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

BRIEF OF DEFENDANTS-THIRD-PARTY-PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
City of New York and New York City Department of Environmental Protection, and Joel A. Miele, Sr.,
100 Church Street
New York, New York 10007
(212) 788-1585

Of Counsel
HILARY MELTZER
WILLIAM PLACHE

Dated June 9, 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

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

A. Nature of the Case 3

B. Course of the Proceedings 5

STATEMENT OF RELEVANT FACTS 7

A. The New York City Water Supply 7

B. Historical Regulation of Turbidity in Tunnel Releases and DEP's Ongoing Efforts Reduce Turbidity 9

C. The City's Efforts to Obtain a Permit 12

D. Findings of the District Court 15

SUMMARY OF ARGUMENT 19

ARGUMENT 22

POINT I

THE NPDES PROGRAM SHOULD NOT APPLY TO AN INTER-BASIN TRANSFER OF UNTREATED WATER WITHIN A MUNICIPAL WATER SUPPLY SYSTEM 22

A. The Supreme Court held in Miccosukee that intra-basin transfers do not require NPDES permits; there is no basis for treating inter-basin transfers differently. 22

B. The uncontested facts demonstrate that there is no basis for distinguishing between this case and the dam cases, as water quality changes resulting from dams are no less significant than those resulting from inter-basin transfers.....25

C. For purposes of determining whether a transfer of water requires a permit, the navigable waters should be considered collectively.....28

POINT II

SECTIONS 101(G) AND 510 OF THE CLEAN WATER ACT SPECIFICALLY PROVIDE THAT STATES' AUTHORITY OVER TRANSFERS FOR WATER SUPPLY PURPOSES ARE NOT AFFECTED BY THE CLEAN WATER ACT.....31

POINT III

THE SHANDAKEN TUNNEL IS AND SHOULD BE REGULATED BY MORE APPROPRIATE LAWS AND REGULATIONS THAN THE NPDES PROVISIONS OF THE CLEAN WATER ACT.....38

A. Federal Programs 39

1. The Safe Drinking Water Act and Surface Water Treatment Rule.....39

2 Total Maximum Daily Loads.....41

3. Congress' intended mechanism for addressing transfers of untreated water under the Clean Water Act 43

B. State Laws and Regulations 44

POINT IV

THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING THE MAXIMUM ALLOWABLE PENALTY FOR VIOLATIONS BETWEEN JUNE AND DECEMBER 2002 45

A. The City submitted its SPDES permit application within a reasonable amount of time. 47

B. The mitigating factors that the District Court determined to be relevant require that the penalties be reduced. 50

C. The District Court's finding that the second element of CWA Section 309(d) was not a mitigating factor was incorrect. 55

CONCLUSION 56

CERTIFICATE OF COMPLIANCE 56

TABLE OF AUTHORITIES

CASES

Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.,
897 F.2d 1128 (11th Cir. 1990) 46

BedRoc Ltd., LLC v. United States,
__ U.S. __, 124 S. Ct. 1587 (2004).....24

Catskill Mountains Chapter of Trout Unlimited v. City of New York,
273 F.3d 481 (2d Cir. 2001) ..... passim

Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980).....24

Dubois v. United States Dep't of Agric.,
102 F.3d 1273 (1st Cir 1996).....37

Environmental Defense Center v. EPA,
344 F.3d 832 (9th Cir. 2002) *cert. denied sub nom. Texas Cities Coalition on Stormwater v. EPA*, __ U.S. __, 2004 U.S. LEXIS 4044 (Jun. 7, 2004).....33

Friends of the Earth, Inc. v. Laidlaw Envt'l Services,
956 F. Supp. 588 (D.S.C. 1997), *vacated* 149 F.3d 303 (4th Cir. 1988), *rev'd* 528 U.S. 167 (2000).....52

Hawaii's Thousand Friends v. Honolulu,
821 F. Supp. 1368 (D. Haw. 1993).....48, 51

Miccosukee Tribe of Indians v. South Florida Water Management District,
280 F.3d 1364 (11th Cir. 2002) *vacated and remanded sub nom. South Florida Water Management District v. Miccosukee Tribe of Indians*, __ U.S. __, 124 S.Ct. 1537 (2004).....4, 23, 29, 37

Nat'l Wildlife Fed'n v. Consumers Power Co.,
862 F.2d 580 (6th Cir. 1988) 23, 25, 28

Nat'l Wildlife Fed'n v. Gorsuch,
693 F.2d 156 (D.C. Cir. 1982).....23, 25

Northern Plains Resource Council v. Fidelity Exploration and Development Co.,
325 F.3d 1155 (9th Cir.), *cert. denied sub nom. Fidelity Exploration and Development Co. v. Northern Plains Resource Council*, __ U.S. __, 124 S.Ct. 434 (2003).....37, 38

Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.,
913 F.2d 64 (3rd Cir. 1990).....46, 48, 52

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,
73 F.3d 546 (5th Cir. 1996) 46

South Florida Water Management District v. Miccosukee Tribe of Indians,
__ U.S. __, 124 S. Ct. 1537 (2004) ..... passim

Tull v. United States,
481 U.S. 412 (1987) 48

United States v. City of San Diego,
1991 U.S. Dist. LEXIS 5459 (S.D. Cal. 1991) 54

United States v. Smithfield Foods, Inc.,
191 F.3d 516 (4th Cir. 1999) 46

STATUTES, REGULATIONS and RULES

28 U.S.C.
§ 1291 2
§ 1331 2
§ 2201 2
§ 2202 2

Clean Water Act, 33 U.S.C.
§ 1251 2
§ 1251(a) 36, 53
§ 1251(b) 39
§ 1251(g) 32-34, 36, 39, 41
§ 1311 27
§ 1311(a) 3, 22
§ 1313 30
§ 1313(c)(2)(A) 30
§ 1313(d) 19, 41
§ 1314(f) 43
§ 1314(f)(2)(F) 43
§ 1319(d) 1, 3, 5, 6, 15-18, 46, 47, 50, 51, 54
§ 1326 27
§ 1342 ..... 22, 43
§ 1362(12) 22
§ 1365(a) 1, 2, 6
§ 1370 32

Safe Drinking Water Act,
42 U.S.C. § 300(f) et seq 19, 39

40 C.F.R.
Part 122 Appendix J 27
§ 122.44(d)(1) 33
§ 122(g)(4) 30
Part 141 9
§ 141.70 et seq 19, 39
§ 141.71 39

§ 141.71(a)(2) 39

Fed. R. Civ. P. Rule 12(e) 5

1905 N.Y. Laws Ch. 724 ..... 34, 35

N.Y. Envtl. Conserv. Law
§ 15-0505 44
§ 15-0801 45
§ 15-0801(2) 35
§ 15-0805 45
§ 15-0805(1) 35, 36
§ 15-1313(2) 44
§ 15-1501 ..... 36, 44
§ 17-0303 44
§ 17-0501 44

N.Y. Pub. Health Law
§ 201(1)(l) 39
§ 225 39

N.Y. Comp. Codes R. & Regs.
Title 6
Part 670 ..... 13, 36, 45
§ 700 44
§ 703.2 13
Title 10
Part 5 39
§ 128-3.6 38

MISCELLANEOUS

Amicus Brief of the United States in *South Florida Water Management District v. Miccosukee Tribe of Indians*, __ U.S. __, 124 S. Ct. 1537 (2004) 26, 31

John Caher, *City Ordered to Pay $6 Million Penalty for Polluting Water but Discharge at Esopus Creek Could Have Cost 10 Times More*, 229 N.Y. L.J. p.1 45

http://www.dec.state.ny.us/website/dow/part1.pdf 42

PRELIMINARY STATEMENT

Defendants-third-party-plaintiffs-appellants-cross-appellees City of New York and New York City Department of Environmental Protection, and Defendant-Appellant-Cross-Appellee Joel A. Miele, Sr., Commissioner of the Department of Environmental Protection (collectively, the "City") appeal from an order of the United States District Court for the Northern District of New York ("District Court" or "Northern District"), dated February 6, 2003, as modified by an order dated March 12, 2003, which, among other things: (1) held the City liable for civil penalties in the amount of $5,749,000 pursuant to 33 U.S.C. § 1319(d); (2) directed, pursuant to 33 U.S.C. § 1365(a), that the City pursue, and third-party-defendant the New York State Department of Environmental Conservation ("NYSDEC") make a determination concerning, a State Pollutant Discharge Elimination System ("SPDES") permit for the City's Shandaken Tunnel; and (3) granted judgment in favor of plaintiffs-appellees-cross-appellants. Memorandum-Decision and Order, and Civil Judgment, dated February 6, 2003 (SPA 7-32); Order, March 12, 2003 (Scullin, Jr., U.S.D.J.) (N.D.N.Y. 2003) (SPA 34-39).[1]

[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.

Plaintiffs filed a cross-appeal raising evidentiary issues and disputing the amount of penalties assessed.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1331, as a civil action raising questions of federal law, and pursuant to 33 U.S.C. § 1365(a), as a citizen suit alleging a violation of an effluent standard or limitation under the Clean Water Act. The District Court had jurisdiction over the declaratory and injunctive relief claims pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiffs herein sought declaratory and injunctive relief, alleging that the City is violating the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, by adding pollutants to the Esopus Creek from a point source without a permit.

The U.S. District Court for the Northern District of New York issued an order, entered February 6, 2003, finally determining this action by directing the Clerk of the Court to enter a judgment in favor of plaintiffs. The District Court's judgment is final. Therefore, it is appealable and this Court has jurisdiction over the appeal herein, pursuant to 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. In light of the Supreme Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, __ U.S. __, 124 S.Ct. 1537 (2004) ("*Miccosukee*"), and the factual record that has been developed in this case

since this Court reversed the District Court's dismissal, was the lower court's finding that the City requires a permit pursuant to § 301 of the Clean Water Act, 33 U.S.C. § 1311(a), for releases of natural, untreated water in the context of the City's drinking water supply system, correct?

2. Was the lower court's assessment of $5,749,000 in statutory penalties, the maximum penalty amount for the period during which the lower court found penalties were due, an abuse of discretion and excessive in light of the lower court's factual findings that the City met several of the statutory factors for reducing the amount of a civil penalty, as set forth in 33 U.S.C. § 1319(d)?

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs commenced this action, claiming that the City's diversion of natural mountain water containing fine red clay sediments from the Schoharie reservoir in the Catskill Mountains to the Esopus Creek, the main tributary to the City's Ashokan reservoir, constitutes a discharge of pollutants requiring a National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA").[2] On appeal of the District Court's October 6, 2000 judgment dismissing this action, this Court held that such a diversion is subject to the

[2] In New York State, NPDES permits are administered by NYSDEC as State Pollutant Discharge Elimination System, ("SPDES") permits.

NPDES provisions of the Clean Water Act. 273 F.3d 481 (2nd Cir. 2001). The Eleventh Circuit Court of Appeals subsequently reached a similar determination in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). On writ of certiorari to the Eleventh Circuit, the U.S. Supreme Court vacated and remanded for factual findings regarding whether the water diversion at issue in *Miccosukee* is within a single water body or between two "meaningfully distinct" water bodies. *Miccosukee*, __ U.S. at __, 124 S.Ct. at 1546.

The Supreme Court did not decide whether a transfer of untreated water from one water body to a second, distinct, water body – such as the transfer at issue in this case – needs a NPDES permit, but instead left that issue "open to the parties on remand." *Miccosukee*, 124 S.Ct. at 1545. As set forth below, the instant case makes clear that the Shandaken Tunnel should not be subject to the NPDES requirements; accordingly, the judgment against the City should be reversed.

Even if the City's liability is affirmed, the amount of the penalty assessed in this case should be significantly reduced. The Clean Water Act establishes a number of factors to be considered in determining the amount of a civil penalty including: (1) "the seriousness of the violation or violations"; (2) "any history of such violations"; (3) "any good-faith efforts to comply with the

applicable requirements"; and (4) "such other matters as justice may require." 33 U.S.C. § 1319(d), CWA § 309(d). As explained below, the lower court found that each of these was "a mitigating factor," but nonetheless found the City liable for the maximum statutory penalty for the period during which the court assessed penalties (SPA 19, 23, 24, 26). This Court should resolve the inconsistency between the lower court's factual findings and its application of the law by reducing the amount of the civil penalty – if any penalty is appropriate.

B. Course of the Proceedings

Plaintiffs filed the summons and complaint in this action on or about March 31, 2000 (A29-39). By notice of motion dated May 25, 2000, the City moved to dismiss the complaint and also moved pursuant to Fed. R. Civ. P. Rule 12(e) requiring a more definite statement of all of the claims in the Complaint. *See* First Supplemental Index to the Record on Appeal ("Supp. Index") No. 13. By order dated and entered October 6, 2000, the District Court denied the City's motion to dismiss for lack of subject matter jurisdiction and motion for a more definite statement and granted the City's motion to dismiss the complaint for failure to state a claim. Supp. Index No. 19. Judgment was entered October 6, 2000. Supp. Index No. 20.

Plaintiffs filed a Notice of Appeal to this Court, appealing from the October 6, 2000 judgment, on November 2, 2000. Supp. Index No. 24. On

October 22, 2001, this Court reversed in part, vacated in part, and remanded. *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

By Notice of Motion dated March 13, 2002, plaintiffs moved the District Court for partial summary judgment on the sole question of the City's liability under the CWA (A48-49). By order dated June 4, 2002, the District Court granted plaintiffs' motion for partial summary judgment (SPA 2-5).

The remaining issues in this matter, the amount of penalties, if any, and the appropriate remedy, were tried before the District Court from January 8 through January 14, 2003. The District Court issued an order, dated February 6, 2003, which, as modified by an order dated March 12, 2003, among other things: (1) held the City liable for civil penalties in the amount of $5,749,000 pursuant to 33 U.S.C. § 1319(d); (2) directed, pursuant to 33 U.S.C. § 1365(a), that the City pursue, and third-party-defendant the New York State Department of Environmental Conservation ("NYSDEC") make a determination concerning, a State Pollutant Discharge Elimination System ("SPDES") permit for the City's Shandaken Tunnel; and (3) granted judgment in favor of plaintiffs-appellees-cross-appellants (SPA 7-32, 34-39). The City now appeals from the District Court's February 6, 2003 order, as modified, and from the District Court's June 4, 2002

order granting partial summary judgment, which became final in the February 6, 2003 order.

STATEMENT OF RELEVANT FACTS

A. The New York City Water Supply

The City of New York owns and operates, through the New York City Department of Environmental Protection (DEP), the largest unfiltered drinking water supply in the nation (A320). The City's water supply system is comprised of three separate components: the Catskill, the Delaware, and the Croton systems (A909-10). The Catskill system, which is at issue in this case, provides about 40% of the City's water supply and consists of two reservoirs, the Ashokan and the Schoharie (A321, 909). Water is moved from the Schoharie reservoir through the eighteen-mile Shandaken Tunnel into the Esopus Creek (A321-22). The water then travels within the Esopus to the Ashokan reservoir (A322). The Ashokan went into service in 1915; the Schoharie came on line in 1926 (A321). Aside from the Shandaken Tunnel, which became operational in 1924, there is no other way to move Schoharie water to New York City (A911-12). Because water in the Schoharie reservoir contains naturally occurring suspended solids, the discharges from the Shandaken Tunnel into the Esopus are often more turbid than the receiving waters of the Esopus (A329). A map of the New York City water supply system appears on page A339 of the Joint Appendix.

The City's average demand for water is approximately 1.2 billion gallons per day (A910). Under normal operating conditions, about 16% of the overall supply originates in the Schoharie reservoir (A911-12). The City's water supply system is, and must be, designed so that it can be operated with the flexibility to accommodate both predictable and unusual situations that interfere with normal operations (A915-18). Moreover, DEP has limited control over the demand for the City's water, with the exception of certain restrictions on water use that apply only during drought emergencies (A928-30). Even to the limited extent that City regulations restrict use of water during drought emergencies, these restrictions are difficult, and resource-intensive, to enforce (A930). Thus, reducing the City's reliance on water from the Catskill system, including water from the Schoharie reservoir, is unrealistic and potentially dangerous to the public health and safety of nine million New Yorkers, including the eight million residents of New York City and the one million residents of upstate communities to which the City is required to provide water under State law (A325).

The Shandaken Tunnel has a maximum flow capacity of 650 million gallons per day (A912). Because of the City's release of water through the Shandaken Tunnel, a yearly average of 39% of the Esopus flow below the Shandaken Tunnel portal originates from the Schoharie reservoir (A927). From

June through September, DEP contributes over 70% of the Esopus flow downstream of the Tunnel, on average, and can peak at nearly 100%. *Id*.

Recognizing that the releases from the Shandaken Tunnel benefit the aquatic environment of the Lower Esopus, NYSDEC has promulgated regulations which, since 1977, have required DEP to release water from the Shandaken Tunnel to maintain a specified flow in the Esopus Creek, downstream of the Shandaken portal (A922-23). The NYSDEC "Release Requirements" are set forth at N.Y. Comp. Codes R. & Regs. tit. 6, Part 670. The Tunnel releases help support a sizeable trout population and promote certain recreational uses of the Lower Esopus (A325). In addition to the Release Requirements, which provide a general directive to maintain certain flows throughout the year, NYSDEC also regularly issues specific directives for the release of water through the Tunnel to support certain recreational events (A924).

B. Historical Regulation of Turbidity in Tunnel Releases and DEP's Ongoing Efforts to Reduce Turbidity

DEP has operated the Catskill and Delaware water supply systems under a series of Filtration Avoidance Determinations, or "FADs," issued by the U.S. Environmental Protection Agency ("EPA") pursuant to the Surface Water Treatment Rule, 40 C.F.R. Part 141, since January 1993 (A939). The FAD program is administered by EPA in consultation with the City, NYSDEC, and the New York State Department of Health. Since EPA's first Filtration Avoidance

Determination in January 1993, EPA has imposed, and DEP has satisfied, requirements related to turbidity in the Catskill System, under the federal Safe Drinking Water Act and the Surface Water Treatment Rule (A939-43).

The most recent FAD, issued by EPA in November 2002 ("2002 FAD"), contains an entire section on Catskill turbidity control, and requires the City to undertake a number of studies and projects to address turbidity released from the Shandaken Tunnel (A1791-92). The measures required under the 2002 FAD include completing by 2006 a comprehensive analysis to identify engineering and structural alternatives that may reduce turbidity from the Shandaken Tunnel, some of which could cost hundreds of millions of dollars to implement (A954). Under the FAD, DEP is committed to implementing alternatives that the analysis shows to be feasible, effective, and cost effective (A1791-92, 960-66). An integral component of this analysis, which is currently underway, is the development of a sophisticated model of hydrodynamics within the reservoir that addresses temperature, turbidity, particle behavior, inflow, and outflow (A961-64, 997-99). That model will be used to evaluate the impacts of various potential turbidity reduction alternatives that are currently under consideration (A961-64, 334). The timeline for these studies, which is detailed in the 2002 FAD, recognizes that it would be fiscally and environmentally irresponsible to proceed with any of these

capital projects, many of which might have only minimal turbidity reduction benefits, before fully evaluating their impacts (A960-66, 334).

Other projects required under the FAD to address turbidity include, among other things, evaluating possible interim measures to reduce turbidity; dredging the Schoharie intake channel to the Shandaken Tunnel to remove sediment; studying and reporting on sources of turbidity in the Schoharie watershed and identifying whether and how they are addressed; and expanding the water quality telemetry system. Each of these projects is underway or has already been completed (A1791-92). *See* Monthly Status Report to the Northern District Court, dated June 1, 2004, Supp. Index No. __,[3] at 2-4 for a description of the current status of the City's projects to address the turbidity problems.

Despite the fact that EPA has known that turbid water is released through the Shandaken Tunnel, and despite EPA's requirement that the City analyze and address turbidity in those releases, EPA has never sought to regulate, and has never regulated, levels of turbidity and suspended solids in the Tunnel releases under the Clean Water Act (A932-33, 938-39). NYSDEC is the agency with delegated authority to enforce the Clean Water Act in New York State. Prior

[3] As of June 7, 2004, when the First Supplemental Index was transmitted to this Court, the June 1, 2004 Monthly Status Report had not yet been entered. The City has asked the District Court to send an updated Supplemental Index to this Court.

to this Court's October 22, 2001 decision in this case, NYSDEC never enforced the Clean Water Act permitting provisions against the Tunnel discharge (A932, 939). Not until the City approached NYSDEC seeking to obtain a permit for the discharge in response to this Court's October 22, 2001 decision did permitting the Tunnel discharge become an issue for NYSDEC.

Before that decision, the City's primary concern about turbidity in water released from the Shandaken Tunnel was to ensure compliance with State and federal laws concerning public drinking water supplies. Based on DEP's knowledge of the ways in which surface public water systems are typically designed and managed, and the City's understanding of the applicable laws, the City did not believe the Shandaken Tunnel was subject to the federal Clean Water Act prohibition against unpermitted discharges of pollutants (A932, 939). The District Court specifically held that the City's belief was reasonable (SPA 22-24).

C. The City's Efforts to Obtain a Permit

Following this Court's October 21, 2001 decision, the City initiated discussions with NYSDEC seeking a permit for the Tunnel releases in the summer of 2002 (A970). Those discussions did not begin sooner because DEP was devoting its resources to the security of the City's water supply in the wake of the September 11, 2001 attacks, which took place just one month before this Court's decision, and to the serious drought conditions, which had major effects on the

City's water supply system (A971, 1015). The proposed permit for the Shandaken Tunnel not only presented a unique issue for both NYSDEC and the City, but also presented a completely new challenge that had never before been addressed by any regulatory agency in the nation charged with administration of the Clean Water Act – the permitting of releases of water that was not only desired, but necessary for water supply purposes (A971, 1010). The City is not aware of any instance in which Clean Water Act permits have ever been required for anything beyond industrial or commercial discharges and unwanted municipal wastewater or stormwater (A1010). Accordingly, there was no model from which to craft the City's application, and the City and NYSDEC had to meet to discuss the contents of the application and the nature of such a permit (A971). From the outset, it was clear that the permit had to be drafted to allow for the releases of water through the Tunnel, which are essential to meet the City's water supply needs, as well as for compliance with the State Release Requirements set forth at N.Y. Comp. Codes R. & Regs. tit. 6, Part 670 (970-73).

In New York State, a permit must not allow a discharge that will cause a violation of State Water Quality Standards. The standard for discharges of turbid waters to Class A(T) water bodies such as the Esopus Creek, at the point of the discharge from the Tunnel, is: "no increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2.

Determining compliance with that requirement depends on a number of variables including, but not limited to, ambient turbidity levels in the Esopus at any particular time and flow volumes in both the Tunnel and the Esopus (A1083).

The discussions between the City and NYSDEC that began in the summer of 2002 focused on the development of a sophisticated model for the permit application, which would consider all of the relevant variables at issue in the Tunnel releases (A970-72, 1011). However, at a meeting in late November or early December 2002, NYSDEC informed DEP that it no longer sought the complicated analysis that the parties had thought was necessary up to that point, and instead needed only some factual data about the Tunnel releases (A971-72, 1011-12). After being informed that NYSDEC sought a greatly simplified permit application, DEP was quick to act, and submitted the application under the agreed upon format on December 30, 2002 (A968-69, 1811-1903). (The cover letter to the SPDES permit application, A1811-12, was incorrectly dated January 30, 2002.)

NYSDEC issued a draft SPDES permit for public comment on February 18, 2004. *See* City's Monthly Status Report to the Northern District Court, dated April 1, 2004. Supp. Index No. 160. However, after receiving comments on that draft, NYSDEC withdrew it, and indicated that it would release a revised draft permit for public comment. *See id.* Although the permit has not yet been re-noticed, NYSDEC provided a revised draft permit to the City on May 24,

2004. *See* City's Monthly Status Report to the Northern District Court, dated June 1, 2004. Supp. Index No. __. The passage of nearly a year and a half between the City's submission of its application and NYSDEC's circulation of the current draft of the SPDES permit is indicative of the lack of precedent for permitting this type of discharge.

D. Findings of the District Court

In its discussion of civil penalties, the District Court applied the six factors set forth in Section 309(d) of the Clean Water Act to the City's operation of the Shandaken Tunnel (SPA 15). The District Court determined that a number of factors mitigate the amount of penalties in this case (SPA 18-26). In looking first to the seriousness of the violation, the Court emphasized that the turbidity and suspended solids released from the Tunnel were not toxic and were, at least in part, naturally occurring (SPA 19). The District Court also determined that "there was no evidence of a significant decrease in the number of trout or of any trout kill as a result of the discharges." *Id.* "In fact," the Court continued, "there was evidence that without the discharge of the water through the Shandaken Tunnel, there would have [been] less habitat for trout because of low water levels." *Id.* The Court concluded that the seriousness of the violation factor mitigated against penalties. *Id.*

In assessing the second factor under CWA Section 309(d) – the economic benefit resulting from the violations – the District Court assessed the operation and maintenance costs of an alum coagulation plant, which was the turbidity treatment proposal advanced by plaintiffs' expert (SPA 19-22). Defendants presented expert testimony demonstrating not only the uncertainty of the operation and maintenance costs of plaintiffs' proposal (A1084-89), but also demonstrating that the plant would cost several hundred million dollars to build (A1090), that it would require a 20 to 40 acre site (A1089), and would have serious environmental impacts to the pristine Catskill Mountain setting in which it would be located (A1091-92). The environmental impacts of such a plant, both during and after construction, would include change in land use and loss of open space, visual impacts, air impacts, noise impacts, natural resource displacement, and traffic impacts resulting from 100 or more trucks per day. *Id.* The Court took note of these impacts, and "question[ed] the feasibility of [plaintiffs' expert's] plan, both from a design and construction standpoint as well as an operational and maintenance perspective since he did not take into account the environmental impact of his design or the on-going effects on the environment – such as the increased traffic – that the construction of such a plant would have" (SPA 20-21). Significantly, plaintiffs' own witnesses are opposed to the treatment option proposed by plaintiffs' expert (A819, 839, 884). Notwithstanding the evidence

showing that the only treatment option advanced by plaintiffs for the purpose of assessing the economic benefits to the City was unrealistic and would significantly harm the environment, the Court did not consider the economic benefit factor to be a mitigating factor (SPA 22).

In assessing the third factor of CWA Section 309(d), the history of violations, the Court determined, based on the testimony of Michael Principe, Ph.D., Deputy Commissioner of DEP's Bureau of Water Supply, that the City reasonably believed that it did not need a SPDES permit to operate the Shandaken Tunnel until this Court's October 21, 2001 decision. In holding that this was a mitigating factor, the Court specifically noted that "although the EPA and DEC closely monitored the quality of Defendants' water supply pursuant to other statutes and were aware that Defendants discharged water through the Shandaken Tunnel as part of their water supply system, Dr. Principe testified that neither the EPA nor NYSDEC ever suggested to Defendants that they needed a SPDES permit to operate the Shandaken Tunnel" (SPA 23).

In assessing the fourth factor, any good faith efforts to comply with the applicable requirements, the District Court noted that the City began discussions with NYSDEC, after this Court's October 21, 2001 decision, to determine what information NYSDEC required before it could issue a SPDES permit. The District Court specifically noted that because of other pressing issues,

"including the safety of New York City's water supply" after September 11, 2001, the fourteen month delay between this Court's decision and the filing of the SPDES permit application did not evidence a lack of good faith (SPA 23-24). The District Court further cited the City's ongoing efforts to reduce turbidity in the Tunnel releases, and concluded that the fourth element of CWA Section 309(d) was a significant mitigating factor (SPA 24).

Finally, with respect to the sixth factor, such other matters as justice may require, the District Court recognized that "[A]ssessing a monetary penalty in this case would be tantamount to saying that if you believe in good faith that your activities are not subject to a CWA permit and neither EPA nor DEC has ever indicated that you needed such a permit, you can be penalized if a citizen suit is commenced against you and the court finds you are wrong" (SPA 25-26). The District Court found that the sixth element was a mitigating factor.

Notwithstanding the District Court's conclusion that there was a lack of environmental harm; that the City had a reasonable belief, prior to October 21, 2001, that it did not need a SPDES permit to operate the Tunnel; and that the City, both before and after this Court's decision, has continued to address turbidity in the Tunnel releases, the District Court issued penalties in the amount of $5,749,000 (SPA 26). In reaching that figure, the District Court issued the maximum statutory penalty for the period for which it determined penalties were appropriate. The

period for which the District Court chose to impose penalties ran from June 22, 2002 until December 31, 2002. *Id.*

SUMMARY OF ARGUMENT

In operating the largest unfiltered drinking water supply in the nation, the City is fundamentally concerned with protecting and preserving water quality. Since 1924, when the Shandaken Tunnel, the source of approximately 16% of water supplied to nearly half the State's population, went into service, it has been subject to extensive regulation and oversight by the State and federal governments as part of a public water supply. Indeed, the City is spending millions of dollars to addressing the pollutant at issue in this case – turbidity caused by glacial clays in the Schoharie watershed, the area that supplies water to the Shandaken Tunnel. The question here is whether the NPDES provisions of the federal Clean Water Act are an appropriate framework for regulating the Tunnel, which simply moves water from the Schoharie reservoir to the main tributary of the Ashokan reservoir.

As we argue below, the answer is no. Instead, water quality should continue to be governed by the federal Safe Drinking Water Act, 42 U.S.C. § 300(f) et seq., and the Surface Water Treatment Rule, 40 C.F.R. § 141.70 et seq., and the turbidity should be regulated at its non-point sources under the Clean Water Act program intended for that purpose, the Total Maximum Daily Load program. CWA § 303(d); 33 U.S.C. § 1313(d). In contrast, application of the

NPDES provisions to the Shandaken Tunnel may jeopardize the City's ability to provide sufficient water to meet demand and has given rise to what is apparently the largest Clean Water Act penalty ever assessed against a municipality, simply for continuing to operate the water supply system as we have done for 80 years, including the 30 years since the CWA was enacted.

In 2001, when this Court addressed the question of whether the City's release of water from the Shandaken Tunnel requires a NPDES permit, the Supreme Court had not yet considered the applicability of those provisions to transfers of untreated water and, because the appeal in this case arose from a motion to dismiss, there was no factual record before this Court. The City respectfully requests that this Court reconsider the issue in light of at least two significant developments since 2001: (1) the Supreme Court's unequivocal holding in *Miccosukee*, 124 S.Ct. 1537 (2004) that intra-basin transfers do not require NPDES permits, which resolves any doubt about the validity of two key appellate decisions that this Court questioned in 2001, and (2) the clear, uncontested factual record in this case that there is no legitimate basis for treating inter- and intra-basin transfers of untreated water differently.

In any event, the penalties assessed by the District Court are excessive. The CWA sets forth six factors to be considered in determining the amount of penalties. The District Court found that the City's operation of the

Shandaken Tunnel meets four of those factors: (1) there is no material environmental harm resulting from the Tunnel discharges; (2) the City had a reasonable belief, prior to this Court's October 21, 2001 decision, that no SPDES permit was required for the Tunnel; (3) the City has made substantial efforts, both before and after October 21, 2001, to address turbidity in the Tunnel releases; and (4) "assessing a monetary penalty in this case would be tantamount to saying that if you believe in good faith that your activities are not subject to a CWA permit and neither EPA nor DEC has ever indicated that you needed such a permit, you can be penalized if a citizen suit is commenced against you and the court finds you are wrong." Ironically, as the District Court noted, NYSDEC, the agency delegated authority to administer the CWA in New York State, in fact requires releases from the Tunnel. In light of these factual findings, the District Court's assessment of $5.749 million in penalties was an abuse of discretion.

ARGUMENT

POINT I

THE NPDES PROGRAM SHOULD NOT APPLY TO AN INTER-BASIN TRANSFER OF UNTREATED WATER WITHIN A MUNICIPAL WATER SUPPLY SYSTEM

A. The Supreme Court held in *Miccosukee* that intra-basin transfers do not require NPDES permits; there is no basis for treating inter-basin transfers differently.

The Clean Water Act provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The issue at the heart of this case is whether, when natural, untreated water is moved from a reservoir created by impounding a stream into a second stream (an inter-basin transfer), a pollutant has been "added" to navigable waters within the meaning of the CWA. As discussed below, the Supreme Court explicitly left this question unanswered in *Miccosukee*. 124 S.Ct. 1537, 1545.

The Supreme Court did, however, make clear that no NPDES permit is required for an intra-basin transfer of water. The transfer at issue in *Miccosukee* is from a canal (the "C-11"), through a pump station (the "S-9"), to a wetland (the "WCA-3"). 124 S.Ct. at 1540. The Supreme Court held: "If … the District Court

… conclude[s] that C-11 and WCA-3 are not meaningfully distinct … then the S-9 pump station will not need an NPDES permit." Id. at 1547.

This is a critical development in the analysis of this issue. In its first decision in this case, this Court questioned the validity, in light of recent Supreme Court cases about deference to administrative agencies, of cases from the 1980s in which the Sixth and District of Columbia Circuits had held that NPDES permit were not required for releases from dams. 273 F.3d 481, 491; *see Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). As this Court noted, EPA's position in *Gorsuch* and *Consumers Power* was not "the sort of formal, binding articulation of an agency's views that would justify Chevron deference after Christensen." *Id*. *See also Miccosukee v. South Florida Water Management District*, 280 F.3d at 1368, n.4. In light of the Supreme Court's holding in *Miccosukee*, however, there can be no further doubt about the validity of *Gorsuch* and *Consumers Power* or about the principle that the NPDES program does not apply to intra-basin transfers of untreated water.

There is nothing in the text of the Clean Water Act that suggests that inter- and intra-basin transfers should be treated differently. Without a textual basis for this distinction, it should not be made.

> The preeminent canon of statutory interpretation requires us to "presume that

> [the] legislature says in a statute what it means and means in a statute what it says there." Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.

BedRoc Ltd., LLC v. United States, __ U.S. __, 124 S.Ct. 1587, 1593 (2004) (citations omitted). "Absent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In the absence of statutory language indicating that Congress intended to distinguish between inter- and intra-basin transfers, the inquiry must end.

In *Miccosukee*, the Supreme Court did not decide whether there is a distinction between inter- and intra-basin transfers. Rather, it specifically left the question open, and invited the parties to address it on remand in the context of the "unitary waters" approach discussed in detail below. *Id*. 124 S.Ct. at 1545.

As in this case, the parties in *Miccosukee* had not developed, prior to the Supreme Court's review, the fact that changes in water quality resulting from impoundment can be as pronounced as differences in water quality between different water bodies. Accordingly, the Supreme Court appears to have presumed that the release of impounded water to waters below the impoundment would have less impact on water quality than the addition of untreated water from another basin. *Miccosukee*, 124 S.Ct at 1545.

As the City demonstrated through uncontested evidence presented in this case, discussed immediately below, there is no scientific basis for a distinction between inter- and intra-basin transfers (A336-37). Recognizing that there was no basis for such a distinction, Congress did not write one into the statute. Courts should not create such a distinction without a basis in law or fact. In *Miccosukee*, the parties will have an opportunity to develop facts showing water quality impacts resulting from impoundments while they address the unitary waters argument at the invitation of the Supreme Court. Those facts have already been developed in this case, and are not contested.

B. The uncontested facts demonstrate that there is no basis for distinguishing between this case and the dam cases, as water quality changes resulting from dams are no less significant than those resulting from inter-basin transfers.

This Court's October 21, 2001 decision assumed a distinction between inter-basin transfers, such as the releases from the Shandaken Tunnel, and intra-basin transfers – discharges of water from impoundments back into the watercourse that was dammed to impound the water. The latter were at issue in *Gorsuch* and *Consumers Power*. As discussed above, there is nothing in the text of the Clean Water Act that supports treating inter- and intra-basin transfers differently.

There is no factual basis for this distinction either, as it is not supported by the science of lakes and ecosystems. When water is impounded by a

dam, its biochemistry is fundamentally altered. As the Federal Government noted in its *amicus* brief in *Miccosukee*, "the storage of the water may induce changes in water quality and pollutant levels, including, for example, changes in chemical, physical, and biological characteristics." Brief for the United States as *Amicus Curiae* Supporting Petitioner at 16, *South Florida Water Management District v. Miccosukee*, 124 S.Ct. 1537 (2004) (No. 02-626) ("U.S. Amicus Brief").[4]

Because the changes resulting from impounding water were not developed in the record prior to this Court's October 21, 2001 decision, this Court understandably concluded that releasing water from a dam could be equated with lifting a ladle of soup from a pot and returning the ladle to the same pot. *Catskill Mountains*, 273 F.3d at 492. The City addressed this issue on remand, and the record now contains evidence showing the dramatic changes to water quality that may result from impoundment. That uncontested evidence supports this Court's reconsideration of the soup ladle analogy.

Perhaps most basically, the temperature of impounded water changes. Generally speaking, in warmer months, water in the lake (or reservoir) created by a dam is warmer near the surface (the epiliminion), and colder at lower depths (the hypolimnion), than water in the stream that feeds it, simply because of relative

[4] The City will provide the Court with the U.S. Amicus Brief upon request.

exposure to the sun (A336-37). Second, still water supports different types of ecosystems than flowing water (A337). The phytoplankton and algae that grow in still (lentic) waters reduce the levels of nutrients, such as phosphorus and nitrogen, in comparison with the levels that occur in moving (lotic) waters. *Id.* Similarly, these biota affect the levels of dissolved oxygen and biochemical oxygen demand ("BOD"): generally, oxygen levels are depleted in the hypolimnion by the bacteria involved in the decomposition of algae, while in the epilimnion, waters are well aerated by wind and wave action and the production of algae. *Id.* Low levels of dissolved oxygen in the hypolimnetic layer can, in turn, affect the degree to which various metals and other pollutants that occur naturally in the rocks and sediment particles ionize and become dissolved constituents of the water itself. *Id.* Finally, sediments, and any compounds adhering to sediment particles, can settle out in lentic waters, depending on the residence time. *Id.* All of these factors affect pollutant levels in water within the meaning of the Clean Water Act: heat, nutrients, BOD, dissolved oxygen, metals, and sediments are all regulated pollutants. *See, e.g.*, 33 U.S.C. §§ 1311, 1326; 40 C.F.R. Part 122 Appendix J.

For these reasons, the 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, such as the flow from the Shandaken Tunnel and the upper Esopus Creek. *Id.* These facts demonstrate that there is no basis to

distinguish the dam cases from the discharge at issue in this case, as the water quality impacts to the receiving water are no different.[5]

C. For purposes of determining whether a transfer of water requires a permit, the navigable waters should be considered collectively.

In *Miccosukee,* the U.S. Government as *amicus curiae,* along with the petitioner and other *amici,* presented its understanding that:

> all waters of the United States that fall within the Act's definition of "navigable waters" … should be viewed unitarily for purposes of NPDES permitting requirements. Because the Act requires NPDES permits only where there is an addition of a pollutant 'to navigable waters,' the Government's approach would lead to the conclusion that such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body.

[5] The City also notes the incongruous results of this artificial distinction. In *Consumers Power,* the water was processed through hydroelectric generation equipment prior to its return to the receiving water body. During that process, the fish living in that water were pulverized prior to the discharge of that water. It makes no sense to allow the discharge of the resulting slurry to proceed without a NPDES permit while the City's movement of water for an unfiltered drinking water supply is subject to this requirement. The City demonstrated, and the District Court held, that the pollution that exists in the water released from the Shandaken Tunnel – naturally occurring clay particles – have no measurable environmental impact. Hardly the same can be said for the releases at issue in *Consumers Power.* The result of this unjustified distinction in this case is the imposition millions of dollars in penalties for a harmless discharge that the City reasonably believed was not subject to the NPDES permitting requirement, as recognized by the District Court (SPA 21-26).

124 S.Ct. at 1543. *See* U.S. Amicus Brief at 15-20. The Supreme Court adopted the terminology the U.S. government used in its *amicus* brief in *Miccosukee* to characterize what this Court previously referred to as the "singular entity" theory, 273 F.3d at 493. The Supreme Court elaborated upon the position of the U.S. Government:

> The "unitary waters" argument focuses on the Act's definition of a pollutant discharge as "any addition of any pollutant to navigable waters from any point source." § 1362(12). The Government contends that the absence of the word "any" prior to the phrase "navigable waters" in § 1362(12) signals Congress' understanding that NPDES permits would not be required for pollution caused by the engineered transfer of one "navigable water" into another.

124 S.Ct. at 1543-44. Similarly, the use of the collective term "waters" suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer of pollutants from one body of water to another.

In a brief discussion, the Supreme Court identified two CWA provisions that "might be read to suggest a view contrary to the unitary waters approach." 124 S.Ct. at 1544. First, the Supreme Court noted that states establish water quality standards for individual bodies of water. *Id.* A state takes into account "the designated uses of the navigable waters involved" and, if NPDES

permits with limits based on the site-specific water quality standards fail to achieve those water quality standards, the state must analyze the total maximum daily load of the relevant pollutant that the water body in question can assimilate. 33 U.S.C. §§ 1313(c)(2)(A), 1313. This does not, however, undermine the unitary waters concept. Indeed, the NPDES program could not address those discharges that it clearly was intended to cover, let alone achieve the overall remedial goals of the CWA, without such a mechanism for establishing site-specific permit limits to address local water quality conditions. This structure for establishing and striving to achieve water quality standards simply recognizes that water quality varies among different bodies of water; it is not relevant to the question here of whether the "navigable waters" are unitary for purposes of determining whether a NPDES permit is needed in the first instance.

Second, the Supreme Court looked at provisions available to certain NPDES permit holders who withdraw water for industrial purposes and release it back to the same water body. 124 S.Ct. at 1544. While the Supreme Court correctly points out that under 40 C.F.R. § 122(g)(4), under these circumstances, the permit holder is not required to remove pollutants that already existed in that water body, this is simply irrelevant to the question of whether a NPDES permit is required. Indeed, in its amicus brief in *Miccosukee*, the U.S. Government specifically distinguished between the mere transfer of untreated water which does

not require a permit, and the situation in which at issue in the "intake credit" regulations where

> water is diverted from navigable waters for an intervening use," in which case the water "may lose its status as 'waters of the United States'" and consequently become subject, upon its reintroduction into navigable waters, to the NPDES permitting process.

U.S. Amicus Brief at 23. As discussed below, commercial exploitation of water should be treated differently from simple municipal water management. Both of these provisions cited by the Supreme Court dictate *where* pollutants may be added to the nation's waters where an NPDES permit is required; neither is relevant to the question here of *whether* a NPDES permit is required in the first place.

POINT II

SECTIONS 101(G) AND 510 OF THE CLEAN WATER ACT SPECIFICALLY PROVIDE THAT STATES' AUTHORITY OVER TRANSFERS FOR WATER SUPPLY PURPOSES ARE NOT AFFECTED BY THE CLEAN WATER ACT

Because water released from the Shandaken Tunnel is, and will continue to be, frequently more turbid than receiving waters in the Esopus Creek, a NPDES permit, which must assure compliance with the state water quality standard for turbidity – no increase that causes a substantial visible contrast – will restrict the City's use of the Shandaken Tunnel (A335, 963-65). The Clean Water

Act specifically prohibits this result. Section 101(g), entitled "Authority of States Over Water," states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

33 U.S.C. § 1251(g).

In addition, Section 510 of the CWA, "State Authority," further demonstrates Congress' intention that the Clean Water Act NPDES permitting provision shall not affect allocation of water within a state.

> Except as expressly provided in this chapter, nothing in this chapter shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters … of such States.

33 U.S.C. § 1370.

The Supreme Court confirmed in *Miccosukee* that if transfers of water are prohibited through the NPDES program, CWA Section 101(g) would be violated.

> Many of these 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).

124 S.Ct at 1545. However, the Supreme Court suggested the possibility of an administrative solution to this problem:

> On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to points sources associated with water distribution programs.

Id. Unfortunately, the solution envisioned by the Supreme Court, the issuance of general permits, is not an adequate solution for two reasons. First, the use of general permits has been called into question in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2002) *cert. denied sub nom. Texas Cities Coalition on Stormwater v. EPA*, __ U.S. __, 2004 U.S. LEXIS 4044 (Jun. 7, 2004). The Ninth Circuit found, in the context of municipal stormwater permits, that general permits do not provide for the "meaningful review by an appropriate regulating agency" necessary to ensure that a permit program meets the requirements of the CWA. *Id.* at 856.

Second, general permits raise the same practical problem for New York City in this case as an individual permit. NPDES permits – including general

permits – must include effluent limitations to "[a]chieve water quality standards … including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). As noted above, it is not clear that there is a reasonable, feasible way for the City to ensure that releases from the Shandaken Tunnel – 16% of our water supply – consistently achieve the State water quality standard for turbidity.

Because the Supreme Court was referring to a concept, general permitting, that had not been developed in the record in *Miccosukee*, its discussion of general permits does not reflect a full factual analysis. On remand, the parties in *Miccosukee* will have an opportunity to demonstrate why general permits are not a solution to the violation of CWA Section 101(g) that would ensue from requiring a NPDES permit for the transfer at issue there.

In this case, the record developed on remand demonstrates that there is no solution that will reduce turbidity to amounts that will allow compliance with the State water quality standards at all times (A958-64). Plaintiffs' only proposed solution, the alum coagulation plant, was, as discussed above, infeasible. Thus, the record in this case leaves no question that requiring a NPDES permit for the Shandaken Tunnel will limit the City's distribution of Schoharie water, in violation of CWA Section 101(g) and 510.

The City's water supply system is operated under State law to provide water to New York City and upstate communities. The creation of the upstate

reservoirs was authorized under the Water Supply Act. 1905 N.Y. Laws Ch. 724, "An Act to provide for an additional supply of pure and wholesome water for the city of New York; and for the acquisition of lands or interest therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects." Among other things, all plans for the reservoir system were required to be "submitted to and approved by the state water supply commission." *Id*. at § 46. While the State retains power over the City's water supply system, the Water Supply Act represents a delegation of water rights to the City by the State Legislature.

New York State continues to be closely involved in allocation of water in connection with the City's water supply system:

> It is hereby declared to be the policy of this state that the volume and rate of change of volume of releases of water from [reservoirs within the New York City system] should be regulated to protect and enhance the recreational use of waters affected by such releases while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes.

N.Y. Envtl. Conserv. Law § 15-0801(2). With respect to the Shandaken Tunnel in particular:

> The Commissioner is authorized and directed to promulgate rules and regulations … for releases from Schoharie reservoir through the Shandaken tunnel.

Id., § 15-0805(1).[6] NYSDEC retains authority over allocations of water for water supply throughout New York State. *Id.*, at § 15-1501. If a NPDES permit is required for the City's operation of the Shandaken Tunnel, use of the Tunnel will be curtailed, and the right of New York State to allocate water, and the rights of the City and the upstate communities who receive Schoharie water under State law, will be abrogated and superseded. This would violate CWA Sections 101(g) and 510.

In adopting these provisions protecting the traditional powers of states over water allocation, Congress recognized that such protection is entirely consistent with the purpose of the Clean Water Act, which is to restore and maintain the integrity of the nation's waters. *See* 33 U.S.C. § 1251(a). Transfers of water for purposes of allocation, such as releases from the Shandaken Tunnel, involve the movement of water that is desirable, rather than the discharge of unwanted water. Requiring a permit to transfer water that has been determined by EPA to be suitable for consumption, without filtration, does not make sense against

[6] As noted above, NYSDEC's release requirements for the Shandaken Tunnel are set forth at N.Y. Comp. Codes R. & Regs. tit. 6, Part 670.

the backdrop of the stated purpose of the Act. Other than this Court's October 21, 2001 decision, no court has ever considered discharges of drinking water within a system, solely for the purpose of moving such drinking water, to be subject to the Act's point source permitting provision. *Compare Miccosukee,* 280 F.3d 1364 (11th Cir. 2002) (discharge of water as part of flood control system). *See also Dubois v. United States Dep't of Agric.,* 102 F.3d 1273 (1st Cir 1996) (discharge of unwanted water after commercial exploitation); *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir.), *cert. denied sub nom. Fidelity Exploration and Development Co. v. Northern Plains Resource Council*, __ U.S. __, 124 S.Ct. 434 (2003) (the release of groundwater pumped into surface waters, during the process of mining, required a NPDES permit).[7] The

[7] In contrast to the municipal water supply activities at issue in this case, *Dubois* defendant Loon Mountain Recreation Corporation was processing the diverted water through snowmaking equipment and *Northern Plains* defendant Fidelity Exploration and Development Company was extracting groundwater in connection with mining operations.

The First Circuit found it significant in *Dubois* that the water was "commercially exploited" between the time of its intake into the snowmaking equipment and the time it was released. 102 F.3d at 1297. The commercial exploitation meant that water was removed from a pond and two other sources, then processed in snowmaking equipment, and then released back into the pond. *Id*.

The underlying water discharge in *Northern Plains* is even more distinct from the transfers at issue in this case. In determining that groundwater was a "pollutant" in *Northern Plains*, the Ninth Circuit emphasized that, because defendant was

Continued…

releases of drinking water through the Shandaken Tunnel are completely different from the discharges in these cases.

POINT III

THE SHANDAKEN TUNNEL IS AND SHOULD BE REGULATED BY MORE APPROPRIATE LAWS AND REGULATIONS THAN THE NPDES PROVISIONS OF THE CLEAN WATER ACT

Protection of the quality of our drinking water supply is of paramount importance to the City. Indeed, SPDES permits issued pursuant to the CWA NPDES program are an essential component of the City's efforts – as well as the efforts of New York State and concerned citizens – to regulate the introduction of pollutants into the water supply. In particular, discharges of pollutants from wastewater treatment plants and industrial facilities in the watershed must comply with stringent SPDES permit limits to protect New York City's unfiltered drinking water. *See*, *e.g.*, Rules and Regulations for the Protection from Contamination, Degradation and Pollution of the New York City Water Supply and its Sources, N.Y. Comp. Codes R. & Regs. tit. 10, § 128-3.6.

---

engaged in commercial activity, the groundwater qualified as "industrial waste." 325 F.3d at 1161.

Continued…

Similarly, the City does not suggest that the Shandaken Tunnel should be unregulated. But the CWA NPDES program is not the right mechanism for addressing the Tunnel; other provisions of federal and State law provide sufficient, and more appropriate, regulatory frameworks to address any water quality impacts associated with the Tunnel releases.

A. Federal Programs

1. The Safe Drinking Water Act and Surface Water Treatment Rule

The City operates the Catskill water supply system under a FAD issued by EPA pursuant to the federal Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(f) *et seq.*, and its implementing regulations, the Surface Water Treatment Rule (SWTR), 40 C.F.R. § 141.70 *et seq*. (A939).[8] The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems, and set forth the criteria that must be met for a public water system to avoid filtration. *See* 40 C.F.R §§ 141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity to 5 NTU immediately prior to the first point of disinfection. 40 C.F.R. § 141.71(a)(2).

Distinguishing between governmental water supply activities and commercial exploitation of water is not only consistent with the goals and policy of the Clean Water Act but is required under the Act. 33 U.S.C. §§ 1251(b) and (g).

[8] The water supply system is also regulated under New York State law. N.Y. Pub. Health Law §§ 201(1)(l), 225; N.Y. Comp. Code R. & Regs. tit. 10, Part 5.

The 2002 FAD contains several provisions that require the City to address and control pollution entering the City's Catskill and Delaware water supply systems from both point and nonpoint sources (A1791-92). The FAD specifically requires the City to address suspended solids and turbidity entering the source waters of the Schoharie reservoir (A1792). The requirements include a stream management program to restore streambanks and streambeds, an agricultural program to reduce pollution from farms near the watershed, and a forestry program to address erosion resulting from logging (A940-44). Most importantly, the FAD requires the City to study and implement any feasible, effective and cost-effective means to reduce turbidity in waters released through the Shandaken Tunnel (A1791).

Thus, the pollutants at issue are being addressed under the SDWA and SWTR, both at the location where they enter the water system and after water is released through the Shandaken Tunnel. The FAD program administered under the SDWA and SWTR not only imposes more effective environmental controls than the NPDES permitting program, it also resolves the underlying issues without losing sight of the fact that the main purpose of the Catskill system is to provide a safe and adequate supply of drinking water to the public. Because the entire supply system, including the Shandaken Tunnel, is effectively regulated under the SDWA and SWTR, it should not be subjected, in contravention of the clear

directive of Congress in Sections 101(g) and 510 of the CWA, to the intransigence and inflexibility of the NPDES point source permitting program which, if applied to the City's water supply system, will jeopardize the City's ability to provide a safe supply of water to the nine million residents, and countless commercial users and workers who rely on the system.

2. Total Maximum Daily Loads

Under Section 303(d) of the CWA, a receiving water that fails to meet applicable water quality standards for a particular pollutant will be placed on a state's impaired waters list and therefore subject to the development of total maximum daily loads (TMDL). 33 U.S.C. § 1313(d). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating those pollutants to their various contributors. TMDLs are implemented for point sources via NPDES permits, and for nonpoint sources through state best management practices.

The TMDL program, in contrast to the NPDES permitting program, is an appropriate means to assess ways to regulate and control pollutants in the Schoharie reservoir, because the pollutants are generally added by nonpoint sources, and the TMDL program, unlike the NPDES program, addresses both point and nonpoint sources of pollution. Indeed, in implementing the TMDL program, NYSDEC has identified the Esopus Creek below the Shandaken Tunnel outlet and

the Ashokan reservoir as impaired because of "silt/sediment" from "streambank erosion" on the 2004 Section 303(d) List. *See* http://www.dec.state.ny.us/website/dow/part1.pdf (last updated January 28, 2004).[9]

The pollutants at issue, turbidity and suspended solids, enter the Schoharie reservoir mainly through nonpoint sources, and are the result of both the natural conditions in the Schoharie watershed and human activity, such as farming, logging, development and disturbances to streambanks and streambeds. The appropriate place to address the pollutants is where they enter the water.

Regulators, environmental advocates, and the scientific community continually stress that it is far better to address pollutants at their source, rather than trying to remove them, or compensate for their impacts, after they have been added to the nation's waters. Regulation of these pollutants under the NPDES program is an impractical approach that seeks to address pollutants at the wrong end of the conveyance. Attempting to address pollutants after the fact rather than at their sources fails to solve the actual environmental problem – reducing pollution into the nation's waters.

[9] NYSDEC also lists the Schoharie reservoir as impaired from silt and sediment, caused by erosion and construction. *Id.*

3. Congress' intended mechanism for addressing transfers of untreated water under the Clean Water Act

Recognizing that the NPDES program was inappropriate for transfers of untreated water, Congress directed EPA to study and make recommendations concerning "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities," in one of several statutory provisions addressing nonpoint sources of pollution. 33 U.S.C. § 1314(f)(2)(F). In recommending consultation with appropriate federal and State agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, 33 U.S.C. § 1314(f), Congress structured the Clean Water Act to address changes in the flow of water differently from point sources of pollutants. In other words, while Congress clearly contemplated that pollutants might be moved within the nation's waters as a result of facilities diverting flow, like the Shandaken Tunnel, the Clean Water Act is structured to address transfers of pollutants resulting from such diversions in a different manner from additions subject to the NPDES permitting requirements of 33 U.S.C. § 1342.

If a NPDES permit is required for the transfer of water through the Shandaken Tunnel, against the clear mandate of Congress, those transfers, which are exclusively for the purpose of water allocation, will be restricted, with grave consequences to the nine million residents of New York State who rely on that water for a safe and adequate water supply.

B. State laws and regulations

In addition to the federal requirements, New York State regulates the Shandaken Tunnel outside of the NPDES point source permit program.

Consistent with its delegated authority to administer the Clean Water Act, New York State has adopted and enforces water quality standards. *See* New York State Environmental Conservation Law (ECL) § 15-1313(2); *see also* ECL § 17-0301, N.Y. Comp. Codes R. & Regs. tit. 6, § 700 *et seq*. The State classifies bodies of water in accordance with their best use, and adopts and enforces water quality standards for specific water bodies, including the Esopus Creek, based on those classifications. *See id.* Releases that violate the state water quality standards are subject to enforcement by the Commissioner of the New York State Department of Environmental Conservation. ECL § 17-0501. Releases from the Shandaken Tunnel are subject to these provisions, independent of the NPDES (or SPDES) program.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. ECL § 15-1501. Under another provision, a permit is required to excavate or place fill in navigable waters. ECL § 15-0505. These laws, if enforced properly, are specifically tailored to address many of the activities that create turbidity in source waters of the Schoharie reservoir, and thus in releases from the Shandaken Tunnel.

Finally, as noted above, New York State regulates releases from reservoirs in order to protect natural resources and recreational uses in the receiving waters. ECL §§ 15-0801 and 15-0805. Indeed, as discussed above, New York City is required, under regulations promulgated by New York State pursuant to these statutes, to make releases from its Shandaken Tunnel, to enhance recreational use of the Esopus Creek. N.Y. Comp. Codes R. & Regs. tit. 6, Part 670.

POINT IV

THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING THE MAXIMUM ALLOWABLE PENALTY FOR VIOLATIONS BETWEEN JUNE AND DECEMBER 2002

The District Court imposed the maximum allowable penalty under the CWA during the period between June 22, 2002 and December 31, 2002.[10] In doing so, it failed to properly consider and apply the mitigating factors set forth in Section 309(d) of the CWA. As a result, the District Court's penalty determination must be vacated.

[10] The penalty represents "possibly the largest municipal sanction every imposed" for a violation of the Clean Water Act. John Caher, *City Ordered to Pay $6 Million Penalty for Polluting Water but Discharge at Esopus Creek Could Have Cost 10 Times More*, 229 N.Y. L.J. p.1, col. 5 (Feb. 7, 2003).

In reviewing a district court's findings of fact in support of a penalty imposed under the CWA, appellate courts apply a clearly erroneous standard. *See United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir. 1996); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 79 (3rd Cir. 1990). In reviewing a district court's weighing of those facts and determination of the penalty, appellate courts apply an abuse of discretion standard. *Cedar Point Oil*, 73 F.3d at 573. *See also Smithfield Foods, Inc.*, 191 F.3d at 526, 529; *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990). In this case, the District Court's penalty calculation contains both erroneous factual determinations and an abuse of discretion in applying certain factual determinations.

Section 309(d) of the CWA requires that courts "shall consider" six listed factors in calculating the amount of the penalty. *Id.* *See also Smithfield Foods*, 191 F.3d at 526 (noting that "these factors are designed to give district courts direction in determining the appropriate civil remedy"); *Tyson Foods*, 897 F.2d at 1141-42 (noting that these factors constrain the district court's discretion in assessing civil penalties). Consideration of the six statutory factors is mandatory. *See Tyson Foods*, 897 F.2d at 1141-42 (district court abused its discretion in imposing no monetary penalty, based solely on evaluation of good faith efforts,

and was directed on remand to consider all six statutory factors in reducing maximum allowable penalties). The listed factors are: (1) the seriousness of the violations; (2) economic benefit resulting from the violation; (3) the history of such violations; (4) any good-faith efforts to comply with the applicable requirements; (5) the economic impact of a penalty; and (6) such other matters as justice may require. 33 U.S.C. § 1319(d).

After considering the six statutory factors, the District Court stated that the maximum allowable penalty should be reduced in light of the lack of material environmental harm caused by the discharges; the City's reasonable belief, prior to this Court's October 21, 2001 decision, that a SPDES permit was not required; and the City's efforts, both before and after October 21, 2001 to address the turbidity issue (SPA 26). Despite these findings, the District Court imposed a civil penalty representing the maximum allowable penalty for the time-period between June 22, 2002 and December 31, 2002, at which time the City submitted a SPDES permit application.

A. The City submitted its SPDES permit application within a reasonable amount of time.

In assessing penalties from June 22, 2002 forward, the District Court implied that the City's delay in submitting the SPDES permit application after June 22, 2002, an arbitrary date picked by the court, was not reasonable. However, in the February 6, 2003 Memorandum Order and Judgment, the District Court stated

that the fourteen month delay between this Court's October 22, 2001 decision and the City's application for a SPDES permit on December 30, 2002, "although somewhat extended, was not undue" (SPA 24). The Court's assessment of penalties for part of that period cannot be reconciled with this finding. Although a district court has broad discretion in the calculation of penalties in a Clean Water Act case, *see, e.g., Tull v. United States*, 481 U.S. 412, 425 (1987); *Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw. 1993), that broad discretion does not allow a court to ignore its own conclusions and issue a penalty that makes the decision internally inconsistent. *See Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 81 (3rd Cir. 1990) (finding that the district court's penalty reduction based on a finding of defendant's good faith directly contradicted the court's earlier conclusion that the defendant's actions "did not rise to the level of 'good faith'") (citation omitted). Having found that the fourteen month delay was not undue, there was no basis for the District Court to penalize the City for any portion of those fourteen months, and the penalty is an abuse of discretion.

The District Court's decision to assess penalties from June 22, 2002 forward is also based on a clearly erroneous finding of fact. The District Court stated its concern "that Defendants provided … very little evidence to explain why they apparently failed to take any affirmative steps to comply with the Second

Circuit's October 21, 2001 decision in a more expeditious manner" (SPA 24, n. 17). The City, however, did provide the very explanation that the Court found lacking. As discussed above, because there was no model for a permit for this type of discharge, the City and NYSDEC had to start from scratch. Dr. Principe testified that DEP did not have the resources to focus on the permitting issue immediately after receiving this Court's decision, as staff was focused on two critical issues that were beyond the City's control at that time – protection of the water supply following the September 11, 2001 attacks and the serious drought conditions (A971, 1015). The District Court specifically found Dr. Principe to be a credible, forthright, and knowledgeable witness, and found that the City's delay in submitting an application as a result of these unforeseen events was reasonable (SPA 26).

Dr. Principe further testified that once the City was able to devote time to the permitting process, NYSDEC and the City needed to first confront the preliminary issue of what would be required for this permit application, which was unlike any other that NYSDEC, or any regulatory agency administering the Clean Water Act, had ever considered (A1010). At first, NYSDEC and the City were contemplating a very complex permit application, involving analyses that would provide the foundation for a permit that would address the interrelationships among flow, duration of flow, turbidity, and temperature (A970-72, 1011).

However, not surprisingly, given the uniqueness and complexity of the issues involved, NYSDEC's and the City's understanding of what was required in a SPDES permit application for the Tunnel had evolved over the course of those discussions. NYSDEC told the City, in late November or early December 2002, to submit a greatly simplified permit application (A971-72, 1011-12). The City quickly responded, and submitted its application about one month after being told what it needed to provide (A968-69, 1811-1903). The District Court overlooked these critical circumstances in assessing penalties from June 22, 2002 forward.

B. The mitigating factors that the District Court determined to be relevant require that the penalties be reduced.

Even if this Court accepts the decision of the District Court to impose penalties from June 22, 2002 forward, there is no basis for those penalties to be the maximum allowable under the statute. Section 309(d) makes clear that a court must consider the listed statutory factors in calculating civil penalties. This provision serves little purpose if a court making use of the penalty-heavy "top-down" approach can choose to accord no weight to a clear and substantial mitigating factor when calculating the penalty amount. By assessing the maximum statutory penalties for the period penalties were assessed, the District Court implicitly concluded that none of the mitigating factors it had found to be relevant offered a basis for reducing the penalty amount during the June through December 2002 time period. This determination was an abuse of discretion.

Perhaps the most important of all the mitigating factors cited by the court is the first, the seriousness of the violation. Although the District Court clearly and correctly found that the lack of material environmental harm caused by the Shandaken Tunnel discharges mitigated against imposition of the maximum penalty, it failed to apply this factor in reducing the penalty during the period for which penalties were imposed. The District Court offers no explanation why this factor should not mitigate the post-June 2002 penalties. There was no evidence that the discharges began to cause material environmental harm after June 2002, and the court's failure to reduce the penalty amount based on this factor was an abuse of discretion.

In *Hawaii's Thousand Friends*, 821 F. Supp. 1368, the district court set civil penalties for discharges of inadequately treated sewage from a Honolulu wastewater treatment plant. The court examined the number of violations, duration of noncompliance, significance of violation, and harm to human health and the environment. *See* 821 F. Supp. at 1383. That case involved more than four years of continuous violations (1,645 days), with 25-35 millions of gallons per day of sewage without secondary treatment discharged to the ocean resulting in violations of oxygen and suspended solids limits. *Id*. at 1384. The court found that "little measurable effect from the discharge on the environment" had been shown. *Id*. at 1387, 1396. Applying the top down approach used by the District Court in this

case, the court reduced the maximum penalty of $249,350,000 to $718,000. *See also Friends of the Earth, Inc. v. Laidlaw Envt'l. Services*, 956 F. Supp. 588 (D. S.C. 1997), *vacated at* 149 F.3d 303 (4th Cir. 1988), *rev'd* 528 U.S. 167 (penalties reduced based on lack of health or environmental harm resulted from discharges of mercury, an extremely toxic pollutant.)

Penalizing a violator found to cause no material environmental harm at the same level that is reserved for the most reprehensible violator is unfair and arbitrary. Penalties have even been reduced where a court found very serious violations of the Clean Water Act for discharges of "toxic substances and many … pollutants known to harm marine life." *Powell Duffryn Terminals*, 913 F.2d at 79. In that case, the Circuit Court accepted the district court's reduction of the statutory maximum by $1 million.

In this case, imposition of the maximum allowable penalty is particularly inappropriate because the District Court also found that the *discharges produced environmental benefit* by increasing downstream fish habitat, and that NYSDEC, the agency that administers the Clean Water Act NPDES program in New York State, frequently requires the City to release the discharges for this purpose (SPA 23, n. 14). By finding that the lack of material environmental harm caused by the discharges should mitigate the maximum allowable penalty, but then

failing to apply this factor in reducing the penalty, the District Court abused its discretion, and its penalty calculation must be vacated.

Further with respect to the first element of CWA Section 309(d), as well as the fourth element – any good faith efforts to comply with applicable requirements – the Court specifically noted the City's ongoing efforts to address the turbidity problem, both before *and after* this Court's October 21, 2002 decision (SPA 26). The record shows that the City pursued those efforts after June 22, 2002 just as diligently as it had before that date, and continues to do so, as required under the 2002 FAD. The City respectfully refers the Court to its most recent Monthly Status Report to the Northern District, dated June 1, 2004, for a current description of its progress with respect to its numerous significant efforts to address turbidity in the Tunnel releases. *Id.* at 2-4. Supp. Index No. __.

In failing to reduce the penalty in light of its finding that the City continued to address the turbidity issue, the District Court's decision not only violates CWA Section 309(d), but loses sight of the overall goal of the Clean Water Act, which is to restore and maintain the chemical, physical and biological integrity of the nations waters. CWA § 101(a), 33 U.S.C. § 1251(a). While the NPDES permitting requirement is an essential component of the Act, the purpose of NPDES permits is to bring point source discharges under regulatory oversight so that pollutant levels in those discharges can be addressed. The District Court

recognized that City was already undertaking a number of programs to address turbidity in the Tunnel discharges, and did not suggest that the City could do more. It nonetheless imposed the maximum statutory penalty for the City's failure to apply for a SPDES permit by a date that the Court arbitrarily determined to be reasonable. The District Court's failure to reduce that penalty in recognition of the City's ongoing programs to address the problem, while focusing exclusively on the date the City applied for a SPDES permit, represents an overly pedantic view of the Clean Water Act, and misses the point of the prohibition against unpermitted discharges.

With respect to the sixth element of CWA Section 309(d), other matters as justice may require, the Court found that releases from the Shandaken Tunnel: (a) do not cause material environmental harm; (b) have environmental benefits to the receiving water; and (c) are in fact mandated by NYSDEC, the very agency that administers the Clean Water Act's NPDES permitting program in New York State. In *United States v. City of San Diego*, 1991 U.S. Dist. LEXIS 5459 at *13-*14 (S.D. Cal. 1991), the Court addressed wastewater discharges and credited municipal good faith efforts to comply with "contradictory and inconsistent regulation by both the state and federal governments." The court assessed an immediate civil penalty of $500,000 out of a statutory maximum of more than $229,000,000.

In light of these decisions, the assessment of penalties for the City's releases from the Shandaken Tunnel in any amount, let alone in the highest amount ever assessed against a municipality, was an abuse of discretion and cannot stand.

C. The District Court's finding that the second element of CWA Section 309(d) was not a mitigating factor was incorrect.

The District Court incorrectly found that the second element of CWA Section 309(d), the economic benefit resulting from non-compliance, was not a mitigating factor. This was improper because there was nothing in the record showing that the City's actions resulted in economic benefit. Plaintiffs presented the expert testimony of Bruce Bell to support their claim that the City has saved millions of dollars in operation and maintenance costs from not having built an alum treatment plant to reduce turbidity in Schoharie water. The City's expert witness, David Nickols, demonstrated that such a plant is neither realistic nor desirable. The plant would require a 20-40 acre site (A1089) and would have monumental environmental impacts on the Catskill region, including loss of open space and natural resources, and visual, noise, air, and traffic impacts (A1091-92). Three of plaintiffs' own witnesses stated at trial that they were opposed to the plant proposed by plaintiffs' expert (A819, 839, 884).

Plaintiffs attempted to show an economic benefit and they failed, because the only evidence they presented was based on a proposal that was not realistic. The District Court recognized the problem inherent in plaintiffs'

presentation, and questioned the feasibility of plaintiffs' plan (SPA 20-21). Nevertheless, the Court inexplicably found that the economic benefit element was not a mitigating factor. This was clear error.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED.

Dated: New York, New York
June 9, 2004

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Defendants-Third-Party-
Plaintiffs-Appellants-Cross-Appellees.

HILARY MELTZER,
WILLIAM S. PLACHE,
of Counsel.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 12,307 words, not including the table of contents, table of authorities, this certificate, the cover, and the inside caption.

HILARY MELTZER
Assistant Corporation Counsel