

In the Matter of the Application of the

**NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**RULING ON ISSUES  
and PARTY STATUS**

for a state pollutant discharge elimination system permit for its discharge from the Shandaken Water Tunnel located in the Town of Shandaken, County of Ulster.

DEC Application No. 3-5150-00420/00001

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### **Background and Project Description**

These proceedings involve the application of the City of New York Department of Environmental Protection (DEP or City) to the New York State Department of Environmental Conservation (DEC or Department) for a state pollutant discharge elimination system permit (SPDES) for its discharge of water from the outfall at the Shandaken Water Tunnel located in Shandaken, Ulster County. This unpermitted discharge, which has occurred since 1924, is part of New York City's water supply system and results from the conveyance of water from the Schoharie Reservoir through the 18-mile-long Shandaken Tunnel into the Esopus Creek where it eventually empties into the Ashokan Reservoir. The tunnel operation is governed by Part 670 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) which the Department adopted in 1977.

In March 2000, the Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfisher, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., Catskill-Delaware Natural Water Alliance, Inc., and Riverkeeper, Inc. (hereinafter collectively referred to as Trout Unlimited, et al.) sued the City and DEP in the U.S. Northern District of New York alleging that these releases were in violation of the Clean Water Act because they were not permitted. After dismissal by the district court and appeal, by decision dated October 23, 2001, the U.S. Court of Appeals for the Second Circuit reinstated the plaintiffs' action finding that a SPDES permit was necessary for this point source discharge. See, Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001).

On remand, Judge Scullin of the U.S. District Court issued an order requiring DEC, as a third party defendant, to make a

determination on DEP's application for a SPDES permit within 18 months. See, Catskill Mountains Chapter of Trout Unlimited v. City of New York, 244 F. Supp. 2d 41 (NDNY 2003).<sup>1</sup> Pursuant to that order, on February 18, 2004, DEC staff issued a draft SPDES permit to DEP which was publicly noticed in the *Environmental Notice Bulletin* (ENB) published that same day. Based upon comments received in response to the terms of that initial draft permit, DEC staff suspended Uniform Procedures Act (UPA) time frames and developed a second draft permit. This proposed permit was publicly noticed in the August 4, 2004 *ENB*.

Because of its disagreements with the August 2004 draft permit, by letter dated September 3, 2004 to Louis A. Alexander, the Department's Assistant Commissioner for the Office of Hearings and Mediation Services (OHMS), the City requested an adjudicatory hearing pursuant to 6 NYCRR § 621.7(f). Trout Unlimited, et al. also requested an adjudicatory hearing in their written comments on the proposed draft permit. Based upon these submissions as well as written comments received by other interested organizations and individuals, the Department staff determined that a public hearing would be held.

Because the New York State Conservation Commission - a predecessor agency to the Department - approved the Schoharie Reservoir and the Shandaken Tunnel as Water Supply Application 166 on October 21, 1914, Department staff have determined that this project is grandfathered and, therefore, exempt from the State Environmental Quality Review Act. See, Environmental Conservation Law (ECL) § 8-0111(5)(a) and 6 NYCRR § 617.5(c)(34).

The City published a notice of hearing in the March 9, 2005 *Catskill Mountain News* and in the March 11, 2005 *Kingston Freeman*. The Department also published the notice in the March 9, 2005 *ENB*. The notice of hearing provided that written comments were to be received by the Department by no later than April 13, 2005.

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<sup>1</sup> While the original order of Judge Scullin required DEC to issue a permit within 18 months, on the application of the Department the judge modified the order to require that DEC complete the application process and make a determination on " . . . whether to issue a SPDES permit . . . " within that time frame. See, Order, dated March 12, 2003 attached as Appendix A to Trout Unlimited, et al. closing brief.

## Legislative Hearing

The legislative hearing was held on April 12, 2005 at 7 p.m. at the Onteora Central School in Boiceville. Administrative Law Judge (ALJ) Helene G. Goldberger of DEC's OHMS presided at this hearing as well as at the issues conference. Approximately forty people were in attendance including staff of the Department and DEP and representatives of interested organizations. In all, there were 12 speakers, most representing whitewater recreational users.

Dr. Michael Principe, Deputy Commissioner and Director of DEP's Bureau of Water Supply, began the session by emphasizing the importance of resolving the SPDES issues to ensure that the water supply that serves 9 million people is not jeopardized. He provided a number of statistics including the fact that the City's primarily surface water supply contains 19 reservoirs and 3 lakes with a capacity of 550 billion gallons. Legislative transcript (Leg. TR), p. 6. This system delivers about 1.3 billion gallons of water per day and drains a watershed area of approximately 2,000 square miles through three interconnected reservoir systems - the Croton, Catskill (comprised of the Ashokan and the Schoharie reservoirs), and Delaware. Id. Dr. Principe stressed the high quality of the water in this system and maintained that it is that quality that allowed NYC to obtain the filtration avoidance determination (FAD) from the United States Environmental Protection Agency (EPA). Leg. TR, p. 7. While acknowledging the necessity of addressing turbidity issues, Dr. Principe stressed the importance of the releases from the Shandaken Tunnel which comprise 16% of the water supply. Leg. TR, p. 8. He also noted the importance of these releases to the Esopus Creek fishery and the recreational users of that water body. Leg. TR, p. 9. Dr. Principe emphasized that these releases are not akin to an industrial discharge and that the SPDES permit that is issued should be reasonable and flexible. Leg. TR, p. 10. He argued that the strict limitations provided in the draft permit as well as the compliance schedule which he described as in conflict with the FAD must be subject to an adjudicatory hearing due to the impractical restraints they place on the City's use of the Tunnel releases. Leg. TR, pp. 12-13. He concluded by stating that measures required by the FAD to address turbidity are already well underway. Leg. TR, p. 14.

DEC's Region 3 Assistant Regional Attorney Carol Krebs noted that the draft SPDES permit was written to reflect the law and regulations and that the Department staff will consider all comments in response to the draft. Leg. TR, pp. 15-16.

David Baker, Harry Jameson, III, Joanne Lipton and four other speakers addressed the desires of kayakers, canoeists and tubers to maintain recreational releases in the Esopus so that these activities can continue. Several speakers noted the use of the Esopus Creek as a training ground for Olympic whitewater competition. Many of these individuals supported the installation of a multi-level intake structure that would help diminish turbidity by allowing the City to have more control over the area of the Schoharie Creek that the water is pulled from.

Chris Olney, of the Catskill Center for Conservation and Development, described the Esopus Creek as a tremendous national resource based upon its placement as an entry into the Catskills, as a water supply, as a fabled trout stream, and as an important resource for recreational use. He stated that all the users should have responsibility for it and work together to resolve the problems with high turbidity and suspended solids that jeopardize the fish habitat and drinking water. He noted that these conditions also detract from the scenic beauty of the Creek. Mr. Olney pointed to the millions of dollars the City is spending on conservation easements, stream restoration, and farm management to reduce turbidity in the watershed and argued that these measures are wasted if the "antiquated" intake chamber remains in place. Leg. TR, p. 41. It is the position of the Catskill Center that the shallow location of the current intake system allows for the discharge of sediment and must be changed. Id. He added that by relocating the intake chamber, the City will also be able to access cooler water that would be beneficial for the fishery. Id.

Craig Michaels, a legal intern with the Pace Law School Environmental Clinic, spoke on behalf of the Trout Unlimited petitioners. He stated that these organizations and the individuals they represent became tired of the mud and silt that is dumped into the Esopus Creek from the Tunnel and thus brought suit against the City. Leg. TR, p. 32. He emphasized that the current operation is not lawful and showed pictures of the Esopus Creek above the Tunnel discharge location and at the discharge point to demonstrate the impacts. Leg. TR, p. 33. Mr. Michaels maintained that the Department staff's draft SPDES permit would allow these conditions to continue and this illegal situation was unacceptable. Leg. TR, pp. 34-35. He also supported the construction of the multi-level intake structure noting that this device was already in operation at all other NYC DEP reservoirs. Leg. TR, p. 35.

Bert Darrow, a lifelong resident of Ulster County, the owner of a flyfishing school, and a member of Trout Unlimited and

Theodore Gordon Flyfishermen, expressed his concern for the Esopus Creek. Leg. TR, p. 45. He stated that the turning point for the turbid conditions occurred in January 1996 due to a huge storm event that caused major damage. Id. He maintained that the Esopus was cleaned up but water from the Schoharie portal ran dirty for years and that was the reason anglers decided to address this condition. Id. He emphasized that these intervenors did not wish to put anyone out of business and that if the conditions were good for trout, they would be good for everyone. Leg. TR., p. 46. He specifically noted that the turbid water did not allow for visibility which made the Creek unsafe for fishermen as well as paddlers. Leg. TR, p. 47. He urged DEC to issue a permit that would address this problem without delay. Leg. TR, p. 49.

Robert Cross, Jr., the Supervisor for the Town of Shandaken, stated that the petitions and comments provided by others addressed most of the concerns of his town; however, he stressed that safety was of huge importance to the citizens of Shandaken. Leg. TR, p. 64. He advocated for funds to be dedicated to make necessary repairs so that conditions in the Esopus corridor that potentially could result in flooding in his community can be addressed. Leg. TR, p. 65. He reported on two resolutions made by the Town to support the Watershed Inspector General's recommendation of the installation of a multi-level structure and against the phosphorous limits placed in the draft SPDES permit on the basis of the potential for limitations on development in this area. Leg. TR, pp. 67-69. Supervisor Cross also noted that tourism was a critical source of income for this community and that the fishermen and paddlers brought in a lot of money. Leg. TR, p. 66-67. Thus, the concerns of these constituencies regarding releases and turbidity were of importance to the Town. Mr. Cross asked that the issues conference be adjourned so that the Town had more time to file a petition for full party status. Leg. TR, p. 64.

In addition to the statements made at the legislative hearing, I also received over 60 e-mails and letters in support of the recreational users of the Esopus Creek and asking that recreational releases be made a part of any SPDES permit that is issued.

The legislative hearing concluded at 8:05 p.m. Leg. TR, p. 73.

## Issues Conference

Timely petitions for full party status were received by the OHMS from the Trout Unlimited petitioners, the Coalition for Watershed Towns (hereinafter, the Coalition), Kayak and Canoe Club of New York and New York Rivers United (hereinafter referred to collectively as KCCNY, et al.); and Harry G. Jameson, III represented Mountain Creek Recreation, Inc., d/b/a Town Tinker Tube Rental. The Appalachian Mountain Club (AMC) sought amicus status. Because AMC agreed to be represented along with KCCNY, I will use the acronym KCCNY to include this organization.

While the City, as the applicant, was not required to submit a petition in order to obtain full party status, it did submit a statement dated September 3, 2004 that Mr. Plache requested be used to explain DEP's objections to the draft permit. Issues Conference Exhibit (IC Ex.)8. At the request of the ALJ, the Department staff submitted a statement dated April 12, 2005 that explains its position on the draft permit. IC Ex. 15.

The issues conference was convened on April 13, 2005 at 10:00 a.m. at the Olive Library. On behalf of the City the following people appeared: William Plache, Assistant Corporation Counsel; William C. Becker, Ph.D., P.E. of Hazen & Sawyer - the engineering company responsible for the Turbidity Control Study; Jeff Helmut, Operations Engineer for Schoharie and Ashokan Reservoirs; Paul Costas; Paul Rush, Director of the Operations Division - West of Hudson Bureau of Water Supply; Elizabeth Reichheld, Program Manager, Stream Management; Tina Johnstone, Water Supply; David Smith, Ph.D., Section Chief, Bureau of Water Supply in charge of infiltration management and modeling; and Jim Mayfield, Supervisor, Water Hydrology Program.

Representing DEC Region 3 staff were: Assistant Regional Attorney Carol Krebs, as well as DEC staff members Brian Baker, P.E., SPDES permit writer; Thomas R. Snow, Jr.; Kenneth J. Markussen, P.E., DEC Division of Water (DOW), NYC Watershed Section; Francis G. Zagorski, P.E., NYC Watershed Section, Bureau of Water Compliance; Wayne Elliot, Region 3 Regional Fisheries Manager; Michael J. Flaherty of Region 3's Fisheries office and Thom Engel, Environmental Analyst, Division of Environmental Permits.

On behalf of the Trout Unlimited intervenors were: Karl S. Coplan, Esq., Supervising Attorney and Co-Director of Pace Environmental Litigation Clinic and Craig Michaels, Legal Intern.

Representing the Coalition of Watershed Towns (hereinafter referred to as the Coalition) was Kevin Young, Esq. of Young Sommer . . . LLC. Lauren Cook appeared on behalf of KCCNY; and Harry G. Jameson, III represented Mountain Creek Recreation, Inc., d/b/a Town Tinker Tube Rental.

Other individuals at the conference included Supervisor Robert Cross, Jr., Rene Van Schaack, Executive Director of the Greene County Soil and Water Conservation District, and Ron Leonard of the Catskill Delaware Natural Water Alliance, Inc.

At the outset of the issues conference, after introductions, I inquired as to the status of the parties' positions on requests for adjournment of the issues conference that had been made by the Department staff and the Coalition. Ms. Krebs clarified that staff was not seeking an adjournment but was merely advising that Mr. Baker, the principal author of the draft SPDES permit, would not be available on Friday, April 15 or the following week. Since we were able to complete the conference on Thursday, April 14, this became a moot issue. Mr. Young had also been concerned about the availability of several clients due to the recent flooding in the area. Because they were able to attend, Mr. Young explained that the Coalition was ready to proceed while emphasizing the need for these individuals' presence in the communities due to the continued flood issues. I explained my reasons for wishing to proceed and requested that the parties raise any conflicts with the proceedings.

I described the issues conference process including an explanation of the standards for party status and adjudicable issues. I asked Supervisor Cross for an update on the status of the Town of Shandaken's interest, as he had telephoned me prior to the proceedings inquiring about an extension of time for filing a petition for party status. Issues Conference Transcript (TR), pp. 15-17. Specifically, Mr. Cross expressed the Town's particular interests in seeing that stream stabilization measures were taken in the Ashokan basin. TR 18. After some discussion it was agreed that the interests of the Town could largely be represented by the Coalition. TR 19.

#### Mediation Option

I also requested that all the issues conference participants think seriously and speak to one another about mediating the terms of the SPDES permit. I explained that the discharge was a fact of life because it constitutes part of New York City's water supply. The effort to make this discharge less detrimental to the extent it has negative consequences for the environment is

one governed by law and regulation, which offer a limited universe of solutions. TR 28. I informed the participants that the ALJs in the DEC OHMS were trained mediators who could assist in such a mediation which would be entirely voluntary. TR 27. At any point, the participants could decide to end the mediation and return to the formal adjudicatory process. Id. In addition, it was possible that some but not all of the issues could be mediated, leaving others for possible adjudication. Id. I stressed that through mediation the outcome would be a product of their mutual effort while an adjudication would likely result in an outcome with which no one was satisfied. TR 27-28.

In response, Mr. Young and Ms. Krebs expressed support for mediation. TR 29. Mr. Young expressed the view that he saw this process as a continuation of the effort underway that is related to the memorandum of agreement (MOA) pursuant to the FAD. TR 29. He explained that the principal issues concern control of turbidity in the Schoharie and the Ashokan systems and the existing MOA programs relate to those goals. Id. Assistant Regional Attorney Krebs stated that the draft permit is an effort to balance the competing interests and she agreed with Mr. Young that the differences did not seem so great. TR 30. Mr. Coplan explained that it had already been 18 months since a mediation that was spearheaded by Jim Tierney, the Watershed Inspector General, had concluded unsuccessfully on these same issues. TR 30-31. While Attorney Coplan agreed there was a lot of consensus among the various constituencies and he did not oppose a mediation effort, he expressed concern over engaging in any process that would further delay implementation of the SPDES permit. TR 31-32. Mr. Plache stated that the City was already engaged in activities to address the problems pursuant to the FAD requirements. TR 33-35. He said that DEP's fear in consenting to mediation is that the focus would be on the construction of the multiple level intake which is currently subject to evaluation by the City. TR 34.

In response to Mr. Young's question as to the City's reception to discussing non-structural measures, Mr. Plache advised that DEP would be pleased to discuss the possibility of ". . . potential solutions, creative solutions . . ." with any of the participants. TR 37-38. The DEC staff and the Coalition stated their intent to attempt to negotiate these non-structural measures. TR 304.

As a result of discussions during the conference, the Coalition agreed to work with the City and others to attempt to resolve the Coalition's objections to the phosphorous limits in the draft SPDES permit. Mr. Young stated his intent to pursue a



discussion with EPA and DEC to determine the applicability of phosphorous limits to this SPDES permit. TR 452.

### Environmental Interest

Upon inquiry, none of the participants indicated any objections to the participation of any petitioners based upon environmental interest. TR 38. Therefore, I will determine party status solely on the basis of whether the petitioners have raised substantive and significant issues.

### FAD Status

We next discussed the status of the City's actions under the FAD.<sup>2</sup> We were advised that every 6 months, EPA and the State agencies meet with the City to discuss progress on the various measures required by the FAD. TR 41. On December 31, 2004, the City issued the Phase I report entitled *Catskill Turbidity Control Study*. See, IC Ex. 16; TR 41-42. This report provides the results of study of alternative measures to address turbidity in the Schoharie Reservoir and Shandaken Tunnel discharge including but not limited to the multi-level structure. TR 44. Based upon this assessment, the City will proceed to further evaluate those controls in a Phase II study that the December 2004 report found sufficiently viable to pursue further. TR 44-45. These include, among others, the multi-level intake structure, an in-reservoir baffle, and modification of the operations at the Ashokan and Schoharie Reservoirs. IC 16, pp. ES-1-5; TR 45-46. The Phase II report is due in September 2006. TR 45.

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<sup>2</sup> In 1989, EPA promulgated a Surface Water Treatment Rule (SWTR), Subpart H of 40 CFR, Part 141, pursuant to the Safe Drinking Water Act (SDWA) of 1986. These regulations require the reduction of risk of water-borne diseases from microbial contaminants at public water systems with surface water sources either through filtration or through meeting strict water quality standards, disinfection and actions that make filtration unnecessary. EPA has issued a series of determinations with respect to New York City's drinking water supply; the latest FAD was issued in November 2002. <http://www.epa.gov/region02/water/nycshed/2002fad.pdf>. The FAD requires the City to monitor, study, plan and implement a myriad of measures to ensure that filtration will be unnecessary for the Catskill/Delaware system. Among these measures are requirements for Catskill turbidity control. FAD, pp. 46-47.

## April 14, 2005 Site Visit

On April 14, 2005, at the conclusion of the issues conference, the participants agreed with me that it would be useful to observe the Shandaken Tunnel outlet and its relationship to the Esopus Creek. Because the Tunnel was not operating that day, we agreed that the conditions manifested might not be typical, and we acknowledged the possibility of a second trip during the adjudicatory hearing when the Tunnel is operating. The DEP staff and others pointed out the structure and some nearby small buildings that house gauging equipment. We were able to observe the sampling location as well as the Esopus Creek. Because there are some leaks in the Tunnel, we did see a small amount of water being discharged from the Tunnel.

## Briefing Schedule

The issues conference participants agreed that they wished to submit closing briefs. The ALJ emphasized that these briefs should not be used to reiterate arguments already made at the issues conference. Instead, without limiting the substance of the briefs, I explained that I was looking for support for the positions asserted at the issues conference on certain legal issues. In my memorandum of April 18, 2005 to the conference participants, I provided a list of these issues: 1) the City's position that due to the unique nature of this discharge, the permit issued to the City may have flexibility pursuant to the Clean Water Act; 2) the relationship of the FAD to the issuance of this permit including effect of FAD work and scheduling on SPDES permit conditions; 3) the relationship of water quality standards to permit limitations in light of specific draft terms of the SPDES permit including various exemptions - i.e., staff's "common sense" approach to permit development; 4) the position of Trout Unlimited, et al. that the law does not permit exemptions from water quality standards; 5) the position of the Coalition with respect to deletion of phosphorous limits from the draft permit; 6) the treatment of settleable solids and color in the draft permit; and 7) the basis for inclusion of recreational releases in the draft permit conditions.

The transcript of the legislative hearing and the issues conference were received in the OHMS on April 29, 2005. The closing brief of Trout Unlimited, et al. was received on May 20, 2005, the closing briefs of the other participants were received on May 23, 2005 and the replies were received by e-mail on

June 3, 2005.<sup>3</sup> Because all of the City's attachments did not arrive in this office until June 9, 2005, that is the date of the close of the issues conference record.

### **Standard of Review**

When there is a dispute between the Department staff and the applicant over a substantial condition of a draft permit, that issue is deemed adjudicable. 6 NYCRR § 624.4(c)(1)(i). Therefore, many of those issues raised by the City, unless resolved through discussions, will be subject to adjudication. Some matters raised by the City are legal issues and the arguments presented in the City's September 2004 submission, the Department's April 12, 2005 submission, the petitions, closing and reply briefs and the arguments advanced at the issues conference will serve as the bases for my determination.

When Department staff has determined that a permit application will, subject to draft permit conditions, meet all statutory and regulatory requirements, petitioners must demonstrate that an issue is substantive and significant in order for the issue to be subject to adjudication and for the petitioner to achieve party status. 6 NYCRR § 624.4(c)(1)(iii). An issue is substantive if sufficient doubt exists about the applicant's ability to meet statutory or regulatory criteria, such that a reasonable person would require further inquiry. 6 NYCRR § 624.4(c)(2). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit. 6 NYCRR § 624.4(c)(3).

Petitioners must provide an appropriate offer of proof to support these contentions and this offer "can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the

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<sup>3</sup> The City's reply brief references its letter dated June 2, 2005 to DEC regarding a variance application. This letter was not included with the brief and on June 6, I requested that it be sent to my office and the issues conference participants. Mr. Plache sent the letter via e-mail on June 7, 2005. In addition, the brief references an attached exhibit which was not part of the document received by this office on June 3. I brought this omission to the attention of Mr. Plache on June 6, 2005 and the attachment was received in this office on June 9, 2005.

Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues.'" Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, p. 2.

## PROPOSED ISSUES

### Turbidity

#### Introduction

The major concern in this permit proceeding is the entry of turbid water into the Esopus Creek, which is classified by the Department as an A(T) stream.<sup>4</sup> According to 6 NYCRR § 703(2), the water quality standard for discharges of turbidity to such a stream is "no increase that will cause a substantial visible contrast to natural conditions." Judge Scullin explains in his decision of February 6, 2003, that the turbidity is caused by the reservoir's design and the geology of the Schoharie drainage basin as well as erosion in the Schoharie Watershed resulting from land disturbance from human activities. See, Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. The City of New York, et al, 244 F. Supp. 2d 41, 46. The Department staff, the applicant, and all the petitioners appear to agree that there is a turbidity problem that can be attributed, at least in part, to the water that is discharged from the Shandaken Tunnel to the Esopus. TR 128. The differences reside in what if anything the City can do to address this problem in the short and long term and what legal obligations must be set forth in the SPDES permit.

The City argues that because this is a portion of a public water supply and not an industrial discharge, the standard SPDES permit conditions are inapplicable. The City explains that unlike an industrial discharger which is adding pollutants to a water body through its processes, the Tunnel is merely a conduit of the water and the sediments that come with it as a result of

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<sup>4</sup> According to the *Standard Methods for the Examination of Water and Wastewater*, 20<sup>th</sup> edition (1998), "turbidity in water is caused by suspended and colloidal matter such as clay, silt, finely divided organic and inorganic matter, and plankton and other microscopic organisms."

activities - natural and human - over which it has no control. While the City reiterates its commitment to the FAD requirements, it urges the Department to apply flexibility to this permit which will affect the drinking water supply of millions of New Yorkers. Specifically, the City protests the setting of specific turbidity limits because of what it sees as its inability to control the amount of turbid water coming into its reservoirs and the necessity of pushing water through the system. The City also requests that the State not add conflicting and expensive requirements to the commitments that the City is already bound to as a result of the FAD. IC Ex. 8; NYC Initial Post-Issues Conference Brief (NYC Br.), pp. 2-4, 6, 8-9, 13-20; NYC Post-Issues Conference Reply Brief (NYC Reply Br.), pp. 2, 6.

The Department staff explains that with the draft permit conditions, it is seeking to meet both the standards set forth in § 703(2) and those provided in Part 670 of 6 NYCRR. Part 670 is entitled *Reservoir Releases Regulations: Schoharie Reservoir-Shandaken Tunnel-Esopus Creek*. Section 670.1 explains that the purpose of this Part is

“to regulate the volume and rate of change of diversions of water from the Schoharie reservoir through the Shandaken Tunnel into Esopus Creek, in order to protect and enhance the recreational use of waters in Esopus Creek in a manner consistent with the protection of existing recreational uses of the Ashokan and Schoharie reservoirs, while ensuring and without impairing an adequate supply of water for . . . any municipality which uses water from such reservoirs for drinking and other purposes.”

Subject to a number of conditions contained in this Part, these regulations call for the operation of the Shandaken Tunnel to ensure a combined flow of 160 million gallons per day to the Esopus Creek. 6 NYCRR § 607.3(a). The City's reservoir releases manager is also charged with responding to requests for recreational releases. 6 NYCRR § 670.5.

Department staff expresses its goal of obtaining with the draft permit a balance that protects the fishery, water quality, and water supply. IC Ex. 15. Staff finds that its draft permit is as flexible as applicable law and regulation allow. See, Staff Post-Issues Conference Brief (Staff Br.), p. 1. Because the staff of the Division of Fish and Wildlife have information concluding that long-term exposure to levels of turbidity greater than those proposed in the draft permit is detrimental to trout, the Department staff has concluded that definitive turbidity

limits are necessary. IC Ex. 15; Staff Br., p. 3. In its reply brief, staff explain that the City faces a situation in which, at times, meeting one water quality standard may result in the violation of another. Therefore, the Department staff has crafted conditions that minimize these occurrences. See, Staff Reply Br., pp. 1.

Trout Unlimited, et al. maintain that absolute limits are needed in the permit to meet the § 703 standard. These petitioners object to exemptions and flexibility in the permit on the basis that lack of definitive numeric standards jeopardizes water quality and is illegal. In further support of this position, Trout Unlimited, et al. points to the position of the City in the prior litigation indicating the inflexibility of the Clean Water Act. Trout Unlimited, et al. Post-Issues Conference Memorandum of Law, p. 5 and Appendix B to the Memorandum of Law.

On June 7, 2005, I received a copy of the letter that Mr. Plache sent to the staff on June 2 (attached hereto). The letter is identified as a settlement communication that addresses a few of the issues that were raised previously and discussed at the issues conference and in the post-issues conference briefs. In addition, the City states that while it does not believe a variance is necessary for the DEC to use its discretion to craft a viable permit, to the extent the Department believes that a variance is necessary, it should consider the City's letter as such an application. The problem with this approach is that it comes late in this process. Section 702.17(e) of 6 NYCRR requires that a "variance request shall be available to the public for review during the public notice period for the permit." Since the variance request did not accompany the City's application and was therefore not included in the hearing notice, I cannot consider it at this juncture. If the City decides that a variance request is necessary, than it should adhere to the requirements set forth in 6 NYCRR § 702.17. In the meantime, this application process will proceed.

#### Definition and Calculation of Daily Average and Daily Maximum

In its September 2004 submission, the City expressed the view that the draft permit's definitions of daily average turbidity, daily discharge, and daily average turbidity limit were inconsistent. IC Ex. 8, p. 5. The City was concerned that these terms would result in an "average of daily maximums" that would not reflect the average daily discharge from the Tunnel. TR 47-58. At the issues conference, the staff explained that it devised a new footnote on page 4 of 14 of the draft permit (footnote 3, condition C) that provides that "the daily maximum

turbidity limit shall be determined by calculating the average of the hourly turbidity measurements over the course of a 24-hour period." TR 50-52; IC Ex.7b, p. 4, note 3C.<sup>5</sup> While at first the City did not think this revision addressed its concerns of a potential violation due to a turbidity spike over which it had no control, by the conclusion of the issues conference it was satisfied with the language. TR 476.

However, the City maintains its disagreement with the draft permit's definition of daily average. NYC Reply Br., p. 8, fn. 7. DEP maintains that the definition in the draft permit "makes no sense." Id. Specifically, the City points to confusion as to how the daily average is calculated. Note 1 on p. 2 of the draft permit defines daily average or 30-day arithmetic mean (30-day average): "the highest allowable average of daily discharges over a calendar month, calculated as the sum of each of the daily discharges measured during a calendar month divided by the number of daily discharges measured during that month." The City notes that even the exempt discharges are measured so this "daily average may be unworkable." The City argues that the manner in which the daily average limit is defined would mean that if it had a release of 15.1 NTU and turned off the Tunnel immediately and released no more water for the month, DEP would be in violation of the "daily average" without coming close to violating the "daily maximum" of 35 NTU. Id.

**Ruling:** Pursuant to 6 NYCRR § 750-1.2(23), "daily discharge means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar for the purposes of sampling. For pollutants expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement (concentration) of the pollutant over the day."

At the issues conference, DEC permit writer Baker explained that the ". . . wording is kind of weird . . ." but the permit requirement is merely seeking the average of the measurements over a 24-hour period. TR 54-55. The staff maintains that its choice of language is based on the 2002 Discharge Monitor Report Manual. TR 51-55. However, as I stated at the issues conference, if the wording does not make sense to the readers, it needs to be changed. Therefore, I direct the staff to revise the

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<sup>5</sup> I have marked as IC Ex. 7b a revised draft permit that staff submitted with its post-issues conference memorandum.

definition of daily average to better reflect the applicable regulation and its intent prior to the commencement of the hearing. If the City maintains an objection to the revised language, it will be able to raise this matter again during the adjudicatory hearing. There is no need to adjudicate the issue of daily maximum because the City has withdrawn its objection to the permit language. TR 476.

#### Numeric Limits

The Clean Water Act requires that dischargers meet treatment based on EPA's assessment of the particular industry's ability to treat pollution. 33 CWA § 1311; FWPCA § 301. In addition, more stringent limitations must be established where necessary to achieve water quality goals for the receiving body of water. 33 CWA § 1312; FWPCA § 302. The draft Shandaken Tunnel SPDES permit has interim and final limits for turbidity. IC Ex. 7a. Turbidity is measured as NTU which is an abbreviation for nephelometric turbidity units. See, Standard Methods, supra at 2-9. Staff has set interim limits of 30 NTU for June to October, and 35 NTU for November to May. The draft permit also limits the turbidity increase from June to October to 15 NTU and 20 NTU for November to May. A limit of 100 NTU is set for shutdown. The final permit limits which are to take effect five years from the effective date of the permit provide for a daily average of 15 NTU and a daily maximum of 35 NTU. Shutdown of the tunnel is set at 100 NTU and an increase in turbidity is set at a maximum of 15 NTU. Id., p. 3 of 14.

Staff explains in its April 12 submission that it derived these limits by examining turbidity data it considered representative and which it obtained from DEP as part of the City's ongoing monitoring. IC Ex. 15. See also, TR 112-117. Using this data and the permit writer's best professional judgment (BPJ), including consideration of impact on fisheries and the potential effect of turbidity reduction measures required by the draft permit and the FAD, the Department staff arrived at these numbers.<sup>6</sup> IC Exs. 15, 17; TR 112-121. Staff explained at the issues conference that in order to provide an objective standard to quantify "substantial visible contrast" in this location, it was necessary to select specific limits. TR 101.

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<sup>6</sup> Where, as here, EPA has issued no effluent guideline for the type of discharge, the permit writer will apply BPJ to establish permit limitations. 40 C.F.R. § 125.3(c).



The City disputes the viability of these limits, claiming that "[t]here is no basis to regulate turbidity as an absolute number." IC Ex. 8 at p. 6. The City maintains that because turbidity in the Esopus Creek fluctuates, a single set limit does not make sense. Id. DEP argues that when the turbidity in the Esopus, upstream of the portal, exceeds the turbidity in the water that is released from the Tunnel, no limit should apply. Id. In sharp contrast to the conclusions of DEC staff and Trout Unlimited, et al., the City states that there will be no "substantial visible contrast" until releases approach 100 NTU when the upstream water has an NTU of 10. Id.

The City also concludes that the specific numbers that DEC staff has proposed are erroneous and that staff has failed to put forward a justification for them. Id. at p. 7. For example, staff explained that it had not included periods of severe storm events in its calculations based upon its belief that these numbers would be outside the normal range of turbidity. The City disputes this claiming that while the 1996 storm may have been more severe than typical, the area is subject to frequent storms that result in similar increases in turbidity. TR 130-132. Therefore, the City posits that these years of data should have been included in the calculations. Id. The City disputes the basis for DEC staff's conclusion that higher levels of turbidity may be harmful to fish in the Esopus Creek. Id. And, DEP contends the DEC's staff's calculations are incorrect and its best professional judgment must be questioned. Id. at pp. 8-9. DEP also disputes the draft permit's use of only a single final turbidity limit while the interim limits have seasonal variations. Id. at 10.

Trout Unlimited, et al. maintain that they have evidence that even at 10 NTU, the substantial visible contrast is reached and therefore all of the draft permit limits are set too high. TR 87-89; IC Exs. 4 and 5. Trout Unlimited, et al. provide in their petition that the numbers at which the turbidity levels are set in the draft permit will cause harm to the trout population. IC Ex. 9, Attachment 3 at p. 5; TR 134-137. While acknowledging that there may be a need for interim limits prior to the period when the City can attain full compliance, these petitioners dispute the final limits proposed. IC Ex. 9, Attachment 3, p. 6. In addition, Trout Unlimited, et al. argue that DEC staff did not properly use BPJ in devising the turbidity limits because no treatment technologies or controls were utilized in this determination. IC Ex. 9, pp. 18-19. These intervenors argue that there is no compromise of water quality standards permitted in the law and that the "compromise" comes from applying the appropriate turbidity reduction measures. TR 91. In this case,

Trout Unlimited, et al. contend that this is the multi-level intake structure. TR 91.

**Ruling:** Staff's determination to impose specific numeric limits for turbidity is appropriate because staff has concluded that discharges of turbidity over a certain level will cause degradation to the receiving waters and harm to the fishery. ECL § 17-0811(5); 40 C.F.R. 122.44(d)(1)(I); IC Exs. 15, pp. 1-2;17;18. There does not seem to be a real dispute over whether or not turbidity is harmful. However, because the City and DEC staff dispute the issue of appropriate turbidity permit limits, this is an issue for adjudication. 6 NYCRR § 624.4(c)(1)(i). Trout Unlimited, et al. have demonstrated that they have information that directly disputes the staff's selection of turbidity limits and an expert through which this evidence may be communicated. See, Attachment 3 to Trout Unlimited, et al.'s petition, IC Ex. 9, p. 3; TR 134-137. Thus, this matter will be subject to adjudication through the participation of these three parties.

In its reply brief, staff stated its agreement with the City to allow for a "sliding" limit "based on upstream Esopus water quality." Staff Reply Br., p. 5. This concession is in response to the City's complaint that the specific limits make no sense when the receiving waters have a higher turbidity level than the portal's discharge. See, NYC Reply Br., p. 8. Specifically, this would allow for the transfer of water after storm events. Id. However, staff notes that this condition would have to provide that as the Upper Esopus Basin produces higher quality water, the tunnel discharge quality will have to match it. Id. Accordingly, staff is directed to circulate to the issues conference participants revised permit language that addresses this "sliding" limit. If agreement cannot be reached on this, this matter will be adjudicated as part of the hearing on the appropriate turbidity limits.

### **Schedule of Compliance/FAD**

#### Structural Compliance Measures

The draft permit contains a schedule of compliance entitled "Turbidity Reduction Measures" that includes both structural and non-structural programs. See, IC Ex. 7b, pp. 8-10. The draft permit states that the goals of both of these programs are "to reduce turbidity in the Shandaken Tunnel and maximize the volume of cold water available for discharge to the Esopus Creek" in order "to protect the water supply, fishery and recreational uses of the Esopus Creek. . ." IC Ex. 7b, p. 8. With respect to

structural modifications, the draft permit requires DEP "to identify and implement any short and long term structural measures which will achieve [these] goals . . . [including] but not limited to, a multi level intake structure, turbidity curtain and any alternatives identified and implemented in accordance with the Comprehensive Analysis of Potential Alternatives at Schoharie Reservoir . . . [pursuant to] the November 2002 FAD." IC Ex. 7b, p. 8.

There is a schedule set out in the draft permit that requires the submission of an approvable report within 18 months from the effective date of the permit that details the study of alternatives, the projected turbidity reductions and increases in cold water availability and recommended actions along with a schedule for implementation. Id.

The schedule requires the commencement of implementation of these measures within two months of the date of approval, and completion of the structural measures within seven years of the effective date of the permit. Id.

In its September 2004 letter, at the issues conference, and in its closing briefs, the City emphasized that it should not be required to do more than already required by the FAD and that the permit should be careful not to create any conflicts with the FAD. IC Ex. 8, pp. 13-16; TR 224-225; NYC Br., pp. 13-18; NYC Reply Br., pp. 11-13. The City states that the FAD's purpose is to increase water quality which will ultimately be beneficial for all the interests at stake in this proceeding. DEP emphasizes that it has just completed Phase I of its *Catskill Turbidity Control Study* (December 2004) to assess preliminarily the alternatives for decreasing turbidity in this area. IC Ex. 16. Phase II of this study will provide the information needed for the selection of remedies among these alternatives and is due on September 30, 2006. NYC Reply Br., , p. 15. On December 30, 2006, DEP will submit its plan "for implementing any feasible, effective, and cost-effective measures identified by the Phase II analysis . . ." Id. at p. 15. Among the options that were determined potentially viable in the Phase I report is the multi-level intake structure. IC Ex. 16, ES-2. The City insists however that it would be premature and irresponsible to pinpoint a remedy until these phases of study are complete given the great expense of the construction of this option or others and "the uncertainty as to their effectiveness . . ." NYC Reply Br., p. 15. Contrary to the position of Trout Unlimited, et al., the City maintains that there is more than one mechanism available to reduce turbidity and improve cold water storage. NYC Reply Br., p. 12; Ex. 16, Section 7. The City contends that the permit

should "mirror" the FAD requirements and this would be sufficient to address turbidity and temperature concerns in the Esopus. TR 225; NYC Br., p. 14.

Staff and Trout Unlimited, et al. agree that the work conducted by the City pursuant to the FAD should not affect the provisions of the final SPDES permit. Staff Reply Br., p. 6. The staff takes the position that complying with the SPDES requirements should not be in conflict with the FAD. Id. at p. 7.

Trout Unlimited, et al. along with the recreational intervenors have determined that the multi-level intake structure is the appropriate mechanism to install at the Schoharie Reservoir in order to reduce turbidity and increase cold water volume. IC Ex. 9, pp. 28-29; Trout Unlimited, et al. Post-Issues Conference Memorandum of Law, pp. 9-10; Town Tinker Tube Rental brief, pp. 3-4; NYRU/KCCNY Br., p.4. Trout Unlimited, et al. and KCCNY, et al. have put forward Peter Skinner, P.E. as an expert witness to address the viability of this structure. TR 315. Mr. Skinner, formerly employed by the New York State Attorney General's Environmental Protection Bureau and now retired from that office, was one of the authors of the Attorney General's report *Clean Water-Clean Creek, A proposal for a Multiple Level Water Intake Structure in the Schoharie Reservoir to Improve Drinking Water Quality, Protect the Esopus Creek, and Expand the New York City Water Supply* (2003). Trout Unlimited, et al. argues that the time frame for implementation of the structural measures in the draft permit is too drawn out and that the permit deadlines should be set as fixed dates with August 2004 as the starting point. This is because that is the date by which DEC staff originally calculated the permit would be issued based upon Judge Scullin's order. Trout Unlimited, et al. Br., p. 4 and Attachment A thereto.

**Ruling:** Because the staff and the applicant do not agree on this substantial permit term - the means by which the City will achieve compliance with the effluent limits - a hearing is necessary on this issue. 6 NYCRR § 624.4(c)(i). In addition, Trout Unlimited, et al. has provided reasonable grounds to challenge the City's determination to study the structural alternatives for another 1 ½ years before coming to a determination. This is a substantive issue because it goes directly to the applicant's ability to come into compliance with the applicable standards. It is also significant because depending on the outcome it could result in major changes to the permit terms. 6 NYCRR § 624.4(c)(2), (3). Through the report of the Attorney General and the testimony of their witness, they

can challenge the City's position that more study is needed on the viability of the multi-level intake structure. The hearing should address whether or not the multi-level intake structure is viable. The hearing should also address the time frames proposed by the staff and whether or not they are reasonable to achieve.

There can be no dispute with respect to the legal authority of the Department to require the City to take steps to reduce the turbidity in the Esopus Creek that is caused by the discharge from the Shandaken Tunnel. The Environmental Conservation Law provides authority to DEC to require dischargers to take such action and the Department routinely does so. ECL §§ 17-0303 (2), (4) (d). In Bath Petroleum Storage, Inc. v. NYSDEC, 136 F. Supp 2d 52, 60, fn 6, referring to ECL §§ 17-0801 and 0807, Judge Kahn stated that the Department had broad authority to set standards and requirements regulating discharges into State waters.

Section 17-0813 of the ECL acknowledges the inclusion of compliance schedules in SPDES permits and requires "that the permittee within the shortest reasonable time consistent with the requirements of the Act conform to and meet:

1. applicable effluent limitations.
2. any further limitations necessary to insure compliance with water quality standards adopted pursuant to state law.
3. standards of performance for new sources."

While the Department's actions may result in an acceleration of measures that are required pursuant to the FAD, there is no apparent conflict. In any case, it is clear that the law requires the City to act expeditiously. To the extent that the Department is more stringent in its requirements, this is entirely permissible pursuant to the Clean Water Act. 33 CWA § 1370; FWPCA § 510.

#### Non-structural Compliance Measures

With respect to non-structural turbidity reduction measures, the draft SPDES permit provides that "[t]he Permittee shall continue the Stream Management Program as detailed in Section 4.5 of the November 2002 FAD. The DEP may continue contracts as previously developed to fulfill this requirement . . ." and lists projects and monitoring reports scheduled on the Batavia Kill, West Kill, Schoharie Creek and other locations pursuant to the FAD. IC Ex. 7b, page 8. This section of the draft permit also requires that the City continue a program " . . . to repair

streams and streambanks that are in need of restoration based on identified addition of suspended sediment (and turbidity) to the Schoharie Reservoir." Id. at p. 9. In addition, the draft permit calls for the repair of a minimum of 5,000 linear feet of stream in the Schoharie Basin within seven years of the effective date of the permit.

The draft permit also requires that DEP provide funding for local implementation of stream management programs currently being developed for the Schoharie Reservoir basin. This condition requires the City to deposit at least \$3 million into a fund with the Catskill Watershed Corporation that will administer this local implementation program. In addition, Section D of this condition requires the City to identify and implement any other short or long term nonstructural measures not already identified that would assist in meeting the goals of this program.

In its reply brief, the City states that the revised section on non-structural programs that DEC staff circulated on May 23, 2005 with the submission of its brief does not reflect DEP's position on these measures. NYC Reply Br., p. 2, fn. 2. The City explains that it is continuing to discuss possible modifications to the nonstructural programs in the draft permit but that no agreement has been reached. At the issues conference and in its written submissions, the City has maintained that it is already committed pursuant to the FAD to implement non-structural programs and this should be sufficient for the purposes of the draft permit. Id. at p. 2. The City stated at the issues conference for example that it is already doing significant stream repair projects and that to tack on an "arbitrary" number of linear feet in addition is not something that it believes is worthwhile. TR 243, 276.

Similar to the Coalition's position on phosphorus, Ms. Reichheld of DEP expressed the view that in lieu of recommending a certain number of additional feet of stream stabilization that it would be more effective to work with localities on demonstration projects for better stewardship. She argued that the City was already involved in so much work in this area that to add more would just result in a shifting of priorities, pitting worthwhile projects against each other. According to her, the national scientific board that advises the City has recommended a slow down on stream restoration. Instead, this board recommends an emphasis on conservation easements, riparian buffer establishment, and emergency flood response protocols to provide more sensitive stream practices. TR 277-283.

Mr. Van Schaack of the Coalition expressed the view the critical area seeding efforts are worthwhile but there needs to be more support of the localities that have insufficient staff and equipment. TR 286-289. With respect to stream restoration, Mr. Van Schaack agreed that there are a lot of unstable soils coming off banks but that there needs to be a better approach for addressing these problems in the watershed. TR 290-291. Mr. Young concurred by saying that the Coalition would like to use this process as an opportunity to develop a long term effective plan. TR 291-293. In addition, Mr. Van Schaack said that it would be beneficial to focus on the riparian corridor for acquisition of conservation easements and that this requires further support. TR 294-295. The Coalition stated that it would like to negotiate the non-structural issues but did not wish to see a delay until December 2006 - the schedule in the FAD. TR 295. Ms. Reichheld indicated that the City was receptive to negotiation of all these matters and the only clear objection was to the requirement of a set amount of linear feet of stream restoration. TR 296-299.

Staff responded by referencing the DEP Catskill Turbidity Control report dated July 31, 2003 in which DEP identified the largest contributors of turbidity in the Schoharie basin as the Batavia Kill and Westkill. TR 301; IC Ex. 21. Based upon this knowledge staff was looking for stream bank restoration in those areas. Id. The Batavia Kill Stream Management Plan referenced by staff also indicated that a certain amount of funds were needed. Therefore, in the prior draft permit, staff adopted that figure. TR 302; IC Ex. 22.

Ultimately, the staff, the Coalition, and the City agreed to mediate this issue independently. However, by the time of the writing of this ruling, no agreement was reached. TR 304-309.

**Ruling:** I encourage the involved parties to continue to attempt a resolution on the non-structural measures. However, in the event that no settlement is reached by the time the adjudicatory hearing commences on other matters, a hearing will be scheduled on this matter too. The City and the staff disagree on a substantial term of the compliance schedule contained in the draft permit. The hearing will address the viability of the various non-structural measures and the appropriate implementation schedule. I refer to my discussion at p. 21 on structural measures with respect to the staff's authority to pursue conditions independently of the FAD and with a different time frame. The Coalition through Mr. Van Schaack has exhibited a great deal of knowledge that it can bring to bear on this issue. The Coalition supports many of the conditions in the

draft permit and has indicated its ability to provide "a detailed listing of non-structural activities . . . that can commence implementation and planning now - not years into the future." IC Ex. 14, pp. 16-22. In addition, the draft permit specifically provides for local implementation of the stream management program and therefore, it is appropriate to involve the Coalition in this issue. IC Ex. 7b, p. 9, 2B. Accordingly, I grant them party status so that they can contribute at the hearing on this matter.

### Public Outreach

In its September 2004 submission, the City objected to the requirement in the draft permit that DEP hold semi-annual status meetings to apprise the public of its progress with respect to turbidity reduction and to obtain feedback on this issue. IC Ex. 8, p. 13. At the issues conference, the City withdrew its objection to this requirement and therefore, there is no need to adjudicate this matter. TR 428.

Related to public outreach, the Coalition requested that the requirement that reports be submitted on progress related to compliance measures be extended so that copies of the reports were sent to the Greene County Soil and Water Conservation District. TR 468. The City agreed to this request and therefore, I direct the staff to add this language to the condition on progress reports. IC Ex. 7b, p. 6.

### **Phosphorus**

The Department staff has included a 12-month rolling average limit for phosphorus by adding the daily average loadings of this pollutant in kg/day for the subject month to the daily average loadings for each of the preceding eleven months. IC Ex. 7a, fn. 5. The draft permit also states that compliance with this limit shall be recalculated each month. Staff explains that the limit in the permit - 10,457 kg/year - is equivalent to the total maximum daily load (TMDL) for the Tunnel, which in turn is based on a statistical analysis of data from the Tunnel outlet from January 1987 to December 2002. IC Ex. 15, p. 2.

TMDL is the maximum load of pollutants that can be tolerated by a water body and maintain water quality standards. Section 303(d) of the Clean Water Act requires that states identify waterbodies that after application of technology-based standards still do not meet water quality standards. The Act requires that the states adopt and implement TMDLs which subject to EPA approval will achieve water quality standards. See, Phase II



*Phosphorus Total Maximum Daily Loads for Reservoirs in the New York City Water Supply Watershed (Phase II Phosphorus TMDL)* (June 2000) (DEC Division of Water - Bureau of Watershed Management) at p. 1. EPA approved DEC's TMDLs in October 2000. Based upon the site specific TMDL, the Department is obligated to establish appropriate limits in SPDES permits. ECL 17-0811; 6 NYCRR § 750-1.11(a); 33 U.S.C. §§ 1311(b)(1)(c), 1313(e)(3)(A); 44 CFR § 122.44(d)(1)(vii)(B). The TMDL is established by combining the discharge from point sources known as wasteload allocations (WLAs) and the discharge from non-point sources - load allocation (LAs) with an additional sum for a margin of safety. *Phase II Phosphorus TMDL*, p. 1. The concern with phosphorus is its link to algal growth as well as odor and taste impairment of drinking water. Id., p. 7.

In DEC's 2000 TMDL, 15 micrograms per liter (ug/l) is set as the drinking water objective for phosphorus in the Ashokan Reservoir (the reservoir to which the Tunnel discharge ultimately reaches through the Esopus Creek). Id., p. 8. Outside of the New York City reservoir system, the phosphorus guidance value in New York State is 20 ug/l. Id., p. 2. Although this plan also finds that neither the Schoharie nor Ashokan Reservoirs are water quality limited with respect to phosphorus, the staff have determined that because there is a TMDL for phosphorus within the watershed, a limit is needed. Id., p. 17; TR 450. The Phase II TMDL provides the available phosphorus load is 40, 859 kg for the West Basin of the Ashokan and the current load is 32,833 kg, leaving an available load of 8,026 kg. *Phase II Phosphorus TMDL*, p. 35.

According to staff, in order to issue the SPDES permit for the Shandaken Tunnel discharge, it must revise the Ashokan Reservoir Phosphorus TMDL. IC Ex. 24, Fact Sheet. Previously, the Department accounted for the phosphorus load from the Tunnel as part of the nonpoint source or LA component of the Ashokan (West) TMDL. Id. Staff states that because the Tunnel is now identified as a point source (WLA), this action necessitates reidentifying this load. Id. The 10,457 kg/year was previously included as part of the nonpoint source contribution. IC Ex. 24, Public Notice, p. 1.

The phosphorus limits in the draft permit are the major concern of the Coalition because it finds that the proposed phosphorus limit will reduce the capacity available from nonpoint sources (and new sources) by approximate 4,400 kg per year. IC Ex. 14, p.8. The Coalition argues that DEC staff has selected a WLA for the Shandaken Tunnel far in excess of what is necessary to meet water quality standards. Id., p. 8; TR 433-434. This

conclusion is based on the Coalition's assessment that DEC staff's calculation, based upon 95% of the daily phosphorus loadings from January 1987 to December 2002 on a log normal basis, was below the value used in determining the 12-month rolling average limit. Id. The Coalition argues that the WLA should be established at the "90<sup>th</sup> percentile of the 12-month rolling average." Id.

The Coalition argues further that there is no need to assign a WLA to the Shandaken Tunnel and that no modification is necessary to the Phase II TMDL. Issues Conference Ex. 14, p. 8. The Coalition supports this conclusion by stating that the Shandaken Tunnel discharge has not been altered from when the Phase II TMDL was adopted. Id., pp. 8-9. It points to the staff's initial determination not to include an effluent limit for phosphorus but instead to have an action level that if exceeded would require the City to develop and implement a phosphorus reduction plan. Id., p. 9. The Coalition maintains that the major sources of phosphorus in the Schoharie Basin are nonpoint sources and that point sources comprise less than 3 percent of the TMDL for the Schoharie Basin. Id. As the City argues with respect to turbidity, the Coalition maintains that the applicant does not have direct control over phosphorus loads as weather and discharge releases control. Id.; TR 434.

The Coalition expressed the concern that with this limit in the draft permit, the City will deny any new development in the Schoharie Basin. TR 434. With respect to the draft permit's requirement that the City submit an approvable report on the potential for projected new development within the Schoharie Reservoir basin and its potential to cause an increase in storm water flows and related impacts, the Coalition disputes this measure's justification. TR 436-437. The Coalition argues that people are not the main source of the problem and if the Department wants to address turbidity and phosphorus, the target should be nonpoint sources. Id.

Rather than require a buildout analysis, the Coalition proposes that the City agree to contract with the localities to do a phosphorus reduction study. TR 437. Mr. Young stated that this has been done successfully in the Cannonsville Basin in Delaware County with the Phosphorus Reduction Plan or Phosphorus Best Management Plan (BMP). Id. See also, Coalition Post-Issues Conference Memorandum of Law, pp. 4-7. He explained that this BMP entailed identifying all the sources of phosphorus and methods to address them along with an implementation plan. Counsel advised that this cooperative method would get greater reductions. TR 437. In its memorandum of law, the Coalition

supported the legality of this approach with citations to 40 C.F.R. § 144.22(k), which provides that BMPs are appropriate when it is infeasible to establish effluent limitations. Coalition Br., pp. 6-7. It is the Coalition's position that establishing numeric limitations is infeasible for this discharge because it is essentially stormwater. Id., p. 10; TR 455-456. Mr. Young stated that the Coalition would like to meet with EPA to discuss whether or not an effluent limitation is indeed required in this case. TR 456.

The Coalition stated that the issue of the TMDL and its applicability to this permitting process was a legal one. TR 438. However, to establish the impact of phosphorus, the levels in the Schoharie Basin and its sources, the Coalition would offer the testimony of Rene Van Schaack of the Greene County Soil and Water Conservation District, and Dean Frazier and Keith Porter, the primary authors of phosphorus mitigation measures in Delaware County. Mr. Porter is from Cornell University and Mr. Frazier is from the Delaware County Soil and Water Conservation District. TR 438-439.

At the issues conference, staff responded by stating that the inclusion of the phosphorus limit is consistent with EPA guidance "if there is a water quality limiting parameter." TR 439. Mr. Baker stated that staff was not permitted to substitute the limit with an action level. Id. The staff reiterated that the level was developed by shifting of the Shandaken Tunnel phosphorus load from a load allocation to a waste load allocation. TR 440. He responded to the Coalition's concerns by saying that if the effluent data supported a lower water quality base effluent limit, the Department would make that change. TR 440-441. He agreed with Mr. Young that having New York City contract to do a phosphorus reduction study was a good idea. TR 441.

In the Department's reply brief of June 3, 2005, staff states its agreement with the Coalition that DEC's June 2000 Phase II TMDL for NYC Watershed Reservoirs indicates that the Schoharie and the Ashokan are not impaired for phosphorus and therefore reductions are not called for in the TMDL calculations. Staff Reply Br., p. 11. Even so, staff maintains its view that numeric effluent limits are appropriate for this discharge but is willing to consider an alternative means of controlling phosphorus. Id. Staff states its intention to contact EPA with respect to the Coalition's proposal to use a BMP in lieu of the effluent limitations. Id.

The City's representatives agreed largely with the Coalition's view by stating that a buildout analysis had not been done because it appeared that impermeable surfaces appeared to account for a small fraction of the contribution. TR 444. The City also agreed that it made sense to go directly to addressing the major sources. TR 444-445. Ms. Reichheld indicated that Ira Stern would be the individual from the City that would be in the best position to respond to how and whether the City could agree to the Coalition's approach. TR 448. To date, I have not seen any correspondence from Mr. Stern responding to this issue.

Trout Unlimited, et al. stated that it was their comments that led to the inclusion of the effluent limitation and it is required by regulation. (40 C.F.R. § 122.44[d][1][i]). Mr. Michaels stated that anything that is recognized as a pollutant must have an effluent limitation. TR 454.

**Ruling:** The first matter to address with respect to this effluent limitation is whether it is warranted. As Mr. Young stated in response to Mr. Michaels, there are many other pollutants that may exist in the effluent and yet are not included as parameters with limits in the draft permit. TR 454. Section 44(k)(4) of 40 C.F.R. 122 provides that BMPs may be used to control pollutants when the practices are reasonably necessary to achieve effluent limitations and carry out the intent of the Act. It would appear from the statements of the Coalition, the City, and DEC staff that the creation of an appropriate BMP and its implementation would go much further towards this end. In fact, Mr. Young pointed out at the issues conference that the area was already inundated with regulation concerning point sources and that further similar measures would only be redundant. TR 445-446.

I do not feel it is necessary at this juncture to rule on the issue of the legality of the BMP versus the limitation as DEC staff and the Coalition have expressed their intention to seek an understanding with EPA. Therefore, I direct these parties to report back to the me and the other participants regarding their discussions prior to the commencement of the adjudicatory hearing. If EPA deems the BMP appropriate, I ask staff to advise whether it intends to adopt the BMP-based permit condition drafted by the Coalition or offer an alternative. See, Coalition Br., p. 6.

With respect to the appropriate calculation of the phosphorus limitation, DEC staff indicated a willingness to explore further with the Coalition the bases for staff's conclusions. TR 460-462. I direct these parties to report back

to me and the others on these discussions prior to the commencement of the adjudicatory hearing.

If EPA determines that a limitation is necessary pursuant to the TMDL and the parties cannot agree on the appropriate limitation, I do find that it is necessary to adjudicate the issue of the appropriate phosphorus limit. The Coalition has raised substantive and significant issues with respect to whether staff's limit is appropriate and has put forward experts who can testify on these matters. Therefore, in the event that it is necessary to hold a hearing on the phosphorus issue, the Coalition is deemed a full party to such proceedings.

### **Temperature**

The City disputes the draft permit's action level of 65 degrees Fahrenheit between May and September for the Tunnel releases. IC Ex. 7a, p. 3. The City argues that 6 NYCRR § 704.2(a)(2) restricts discharges over 70 degrees Fahrenheit and the Department has no authority to impose restrictions that are more stringent. Similarly, DEP does not agree with the draft permit's selection of a 62-degree cutoff for assessing cold water volume. IC Ex. 7a, 5 of 14, fn 6. The draft permit requires the City to develop a thermal profile from water temperature data collected from certain water depths. IC Ex. 7b, p. 5, fn. 4. DEP requested that the City be permitted to collect this information in meters, rather than feet, as the former is the standard for the equipment utilized by DEP. IC Ex. 8, p. 10.

DEC staff explains that the cold water volume elevation level contained in the draft permit is set at 62 degrees to protect the Esopus Creek fishery and to ensure that there are adequate reserves of cold water available for the summer months. IC Ex. 15. Mr. Flaherty elaborated at the issues conference that water bodies are made up of layers that have varying temperatures with the warmer layers on top and the cooler ones below. TR 392-395; IC Ex. 23. He explained that there was a limited supply of cool water once the warmer months arrive. TR 393-394; IC Ex. 23. Given this limited supply of cooler water - water that is more beneficial for trout - staff selected the 62 degree measurement so that the City could target how much cool water was available for the summer. TR 394-395. Once 65 degrees is reached, that would serve as a "warning bell" that the water temperatures were getting close to the limit of 70 degrees, signaling a need to budget water so as not to exceed the seventy degree limitation. TR 395-398; IC Ex. 23.

Trout Unlimited, et al. objected only to any exemptions for the temperature requirements.

The staff agreed to revise the conditions so that monitoring of the cold water reserves could be expressed in meters rather than feet. TR 388.

**Ruling:** The intention of the staff with respect to these conditions is to ensure that the City does not exceed the 70 degree limitation. It is primarily a monitoring and early warning system towards meeting that goal. TR 404-405. At the issues conference, the City appeared amenable to attempting to resolve this dispute. In its reply brief, the City has not identified this matter as one that it maintains should be adjudicated. Therefore, I conclude that this matter is resolved and the current draft permit language is acceptable.

With respect to the objection of Trout Unlimited, et al. to the exemption set forth in the draft permit for temperature requirements, I adopt the interpretation of staff found in its reply brief at pages 2-4. At times, based upon the nature of the Tunnel discharge, it will be necessary to exceed one parameter in order to meet another. The staff is attempting through the draft permit conditions to balance the multiple factors that protect water quality including temperature, flow, and turbidity. Staff Reply Br., p. 3. In addition, 6 NYCRR § 670.1 states that the regulation of volume and rate of the diversions is meant to protect the recreational use of the waters of the Esopus Creek ". . . while ensuring and without impairing an adequate supply of water . . . for any municipality which uses water from such reservoirs for drinking and other purposes." [emphasis added.]

As noted by staff, the Antidegradation Policy (O & D Memorandum No. 85-40 [9/9/85]) provides that the SPDES permitting process allows for "[v]ariations in numerical water quality criteria that are not significant and do not interfere with the attained higher use are permitted." IC Ex. 18, p. 2. There are limited circumstances under which the City is permitted to discharge water that does not meet the temperature requirements. These include periods of drought warnings or emergencies; responses to actions directed by DEC; emergency action to avert a threat to public health or safety; fishery protections; and work that is required under the compliance schedule in the permit. All these are reasonable and necessary and in the interest of the

public and the environment.<sup>7</sup> Therefore, there is no need to adjudicate this matter.

### **Suspended Solids/Color**

In their petition, Trout Unlimited, et al. notes that the draft permit does not contain interim or final permit limits for suspended solids or color and that the current discharge exceeds water quality standards for these parameters, resulting in the impairment of the Esopus for best use. IC Ex. 9, p.19-20; TR 252-253. Trout Unlimited, et al. reports that fishermen stay away from the Creek because the water is too cloudy for them to see whether there are hazards such as rocks, logs, deep pools, etc. TR 255.

Staff has responded that it has placed a "monitor only" requirement in the draft permit for these parameters in order to get a good data base on whether effluent limitations are necessary. TR 256. DEC permit writer Brian Baker explained that turbidity will measure both suspended and colloidal solids. TR 256. And, turbidity is also an indicative parameter for color according to Mr. Baker. Id. Therefore, staff concluded that with respect to turbidity, suspended solids, and color "you're really looking at three different ways of measuring very similar things." TR 257. Therefore, staff did not find it was necessary to place limitations on all three. Id.

At the issues conference and in its reply brief, the City did not add anything to this discussion.

**Ruling:** I do not find that this is an appropriate matter for adjudication as the staff has provided sufficient grounds for establishing that the link among the three parameters is strong enough so that it would be duplicative to require limitations for suspended solids and color. Trout Unlimited, et al. has not presented information rebutting this characterization. Their response at the issues conference was that (1) the regulations speak of different parameters; (2) monitoring has gone on long enough and "we would just like to see limits put in the permit"; (3) there should be enough data by now to establish whether "they can, again, comply with water quality standards." TR 258. These arguments do not address or overcome DEC's explanation that these parameters will be addressed through action on turbidity.

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<sup>7</sup> Exemptions such as these are addressed later in this ruling. See, pp. 31-36.

Accordingly, I do not find this issue substantive and significant and there will not be an adjudication of it.

### **Exemptions**

The Department staff have included a number of conditions under which the City would be exempt from meeting turbidity, turbidity increase, and temperature limits. (See, discussion above at pp.23-24 regarding temperature exemptions). In addition, the City has requested additional exemptions that the staff has not included in the draft permit. Trout Unlimited, et al. opposes any exemptions under any circumstances. The following is a discussion of the specific exemptions at issue and my rulings on each one.

#### Drought Avoidance

The draft permit contains an exemption from temperature, turbidity and turbidity increase limits and action levels when, *inter alia*, DEP in consultation with DEC "determines that additional resources are reasonably necessary in the case of drought warnings or emergencies." IC Ex. 7b, page 4, Footnote 2(a). The City finds this drought avoidance exemption too narrow as it does not encompass circumstances when the City seeks to take action to prevent drought conditions - that is to keep reservoir levels as high as possible and move the water close to the population served. TR 409-412. In addition to the two conditions contained in Footnote 2(a), p. 4 of 14 of the draft SPDES permit, the City wants the exemption to continue in situations in which "DEP, in consultation with the Department, determines that additional resources are reasonably necessary to avoid drought conditions." And the City also wants to add to the draft permit: "[a]nd will continue for so long as there is a drought watch, warning or emergency." TR 412.

The Department staff does not agree with this language because it finds it to be too broad. Assistant Regional Attorney Krebs noted that to include language that states the City is exempt from turbidity requirements to avoid a drought condition could mean that all through the summer months the City would not have to meet water quality standards. TR 413. Initially, the Department staff concluded that it is more appropriate to limit this exemption to situations of drought warnings and emergencies. However, in its reply brief, staff agrees that it is willing to consider a language change to address circumstances where there is a need to rectify a drawdown in the reservoir system such as in the Delaware after the recent floods. Staff Reply Br., p. 9.



Trout Unlimited, et al. is opposed to any exemptions to the SPDES permit limits. These petitioners argue that the law and regulations do not provide for any exemptions. In addition, Trout Unlimited, et al. argues that if the City installed the appropriate control technology, i.e., the multi-level intake structure, such exemptions would not be necessary. TR 406; IC 9, pp. 9, 28-29.

**Ruling:** The City's argument, that this case which subjects a public water supply to Clean Water Act requirements is one of first impression, appears correct. City Post-Issues Conference Brief (NYC Br.), pp. 1-4. In addition to the unique circumstance of subjecting a public water source to SPDES' requirements, as noted above, the City's actions are also subject to water quality standards contained in Part 750 of 6 NYCRR and release requirements contained in Part 670. It would appear from the information supplied by staff, the applicant, and the intervenors that a rigid application of these regulations in all situations would have to result in violations of one or another of their requirements. For example, if the Department requires that the City comply with the turbidity standards while drought conditions are in effect, the City's need to supply its citizens with water from the Schoharie Reservoir could result in turbidity violations.<sup>8</sup> While Trout Unlimited, et al. as well as KCCNY, et al. argue that such a Hobson's choice is not necessary if the City would install the multi-level intake structure, at least until a permanent turbidity solution is reached, it appears that the City cannot always maintain compliance with the permit limits.

The City cites to two Commissioner decisions in support of its view that the Department may exercise flexibility in this matter. In reviewing these two administrative decisions, I did not find comparable circumstances. In the Town of North Hempstead (12/6/89), the Commissioner permitted the applicant to proceed in construction of part of a landfill based upon a stipulation it had reached with staff. In Wunderlich (9/4/85), the applicant was mining without a permit because it had failed to file a complete and timely renewal application. In this latter case, the Commissioner specifically found that the applicant's actions did not result in any environmental harm. In the case before us, the Department is bound by federal requirements in addition to its own regulations, and no one would

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<sup>8</sup> I believe it would be unreasonable to expect the City not to supply its population with needed water even in the face of potential environmental violations.

disagree that the turbidity conditions that the permit is seeking to resolve are degrading to the environment.

With respect to variance provisions cited by DEP, the City has not applied for a variance pursuant to 6 NYCRR § 702.17 so I do not see their applicability. City Br., pp. 10-11.<sup>9</sup>

I do not find a reason to hold a hearing on this matter. The staff has attempted to devise a condition that should be utilized in only limited circumstances. To the extent that it wishes to address the City's concerns in a limited way, I direct the staff to do so and provide the parties to this proceeding with copies of any revised language. The City's desire to make the language much more open-ended is not reasonable as it would too readily allow for exceedances. The position of Trout Unlimited, et al. is unreasonable for the short term. Also, the permit language must be clarified with respect to the language "NYCDEP, in consultation with the Department . . . ." From this language, it is not unclear whether or not the decision rests on the approval of DEC or whether the City, once it has consulted with the Department, can take whatever steps it chooses. This language must be made clearer. I also recommend to staff and the Commissioner that the permit be revised to indicate that once the structural and non-structural turbidity reduction measures are in place, this exemption along with the others addressed in this ruling be revisited with the goal of their elimination.

#### Void/Void Situation

In its September 2004 letter, the City complained that although the permit allows for an exemption to the flow requirements "when the unfilled storage capacity of the Schoharie reservoir is less than five billion gallons and the unfilled storage capacity of the Ashokan reservoir is more than five billion gallons," the City should also be exempt from turbidity, turbidity difference and temperature action levels and limits in these circumstances. IC Ex. 8, p. 12. DEP expressed its paramount concern of maintaining adequate water levels in the supply. IC Ex. 8. Specifically, the City is concerned that when

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<sup>9</sup> In its reply brief, in a footnote, the City states that it has now applied for a variance by writing a letter to the Department dated June 2, 2005. See, attachment hereto. This letter was supplied to the OHMS on June 7, 2005 after I requested that Mr. Plache provide it. Upon review of the letter and the applicable regulations, it appears that the City is late with this request and it is not clear that the letter meets the regulatory requirements. 6 NYCRR § 702.17.

there is capacity for a lot of water in the downstream Ashokan reservoir and the Schoharie reservoir is full or nearly full, the City should be permitted to move water down to the Ashokan so as not to lose any water from the system due to lack of space. TR 177-182. To avoid drought conditions and ensure system reliability, the City wishes always to maintain as much water as possible close to the City by keeping the water moving down through the reservoir system. TR 180. The City requests an additional exemption in footnote 2 of the permit that would apply between February 1 and June 1 when DEP in consultation with DEC determines that increased diversions are necessary from Schoharie to ensure that reservoirs are full at start of system drawdown. Staff Reply Br., pp. 8-9.

In response to the City's concern, the staff at the issues conference replied that they would wish to take this discussion up with the "Part 670 experts" in the Department who were not present. TR 184-185. In its reply brief, the staff states that it is "partially in agreement with the City regarding the drought condition exemption." In addition, staff states its willingness to change language to address a condition that brings levels of the reservoir system to undesirable lows. Staff Reply Br., p. 9. However, the staff does not provide any specific language to add to the permit to address this matter.

Trout Unlimited, et al. remain opposed to any further additions of exemptions based upon their belief that the City should ". . . come up with a technology that will enable it to meet the final effluent limits and deliver the flow it needs." According to Trout Unlimited, et al., such measures would eliminate the need for this exemption and others because the turbidity would be reduced sufficiently to meet the applicable limits. TR 185.

**Ruling:** As with respect to the exemption for drought avoidance, I do not find this matter requires adjudication. The City's concerns regarding its need to move water in the system to avoid drought circumstances are serious. I direct the staff to devise a condition that narrowly addresses this concern and requires the City to consult with Department staff and it is made clear in the condition however that the Department decides on whether the exemption is appropriate. As discussed above, the "in consultation with" language leaves open who ultimately makes the decision. That must be clarified. And, as with my ruling above, I recommend that this exemption along with the other exemptions set forth in the draft permit be revisited once the turbidity reduction measures and final effluent measures are in effect.

Work pursuant to the FAD

In its September 2004 letter, the City notes that the draft permit provides an exemption from the temperature, turbidity, and turbidity difference limits and action levels if exceedances are caused by work that is required by the compliance schedules in the permit or are otherwise directed by DEC. IC Ex. 8, p. 12; IC Ex. 7b, Footnote 2(e). The City requested that language be added that specifically designates any work performed under the FAD as also exempt from the aforementioned limitations. IC Ex. 8, p. 12 G. The example the City provides in its letter is the FAD requirement that the City dredge the Schoharie Reservoir intake channel. Id. The City expects that work scheduled for the Fall of 2005 will cause a temporary increase in turbidity in the Tunnel releases. Id.; TR 190-192, 194-195. Dr. Becker of DEP explained that the purpose of the dredging is to remove the large volume of sediments that have accumulated in this area to reduce turbidity. TR 192. However, Mr. Costas clarified that it is not likely that this material in the channel contributes a great deal to the general turbidity problem. TR 193. He also noted that the City will be taking measures such as the use of turbidity curtains to limit any turbid release. Mr. Plache stated that the City will try not to release any water from the Tunnel during this period but still expects to see some residual effects from the work. TR 192.

Staff's response to this request was that the draft permit already addresses such circumstances in Footnote 2(e) and additional language is not necessary. TR 196. Footnote 2(e) provides an exemption from temperature, turbidity and turbidity increase limits and action levels when DEP "performing work that is required under the compliance schedules in this permit or otherwise approved by this Department . . ." Although the staff acknowledges that some turbidity may be caused by the dredging, it does not wish to have an "automatic exemption." Id. Because the FAD is a lengthy document, the staff expressed discomfort with a *carte blanche* exemption for anything included therein. TR 198, 200. Mr. Snow explained that there are other restoration projects ongoing in the watershed and these still require compliance with water quality standards. TR 200. In addition, Mr. Young noted that it is unlikely that any actions likely to increase turbidity and taken by the City in the watershed would not require some DEC approval such as an Article 15 permit in this case. TR 200-202.

**Ruling:** I do not find that a hearing on this matter requires adjudication. As noted by staff, the draft permit already provides for exemptions from temperature, turbidity and turbidity

increase limits and action levels when the activity causing potential exceedances is directed or approved by DEC. IC Ex. 7b, fn 2(e). Because work that is subject to the FAD will have such approval or require same, there is no reason for this additional umbrella exemption.

### **General Operational Matters**

#### Potential for Liability When City is Meeting Permit Limits

In its September 2004 submission, the City protests the inclusion of the following language in the draft permit: "The permittee is not authorized to discharge any of the listed parameters at levels which may cause or contribute to a violation of water quality standards." IC Ex. 7a, draft permit, p. 2, n. 2. The City maintains that as long as it is in compliance with the terms of the SPDES permit, it should not be subject to liability. IC Ex. 9, p. 10.

The Department staff and others responded that this language is boilerplate terminology that is set forth in all SPDES permit. TR 108. The staff stated its willingness to explore alternative language. TR 108. In addition, Ms. Krebs explained that while compliance with the permit terms might not deter a complaint, compliance would certainly be a valid defense. TR 106.

**Ruling:** I fail to see what there is to adjudicate with respect to the City's complaint. This is standard SPDES permit language. In the event that there is any accusation of failure to meet water quality standards, the City can defend with its assertion of compliance with the applicable permit terms.

#### Duration of Permit Limits

In its September 2004 submission, the City noted that the tables on page 3 of the permit indicate that the final permit requirements expire upon the effective date of the permit (EDP) + 5 years. But the permit also notes that the turbidity limits come into effect at the conclusion of the turbidity reduction schedule which is EDP + 7 years. Thus, it would seem that the final limits expire before they come into effect. IC Ex. 18, p. 11. Trout Unlimited, et al. also noted this seeming anomaly. IC Ex. 9, p. 29. See also, TR 59.

Staff explained that it was its intention to have in the final permit a set date for attainment of the final limits. TR 59. At the end of the 5-year permit term, the permittee performs a short form renewal. The date for attainment of the

final limits would be "rolled over into the next permit." TR 60-61. Mr. Baker explained that given the amount of work necessary for the City to come into compliance with the final limits, staff did not foresee attainment of those limits within five years. TR 60-61.

**Ruling:** Based upon the explanation provided by staff, there is no longer any contradiction or problem with respect to the permit terms set out in the draft. The final limits will be maintained in any renewals of this permit. Therefore, there is nothing further to address with respect to this matter.

#### DMR Mailing Address

In the City's September 2004 letter to DEC, there is a correction for the appropriate contact information. IC Ex. 8, p. 12. Staff has made this amendment and there is no dispute among the participants.

#### Sampling in Frozen Conditions

The draft permit allows manual monitoring of turbidity when the turbidity monitoring equipment employed by DEP is inoperable. IC Ex. 7b, footnote 3D, page 4 of 14. During periods when the Esopus Creek is frozen or there are other unsafe conditions caused by natural phenomena, the permit exempts the City from continuous turbidity monitoring. Initially, Trout Unlimited, et al. opposed this exemption on the grounds that there was no basis in the regulations for it and that the employees could be trained to sample safely in all conditions. IC Ex. 9, p. 33. However, at the issues conference it was agreed by all participants that this draft condition was acceptable. TR 414.

#### Ramping Rates

In its September 2004 submission, the City raised concerns about the draft permit's ramping rates. The City indicated that the table in the draft permit was at odds with the requirements in 6 NYCRR § 670.3(c). My understanding is that the ramping rate regulates the volume at which the City may curtail or open the discharge from the Tunnel. IC Exs. 8, p. 11 and 7b, page 5 of 14, footnote 7. At the issues conference, Assistant Regional Attorney Krebs explained that the City was correct that there was this discrepancy between the regulations and the proposed condition in the draft permit. TR 416. She elaborated that the permit language was meant to reflect the unwritten agreement between DEC staff and the City that was meant to address fish

kills related to strandings that occurred in the winter when above-portal flows were high. TR 416-417.

Related to this matter, the City also requested a clarification that the time it takes for flow adjustments at the Schoharie intake chamber to take effect would not lead to violations for turbidity if the adjustments are timely. Because there is a 7-hour travel time through the tunnel, if an exceedance is found at a time when response rates are slower because of staffing, higher flows may continue for a few more hours. DEP wants language in the permit that would specifically exempt it from violations for releases after it has begun reducing the flow in compliance with the ramping rates. IC Ex. 8, pp. 11-12.

Because the Region 3 fisheries manager was not available when this issue was discussed at the conference, the Department staff requested an opportunity to discuss this terminology further both with the City and internally. TR 417-419.

**Ruling:** In response to an e-mail that I sent to the issues conference participants on June 2, 2005 inquiring of the status of discussions on the ramping rate conditions, Ms. Krebs reported that there had been no agreement yet. Accordingly, I must conclude that to the extent that the draft permit is at odds with the regulations, the latter must rule and staff should revise the draft permit conditions accordingly. As for the City's request that it not be subject to penalties that might result from the 7-hour Tunnel travel time, I do not believe this is a matter that requires adjudication. In the event that the City exceeded permit conditions and could attribute this outcome to an unpreventable delay, this would be a reasonable defense to any enforcement action. However, such circumstances should be judged on a case by case basis. The staff may find legitimately that there are times when DEP staff was negligent in its responsiveness. Therefore, it would be my recommendation that such exemption not be included given its potential for abuse.

#### Water Management

On page 5 of 14, Footnote 6 of the draft SPDES permit, the last line requires that the City "shall make all reasonable efforts to ensure that the Schoharie Reservoir is full on June 1 of each year." IC Ex. 7b. The City requests that language be added to that line "consistent with good water supply practices." TR 419, IC Ex. 8, p. 12. Assistant Corporation Counsel Plache explained that the Schoharie is the furthest reservoir from New York City in the system and that June is the beginning of the

drawdown season. To ensure that the reservoirs are kept full, the City moves water to the Ashokan and seeks to leave room in the Schoharie Reservoir to accommodate any rain. Mr. Plache explained that if there is a significant void in the Ashokan, there is a risk of going into a drought condition if the City cannot accommodate water from the Schoharie reservoir to comply with the condition. TR 420. The measure that the Department is seeking would be contrary to the City's water supply management policy. TR 419-420.

In response, DEC staff members Krebs and Baker stated that an acceptable addition to the draft permit language would be "consistent with good water supply and natural resource protection practices." TR 421. Ms. Krebs added that the Department would likely also seek language added that calls for consultation with staff. TR 422. Mr. Plache replied that he thought that this would be acceptable.

As part of this discussion, Mr. Young and Mr. Van Schaack raised the concern of the local community of flood control. According to these representatives, the public has expressed the view that the City should use its water supply system to aid in flood control. TR 423-425. Ms. Johnstone responded that the reservoirs as water supply systems were not devised for flood control. She explained that during a major storm, the City cannot just open the floodgates resulting in a void in the system. TR 425-426. Mr. Van Schaack stated that if this issue could be included in the studies that the City is doing, the community would be satisfied in getting an answer. TR 427. Mr. Plache agreed to take this back to DEP for consideration. TR 427.

**Ruling:** Despite this seeming agreement between staff and DEP (the intervenors did not raise concerns on this matter), the revised draft permit that accompanied staff's brief (IC 7b) did not include this language. In any case, the terms that the parties agreed to preliminarily at the issues conference strike a good balance to this permit condition and I direct the staff to include it. However, any inclusion of a consultation requirement must make clear who the decisionmaker is. There will not be a hearing on this matter.

#### Recreational Releases

Section 670.5 of Title 6 of NYCRR provides that the department reservoir releases manager shall respond to requests related to recreational activities on the Esopus Creek. The reservoir releases manager may provide for diversions that



conform to requirements of Part 670. In response to the draft permit, KCCNY, AMC, NYRU, and the Town Tinker Tube Rental all submitted petitions voicing their collective concern that there be sufficient water for recreational users on the Esopus. See, IC Exs. 10, 11, 12, 13. To address this concern, the groups all ask that the Part 670 "requirement" for recreational releases be incorporated into the permit. At the issues conference, I asked for support for these groups' position that Part 670 mandates recreational releases. TR 358. In response, Mr. Cook admitted that it was "to some extent wishful thinking on our part." TR 359. He also indicated that Part 670 does provide a mechanism for such requests and that DEP must respond to them. I noted that there is no dispute on these points. TR 359. Mr. Jameson noted that most of the requests for releases are granted unless there is a concern regarding water temperature restrictions. TR 359-360. He also indicated that the main contribution of the SPDES permit to recreational release concerns is the potential for the installation of the multi-level intake to better budget water temperature control. TR 360-362. Currently, due to the cold water budget concerns in August, there are no August releases. TR 362-363.

Mr. Cook stressed the importance of the Esopus Creek as a Class II - III river as an intermediate training ground for Olympic level white water activities. TR 366-370. He emphasized that protection of these types of rivers was key to the ability of the whitewater sport to remain viable. TR 369-370. He explained that the three organizations he represented - NYRU, KCCNY and AMC - all support multiple recreational uses in the Esopus including fishing. TR 371.

On behalf of Mr. Cross, the Supervisor of the Town of Shandaken, Mr. Young explained that the Town looks at the recreational users as major contributors to the local economy. Accordingly, the Town also wants to ensure that recreational releases continue. TR 378.

In response to my questions as to whether the recreational intervenors including Mr. Jameson could be represented on the intake by Trout Unlimited et al., there was agreement although it was understood that there was not unity on other issues. TR 372, 379.

**Ruling:** It is clear that the recreational intervenors represent many individuals who actively use the Esopus Creek. The majority of the speakers at the legislative hearing and the majority of the writers who submitted comments received by the OHMS were recreational users. As indicated in the comments of Mr. Young,

this use is not purely about sport as it also affects the local economy.

However, as I indicated at the issues conference, I do not see that these petitioners have raised adjudicable issues. TR 364-366, 372-374. There is no requirement in the regulations or law that recreational releases be granted. Requests must be considered and may be granted. Only four such diversions may be made between May and October. 6 NYCRR § 670.5(b). Mr. Jameson indicated that the current process for requesting and receiving releases works fairly well. Apart from the offer of Mr. Skinner on the issue of the multiple level intake structure, there were no offers of proof on any issue affecting the permit's compliance with law or the City's ability to comply with the permit or applicable law and regulation.

However, as this entire process is about the releases of which these intervenors have a great deal of knowledge and special interest, I grant consolidated amicus status to KCCNY, AMC, NYRU and the Town Tinker Tube Rental. 6 NYCRR § 624.5(d)(2). As also discussed at the issues conference, I encourage these amici to assist Trout Unlimited, et al. on the issue of the multi-level intake structure.

### **Conclusion**

I have found the following issues adjudicable:

- Turbidity limits
- Compliance Schedule - structural and non-structural measures unless the latter issue is resolved based on ongoing discussions. Both the specific measures and the time frames proposed in the draft permit will be subject to hearing.
- Phosphorus limits - in the event that the involved parties fail to reach a resolution with EPA and among themselves. These parties are directed to report back to the participants and the OHMS regarding the results of these discussions prior to the commencement of the hearing.

For the reasons set forth in this ruling, I have not found the remaining issues raised by the issues conference participants adjudicable.

Based upon the applicable discussion above, I have directed the staff to revise the draft permit with respect to the following matters:

- Daily average
- Sliding limit
- Drought avoidance
- Void/void
- Ramping rates
- Water management
- Status reports to GCSWCD
- Recommendation that all exemptions be revisited once City completes compliance schedule.

Based upon the record in this proceeding thus far, the following matters have been resolved among the participants:

- Definition of daily maximum
- Public information meetings
- Contact information
- Sampling in frozen conditions
- Measurement standard for thermal profile
- Duration of permit conditions

#### **Party Status**

The staff and the applicant are automatic parties to this proceeding. 6 NYCRR § 624.5(a). Based upon my discussions above I have found Trout Unlimited, et al. and the Coalition to have raised substantive and significant issues in their petitions and thus, they are deemed full parties to these proceedings. 6 NYCRR §§ 624.5(b)(1), (2), 624.5(d)(1). I have also found it appropriate to consolidate KCCNY, NYRU, AMC and the Town Tinker Tube Rental as amici. 6 NYCRR §§ 624.5(b)(3), (d)(2). I direct these amici to designate a representative and advise the parties and myself of this decision.

#### **Appeals**

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis. 6 NYCRR § 624.8(d)(2). Ordinarily, expedited appeals must be filed to the Commissioner in writing within five days of the disputed ruling. 6 NYCRR § 624.6(e)(1).

I will extend this deadline slightly to accommodate the number and length of these rulings and the size of the record

upon which they are based. Due to the fact that these proceedings grow out of a federal court order, a more lengthy period for receipt of appeals is not acceptable. The original and one copy of any appeals must be sent to the attention of Acting Commissioner Denise M. Sheehan and received at the Office of the Commissioner (Attn: Louis A. Alexander, Assistant Commissioner, OHMS, NYSDEC, 625 Broadway, Albany, New York 12233-1010) before 5 p.m. on July 8, 2005. In addition, one copy of any appeal is to be sent to Chief ALJ James T. McClymonds of the OHMS. The parties shall ensure that the transmittal of all papers is made to the Chief ALJ, the ALJ and all others on the service list at the same time and in the same manner as transmittal is made to the Acting Commissioner. No submissions by e-mail or telecopier will be allowed or accepted. Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions. To the extent practicable, appeals should also include citations to transcript pages and exhibit numbers.

The parties should be available for a conference call on Thursday, July 14 at 2:00 p.m. to discuss scheduling of the adjudicatory hearing in this matter.<sup>10</sup> My office will organize this call. Should you wish to be contacted at a number that is different than the one you have provided previously to me, please let me know as soon as possible.

Albany, New York  
June 22, 2005

\_\_\_\_\_  
/s/  
Helene G. Goldberger  
Administrative Law Judge

To: Service List

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<sup>10</sup> Section 624.8(d)(7) of 6 NYCRR provides that there is no automatic stay of the hearing pending appeals. Because a federal court order mandates the issuance of a permit, I consider it necessary to keep this process moving forward.