December 15, 2005

Ms. Roseann B. MacKechnie
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Docket # 03-7203, *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*

Dear Ms. MacKechnie:

By order dated December 2, 2005, this Court directed the parties in the above case to answer two questions regarding Clean Water Act (CWA) § 302, 33 U.S.C. § 1312(b)(2)(A). Pursuant to that order, Plaintiffs-Appellees hereby submit their responses.

Question 1: 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?

I. The Clean Water Act contemplates relief from Water Quality Standards under certain circumstances.

The § 302(b) hearing is a mechanism that Congress established to provide relief from water quality-based effluent limitations. Analogous state variance procedures provide similar relief. They may be used to prevent otherwise absurd results from application of the Act – for instance, a shut-down of part of New York City's water supply. Dischargers must seek relief through mechanisms such as these, not through an attack on the basic prohibition of the Clean Water Act.

A. Section 302 allows the Environmental Protection Agency, after a cost-benefit hearing, to issue an NPDES permit with modified water quality-based effluent limitations.

Section 302(a) establishes that, where the Administrator determines that best available technology (BAT) is not achieving water quality goals, the Administrator may establish more stringent effluent limitations to achieve water quality ("water quality based effluent limitations (WQBELs)"). CWA § 302(a), 33 U.S.C. § 1312(a). The language of § 302 shows that it contemplates applying WQBELs to either a "group" of point sources or to an individual "point source." 33 U.S.C. § 1312(a).[1] Once the Environmental Protection Agency (EPA) has done so,

[1] WQBELs were recommended by EPA in its Water Quality Guidance for the Great Lakes System, *Am. Iron & Steel Inst. v. Envtl. Prot. Agency*, 115 F.3d 979 (D.C. Cir. 1997). And recently, this Court directed EPA to explain why it

an applicant for a permit may demonstrate at a public hearing that the benefits of the WQBELs bear "no reasonable relationship" to the "economic and social costs" of the WQBELs. *Id.* § 1312(b). Once the applicant so demonstrates, the EPA may issue a permit that "modifies" the WQBELs. *Id.* By its terms, then, § 302(b)(2)(A) authorizes EPA to modify water quality based effluent limitations applied pursuant to § 302(a).

A § 302 hearing may not be available in this case, in which the City is seeking a State-issued permit under State-issued water quality standards. *See Homestake Mining Co. v. U.S. Entvl. Prot. Agency,* 477 F. Supp. 1279, 1284, 1286 (D.S.D. 1979) (holding that a state may adopt more stringent water quality standards than those required by the Act, and suggesting in dicta that a § 302 hearing is not available for effluent limitations based on state water quality standards). The Act's inclusion of § 302(b), however, shows that Congress intended there to be a relief valve from water quality-based effluent limitations. Congress was not oblivious to the difficulties that cleaning up our nation's water might entail, and § 302(b) is illustrative of the flexibility that Congress built into the Act:

> The Committee has included language in this section requiring that in the determination of effluent limitations based on water quality, consideration must be given, on a case-by-case basis, to a balancing of the economic and social costs against the social and economic benefits sought to be obtained.
>
> The Committee believes that there must be a reasonable relationship between costs and benefits if there is to be an effective and workable program. . . .
>
> The Committee recognizes that no mathematical balance can be achieved in considering relative costs and benefits nor would any precise formula be desirable, but in each case the Administrator or the State will be able to determine whether there is any reasonable connection at all between the costs which a particular effluent limitation would impose and any benefits (including the attainment of natural water quality) which might be derived.

S. Rep. No. 92-414, at 47-48 (1971) (comments on § 302).[2]

Other CWA provisions and implementing regulations allow for flexibility in the permitting process. Among them are the general permits suggested by the *Miccosukee* Court. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108-09 (2004) (citing 40 C.F.R. §§ 122.28, 123.25 (2003)). Another is a schedule of compliance, which allows important but problematic discharges to continue for the short term. See 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47; N.Y. Envtl. Conserv. Law § 17-0813 (McKinney 2005). Another was the successive-stage implementation of more stringent technology-based standards. 33 U.S.C. § 1311(b). Other variance provisions were noted by this Court last year in *Riverkeeper, Inc. v. U.S. Envtl. Prot. Agency*, 358 F.3d 174, 192 (2d Cir. 2004).

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had declined to include WQBELs in its new CAFO (Concentrated Animal Feeding Operation) Rule. *Waterkeeper Alliance, Inc. v.U.S. Envtl. Prot. Agency,* 399 F.3d 486, 523-24 (2d Cir. 2005).

[2] These comments were made before the current § 303 (state water quality standards) was added to the bill, and make explicit reference to State cost-benefit determinations. Therefore, it is likely that Congress intended a § 302 hearing to be available *whenever* limitations were more stringent than technology-based limits could achieve, *i.e.*, for *all* water quality-based effluent limitations. If so, then the *Homestake* decision is not in accord with Congressional intent. However, as discussed below, an always-available "federal" § 302 hearing is unnecessary because states may create their own cost-benefit hearings in their delegated programs.

B. Under the Clean Water Act, States may establish variances from water quality standards.

The flexibility in applying water quality standards under the Clean Water Act program does not end there. EPA regulations specifically authorize states to include variances from water quality standards in their delegated permit programs. 40 C.F.R. § 131.13. EPA guidance suggests that state variance procedures "involve the same substantive and procedural requirements as removing a designated use," but are discharger and pollutant specific, and less permanent in nature. EPA, *Water Quality Standards Handbook* 5-12 (2d ed. 1994), *available at* http://www.epa.gov/waterscience/standards/handbook/. Variances allow "NPDES permits [to] be written such that reasonable progress is made toward attaining the standards without violating section 402(a)(1) of the Act, which requires that NPDES permits must meet the applicable water quality standards." *Id. See also* EPA, *NPDES Permit Writers Manual* 176 (1996), *available at* http://www.epa.gov/npdes/pubs/owm0243.pdf (discussing three types of variances "that may change the fundamental basis of water quality-based effluent limitations": "site-specific water quality criteria modification," "designated use reclassification," and "water quality standard variance"); EPA, *Coordinating CSO Long-Term Planning with Water Quality Standards Reviews* 34 (2001), *available at* http://epa.gov/npdes/pubs/ wqs_guide_final.pdf (contemplating temporary "bridge" variances for WQS violations caused by municipal combined sewer systems).[3] A state may remove a designated use from a water body if it can demonstrate that attaining the use is not feasible for one of six reasons. *See* 40 C.F.R. § 131.10(g). Each of these options – temporary variances and de-designation of uses – is available to all states, whether or not they have delegated programs. Thus, if a permit applicant in a non-delegated state is denied a § 302 hearing for effluent limitations based on state water quality standards, the applicant may nevertheless seek relief through these water quality standards revision options.[4]

II. New York's variance procedure allows the New York State Department of Environmental Conservation (DEC) to issue an SPDES permit with modified water quality-based effluent limitations.

New York has been an EPA-approved delegated state since October 28, 1975. USEPA, National Pollutant Discharge Elimination System (NPDES), http://cfpub.epa.gov/npdes/ statestats.cfm?program_id=45&view=specific (Apr. 14, 2003). Its program's variance provision provides instruction on assessing cost-and-benefit-type factors on a case-by-case basis as contemplated by the legislative history of § 302 and as allowed by 40 C.F.R. § 131.13. *See* N.Y. Comp. Codes. R. & Regs. tit. 6, § 702.17 (2005). It expressly provides: "The department may grant, to an applicant for a SPDES permit or to a SPDES permittee, a variance to a water quality-based effluent limitation or groundwater effluent limitation included in a SPDES permit." § 702.17(a). The language is clear: the DEC may modify water quality-based effluent limitations in a permit that it issues. As recommended by the EPA *Handbook*, the applicant must demonstrate that "achieving the effluent limitation is not feasible" for one of six reasons.

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[3] New York City is well aware of CWA permitting of municipal systems that violate water quality standards. The City has been violating water quality standards with its combined sewer overflows (CSOs) for decades and continues to get permitted. *See NYCDEP SPDES Permits for 14 Publicly Owned Sewage Treatment Plants*, 1991 N.Y. Env Lexis 55 (NYDEC July 16, 1991); *Modification of SPDES Permits for 14 NYC Publicly Owned Sewage Treatment Plants,* 2005 N.Y. Env Lexis 63 (NYDEC Nov. 9, 2005).

[4] A "designated use" is one component of a water quality standard. 33 U.S.C. § 1311(c)(2)(A). States must also adopt water quality criteria to attain the use. *Id.*

§ 702.17(b). It must further demonstrate that any increased risk to the public and the environment from granting the variance will not "adversely affect the public health, safety, and welfare." § 702.17(c). If a variance is granted, the permit must contain conditions to assure that "reasonable progress be made toward achieving the [original] effluent limitation." § 702.17(e)(2). The variance can be renewed subject to the same requirements. § 702.17(g).

Question 2: 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?

III. If the City of New York makes a showing that it is entitled to a variance, then it will be entitled to modified water quality standard-based effluent limitations in its SPDES permit.

Of the six justifications for a variance from water quality-based effluent limitations in § 702.17, two have possible application here. First, the City could obtain a variance if it demonstrated that it is not feasible to meet water quality standards because "dams, diversions or other types of hydrologic modifications preclude attainment of the standard or guidance value, and it is not feasible to restore the waterbody to its original condition or to operate such modification in a way that would result in such attainment." § 702.17(b)(4). Second, the City could obtain a variance if it demonstrated that it is not feasible to meet water quality standards because water quality-based controls "would result in substantial and widespread economic and social impact." § 702.17(b)(6).

EPA has explained that the identical use removal criteria were intended to "address those circumstances where the attainability of certain uses would be precluded by conditions over which the water quality protection provisions in the regulation had little or no control." Water Quality Standards Regulation: ANPRM, 63 Fed. Reg. 36,742, 36,754 (July 7, 1988). Three general conditions formed the basis for the six removal criteria: "natural water quality or habitat limitations, irretrievable human-caused contamination or conditions, or insupportable economic and social costs." *Id.* at 36,754-55. Regarding the "dams/diversions" criterion, EPA intended "feasibility" under this criterion to be based on "technical considerations, such as the ability to operate an impoundment in an efficient manner that does not degrade water quality," rather than on "economic considerations or a balanced consideration of cost and technology." *Id.* at 36,756.[5] Instead, the "economic/social" criterion is "the appropriate avenue to address economic feasibility." *Id.* And "[t]he key to appropriate application of the use removal criteria is to focus on whether or not a condition, at a specific site, would preclude attaining a designated use." *Id.* at 36,755.

With these considerations in mind, a variance would most likely be granted under the "economic/social" criterion if the City could truly demonstrate that the only way to meet water quality standards would be to shut down the Tunnel and impair New York City's water supply. Whichever criterion the City may choose to apply under, the City has the burden to show that it satisfies the test for a variance. *See* § 702.17(b) ("if the requestor demonstrates").

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[5] EPA's guidance suggests that in determining the "feasibility" of changing the operation of a diversion, structural modifications, such as fish ladders, should be considered. USEPA, *Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analysis* V-7 (1983), *available at* http://www.epa.gov/waterscience/library/wqstandards/uaavol123.pdf.

If the City were to obtain a variance, it would nevertheless need to make reasonable progress toward attaining water quality standard goals. § 702.17(e)(2); *Handbook, supra,* at 5-12. Its permit must contain conditions that, at a minimum, ensure such progress. § 702.17(e)(2). Thus, any variance should take into account the multiple level intake structure that was mentioned at oral argument and identified as a hearing issue by Administrative Law Judge Helene Goldberger in the State permitting proceedings for the Shandaken Tunnel. *See Shandaken Water Tunnel SPDES Permit,* 2005 N.Y. Env Lexis 40, at 40-42 (NYDEC June 22, 2005) (Ruling on Issues & Party Status).

Contrary to its position before this Court that that the Clean Water Act is not flexible enough to allow a permitted Shandaken Tunnel to operate, the City successfully argued the opposite during parallel administrative proceedings. *See id.* at 24, 28 ("the City states that . . . it does not believe a variance is necessary for the DEC to use its discretion to craft a viable permit").[6] Judge Goldberger agreed with the City to the extent that she upheld two exemptions in the permit – for drought avoidance and "void-void" situations, where the City seeks to move water for water supply efficiency. *Id.* at 73-74.[7]

IV. Conclusion

For the foregoing reasons, the Court should recognize that, because the Clean Water Act contemplates relief from its basic prohibition under certain circumstances, its basic prohibition means exactly what it says.

Respectfully Submitted,

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[6] For reasons known only to itself, the City failed to apply for a variance pursuant to the requirements of § 702.17(e), which requires notice-and-comment of the variance application during notice-and-comment of the permit application. *Shandaken SPDES,* 2005 N.Y. Env Lexis 40, at 28. Instead, the City argued in its closing Issues Conference brief that it should be granted a variance under the criterion where "naturally occurring pollutant concentrations prevent attainment." § 702.17(b)(1); Initial Post-Issues Conference Brief of the City of New York at 10, *Shandaken SPDES*, 2005 N.Y. Env Lexis 30 (2005) (attached). The City explicitly stated, as if in answer to this Court's question, that "the variance provisions in NYSDEC's regulations affirm NYSDEC's authority to issue a permit with flexibility." NYC Post-Issues Conference Brief at 10. Plaintiffs-Appellees opposed the City's attempt to invoke § 702.17(a) because the City had followed neither the procedural requirements of § 702.17(e), nor the variance application requirements of § 702.17(d). Proposed Intervenors Catskill Mountains Chapter of Trout Unlimited et al. Post Issues Conference Reply Brief at 5-7, *Shandaken SPDES*, 2005 N.Y. Env Lexis 40 (2005) (attached); *see also* Proposed Intervenors Catskill Mountains Chapter of Trout Unlimited et al. Post-Issues Conference Memorandum of Law 8, *Shandaken SPDES*, 2005 N.Y. Env Lexis 40 (2005) ("[w]hile a variance proceeding may be an option for certain permits under certain circumstances, the City has not properly invoked a variance proceeding here") (attached). Further, the variance criterion the City tried to invoke would have been inapplicable to this situation, where the conditions that cause the water quality standards violation are not "natural" at all. Catskill Mountains Reply Brief at 5.

[7] Plaintiffs continue to maintain that, absent a variance, such exemptions are unlawful because permits must contain effluent limitations stringent enough to meet water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1342(a); 40 C.F.R. § 122.4. Plaintiffs acknowledge that *if or when* a variance is granted, *then* DEC could modify effluent limitations in the City's permit.