

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Department-Initiated Modification of
State Pollutant Discharge Elimination System
(SPDES) Permits Issued Pursuant to
Environmental Conservation Law Article 17 and
6 NYCRR Parts 621, 624, and 750 for Fourteen
Publicly Owned Sewage Treatment Plants
Operated

- by the -

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK,

Permittee.

DEC Permit ID Nos. 2-6007-00025, et al.

SPDES Permit Nos. NY-0026191, et al.

DECISION OF THE COMMISSIONER

June 10, 2010

DECISION OF THE COMMISSIONER

This proceeding addresses the modification of the State Pollutant Discharge Elimination System ("SPDES") permits for the fourteen water pollution control plants ("WPCPs") that the Department of Environmental Protection of the City of New York ("NYCDEP") operates for the City of New York ("City"). The WPCPs treat sewage generated within the City, as well as material from the City's combined and separate sanitary sewage collection facilities.

BACKGROUND

In June 2002, staff of the New York State Department of Environmental Conservation ("DEC" or "Department") provided NYCDEP with notice of intent to modify the SPDES permits for the WPCPs operated by NYCDEP. By letters dated September 27, 2002 and October 22, 2002, NYCDEP preserved the right to object to several of the proposed modifications, and negotiations between the Department and NYCDEP ensued. The SPDES permit modification process resulted in several iterations of draft permits and the resolution or withdrawal of various NYCDEP objections to the proposed modifications.

Several objections remained with respect to the proposed modifications, and NYCDEP requested a hearing. The matter was referred to the Department's Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto. The issues conference was held on September 18 and October 9, 2003, and was reconvened on May 4 and 5, 2005.

The ALJ issued four rulings over the course of this proceeding:

(i) an issues ruling dated January 28, 2004, among other things, granting adjournment of combined sewer overflow ("CSO") issues, pursuant to the motion of Department staff, because of ongoing negotiations between Department staff and NYCDEP regarding alleged CSO violations (see ALJ Ruling on Proposed Adjudicable Issues and Petitions for Party Status and Ruling on Motion for Stay, January 28, 2004, at 5-7). No appeals were taken from this ruling;

(ii) an issues ruling dated April 23, 2004, addressing issues relating to proposed nitrogen effluent reduction schedules. Department staff appealed from the April 23, 2004 ruling, and the appeal was subsequently determined to have been

rendered academic (see Matter of Department of Environmental Protection of the City of New York, Interim Decision of the Deputy Commissioner, June 26, 2006, at 3 [execution of January 2006 consent judgment¹ and issuance of revised draft SPDES permits rendering moot the factual basis for the appeal]);

(iii) an issues ruling dated November 9, 2005, addressing CSO issues ("CSO Issues Ruling"); and

(iv) an issues ruling dated March 16, 2007, addressing nitrogen issues ("Nitrogen Issues Ruling"). In this ruling, the ALJ noted that Department staff's motion to issue the SPDES permit for one of the 14 WPCPs (Oakwood Beach) had been granted (see Nitrogen Issues Ruling, at 1 fn 1; see also Issues Conference Transcript, May 4, 2005, at 9-11 [no objections raised to motion]).

As set forth in the Nitrogen Issues Ruling, the ALJ determined that no issues required adjudication in this proceeding. An appeals schedule was established in the Nitrogen Issues Ruling with respect to that ruling and the CSO Issues Ruling (see Nitrogen Issues Ruling, at 22).

Natural Resources Defense Council, Riverkeeper, Inc., Long Island Soundkeeper Fund, Inc., and New York/New Jersey Baykeeper ("Consolidated Petitioners") filed a joint appeal dated April 13, 2007 ("Consolidated Petitioners Appeal") from the CSO Issues Ruling and the Nitrogen Issues Ruling. NYCDEP and Department staff filed timely responses ("NYCDEP Reply" [dated May 10, 2007] and "Staff Reply" [dated May 4, 2007], respectively) in opposition to the appeal taken by Consolidated Petitioners. The Interstate Environmental Commission ("IEC") filed a reply dated April 27, 2007 ("IEC Reply") in support of certain arguments advanced by Consolidated Petitioners (see IEC Reply, at 9-10 [summarizing IEC position]).

Additionally, both NYCDEP and Department staff appeal ("NYCDEP Appeal" [dated April 13, 2007] and "Staff Appeal" [dated April 13, 2007], respectively) from that portion of the Nitrogen Issues Ruling in which the ALJ determined that the City of New York must be named as a co-permittee with NYCDEP on the SPDES permits (Nitrogen Issues Ruling, Ruling #5). Consolidated Petitioners and the Connecticut Fund for the Environment, Inc.

¹ Matter of New York City Dept. of Env'tl. Protection v State of New York (Sup Ct, New York County, Jan. 10, 2006, Feinman, J., Index No. 04-402174).

filed a reply dated May 10, 2007 ("Joint Reply") in opposition to those appeals. IEC stated that it took "no position" on whether naming the City as a permittee was a substantive and significant issue (see IEC Reply, at 3).

By ruling dated January 18, 2008 (the "2008 Ruling"), I addressed two motions, both dated August 14, 2007, and a filing, dated October 31, 2007, submitted by Consolidated Petitioners and/or Connecticut Fund for the Environment, Inc. ("CFE"). The 2008 Ruling (i) denied Consolidated Petitioners' motion for leave to file a surreply brief in further support of their appeal of the issues rulings; (ii) granted Consolidated Petitioners' and CFE's motion for leave to supplement their reply dated May 10, 2007; and (iii) accepted into the record excerpts from the Jamaica Bay Watershed Protection Plan dated October 1, 2007.

For the reasons discussed in this decision and subject to my comments below, I am:

- (a) reversing the ALJ's ruling that would require the City to be named as a co-permittee on the permits;
- (b) otherwise affirming the ALJ's remaining rulings;
- (c) remanding this matter to Department staff for issuance of the permits to NYCDEP, consistent with the draft permits prepared by Department staff and this decision; and
- (d) directing that the issues conference participants receive copies of the SPDES permits upon their issuance and notice of any proposed modification to the permits following their issuance.

DISCUSSION

In accordance with the Department's permit hearing regulations, at the issues conference stage a potential party must demonstrate that an issue it proposes for adjudication is both "substantive and significant" (6 NYCRR 624.4[c][1][iii]). An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). In determining whether an issue is substantive, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (id.). 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]).

Pursuant to 6 NYCRR 624.4(c)(4), where Department staff has determined that "a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant."

A potential party's burden of persuasion at an issues conference is met with an appropriate offer of proof supporting its proposed issues. Its assertions must have a factual or scientific foundation. Speculation, expressions of concern, or conclusory statements alone are insufficient to raise an adjudicable issue (see, e.g., Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 ["Crossroads Ventures"], at 7-8). Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions (see, e.g., Matter of Waste Management of New York, LLC, Decision of the Commissioner, October 20, 2006, at 4-5). With respect to legal and policy issues that are raised on appeal, as opposed to factual issues, the Commissioner's review is *de novo* (see Crossroads Ventures, at 10 [internal citations omitted]).

On its appeal, Consolidated Petitioners challenge various rulings of the ALJ (see Consolidated Petitioners Appeal, at 51-52 [summarizing the appeal]). Those challenges, together with the appeals of NYCDEP and Department staff, are addressed below.

1. CSO Issues Ruling, Ruling #2.

In January 2005, Department staff announced the execution of an administrative consent order with the City of New York and NYCDEP regarding CSO regulation for the WPCPs ("2005 ACO"). In this administrative proceeding, an issue was raised whether the 2005 ACO was the appropriate mechanism for CSO regulation, or whether the terms and conditions of the ACO compliance schedule must be explicitly set forth in the draft SPDES permits. Several petitioners further argued that if water quality standards could not be achieved immediately, State law and regulation required that the compliance schedule contain "specific steps designed to

attain compliance within the shortest reasonable time" (see CSO Issues Ruling, Ruling #2, at 9).²

The ALJ ruled that whether Department staff must incorporate the compliance schedule in the permits, or in the alternative, should include a statement in each permit that the compliance schedule represents the "shortest reasonable time" within which to achieve water quality standards for the WPCP's receiving waters, constituted an adjudicable issue (see CSO Issues Ruling, Ruling #2, at 9).

The ALJ stated that adjudication of this issue would be avoided if Department staff opted to either incorporate the 2005 ACO compliance schedule into each of the draft permits or include the "shortest reasonable time" statement in the permits. In accordance with the ALJ's direction, Department staff added to each of the draft permits the following statement: "The CSO Order on Consent contains compliance schedules, which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters." Accordingly, the ALJ determined that adjudication on this issue was avoided (see Nitrogen Issues Ruling, at 4). I note also that the draft permits state, under the heading "Long-Term Control Plan," that the 2005 ACO is attached to the permit.

Consolidated Petitioners object to this resolution as inadequate for the following reasons:

--Compliance with CWA § 402(q)(1)

Consolidated Petitioners argue that section 402(q)(1) of the federal Clean Water Act ("CWA") (33 USC § 1342[q][1]) mandates that the 2005 ACO compliance schedule be incorporated into the permits. This section of CWA states:

"[e]ach permit, order, or decree issued pursuant to this Act after [December 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the

² The phrase "shortest reasonable time" appears both in the Environmental Conservation Law ("ECL") and the applicable regulations (see ECL 17-0813 ["compliance schedules shall require that the permittee within the shortest reasonable time consistent with the requirements of the (CWA) conform and meet" various standards, limitations and criteria]; see also 6 NYCRR 750-1.14 [a]).

Administrator on April 11, 1994" (parenthetical omitted).³

Consolidated Petitioners read this to mean that each and every CWA permit, order, and decree issued to a municipal CSO must contain "the requirement that permittees develop and implement a [long term control plan ("LTCP")] to eliminate or minimize CSO discharges" (Consolidated Petitioners Appeal, at 18). Consolidated Petitioners assert that the development and implementation of an LTCP is "[t]he core of the CSO Control Policy" (id.). Because the compliance schedule for the City's LTCP appears only in the 2005 ACO and not in the draft permits, Consolidated Petitioners argue that the draft permits violate section 402(q) (1).

In its reply brief, IEC states that it "agrees in principle with [Consolidated Petitioners] that the Clean Water Act and state law require incorporation of the [2005] ACO into the draft SPDES Permit, however, [IEC] differs with [Consolidated Petitioners] on how implementation should be carried out for practical purposes" (IEC Reply, at 4). Specifically, IEC maintains that the "wholesale incorporation of the [2005] ACO terms into the SPDES Permits does not serve a practical purpose" (id.). IEC endorses the incorporation into the draft SPDES permits of only milestone dates from the 2005 ACO that it concludes are significant and substantive (see id.).

NYCDEP acknowledges that the compliance schedules for both the water body specific facility plans and long term control plans, and the citywide LTCP are now contained only in the 2005 ACO (NYCDEP Reply, at 2). NYCDEP, however, contends that adding the compliance schedules to the permits is redundant and unnecessary. NYCDEP reads CWA § 402(q) (1) to require LTCP compliance schedules to be contained in the applicable permit, order or decree, but that no requirement exists that the schedules must be duplicated in each of those documents. NYCDEP emphasizes that the statutory language reads "[e]ach permit, order, or decree" and not "[e]ach permit, order, and decree" as the argument of Consolidated Petitioners would suggest (see NYCDEP Reply, at 2-3).

Department staff generally agrees with NYCDEP's read of CWA § 402(q) (1). Staff maintains that the use of the word "or" in

³ The Combined Sewer Overflow Control Policy ("CSO Control Policy") was published in its final form on April 19, 1994, in the Federal Register (59 Fed Reg 18688-701).

the phrase "each permit, order or decree" in the federal statute provides regulatory authorities with discretion in how they choose to ensure that the objectives of the CSO Control Policy are met (Staff Reply, at 4-5). Staff also cites to various provisions of the CSO Control Policy that provide flexibility and discretion to the regulatory authority (id. at 5-9).

I conclude that the meaning ascribed to CWA § 402(q)(1) by NYCDEP and Department staff is in keeping with the plain language of the statute and the provisions of the CSO Control Policy. The federal statute uses the word "or," and its meaning and intent are not to be read out of the statute as Consolidated Petitioners suggest. Accordingly, the inclusion of the compliance schedule in the 2005 ACO is sufficient to meet the legal requirements of the CWA, and the schedule does not have to be restated in each draft permit.

Each draft permit has a section entitled "Long-Term Control Plan." This section states that the Department and NYCDEP entered into the 2005 ACO, which implements the combined sewer overflow abatement plan. The section also states that the 2005 ACO is to be attached to each SPDES permit.⁴

Moreover, where the CSO Control Policy affords regulatory authorities flexibility in achieving the objectives of the policy, the exercise of that authority does not violate section 402(q)(1). As NYCDEP and staff point out, the CSO Control Policy provides for compliance schedules pertaining to LTCs to be

⁴ As an example, the section entitled "Long-Term Control Plan" in the draft permit for the Hunts Point WPCP reads as follows:

"DEC and the Permittee have entered into an Administrative Order on Consent . . . effective January 14, 2005, concerning the Permittee's Combined Sewer Overflow ("CSO") abatement program. In addition to the Monitoring Requirements for CSO Regional Facilities in Item VIII and the CSO Best Management Practices set forth in Item IX, the CSO Order on Consent, which is attached hereto, governs the Permittee's obligations with regard to its CSO abatement program which includes, but is not limited to, design and construction of CSO abatement facilities and the submission of Waterbody/Watershed Facility Plan Reports (*i.e.* CSO Draft Long-Term Control Plans), Drainage Basin Specific CSO Long-Term Control Plans, and the City-Wide CSO Long-Term Control Plans. The CSO Order on Consent contains compliance schedules, which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters. Modifications to the CSO Order on Consent will be public noticed for review and comment in accordance with Uniform Procedures Regulations, 6 NYCRR Part 621".

included in an appropriate enforceable mechanism (see NYCDEP Reply, at 3; Staff Reply, at 4-5). Specifically, under the general heading "[Environmental Protection Agency ("EPA")] Objectives for Permittees," the CSO Control Policy states:

"This policy identifies EPA's major objectives for the long-term CSO control plan. Permittees should develop and submit this long-term CSO control plan as soon as practicable, but generally within two years after the date of the NPDES permit provision, Section 308 information request, or enforcement action requiring the permittee to develop the plan. NPDES authorities [i.e., the EPA or appropriate state regulator] may establish a longer timetable for completion of the long-term CSO control plan on a case-by-case basis to account for site-specific factors which may influence the complexity of the planning process. Once agreed upon, these dates should be included in an appropriate enforceable mechanism" (CSO Control Policy, section II.C [59 Fed Reg 18691] [emphasis added]).

Furthermore, under the general heading "Expectations for Permitting Authorities," the CSO Control Policy states:

"Once the permittee has completed development of the long-term CSO control plan and has coordinated with the permitting authority the selection of the controls necessary to meet the requirements of the CWA, the permitting authority should include in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan, including conditions for water quality monitoring and operation and maintenance" (CSO Control Policy, section IV.A [59 Fed Reg 18695] [emphasis added]).

The CSO Control Policy does not expressly define what an appropriate "enforceable mechanism" is, but does provide that:

"[u]nder the CWA, EPA can use several enforcement options to address permittees with CSOs. Those options directly applicable to this Policy are [CWA] section 308 Information Requests, section 309(a) Administrative Orders, section 309(g) Administrative Penalty Orders, section 309(b) and (d) Civil Judicial Actions, and section 504

Emergency Powers. NPDES States should use comparable means" (CSO Control Policy, section V.C [59 Fed Reg 18697]).

Additionally, the CSO Control Policy states that its provisions may be implemented through a "permit or other enforceable mechanism" (see CSO Control Policy, section I.C [59 Fed Reg 18690]; section I.D [*id.*]; and section II.B [*id.* at 18691]). Therefore, under the CSO Control Policy, the phrase "enforceable mechanism" includes an administrative consent order, among other enforcement mechanisms.

Nothing in this record suggests that either the plain language of CWA § 402(q)(1) or the exceptions, flexibility, and discretion established under the CSO Control Policy were to be replaced by a more prescriptive regimen. I do not read CWA § 402(q)(1) to eliminate that flexibility. As previously set forth, the CSO Control Policy authorizes the states to determine the appropriate enforceable mechanism through which to establish CSO compliance schedules. Here, Department staff has determined that the 2005 ACO is the appropriate mechanism under which to impose the compliance schedule, and nothing in the CSO Control Policy requires that each subsequent permit restate that same schedule.⁵

--Compliance with New York Law

Consolidated Petitioners next argue that New York State law provides an independent basis for the requirement that the City's CSO obligations be embodied in the SPDES permits (Consolidated Petitioners Appeal, at 25). Consolidated Petitioners cite ECL 17-0811(5) and assert that it requires "all SPDES permits issued by DEC [to] include such limitations as are 'necessary to insure compliance with water quality standards adopted pursuant to state law'" (*id.*). Additionally, Consolidated Petitioners argue that, under the circumstances presented here, ECL 17-0813(2) requires

⁵ Consolidated Petitioners' reliance on Friends of the Earth, Inc. v EPA, 446 F.3d 140 (D.C. Cir 2006) is misplaced. Consolidated Petitioners emphasize a phrase in the court's decision wherein the court states that "the CSO Policy requires municipalities with combined sewer systems to develop long-term control plans" (Consolidated Petitioners Appeal, at 24 [emphasis supplied by Consolidated Petitioners]). This does not conflict with my holding that the LTCP compliance schedule may be contained in the 2005 ACO rather than in the permit, as both are considered "enforceable mechanisms" under the CSO Control Policy.

SPDES permits to include compliance schedules and, as provided in 6 NYCRR 750-1.14(a), those schedules must contain "specific steps . . . designed to attain compliance within the shortest reasonable time" (*id.* at 26).

Department staff challenges Consolidated Petitioners' interpretation of the ECL. Among its arguments, Department staff further maintains that ECL 17-0813(2) provides only that SPDES permits "may contain compliance schedules" and that, if such schedules are included in the permits, they shall ensure "compliance with water quality standards within the shortest reasonable time" (*id.* at 11 [emphasis supplied by Department staff]).

In addition to the ECL provisions, Consolidated Petitioners argue that "DEC regulations are explicit that, '[w]here the time for compliance . . . exceeds nine months, a schedule of compliance shall be specified in the permit, which will set forth interim requirements and the dates for their achievement'" (Consolidated Petitioners, at 26 [quoting 6 NYCRR 750-1.14(b)] [emphasis supplied by Consolidated Petitioners]).

The time for compliance under the 2005 ACO compliance schedules is in excess of nine months, and neither NYCDEP nor Department staff dispute the applicability of 6 NYCRR 750-1.14(b) to the permits at issue here. Thus, the question is whether the draft permits meet the regulatory requirement that a schedule of compliance be "specified" in the permit.

The draft permits, in accordance with the ALJ's directive, contain the following provision: "[t]he CSO Order on Consent contains compliance schedules, which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters" (*see, e.g.*, the draft SPDES permit for the Jamaica Water Pollution Control Plant, Section IX, Long-Term Control Plan). Both the explicit reference in each draft permit to the 2005 ACO and its attachment to each permit satisfies the requirement of section 750-1.14(b) to "specify" in the permit a compliance schedule that exceeds nine months.

--Other Arguments

Consolidated Petitioners contend that the decision not to incorporate the 2005 ACO compliance schedules in the permits "cannot be reconciled with the ALJ's subsequent . . . holding that the 'interim effluent limits' for nitrogen discharges set

forth in the January 2006 consent judgment^[6] . . . must be incorporated [in the permits]" (Consolidated Petitioners Appeal, at 29). They also argue that it may, in the event that the City violates the terms of the compliance schedules, adversely affect the viability of an action by EPA or a citizen suit seeking to enforce the compliance schedules (*id.* at 30). IEC agrees with Consolidated Petitioners' arguments concerning citizen suits and contends that "a consent order as a stand alone document provides no avenue for non-signatories to enforce the failure to meet any obligation on the part of the signatories" (IEC Reply, at 5).

With regard to whether the ALJ's decision to incorporate the nitrogen limits conflicts with his decision not to incorporate the compliance schedules, Department staff points to numerous distinctions between these two rulings of the ALJ, especially the fact that NYCDEP and staff agreed to the incorporation of the effluent limits for nitrogen (*see* Staff Reply, at 12-14). I concur with Department staff that the incorporation of the effluent limits for nitrogen, which reflected an agreement between NYCDEP and staff, does not otherwise mandate the incorporation of the 2005 ACO compliance schedules in the permits.

In summary, the inclusion of the compliance schedule in the 2005 ACO, which is an enforceable mechanism, satisfies the requirements of both federal and State law. Additionally, Department staff has, by the very language of the draft permits, provided that the 2005 ACO is to be attached to each SPDES permit (*see, e.g.,* draft permit for Newtown Creek Water Pollution Control Plant, Section IX [stating that the 2005 ACO is "attached hereto"]).⁷

2. CSO Issues Ruling, Ruling #4.

CSO Issues Ruling, Ruling #4, addresses whether the draft permits failed to conform with the CSO Control Policy of the EPA

⁶ In January 2006, a consent judgment was entered in Matter of New York City Dept. of Env'tl. Protection v State of New York, (Sup Ct, New York County, Jan. 10, 2006, Feinman, J., Index No. 04-402174). Among other things, the 2006 consent judgment sets forth interim effluent limits for nitrogen discharges from the WPCPs. Pursuant to the consent judgment, Department staff issued revised draft permits addressing nitrogen and other issues.

⁷ Whether the 2005 ACO may be challenged in a citizen suit by non-signatories is not relevant to whether the Consolidated Petitioners raised an adjudicable issue. Here they have not.

because the draft permits did not include narrative water quality based effluent limitations. The ruling stated that the narrative water quality standards are applicable to all SPDES permits by operation of State law and, therefore, the issue whether the standards are expressly included in the permit terms is neither substantive nor significant (see CSO Issues Ruling, at 13).

Consolidated Petitioners argue that both federal and State law require SPDES permits to include narrative water quality effluent limitations and that, as currently proposed, the draft permits fail to do so (see Consolidated Petitioners Appeal, at 36). IEC supports the inclusion of limitations based on water quality standards in the SPDES permits, but only with respect to certain parameters - floatables, settleable solids, and oil and grease (see IEC Reply, at 7).

NYCDEP and Department staff argue that compliance with water quality standards is already mandated by the draft permits as written and, therefore, no revisions to the permits are necessary. Both NYCDEP and staff quote text from the first page of the draft permits which states that discharges must be "in accordance with effluent limitations; monitoring and reporting requirements; other provisions and conditions set forth in this permit, and 6 NYCRR Part 750-1.2(a) and 750-2" (see NYCDEP Reply, at 5; Staff Reply, at 19).

The assertion of Consolidated Petitioners and IEC that the draft permits do not require NYCDEP to comply with water quality standards is not correct. Not only are the Consolidated Petitioners and IEC incorrect as to what the draft permits state, a permittee cannot violate water quality standards by operation of federal and State law. Congress intended water quality standards to provide an important backstop to effluent limitations in a CWA (SPDES) permit (see CWA § 301[b][1][C]). In other words, water quality standards can drive the imposition of more stringent limitations.⁸ The ECL and accompanying regulations further this federal mandate. For example, in New York State, water quality standards are established under ECL 17-0301. To ensure that the water quality standards are maintained, ECL 17-0501(1) expressly provides that it is "unlawful for any person . . . to discharge . . . matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301."

⁸ See, e.g., Arkansas v Oklahoma, 503 US 91, 101(1992) (addressing how water quality standards supplement effluent limitations to prevent water quality from falling below acceptable levels).

The regulations further support the mandate that permittees are to comply with water quality standards. Section 750-2.1(b) of 6 NYCRR subpart 750-2, which is referenced in each of the draft permits, provides that "[s]atisfaction of permit provisions notwithstanding, if operation pursuant to the permit causes or contributes to a condition in contravention of State water quality standards or guidance values," the Department may modify the permit or take enforcement action against the permittee, including requiring abatement action or prohibiting operation. Therefore, by operation of federal and State statutes (the CWA and the ECL), and by express reference in the draft permits to 6 NYCRR subpart 750-2, NYCDEP is required to comply with water quality standards.⁹ The additional language that Consolidated Petitioners and IEC seek to incorporate into the permits is neither required nor necessary.

3. CSO Issues Ruling, Ruling #7, & Nitrogen Issues Ruling, Ruling #4.

The CSO Issues Ruling, Ruling #7, addresses whether discharges of nitrogen and biological oxygen demand ("BOD") in treated effluent from the four Jamaica Bay WPCPs¹⁰ act cumulatively with CSO discharges to impair water quality in Jamaica Bay, and, therefore, require that the permits for the four plants contain water quality-based effluent limitations for nitrogen and BOD to address the cumulative impacts. The ALJ ruled that "[n]o adjudicable issue exists regarding revision of the draft Jamaica Bay permits to recite a narrative water quality standard" (CSO Issues Ruling, at 17). The ALJ noted that the applicable regulations are referenced on the first page of each draft permit and those regulations contain the narrative water quality standards (see id.).

Nitrogen Issues Ruling, Ruling #4, is interrelated with CSO Issues Rulings numbered 4 and 7 above. With respect to Nitrogen Issues Ruling, Ruling #4, the ALJ denied adjudication of the issue whether the SPDES permits for the WPCPs that discharge into

⁹ This is not to suggest that NYCDEP would violate the legal obligation to comply with applicable water quality standards when it acts pursuant to a duly signed consent order, decree, or judgment. As the discussion elsewhere in this decision indicates, consent orders, decrees, or judgments constitute appropriate enforcement mechanisms to achieve compliance.

¹⁰ The four plants are 26th Ward WPCP, Coney Island WPCP, Rockaway WPCP, and Jamaica WPCP (collectively, "Jamaica Bay plants") (see CSO Issues Ruling, at 16 fn 1).

Jamaica Bay must include additional provisions to ensure compliance with water quality standards pertaining to nitrogen.

Consolidated Petitioners argue that the draft permits for the Jamaica Bay plants sanction a pollutant discharge that does not meet applicable water quality standards. Consolidated Petitioners assert that NYCDEP has been in "compliance" with its existing effluent limits for nitrogen, that these limits are unchanged in the draft permits, and that, nevertheless, violations of water quality standards continue (see Consolidated Petitioners Appeal, at 40-43). Consolidated Petitioners argue, "even assuming the permits [for the Jamaica Bay plants] do include a narrative water quality-based effluent limitation for nitrogen," the numeric limits in the draft permits "can hardly be said to 'ensure' compliance with water quality standards in any real-world, practical sense" (id. at 43).

Additionally, Consolidated Petitioners argue that the ALJ's reliance on Department staff's stated intent to revise the permits in the future to improve Jamaica Bay water quality is in error. Consolidated Petitioners contend that this "intent" is insufficient to satisfy legal requirements that apply to the permits today (see Consolidated Petitioners Appeal, at 43-44). Consolidated Petitioners conclude that the Commissioner should reverse Ruling #4 of the Nitrogen Issues Ruling and Ruling #7 of the CSO Issues Ruling and rule that the nitrogen effluent limits for the four Jamaica Bay plants "are inadequate as a matter of law" (id. at 47).

Department staff notes that both the revised draft SPDES permits for the Jamaica Bay plants and the 2006 Consent Judgment provide that, following the approval of the Comprehensive Jamaica Bay Report,¹¹ the permits will be reopened for modification (see Staff Reply, at 25). Department staff argues that it would be inappropriate to require changes to the Jamaica Bay plant draft

¹¹ Under the terms of the 2006 consent judgment, NYCDEP is required to submit the Comprehensive Jamaica Bay Report to the Department for approval. The Comprehensive Jamaica Bay Report "shall summarize and integrate" information from sources specified in the 2006 consent judgment "and provide recommendations and an implementation schedule for improving water quality in Jamaica Bay" (2006 consent judgment, Appendix B ["26th Ward WPCP Upgrade Schedule & Jamaica Bay Milestones"]). NYCDEP submitted the report, which among other things, addressed a phased approach for adaptive management of environmental improvements and nitrogen reduction by advanced wastewater treatment, to the Department in October 2006 for staff review.

permits at this time, on the basis of the Comprehensive Jamaica Bay Report, prior to Department approval of that report (see id. at 24-25).

Consolidated Petitioners miscomprehend what is required by the language contained in the draft Jamaica Bay plant permits. Each of the draft permits expressly states that “[u]pon approval by the Department [of the Jamaica Bay Report], or as soon as possible thereafter, the Department will reopen the permit and propose a modification to the SPDES permits for the Jamaica Bay WPCPs . . . to require the implementation of the Comprehensive Jamaica Bay Report” (see draft SPDES permit for the Jamaica Water Pollution Control Plant, section VI, Jamaica Bay WPCPs [Jamaica, Rockaway, Coney Island, 26th Ward] No-Net Increase Effluent Limits and Monitoring for Nitrogen, at 10 fn 5 [emphasis supplied]). Accordingly, the draft permits for the Jamaica Bay plants expressly provide a mechanism by which the permits will be reopened once the Comprehensive Jamaica Bay Report is approved.

Therefore, I determine that the draft Jamaica Bay plant permits provide an appropriate mechanism to ensure compliance with water quality standards within the shortest reasonable time.

4. CSO Issues Ruling, Ruling #9

CSO Issues Ruling, Ruling #9, addresses whether the draft SPDES permits and the CSO ACO incorporated appropriate procedures for public review and participation. The ALJ determined that the proposed issue did not raise doubts about NYCDEP’s ability to meet statutory or regulatory criteria nor did the issue have the potential to result in denial or major modification of the draft permits, or result in imposition of significant new permit conditions in the draft permits. Accordingly, the ALJ concluded that the issue was not adjudicable (see CSO Issues Ruling, Ruling #9, at 20).

On their appeal, Consolidated Petitioners argue that “in order to comply with a 1993 ruling of the DEC Commissioner concerning the City’s SPDES Permits and the 1992 administrative consent order on CSOs [“1992 ACO”], the proposed SPDES Permits must be revised to state specifically that any future modifications to the [2005 ACO] will be subject to an opportunity for a full adjudicatory hearing under 6 NYCRR Part 624” (Consolidated Petitioners Appeal, at 48). Consolidated Petitioners rely, in part, on a 1993 ALJ ruling that recommended the 1992 ACO be revised “to require any proposed modification of the schedule of compliance to comply with the procedural requirements of 6 NYCRR Part 753, governing SPDES permit

applications" (Matter of New York City Department of Environmental Protection, Supplemental Rulings of Administrative Law Judge, January 27, 1993, at 8 ["1993 Ruling"]). The 1993 Ruling was affirmed by the Commissioner (see Matter of New York City Department of Environmental Protection, Third Interim Decision of the Commissioner, June 1, 1993, at 2 ["Third Interim Decision"]). Part 753 of 6 NYCRR set forth regulations governing notice, public participation, and hearings applicable to SPDES permit applications.

Consolidated Petitioners argue that the reference in the draft permits to 6 NYCRR part 621 is insufficient to ensure appropriate public participation. According to Consolidated Petitioners, this approach "fails to satisfy the requirement of the Third Interim Decision (affirming [the] 1993 ruling) that ACO modifications must afford full public participation rights, including the opportunity for an adjudicatory hearing, not merely the notice and comment procedures applicable under Part 621" (Consolidated Petitioners Appeal, at 49).

IEC "fully endorses" Consolidated Petitioners' argument that the draft permits are inconsistent with the 1993 Ruling (IEC Reply, at 8). IEC argues that the draft permits "must be revised to state specifically that any future modifications of the [2005] ACO will be subject to an opportunity for a full adjudicatory hearing under 6 NYCRR Part 624" (id. at 9).

The arguments of Consolidated Petitioners and IEC are misplaced. First, the 1993 Ruling and the Third Interim Decision are not applicable. The 1992 ACO, as modified in 1996, was rendered "null and void" by the 2005 ACO (see 2005 ACO, at paragraph I, at 6). The 2005 ACO did not simply modify the 1992 ACO, but rather, replaced the earlier ACO "in [its] entirety" (id.). Second, part 753 of 6 NYCRR, which as noted established notice, public participation, and hearings-related requirements for SPDES permit applications, was repealed in 2003. Consolidated Petitioners cite no similar provision enacted in its place.¹² In short, the 1993 Ruling concerned provisions of an order on consent that is now superseded and imposed procedural requirements from a regulation now repealed.

¹² In the 1993 ruling, the ALJ sought to address, by citing part 753, issues relating to public notice requirements in the event that a modification to the compliance schedule in the 1992 ACO was proposed (see 1993 Ruling, at 8 [noting that under part 753, a proposed modification to the compliance schedule would require "public notice . . . along with a hearing if substantive issues are raised"] [emphasis added]).

Consolidated Petitioners also confuse the application of Parts 621 and 624. Presently, Part 621 establishes specific requirements governing the general permitting process, including, among other things, modification of permits (see 6 NYCRR 621.13; see also 6 NYCRR 750-1.18[a][referencing modifications in the context of 6 NYCRR part 621]). It also establishes standards governing whether a public hearing will be conducted, and, in the event that substantive and significant issues are raised, authorizes referral for adjudication (see, e.g., 6 NYCRR 621.8). Once a matter is referred to the Office of Hearings and Mediation Services for adjudication, Part 624 sets forth the permit hearing procedures that govern.

The current draft permit language, as proposed by Department staff, provides an appropriate mechanism for public participation where the modification at issue is of sufficient consequence to warrant public notice and, potentially, an adjudicatory hearing. Specifically, Department staff's proposed language states that "[m]odifications to the CSO Order on Consent will be publicly noticed for review and comment in accordance with Uniform Procedures Regulations, 6 NYCRR Part 621" (see e.g. draft SPDES permit for the Jamaica Water Pollution Control Plant, Section IX, Long-Term Control Plan).

Furthermore, where either the Department's review or comments received from the public on those modifications raise substantive and significant issues that may result in denial of or substantial revision to a proposed modification, the Department would hold an adjudicatory public hearing in accordance with the provisions of 6 NYCRR part 624 (see 6 NYCRR 621.8[b] and [g]; see also 6 NYCRR 621.13[f][noting where modifications for SPDES and other delegated permits are to be treated as new applications]¹³). Accordingly, if substantive and significant issues are raised, the matter will be referred to the Office of Hearings and Mediation Services for adjudication.

Thus, the current provisions of Part 621 provide Consolidated Petitioners and IEC with the procedural safeguards they seek. Accordingly, no revision to the language of the draft permits with respect to procedural requirements is legally

¹³ Section 621.11(h) of 6 NYCRR also establishes that, in various circumstances, the Department may determine that "any application for . . . modification will be treated as a new application for a permit." This includes, but is not limited to, where an application involves a material change in existing permit conditions or in the scope of the permitted actions, or where there is newly discovered material information (see 621.11[h]).

required. However, recognizing the interests of the issues conference participants in this matter and their involvement in this proceeding, it would be appropriate for issues conference participants to be notified of any proposed modification to the SPDES permits following their issuance and during their term. Accordingly, Department staff is directed to notify in writing Consolidated Petitioners, IEC, and the other organizations on the service list to this proceeding of any proposed modifications to the permits following their issuance.

5. Nitrogen Issues Ruling, Ruling #5

In Nitrogen Issues Ruling, Ruling #5, the ALJ held that the City of New York must be added as a named permittee to each of the proposed SPDES permits. NYCDEP and Department staff appeal from that ruling.

NYCDEP argues that the issue was not timely raised by Consolidated Petitioners and should not have been considered by the ALJ (see NYCDEP Appeal, at 2). Moreover, NYCDEP argues, pursuant to 6 NYCRR 750-1.6(a), it is NYCDEP, as the "operator" of the WPCPs, that "is responsible for obtaining a permit, and ensuring compliance with its requirements" (NYCDEP Appeal, at 5). NYCDEP also challenges the ruling's reliance on 6 NYCRR 750-1.7(a)(17) as the basis for requiring the City to be named as a co-permittee. According to NYCDEP, this section pertains only to the Department's ability to request additional information from an applicant and, "[i]n contrast, the [identity of the] proper applicant is set forth in the previous section, 750-1.6(a), and is the operator of the facility" (id. at 6).

Department staff makes similar arguments. Staff contends that 6 NYCRR 750-1.7(a)(17) provides the Department with "discretion to require the applicant to submit additional information that would assist in drafting the SPDES permit parameters" (Staff Appeal, at 3-4). Staff agrees with NYCDEP that "federal and state regulations express that it is the operator's duty to obtain a permit when a facility is owned by one person but operated by another person" (id., at 5 [citing 40 CFR 122.21(b) and 6 NYCRR 750-1.6(a)]).

Consolidated Petitioners and the Connecticut Fund for the Environment, Inc. ("CFE") question whether NYCDEP has the authority to implement all the provisions of the draft permits. As summarized in the Joint Reply, the primary concern of Consolidated Petitioners and CFE is that "only the City, via its myriad agencies (not just NYCDEP), has operational control over all aspects of the 14 [WPCPs] and possesses the authorities

needed to comply with many terms of the Proposed SPDES Permit relating to stormwater and CSOs" (Joint Reply, at 2).

Under the circumstances presented here, I am satisfied that NYCDEP, as the operator of the 14 WPCPs, is the appropriate permittee, and the City need not be added to the permits as a co-permittee. The legal arguments set forth by NYCDEP and Department staff are persuasive and compelling. NYCDEP is, indisputably, a department within the municipal government of the City of New York. As a duly established department under the charter of the City of New York, NYCDEP is an administrative division of the City acting within its sphere of authority.

I have reviewed relevant provisions of the New York City Charter and the New York City Rules and Regulations. The City has granted NYCDEP broad powers and authorities in all matters relating to the City's sewer system.¹⁴ Accordingly, I am satisfied that, in applying for and being named the permittee on the SPDES permits, NYCDEP is acting within its authority pursuant to the powers granted to it by the City.

For the foregoing reasons, I reverse Ruling #5 of the Nitrogen Issues Ruling and hold that Department staff need name only NYCDEP as the permittee on the SPDES permits that are the subject of this proceeding.¹⁵

¹⁴ See, e.g., NY City Charter § 1403 (stating that the commissioner of NYCDEP "shall have charge and control of and be responsible for all those functions and operations of the city relating to . . . the disposal of sewage and the prevention of air, water and noise pollution," and further stating, at § 1403(b), that the commissioner "shall have charge and control over the location, construction, alteration, repair, maintenance and operation of all sewers . . . and sewage disposal plants, and of all matters in the several boroughs relating to public sewers and drainage"); Rules of City of NY Dept. of Env'tl. Protection (15 RCNY) § 19-02 (governing the disposal of wastewater, stormwater and groundwater).

¹⁵ NYCDEP and Department staff contend that this issue regarding the entity or entities to be named as permittee was not timely raised before the ALJ and should not be considered (see NYCDEP Appeal, at 2-4; Staff Appeal, at 9-10). Based upon the record before me, I conclude that the issue was timely raised.

CONCLUSION

Based upon my review of the record, Consolidated Petitioners in their appeal failed to raise any substantive and significant issues for adjudication. To the extent that Consolidated Petitioners raised other arguments on their appeal that are not specifically addressed in this decision, I have considered them and found them to be without merit. Accordingly, Consolidated Petitioners' appeal is dismissed.

Upon consideration of the appeal of NYCDEP and Department staff, I reverse Nitrogen Issues Ruling, Ruling #5, and hold that the City of New York need not be added to the draft permits as a co-permittee.

There being no issues for adjudication, I remand this matter to Department staff for issuance of the permits to NYCDEP, consistent with the draft permits prepared by Department staff and this decision. As noted, the 2005 ACO is to be attached to each permit.

Copies of the permits shall also be mailed to the service list in this proceeding at the same time that they are issued to NYCDEP.

Department staff is also directed to provide notice of any proposed modification to the SPDES permits following their issuance to the service list at the same time that the notice is provided to NYCDEP.

For the New York State Department
of Environmental Conservation

/s/

By: Alexander B. Grannis
Commissioner

Dated: June 10, 2010
Albany, New York