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December 16, 2005

Hon. Roseann B. MacKechnie
Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square – 18th Fl.
New York, NY 10007

re: *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, Nos. 03-7203-cv, 7253-cv

Dear Ms. MacKechnie:

Third-Party-Defendants-Appellees New York State Department of Environmental Conservation (DEC) and State of New York (together "the State") submit this letter addressing the questions posed by the Court's December 2, 2005 order: "Does 33 U.S.C. § 1312(b)(2)(A) and its state analog, 6 N.Y.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?"

There is more than adequate flexibility under both state and federal law to insure that drinking water can be transported to the City using the Shandaken Tunnel under a permit to be issued by DEC. A brief review of the process of granting a permit to the City, however, is appropriate before responding to the Court's questions in detail. Under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, a permit issued by either the United States Environmental Protection Agency (EPA) or a state having an EPA-authorized state program must require the discharger to meet both technology-based and water-quality-based effluent limitations. Technology-based limits are based on the effluent levels that can be achieved using treatment technologies, such as coagulants, screens, or filters, although the use of a specified technology is not required; water-quality-based limits on discharges are those needed in order to protect "designated uses" of the receiving waterbody. 33 U.S.C. § 1342(a)-(b); *see* 40 C.F.R. §§ 122.44(a)(1), 122.44(e), and 125.3 (technology-based effluent limitations); 40 C.F.R. §§ 122.44(d)(1)-(2) and 131.2 (water-quality-based limitations). The permit writer will determine what technology-based effluent limitations are applicable, determine whether the receiving waters will attain water quality standards when the technology-based limits are met, and if not, develop more stringent effluent limits necessary to attain those standards. *See* EPA, NPDES Permit Writers' Manual 24-26 (December 1996), accessible at http://www.epa.gov/npdes/pubs/owm0243.pdf (hereafter "Permit Manual").

When no national technology-based limitations for an industry have been set pursuant to

33 U.S.C. §§ 1311(b)(1)(A) and 1311(b)(2), as is the case for these reservoir discharges, the permit writer uses "best professional judgment" (BPJ) to set the technology-based limitations based on "best available technology" (BAT), "best conventional pollutant control technology" (BCT), or "best practicable control technology currently available" (BPT), depending upon the particular pollutant being discharged. 33 U.S.C. § 1342(a)(1)(B); *see* 33 C.F.R. § 125.3(c). Similarly, when no numerical water quality standard exists for a particular pollutant or the water quality standard is a narrative standard,[1] the permit writer uses BPJ to set numeric effluent limits on a case-by-case basis. 40 C.F.R. § 122.44(d)(1)(vi)(B). *See also* Permit Manual, *supra* at 69.

Finally, a permit applicant may obtain certain variances from effluent limitations depending on individual circumstances, or states may temporarily or permanently change designated uses of water bodies to alter existing limitations. 33 U.S.C. § 1311(c), (g), and (n); 33 U.S.C. § 1312(b)(2)(A); and 40 C.F.R. §§ 122.21(m), 131.10(g). In particular, EPA may modify limitations otherwise applicable to a discharger if "such modified requirements (1) will represent the maximum use of technology within the economic capacity of the owner or operation, and (2) will result in reasonable further progress toward the elimination of the discharge of the pollutants." 33 U.S.C. § 1311(c). States also may employ variances when issuing permits through EPA-approved state programs. 40 C.F.R. § 131.13. *See also* Permit Manual, *supra* at Chapter 10, §§ 10.1 to 10.2. In New York, variances are provided in accordance with 6 N.Y.C.R.R. § 702.17. Both EPA and states also may establish "compliance schedules" in permits that allow continued discharges but place permittees on schedules to improve the discharges' quality. 40 C.F.R. § 122.47; 6 N.Y.C.R.R. § 750-1.14. As the Supreme Court concluded in *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992), there is no "categorical ban" on discharges to waterways not meeting standards, and EPA and states have "broad authority" to develop long-range programs to lessen and ultimately eliminate existing pollution.

### A. Establishment of Technology-Based Limitations Provides DEC With Broad Flexibility In Determining Effluent Limitations for the Shandaken Tunnel Discharges

Because there are no national or New York promulgated technology-based effluent limitations directly governing reservoir discharges under the CWA or its New York counterpart, DEC will use BPJ to set the applicable technology-based limitations for the Shandaken Tunnel discharges. To do so, DEC will consider the available technologies, cost, engineering aspects of various types of control techniques, available best management practices, and non-water quality environmental impacts. 40 C.F.R. § 125.3; Permit Manual, *supra* at 69 ("Because it is so broad in scope, BPJ allows the permit writer considerable flexibility in establishing permit terms and conditions."); *see generally* Permit Manual at § 5.1.4. During this process, DEC will address all impacts any limitations may have on all of the uses of Esopus Creek, which include not only its recreational, fishing and wildlife uses, but also its historic usage as a part of the City's drinking water

[1]A narrative standard is a limitation that does not provide numerically measured limits but is stated in general terms. The turbidity standard at issue in this matter – "no increase [in turbidity] that will cause a substantial visible contrast to natural conditions" – is a narrative standard. *See* 6 N.Y.C.R.R. § 703.2 (narrative water quality standards).

system. Thus, for instance, inordinately expensive technologies that will not substantially improve turbidity would be unlikely to be required. Because non-water quality environmental impacts must be considered, limitations that would deprive the City or other New York municipalities of needed drinking water supplies are extremely unlikely to be imposed.[2]

**B. If CWA § 302(a), 33 U.S.C. § 1312(a), Were Triggered, the Exception in § 1312(b)(2)(A) Would Allow Discharges from the Shandaken Tunnel for Needed Water Supplies.**

While the Court has inquired about the applicability of 33 U.S.C. § 1312(b)(2)(A), that provision is not triggered unless more stringent limits are set pursuant to 33 U.S.C. § 1312(a). Here, it is not evident that the technology-based limitations to be set by DEC will be insufficient to attain "that water quality" that meets the CWA goals recited in § 1312(a) and that additional limitations would be needed under § 1312(a). Should that point be reached, however, § 1312(b)(2)(A) would allow EPA to give substantial weight to "protection of public health [and] public water supplies," *see* § 1312(a), when balancing benefits that accrue from more stringent limits against the "economic and social costs" resulting from such limitations. This ensures even greater flexibility in the permitting process. Given the impacts cutting the water supply could have, the State cannot envision the imposition of any CWA limitations by either EPA or DEC that would deprive the City of needed water supply from the Schoharie/Ashokan branch of its supply system.

**C. State Variances to Effluent Limitations and Required Discharges from the Shandaken Tunnel Pursuant to 6 N.Y.C.R.R. Part 670 Will Ensure Continued Discharges from the Shandaken Tunnel Under Any Permit Issued by the State.**

The State's variance provisions at 6 N.Y.C.R.R. § 702.17 also give the State considerable flexibility to modify effluent limitations that might otherwise apply to the Shandaken Tunnel discharge should that become necessary, and unquestionably the City will obtain a permit, with accomplishable requirements, to use the Shandaken Tunnel to transport drinking water to New York City should it become necessary for it to seek a variance. EPA-authorized states may issue variances from effluent limitations in accordance with approved variance policies. 40 C.F.R. § 131.13 ("States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as . . . variances."). Here, the City might assert that provisions of § 702.17(b) are applicable because: arguably, the suspended solids in the Tunnel discharge are naturally-occurring concentrations that prevent attainment of the standards or, alternatively, are human-caused conditions that would cause more environmental damage – loss of drinking water – to correct, § 702(b)(1), (3); it is not feasible to operate the Tunnel and meet standards because of hydrological or physical conditions, § 702.17(b)(4)-(5); or that meeting the limitations would cause "substantial and widespread economic and social impact[s]," § 702.17(b)(6).[3]

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[2]As discussed *infra*, a draft permit prepared by DEC, the subject of ongoing permitting proceedings, demonstrates the broad flexibility available to regulators.

[3]The federal counterpart of § 702.17(b), 40 C.F.R. § 131.10(g), uses identical language addressing changes in use for purposes of setting water quality standards. The State notes that as there is no federal standard for turbidity or total suspended solids that would apply to this discharge, (continued...)

In addition, in order to regulate reservoir discharges and the allocation of water for drinking water and recreation pursuant to NY Environmental Conservation Law (ECL) § 15-0801 *et seq.*, 6 N.Y.C.R.R. Part 670 requires minimal water flow in Esopus Creek, including the release of water from the Shandaken Tunnel necessary to maintain such flow. The City is required to maintain flow at between 160 and 300 million gallons per day (mgd).[4] Thus, there will always be at least 160 mgd from the Schoharie Reservoir and Esopus Creek together flowing into the Ashokan Reservoir for drinking water use in the City.

**D. The Permitting Proceedings in Progress Demonstrate the Flexibility Available to DEC When Setting Permit Limits.**

The parties are in the midst of a permitting proceeding before an administrative law judge (ALJ), and a draft permit has been subject to public comment. As is apparent from the draft permit, there is considerable flexibility in setting limitations, and exemptions that will maintain minimal flow through Esopus Creek and will allow necessary discharges for drinking water purposes have been included. Using BPJ, DEC staff have proposed numerical effluent limitations for turbidity, temperature, and phosphorus. The interim turbidity limitations vary depending on season. *See* 40 CFR § 131.10(f) ("States may adopt seasonal uses as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent water quality criteria."). DEC staff have proposed that the Tunnel be shutdown when turbidity is above 100 NTU.[5] However, such highly turbid flows are almost always the result of heavy storms, when flows in the Esopus Creek are also high and naturally turbid. Therefore, "when the flow from the Shandaken Tunnel needs to be reduced, it should not result in conditions of inadequate flow in the Esopus Creek." *See* NYS Env. Notice Bulletin, Notice of Completed Application for Shandaken Tunnel Outlet (August 4, 2004), available at http://www.dec.state.ny.us/website/enb2004/20040804/Reg3.html. The draft permit also establishes a compliance schedule for the City that requires it to investigate both structural modifications, including a multi-level intake structure, and nonstructural programs, such as stream restorations, seeding of lands, and management practices that can reduce the turbidity of Tunnel discharges; submit an evaluative report; and then implement approved measures on a specified schedule. Finally, the draft permit sets a series of exemptions from the limitations in order to ensure

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[3](...continued)
any variances for these parameters would therefore be determined by state rather than federal law.

[4]The releases required by ECL § 15-0805(1) and Part 670 address both recreational and water supply needs, and in part are subject to the United States Supreme Court's decree regarding the allocation of water in the Delaware River in *New Jersey v.* New *York*, 347 U.S. 995 (1954), and related decrees. *See Badgley v. New York,* 606 F.2d 358, 369 (2d Cir. 1979), *cert. den.* 447 U.S. 906 (1980). Indeed, it is the State, not the City, that determines water allocation. ECL Article 15. The City's arguments that a permit governing discharges from the Shandaken Tunnel impermissibly affects water allocation in violation of 33 U.S.C. § 1251(g) not only are wrong but also are besides the point since allocation is not within the City's powers in the first place, but rather is determined by the State.

[5]NTU is nephelometric turbidity units, a standard scientific measure of turbidity.

that the City's water supplies will not be affected. Even when turbidity levels exceed the permit limitations, discharges would be allowed if necessary to address and avoid drought conditions; to remedy emergency threats and conditions; to avert threats to public health or safety; and to allow repairs and alterations to the upstream reservoir. The August 2004 draft permit is available at http://www.dec.state.ny.us/website/dcs/eisanddp/shandakpermit.pdf, although there have been some further modifications to it since it was originally published. *See In re: New York City Department of Environmental Protection*, DEC Application No. 3-5150-00420/00001, Ruling on Issues and Party Status at 18 ("circulation of revised permit language") (June 22, 2005), available at http://www.dec.state.ny.us/website/ohms/decis/shandakenir.html (hereafter "ALJ Ruling").

DEC staff's draft permit will be examined in the course of the permitting hearing, leading to a recommended determination by the ALJ and, if appealed, a final determination by the DEC Commissioner. The ALJ already has found that "it would be unreasonable to expect the City not to supply its population with needed water even in the face of potential environmental violations" when she was addressing objections to the proposed exemptions. ALJ Ruling, *supra* at 33 n.8. The City has not yet formally applied for a variance from any of the proposed permit limitations. *Id.* at 14, 34 n.9.

## CONCLUSION

Particularly given the flexibility contained in federal and state law regarding the setting of permit limitations and variances to them, whether a permit for the City's discharge is required as a matter of law should not turn on possible conditions of that permit. If any party is dissatisfied with the permit as issued following the permitting proceeding, it can challenge its terms by seeking review by the DEC Commissioner or in the courts. The question of whether the CWA requires a permit turns on the CWA's statutory language, not on how the regulatory agency issuing the permit weighs and balances the varied goals and requirements of the CWA. Nonetheless, there is no doubt that the City will obtain a permit with effluent limitations that will allow it to continue to use the Shandaken Tunnel to transport drinking water to the City.

Respectfully submitted,

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cc: Attached service list

## CERTIFICATE OF SERVICE

I hereby certify that I have, on this 16th day of December, 2005, caused a true and correct copy of the foregoing Letter Brief of Third-Party-Defendants-Appellees State of New York, *et al.*, to be served United States 1st class mail on:

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