NATIONAL LEAGUE OF CITIES
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

December 15, 2005

VIA FEDERAL EXPRESS

Roseann B. MacKechnie
Clerk of Court
United States Court of Appeals, Second Circuit
40 Foley Square
New York, NY 10007

Re: Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. City of New York, et al., Docket Nos. 03-7203-cv(L), 03-7253-cv(XAP)

Dear Ms. MacKechnie:

This letter is submitted by the undersigned *amici curiae*, the National League of Cities and the Association of Metropolitan Sewerage Agencies (nka National Association of Clean Water Agencies) in response to the Court's directive of December 2, 2005, which instructed the parties to address the following question:

> Does 33 U.S.C. 1312(B)(2)(A) [Section 302(b)(2)(A) of the federal Clean Water Act] and its state analogue, 6 N.Y.C.C.R.R. § 702.17, allow the State of New York the flexibility to issue an NPDES (or SPDES) permit that modifies the effluent limitations that would otherwise apply to the Shandaken Tunnel discharge? If so, is this flexibility sufficient to allow the City of New York to obtain a permit to continue to use the Shandaken Tunnel to transport drinking water to New York City and the surrounding area?

I. CWA § 302 Does Not Allow the Relaxation of Effluent Limits Required to Meet State Water Quality Standards Pursuant to CWA § 301.

The answer to the Court's two-part question requires, at the outset, a clarification of the role of CWA § 302 in the overall statutory scheme of the Clean Water Act ("CWA"). The requirement that all NPDES permits must contain "any more stringent limitation . . . necessary to meet" state water quality standards is imposed by CWA § 301(b)(1)(C). Section 302 does not affect that fundamental requirement in any way; rather it provides U.S. EPA with an independent, supplemental authority to establish effluent limitations for a point source or group of point sources whenever the Administrator determines that the application of technology-based effluent limitations promulgated under CWA § 301(b)(2) of the Act would interfere with the attainment or maintenance of adequate water quality. Section 302(b)(2)(A) allows U.S. EPA to relax these supplemental effluent limitations – and only these limitations – under the circumstances described by the Court. It does not authorize the relaxation of any more stringent limitations necessary to meet state-promulgated water quality standards. As the *amici* explained at pp. 16-

17 of their Brief, the limits necessary to meet state water quality standards must be met without regard to feasibility or cost. *See Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990); *Ackels v. U.S. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993).

The supplemental role of CWA § 302 was strongly emphasized in the legislative history of the 1972 Act. As explained in the Senate Committee Report to the Senate version of the bill,

> In all cases, the proposed effluent limitations [under § 302] shall not operate to delay the application of any effluent limitation established under section 301. Section 302 is intended to furnish a supplemental basis for improving water quality, and not to be a cause for delay in executing the requirements of Section 301, or for requiring any less stringent limitation.

92d Cong., 1st. Sess. S. Rep. No. 92-414 (Oct. 28, 1971) at 48, *reprinted in* 2 *A Legislative History of the Water Pollution control Act Amendments of 1972* at 1466 (hereinafter cited as "*1972 Legis. Hist.*"). Similar language appears in the House Report accompanying H.R. 11896 ("Proposed effluent limitations under section 302 shall in no case operate to delay the application of any effluent limitation established under section 301"). 92d Cong., 2d Sess., H.R. Rep. No. 92-911 (March 11, 1972) at 104, *reprinted in* 1 *1972 Legis. Hist.* at 791.

Finally, CWA § 302 applies only to U.S. EPA, and does not authorize any action by the states. *See* P. Evans, *The Clean Water Act Handbook* (ABA, 1994), at 35; *see also* the Conference Committee Report on the final version of the bill, 92d Cong., 2d Sess., S. Rep. No. 92-1236 (Sept. 28, 1972) at 122, *reprinted in* 1 *1972 Legis. Hist.* at 305 ("all authority granted to a State in this section has been eliminated").

II. The States Have Limited Authority to Allow Variances from State Water Quality Standards.

As the foregoing discussion indicates, the State of New York's "variance" regulation in 6 N.Y.C.R.R. § 702.17 is not, strictly speaking, analogous to CWA § 302(b)(2)(A), even though its criteria for determining the economic impact of certain effluent limitations may appear to be similar in approach. The authority of the state to allow a "variance" from strict compliance with state water quality standards is not explicitly set forth in the CWA, but rather stems from the state's exclusive authority to determine in the first instance what those standards will be. *See, generally*, 58 Fed. Reg. 20802, 20920 (April 16, 1993). U.S. EPA has recognized and defined the scope of that state authority in a series of guidance memos issued since 1976. *Id.* EPA will accept the use of variance procedures as part of a state's water quality standards as long as they are consistent with the substantive requirements of 40 C.F.R. § 131.10, which defines the conditions under which a state may find that certain water quality standards are unattainable. *Id.* Generally, variances are granted for a limited period of time, and must be re-evaluated at least every 3 years (the period of time required for the mandatory triennial review of state water quality standards under CWA § 303(c)). *Id.* State variance provisions must be approved by U.S. EPA. 40 C.F.R. 131.13.

Theoretically, therefore, the states may grant a variance from their water quality standards to the same extent that they may modify or relax the standards themselves. In both cases, the state's authority in this regard is confined by U.S. EPA's interpretation of what the Act requires, and is subject to U.S. EPA's statutory authority to review and approve state standards. The State of New York's current variance procedure is set forth in 6 N.Y.C.R.R. § 702.17. As written, it is not clear that a variance would be available to the City of New York for discharges from the Shandaken Tunnel, or that the conditions placed upon such a variance would allow the City to continue to use the tunnel to transport drinking water to its residents. In particular, subsection (e)(2) of the state's variance rule requires, as a condition of any permit that is issued, "that reasonable progress be made toward achieving the effluent limitation based on the standard or guidance value . . . ." In the present case, where the applicable standard for turbidity is "no increase that will cause a substantial visible contrast to natural conditions," 6 N.Y.C.R.R. § 703.2, it may be impossible for the City to meet this condition. Several other limitations on the state's variance procedure also limit its flexibility, such as the fact that its maximum duration is limited to 5 years. 6 N.Y.C.R.R. § 702.17(a)(5).

In any event, the *amici* believe that this Court cannot rely upon the potential availability of a variance that has not been granted, and may ultimately be determined to be unavailable based on a future administrative determination of facts that are not in the record before this Court, to evaluate whether the NPDES permit system is flexible enough to allow the State of New York to issue a permit for the Shandaken Tunnel discharge. As the state's water quality standard for turbidity is currently written, application of the NPDES permitting system to the Shandaken Tunnel discharge violates Congress' specific instruction in CWA § 103(g) 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. *See* Brief of the undersigned *Amici Curiae* at 14.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Letter of *Amici Curiae* National League of Cities, et al. was served via regular first class mail, postage prepaid on this 15th day of December, 2005, upon the following parties:

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