing Shandaken Tunnel releases to the discharge at issue in *Consumers Power*, where water was withdrawn from Lake Michigan, processed through electric generation equipment, and then released back into the lake. Before being released, much of the life within the water was processed in the hydroelectric power plant. 862 F.2d at 582. That water, which was transferred within the same water body, polluted Lake Michigan with pureed fish that would not otherwise have existed. There is no ecological basis for distinguishing between such an intra-basin transfer and the movement of untreated water from the Shandaken Tunnel, and such a distinction does not serve the purposes of the Clean Water Act.

Plaintiffs cite to a particular photograph showing muddy water being released into a relatively clear stream on a particular occasion to influence this Court's opinion about the Shandaken Tunnel. Plaintiffs' Brief at 5. Appellants freely admit that this photograph represents a situation that occurs regularly, although to varying degrees. The Court should recognize that the suspended solids in water in that photograph naturally settle out as a result of flow between, and detention within, downstream reservoirs, and is regularly consumed by the City's residents as clean, unfiltered drinking water. The discharge is not akin to the discharge of pulverized fish carcasses to a water body that would not receive that discharge but for the release at issue in *Consumers Power*.

Lest the Court be left with an incorrect impression about the discharge at issue in this case, the City respectfully refers to the photos at A1435-36. Those photographs show a muddy Esopus Creek upstream of the Tunnel, with noticeably clearer water being released through the Shandaken Tunnel. The truth is that the Esopus Creek is affected by naturally occurring turbidity in its own watershed, notwithstanding the releases from the Shandaken Tunnel. Contrary to the impression created by plaintiffs, the Tunnel does not simply pollute an otherwise pristine stream. All three photographs show accurate views of the discharge on different occasions, and if the photograph cited by plaintiffs "is worth 14,000 words" (Plaintiffs' Brief at 5), the photographs at A1435-36 are worth 7,000 in reply.

C. Applying the NPDES program to inter-basin transfers is not necessary to avoid the disastrous situations predicted by the State.

New York State presents a litany of hypothetical harm that could come from a ruling that inter-basin transfers of untreated water do not require NPDES permits. State Brief at 9-10 and n. 10. The State, however, ignores other laws – indeed, other provisions of the Clean Water Act – that would prevent such calamities. First, any new diversion of polluted water would be subject to environmental review. N.Y. Envtl. Conserv. Law § 8-0101 *et seq.*; 42 U.S.C. § 4321 *et seq*. Moreover, construction of a diversion would require a permit under section 404 of the Clean Water Act and thus a section 401 water quality

certification. 33 U.S.C. §§ 1344, 1341(a)(1). And to the extent that any such diversion occurred in the context of a drinking water supply system, it would also be subject to the Safe Drinking Water Act. 42 U.S.C. § 300(g) *et seq.*

The State's concerns, which include, for example, the transfer of invasive species, would be addressed and prevented under environmental review and the 404 permit process. This concern is of course relevant only to new water transfers, and not to pre-existing transfers like the Shandaken Tunnel, as any transfer of invasive species from an existing facility would already have occurred. This doom scenario is not a realistic concern.

POINT IV

THE SUPREME COURT DID NOT REJECT THE "UNITARY WATERS" THEORY; THE COURT'S CONCERNS CAN ALL BE RESOLVED IN SUPPORT OF THE THEORY

Plaintiffs suggest that the Supreme Court rejected each argument raised by the United States in support of the unitary waters theory.[11] Plaintiffs' Brief at 32. Neither plaintiffs nor the State can counter the plain language in the Clean Water Act that suggests that Congress viewed the "waters of the United

[11] *See generally* Brief for the United States as *Amicus Curiae* Supporting Petitioner, *South Florida Water Management District v. Miccosukee*, 124 S. Ct. 1537 (2004) (No. 02-626). The Brief is available at http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2002-626.pet.ami.inv.html.

States" as a single entity for purposes of determining when a NPDES permit is required.

While plaintiffs are correct that Justice O'Connor at one point characterized the unitary waters theory in oral argument as "extreme," they ignore Justice Scalia's observation that rather than being extreme, the theory is supported by the text of the Clean Water Act, whereas the distinction between inter- and intra-basin transfers has no basis in the language of the statute:

> QUESTION: … I can understand how you can interpret the phrase, navigable waters, to mean all navigable waters. I can't understand how you can interpret the phrase, navigable waters, to mean only those navigable waters that are within a single aquifer or within a single drainage district. How – how can you possibly derive that interpretation from the text?
>
> MR. BISHOP: No, I agree, Justice Scalia.
>
> QUESTION: Which is – which is why you took the extreme position, that is really textually not very extreme at all.

Transcript of Oral Argument in *South Florida Water Management District v. Miccosukee*, No. 02-626, at 15-16 (available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-626.pdf).[12]

A. The coherent regulatory scheme established under the Clean Water Act for ensuring compliance with water quality standards does not support the application of NPDES permits to inter-basin transfers.

In its discussion of the unitary waters theory, the Supreme Court noted that the Clean Water Act anticipates that states will establish water quality standards for individual waters rather than for the waters of the United States collectively. 124 S. Ct. at 1544. As explained above and in the City's initial brief, this practical approach recognizes that water quality varies among different bodies of water – and indeed within single bodies of water, and is irrelevant to the issue here: whether the "navigable waters" are unitary for purposes of determining when NPDES permits are required. City's Initial Brief at 30. The classifications of the Esopus Creek itself vary considerably over its course: it is classified as C(TS) from its headwaters down to the Shandaken Tunnel outlet; A(TS) from the Tunnel to the Ashokan reservoir; B immediately below the reservoir; and then B(T) until it joins

[12] Justice Scalia ultimately dissented from the majority opinion in *Miccosukee* but suggested that the unitary waters theory should be "considered in another case." 124 S. Ct. at 1547.

the Hudson River.[13] *See* N.Y. Comp. Codes R. & Regs. tit. 6, §§ § 861.4, Table 1, items 3, 4, and 862.6, Table 1, items 555, 556. Significantly, the segment of the Esopus with the highest water quality is that immediately below the Shandaken Tunnel. These various classifications may be relevant to the permit limits that would be required for discharges to the Esopus at different points, but do not address the question of when a permit is needed in the first instance.

The City does not suggest that inter-basin transfers "are immune from regulation" (Plaintiffs' Brief at 36), but only that such transfers are not subject to NPDES permits. Where, as here, the predominant sources of pollutants in water are non-point in nature, appropriate development and implementation of TMDLs is the appropriate remedy under the Clean Water Act. The State accurately characterizes the TMDL program (State's Brief at 29) and, as plaintiffs state, to date, that program has not been implemented to address turbidity in the Esopus. Plaintiffs' Brief at 48. But the State's failure to comply with its obligations under the Clean Water Act does not justify creating new requirements for a water supply facility that has been in service since 1924.

[13] Higher use classifications are designated by letters earlier in the alphabet. N.Y. Comp. Codes R. & Regs. tit. 6, § 701.6. The extension (T) refers to trout, and (TS) to trout spawning. *Id.*, § 800.2(b).

In particular, DEC has identified the Schoharie reservoir, the Esopus Creek below the Shandaken Tunnel outlet, and the Ashokan reservoir as impaired because of "silt/sediment" from "erosion" and "construction" (Schoharie reservoir) and "streambank erosion" (Esopus Creek and Ashokan reservoir) on the 2004 Section 303(d) List. *See* http://www.dec.state.ny.us/website/dow/part1.pdf (last updated January 28, 2004). DEC has taken no steps to date to develop a TMDL for this interconnected system. *See* Monthly Status Report to the Northern District, dated June 1, 2004, at 3. Supp. Index No. __. EPA, in partnership with New York State, recognizes that a TMDL to address these impairments must consider the sources of the silt and sediment in the November 2002 Filtration Avoidance Determination, which directs DEP to "Provide technical support to NYSDEC in NYSDEC's development of a suspended sediment TMDL for the Schoharie and Esopus basins." (A1762.)

B. The potential costs – in terms of both money and water – of requiring a SPDES permit for the Shandaken Tunnel underscore the need to read the NPDES provisions in light of sections 101(g) and 510 of the Clean Water Act.

As discussed above in Point II(B)(2), the Supreme Court anticipated the need for a case-by-case, fact-based inquiry into the impacts of requiring a NPDES permit for a municipal water management facility.

While the Supreme Court suggested the possibility that in some cases, the impacts of requiring NPDES permits for inter-basin transfers could be

mitigated through the use of general permits, 124 S. Ct. at 1545, both plaintiffs and New York State recognize that general permits will not resolve the problem the City faces in obtaining a SPDES permit for the Shandaken Tunnel. Plaintiffs' Brief at 45; State Brief at 38. But both attempt to avoid an inquiry into the impacts of a permit for the Shandaken Tunnel by ignoring the problems inherent in devising an individual permit for this discharge. They refer to the ongoing permitting process without acknowledging that DEC has not complied with the District Court's directive to make a determination about a permit within eighteen months (SPA 29).

DEC only noticed a second draft permit for public comment on August 4, 2004. *See* http://www.dec.state.ny.us/website/enb2004/20040804/Reg3.html#351500042000001. Numerous stakeholders, including plaintiffs, the New York State Attorney General, and the City, provided extensive comments criticizing DEC's previous draft permit. Given the inherent tension between the natural levels of turbidity in the Schoharie reservoir and the importance of releases from the Tunnel for water supply and to support the fish habitat in the Esopus, it is reasonable to anticipate that this revised draft will give rise to similar comments and, in all likelihood, one or more requests for a hearing.

The record demonstrates that nothing, short of chemical treatment, possibly supplemented by filtration, would ensure that the Tunnel releases

consistently comply with the water quality standard for turbidity (A334, 1085-88). The record concerning chemical treatment makes clear that many plaintiffs oppose such treatment and that construction would raise serious environmental issues and would cost hundreds of millions of dollars (A819, 839, 884; A1090-92).[14] Because a SPDES permit must provide for compliance with water quality standards all of the time, a permit that does not restrict the City's use of the Shandaken Tunnel, and thus impair the City's ability to provide an adequate supply of safe drinking water, will be infeasible (A335, 963-65).

Both plaintiffs and the State try to characterize the NPDES process as more flexible than it actually is. For instance, plaintiffs suggest that section 302(b)(2)(A), 33 U.S.C. § 1312(b)(2)(A), "provides for relief where a permit applicant can truly show that the cost of achieving water quality standards bears no reasonable relationship to the benefit." Plaintiffs' Brief at 46. But that provision "guarantees hearing only if effluent limitations are adopted under EPA authority"

[14] New York State suggests that a multiple level intake structure "could draw clearer water from various stratified levels of the Schoharie's water column." State Brief, n.11. While the City continues to study the potential benefits of such a structure, A1791, to date no analysis suggests that it would ensure compliance with the applicable water quality standard (A335). When questioned by Judge Scullin at trial on the expected benefits of a multiple level intake, Dr. Principe testified that the intake would reduce turbidity from 10-20 percent of the time, at most (A963).

rather than, as here, state authority. *Homestake Mining Co. v United States Environmental Protection Agency*, 477 F. Supp. 1279, 1286 (D. S.D. 1979).[15]

The statute and case law underscore the inflexibility of the Clean Water Act with respect to water quality based effluent limitations. In addition to meeting technology-based limits, which are developed taking technical and economic feasibility into account, NPDES-regulated discharges must achieve "any more stringent limitation" necessary to meet state water quality standards such as the turbidity standard at issue here. 33 U.S.C. § 1311(b)(1)(C). *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163, as amended by 197 F.3d 1035 (9th Cir. 1999).

Subjecting Tunnel discharges to a NPDES permit will inevitably mean that the City will have to alter, reduce, or suspend discharges from the Tunnel to avoid liability under the Clean Water Act. Such impacts to a State water allocation that was established decades ago and that accounts for 16% of the City's daily drinking water needs are not merely "incidental" but are potentially

[15] Apparently trying to make a similar point, the State inexplicably cites sections of the Clean Water Act: (1) directing EPA to make certain information available to states for purposes of developing performance standards for new sources; and (2) authorizing EPA to regulate discharges of toxic pollutants ancillary to industrial processes. 33 U.S.C. § 1314(c) and (e), respectively. State Brief at 45-46.

devastating.[16] *Cf.* Plaintiffs' Brief at 39-41; State Brief at 36-38; *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 720-21 (1994). Thus, the facts of this case support a finding that the requirement of a SPDES permit for the Shandaken Tunnel would violate sections 101(g) and 510 of the Clean Water Act.

C. EPA's position has been and remains consistent with the unitary waters theory.

In *Miccosukee*, the Supreme Court questioned whether EPA has consistently endorsed the "unitary waters" theory both by identifying a federal regulation that treats regulated discharges differently depending on where they are directed and by citing to an amicus brief submitted by former EPA Administrator Browner in support of respondents ("Browner Amicus Brief"). Neither the

[16] The State suggests that because it does not oppose the permit requirement in this case, sections 101(g) and 510 do not come into play, and the City cannot raise questions concerning State authority to allocate water. State Brief at 38. Even assuming New York State prefers to address the challenge of the Shandaken Tunnel through its SPDES permit program, the amicus brief submitted on behalf of Colorado, New Mexico, Idaho, Nebraska, North Dakota, and Utah indicates that New York's view is not universal. Moreover, the State cannot simply abrogate a right that is rooted in the fundamental principles of Federalism. Finally, section 101(g) does not merely preserve states' rights, but the "rights to quantities of water which have been established by any state." As discussed above, the State has established New York City's right to operate its water supply system by Legislative act, and to draw water from the Catskill water supply system, via the Tunnel, as needed. Section 101(g) confirms that the City's rights are not to be superceded or abrogated by the Clean Water Act.

regulation nor the issue noted in the Browner amicus brief reflects EPA's views, current or past, about whether an inter-basin transfer of untreated water requires a NPDES permit.

First, the Supreme Court noted that under 40 C.F.R. § 122.45(g)(4), if water withdrawn for industrial use is returned to the same water body, the industrial user is not required to remove pollutants that were in the intake water to begin with. *Miccosukee*, 124 S. Ct. at 1544. But this regulation treats water bodies as distinct for purposes of particular NPDES permit limits; it does not address the question of when a NPDES permit is required in the first place.

Second, the Browner Amicus Brief cites a 1975 opinion of the EPA Office of the General Counsel with dicta concerning hypothetical inter-basin transfers of pollutants. 124 S. Ct. 1537 at 1544. But the issue of inter-basin transfers was not raised in any of the seventeen questions before EPA in connection with that opinion.[17] *In re Riverside Irrigation Dist.*, 1975 WL 23864 (Off. Gen. Couns., June 27, 1975). Moreover, to the City's knowledge, EPA has never, before or since that opinion, required a NPDES permit for an inter-basin transfer of untreated water.

[17] The opinion dealt with numerous questions relating to the applicability of the NPDES provisions to irrigation return flows. Since 1977, such flows have been exempt from NPDES permits. 33 U.S.C. § 1362(14).

CONCLUSION

FOR THE REASONS SET FORTH ABOVE AND IN DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS-CROSS APPELLEES' INITIAL BRIEF, THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE CROSS APPEAL OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS SHOULD BE DENIED.

Dated: New York, New York
August 6, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 6,971 words, not including the table of contents, table of authorities, this certificate, the cover, and the inside caption.

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