

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

The Application to Renew
the State Pollutant Discharge Elimination System Permit
for the Kiryas Joel Wastewater Treatment Plant,

-by-

VILLAGE OF KIRYAS JOEL

Applicant.

DEC Application No. 3-3340-00078/00001

SPDES No. NY0250520

DECISION OF THE DEPUTY COMMISSIONER

March 22, 2023

DECISION OF THE DEPUTY COMMISSIONER¹

This proceeding concerns the application of the Village of Kiryas Joel (Village) for the renewal of its State Pollutant Discharge Elimination System (SPDES) permit (SPDES No. NY0250520) authorizing surface discharge from the Kiryas Joel Wastewater Treatment Plant (Village WWTP), located in the Town of Monroe, Orange County, New York. The Village WWTP is owned by the Village and is operated by Orange County (County) through the Orange County Sewer District No. 1 and a third party contractor.²

Staff of the New York State Department of Environmental Conservation (Department or DEC) issued a final SPDES permit to the Village on October 16, 2019 (see Affidavit of Scott E. Sheeley,³ sworn to November 5, 2020 [Sheeley Affidavit], ¶ 17). The SPDES permit, as issued, lists an effective date of November 1, 2019 and an expiration date of October 31, 2024 (see Affirmation of Michael G. Sterthous dated July 31, 2020 [Sterthous Affirmation], Village Exhibit [Exh] V [Village SPDES Permit, among other documents]).⁴ The permit authorizes the surface discharge of 0.97 million gallons per day (mgd) (that is, 970,000 gallons per day) of treated sanitary and industrial wastewater from the Village WWTP into an unnamed tributary of the Ramapo River. The Village, by letter dated November 14, 2019, requested an adjudicatory hearing with respect to the permit pursuant to section 621.10(a)(2) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

This proceeding was referred to the Department's Office of Hearings and Mediation Services, and Administrative Law Judge (ALJ) Michele M. Stefanucci was assigned to the matter. Petitioners Kiryas Joel Meat Market, Inc. and Kiryas Joel Poultry Processing Plant, Inc. (collectively, KJP Petitioners or Petitioners) filed a joint petition for full party status (KJP Petition for Party Status).

Participating in the issues conference were the Village, KJP Petitioners and Department staff.⁵ ALJ Stefanucci issued a Ruling on Issues and Party Status dated May 14, 2021 (Issues Ruling) which, among other things, granted the KJP Petitioners full party status in this

¹ By memorandum dated March 17, 2023, Commissioner Basil Seggos of the Department of Environmental Conservation delegated the decision-making authority in this matter to Louis A. Alexander, Deputy Commissioner for Hearings and Mediation Services. A copy of the delegation is being forwarded to those on the Service List together with the decision.

² See Affirmation of Michael Sterthous dated July 31, 2020, Village Exh V (SPDES Permit Fact Sheet for the Village of Kiryas Joel, Kiryas Joel Wastewater Treatment Plant NY0250520 dated October 16, 2019, at 6 [Facility Information]).

³ Mr. Sheeley is the DEC's Chief Permit Administrator in the Department's Division of Environmental Permits.

⁴ Notwithstanding the reference to the permit as "final", the SPDES permit is subject to revision and modification by virtue of its having been referred for an administrative hearing. In this proceeding, Department staff, the Village and KJP Petitioners each have made arguments in support of revisions and/or modifications to the Village SPDES Permit.

⁵ The issues conference was conducted on papers (see Ruling on Issues and Party Status dated May 14, 2021, at 3; see also 6 NYCRR 624.6 [g] and 624.8[b][1][ii]).

proceeding. The Issues Ruling identified one issue for adjudication, that is: “whether compliance with the timeframes contained in SPDES Permit NY0250520 is reasonable” (Issues Ruling at 18). As to the other issues raised by the Village and Petitioners, the ALJ found that the issues were without merit and/or that no factual dispute was raised for adjudication (see id. at 5-18).

Presently pending before me are appeals taken by the Village and by the KJP Petitioners from the Issues Ruling. Department staff did not appeal from the Issues Ruling.

The Village, in its appeal dated June 4, 2021 (Village Appeal), identifies what it characterizes as disputed facts relating to stream classification, expiration of the permit, the mini pretreatment program contained in the permit, the data relied upon by Department staff in justifying permit conditions, the achievability of compliance with the permit conditions, and pollutant specific discharge limits and monitoring and reporting requirements (see Village Appeal at 3-11). The Village further contends that (a) the Issues Ruling deprived the Village of its statutory and regulatory right to a hearing on the significant conditions in the SPDES Permit, (b) the Department violated the State Environmental Quality Review Act (SEQRA) by its failure to require the preparation of an environmental impact statement, and (c) no authority existed to impose a pretreatment program in the Village’s SPDES Permit (see Village Appeal at 13-27).

The KJP Petitioners, in their appeal dated June 3, 2021 (Petitioners’ Appeal), contend that the conditions in the Village SPDES Permit create a legally impermissible arrangement subjecting Petitioners to two treatment programs under two permits – pretreatment requirements pursuant to a permit previously issued to them by the Orange County Department of Public Works (see Sterthous Affirmation, Exh O [Industrial Wastewater Discharge Permit -- Significant Industrial User issued by the Orange County Department of Public Works to Kiryas Joel Meat Market, Inc.]) and a mini pretreatment program in the Village’s SPDES Permit (see Petitioners’ Appeal at 2-3; 4-5). In addition, the KJP Petitioners argue that an adjudicatory hearing is necessary concerning the effluent limits for total dissolved solids (TDS) in the Village’s SPDES Permit because the ALJ improperly shifted the burden to provide data concerning background, in-stream conditions to the KJP Petitioners and the Village (see Petitioners’ Appeal at 5-7).

Department staff filed a reply dated June 30, 2021 (Department Staff Reply to Appeals) in opposition to the appeals of the Issues Ruling by the Village and the KJP Petitioners.

I have given careful consideration to the appeals and Department staff’s reply to those appeals. The Village, KJP Petitioners, and Department staff have provided comprehensive filings in this matter, including supporting affidavits and affirmations. Upon my review of the record before me, I conclude that the SPDES Permit and its terms and conditions as developed by Department staff, including the framework of the proposed schedule of compliance, is fully supported, and, with a modification of the effective date of the permit and the due dates in the schedule of compliance, no adjudicable issues are presented. Subject to my comments below, I hereby adopt the ALJ’s Issues Ruling, with the exception of the ALJ’s determination that the schedule of compliance is an adjudicable issue.

BACKGROUND

KJP Petitioners operate a kosher poultry processing facility (poultry facility) that discharges its wastewater to the Village WWTP. KJP Petitioners assert that they operate a pretreatment system which pretreats the poultry facility’s industrial wastewater prior to discharge in accordance with a permit issued by the Orange County Department of Public Works pursuant to the County’s local sewer use law (see KJP Petitioners’ Petition for Party Status at 2; Affidavit of William Meinert, P.E.,⁶ sworn to March 13, 2020 [Meinert Affidavit], ¶ 5 [the poultry facility “currently discharges its wastewater to the Village WWTP and operates a pretreatment system which pretreats its industrial wastewater prior to discharge in accordance with a pretreatment permit issued by Orange County pursuant to the County’s local sewer use law”]); Sterthous Affirmation, Village Exh O [Industrial Wastewater Discharge Permit – Significant Industrial User issued to Kiryas Joel Meat Market, Inc.]. The County’s permit for the poultry facility imposes specific discharge limitations for the following parameters: CBOD₅ (carbonaceous biochemical oxygen demand); FOG (concentration of fats, oils and grease); and TSS (total suspended solids) (see Village Exh O at 2 [Table 1]). The County’s permit for the poultry facility does not impose specific discharge limitations for TDS or chlorides (see id. [Table 1]).

Petitioners use salt during the koshering process (see KJP Petition for Party Status at 2). Salt rinsed from processed chickens generates wastewater that contains TDS (see id.). According to Department staff, the discharge from the Village WWTP is “heavily influenced by untreated [TDS] received from [the poultry facility]” (Department Staff Reply to Appeals at 1; see also Affidavit of Carrie E. Smith, P.E.⁷ sworn to November 6, 2020 [Smith Affidavit], ¶ 103 [wastewater from poultry facility is a significant source of TDS at Village WWTP], ¶ 104 [noting constituents of salt as primarily consisting of sodium and chloride], ¶¶ 108-111 [addressing contributions of TDS from the poultry facility to Village WWTP, and noting that the poultry facility “accounts for more than 90 percent of the TDS discharged from the Village WWTP” [emphasis in original]).

The Village is part of Orange County Sewer District No. 1, and the County operates the Village WWTP (see Meinert Affidavit ¶ 8; Smith Affidavit, DEC Exh W at 2). The Village WWTP currently receives a portion of the domestic wastewater from the Village⁸ and all of the pretreated industrial wastewater discharged from the poultry facility (see Issues Ruling at 1).⁹

⁶ Mr. Meinert, who has submitted an affidavit on behalf of Kiryas Joel Meat Market, Inc. and Kiryas Joel Poultry Processing, Inc., is a licensed professional engineer who is Vice President, Wastewater Market Sector Leader at Ramboll US, an architecture and engineering consulting firm, and serves as wastewater practice leader for the company’s public sector clients (see Meinert Affidavit ¶¶ 1-2).

⁷ Ms. Smith is a licensed professional engineer who has served as a DEC permit engineer since 2014, with experience in municipal and industrial permit development under the SPDES permitting program (see Smith Affidavit at ¶¶ 1-2).

⁸ The remaining domestic wastewater from the Village is directed to the Harriman Wastewater Treatment Plant which operates pursuant to a SPDES permit issued to the Orange County Department of Public Works (see Issues Ruling at 1).

⁹ Petitioners’ poultry facility is the sole industrial discharger to the Village WWTP (see Village Brief dated July 31, 2020 in Support of Its Objections and Challenges to the Final SPDES Permit, at 12 [Village Brief]; Sterthous

The Department initially issued a SPDES permit to the Village for the Village WWTP effective on July 1, 1994 (see Sterthous Affirmation, Village Exh D; Smith Affidavit ¶ 14). The permit contemplated that the Village WWTP would be constructed in two stages during the permit's five year term and, after the completion of the second stage of construction, the discharge capacity would be 0.97 mgd of wastewater (see Sterthous Affirmation, Village Exh D; Smith Affidavit ¶ 14). At the time that the initial SPDES permit was issued, the unnamed tributary receiving discharge from the Village WWTP was classified as a Class D water body, and the permit so stated (see Sterthous Affirmation, Village Exh D [July 1, 1994 permit] at 1). Shortly thereafter, by regulatory amendment filed October 21, 1994, the stream was reclassified to a Class C water body (see Affidavit of Jason R. Fagel¹⁰ dated November 3, 2020 [Fagel Affidavit], ¶¶ 5-6; 6 NYCRR 860.4-95).

The Department administratively renewed the Village's SPDES permit, without change, effective 1999, 2004 and 2009 (see Sterthous Affirmation, Village Exhs D, E, F and G [Exhibits D, E and F contain the July 1, 1994, July 1, 1999, and July 1, 2004 SPDES Permits, respectively while Exhibit G contains the July 1, 1994 and the August 1, 2009 SPDES Permits]).¹¹ The poultry facility began discharging industrial wastewater to the Village WWTP at some point between 2002 and 2004 (see Smith Affidavit ¶ 93 n 71). The Village's 2009 permit had an expiration date of July 31, 2014 (see Sterthous Affirmation, Village Exh G). By letter dated August 9, 2013, Department staff sent the Village a request for information (RFI), advising that, due to the Village WWTP's Environmental Benefit Permit Strategy (EBPS) priority ranking and other EBPS considerations, the Department was evaluating the Village's SPDES permit to determine the need for modification (see Smith Affidavit ¶ 16; DEC Exh E [DEC Letter dated August 9, 2013]).¹² Department staff requested a completed permit application (Form NY-2A) and additional information from the Village, including sample results (see id.).

Affirmation, Village Exh V [SPDES Permit Fact Sheet for the Village of Kiryas Joel, Kiryas Joel Wastewater Treatment Plant NY0250520 dated October 16, 2019 (SPDES Permit Fact Sheet)], at 6 [referencing the industrial user as "Kiryas Joel Poultry Processing Plant [KJ Meat Market Corporation, Inc. and KJ Poultry]"]. Village Exhibit V contains the Village's SPDES Permit issued on October 16, 2019 (consisting of 15 pages) which is the subject of this proceeding, the DEC Responsiveness Summary issued on October 16, 2019 (consisting of 24 pages), and the SPDES Permit Fact Sheet issued on October 16, 2019 (consisting of 30 pages). These documents are referenced in this decision as the Village SPDES Permit, the DEC Responsiveness Summary and the SPDES Permit Fact Sheet, respectively.

¹⁰ Mr. Fagel was employed by the New England Interstate Water Pollution Control Commission doing water quality work on behalf of DEC from 2002 to 2006, and has worked directly for the Department since 2006. Since 2012 Mr. Fagel has worked with the DEC's Water Quality Standards and Classification program (see Fagel Affidavit ¶¶ 1-2).

¹¹ The Department, in renewing the SPDES permit in 1999, 2004 and 2009, did not make note of the change in the classification of the unnamed tributary from Class D to Class C (see Sterthous Affirmation, Village Exhs E, F and G [containing the 1994, 2004, and 2009 permits]). In 2004, the DEC updated the General Conditions to comply with regulatory amendments (see Smith Affidavit ¶ 14, DEC Exh C). This modification was part of a statewide modification of all SPDES permits (see id.).

¹² The Department's Division of Water, in accordance with Environmental Conservation Law 17-0817 and the requirements in 6 NYCRR part 750-1.19, has adopted the EBPS. This system establishes procedures to manage SPDES permit renewal applications in a manner that prioritizes permits based upon their potential or actual impact to the environment (see State Pollutant Discharge Elimination System [SPDES] Environmental Benefit Permit Strategy [EBPS], Overview at 1. This document appears on the DEC website at https://www.dec.ny.gov/docs/water_pdf/epbsoverview.pdf).

The Village did not submit an application for renewal of its SPDES permit prior to its expiration and the permit expired on July 31, 2014 (see Smith Affidavit ¶ 18).¹³ On January 21, 2015, the Department and the Village entered into an order on consent (2015 Consent Order) which resolved a notice of violation issued by the Department to the Village alleging that the Village was discharging pollutants without a valid SPDES permit (see Smith Affidavit ¶ 19; DEC Exh G). The 2015 Consent Order permitted the Village to operate pursuant to its expired SPDES permit until the Department issued a valid permit, so long as the Village complied with all terms, conditions and limitations of the expired permit (see DEC Exh G at 7). On April 2, 2015, the Village submitted a late response to the RFI which included a signed and dated Form NY-2A permit application (see Smith Affidavit ¶ 16).¹⁴

Department staff prepared a draft permit for the Village (see Sheeley Affidavit ¶ 12), and conducted a full technical review of the application (see Smith Affidavit ¶¶ 23-24). Staff classified the application as an unlisted action pursuant to the State Environmental Quality Review Act (SEQRA) and prepared a short environmental assessment form (Short EAF). As set forth in the Short EAF, staff determined that there were no significant adverse environmental impacts associated with the permit renewal and modification and issued a negative declaration (see Sheeley Affidavit ¶¶ 19-20, 26-28; Sterthous Affirmation, Village Exh U [containing Short EAF dated April 6, 2018]).

Department staff provided for a public comment period with respect to the SPDES permit in 2018. Three extensions were granted to the public comment period (see Sheeley Affidavit ¶ 12). The DEC received eight sets of public comments (see id. ¶ 13; see also id. ¶ 16). Following consideration of the comments and further review, the Department issued the final SPDES permit on October 16, 2019, together with a SPDES Permit Fact Sheet and a DEC Responsiveness Summary (see Sheeley Affidavit ¶¶ 16-18; Sterthous Affirmation, Village Exh V [containing the Village SPDES Permit, SPDES Permit Fact Sheet and DEC Responsiveness Summary]). The SPDES permit issued in October 2019 to the Village allowed for the same daily discharge (0.97 mgd) as the prior permit but incorporated several changes, including new limits for TDS and other parameters, a new mini pretreatment program and new monitoring requirements (see SPDES Permit Fact Sheet at 3 [Summary of Permit Changes]). The newly-issued SPDES permit indicated that the unnamed tributary of the Ramapo River which received the discharge was a Class C water body (see SPDES Permit at 1).

¹³ The SPDES Permit Fact Sheet states that the SPDES permit had expired on August 8, 2014 (see SPDES Permit Fact Sheet at 4, 7).

¹⁴ The 2015 Consent Order stated that the Village had filed an application for renewal of its SPDES permit on December 15, 2014 (see DEC Exh G at 2 ¶ 11). The 2015 Consent Order further stated that the Village took the position that it had completed the renewal application in 2013 but “misunderstood the necessity for submission of the renewal form in light of discussions with the Department” and “in light of certain enforcement activities by the [U.S.] Environmental Protection Agency” (id. ¶ 12). Department staff asserts that the permit application submitted by the Village on December 15, 2014 was unsigned and undated (see Department Staff Reply to Appeals at 1 n 2[2]). Notwithstanding the Village’s arguments, the renewal application was untimely and the SPDES permit had expired by its terms several months earlier. The Village and the Department later executed a second order on consent (effective November 7, 2018) to address further violations of the SPDES permit and applicable regulations (see DEC Exh H ¶ 16).

By letter dated November 14, 2019, the Village requested an adjudicatory hearing with respect to the Village SPDES Permit and, as it characterized, the “significant amendments and conditions” included in the Village SPDES Permit (Sterthous Affirmation, Village Exh S at 1).

APPEALS AND RESPONSES

A review of the issues that the Village and KJP Petitioners have raised on appeal follows.

Standard for Adjudication

The Village argued before the ALJ that, pursuant to the State Administrative Procedure Act (SAPA) and applicable regulatory language in 6 NYCRR parts 621 and 624, it was entitled to an adjudicatory hearing “on each and every issue that it disputes with the permit” (see Village Brief at 15; see also *id.* at 14-18 [discussing its statutory entitlement to a hearing]). The ALJ rejected the argument that the Village is entitled to an evidentiary hearing as a matter of right (see Issues Ruling at 4-5).

The Village, in its appeal, reiterates the argument regarding its entitlement to a hearing (see Village Appeal at 13-15). Department staff correctly contends that no automatic right exists to adjudication as the Village maintains (see Department Staff Reply to Appeals at 2-3).

Part 624 of 6 NYCRR establishes the standards for adjudicable issues. An issue is adjudicable if:

- “(i) it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit;
- (ii) it relates to a matter cited by the department staff as a basis to deny the permit and is contested by the applicant; or
- (iii) it is proposed by a potential party and is both substantive and significant” (6 NYCRR 624.4[c][1][i]-[iii]).

Any legal issue, the resolution of which is not dependent on facts that are in substantial dispute, is generally addressed in the issues ruling (see 6 NYCRR 624.4[b][2][iv]).

As this matter does not involve a permit denial, the relevant standard for applicant Village is set forth in 6 NYCRR 624.4(c)(1)(i). For the KJP Petitioners, the relevant standard is set forth in 6 NYCRR 624.4(c)(1)(iii).

In areas where Department staff has relied on its expertise, Department staff’s evaluation of the application and supporting documentation is an important consideration in determining whether an issue is adjudicable (see Matter of Crossroads Ventures, LLC, Interim Decision of the Commissioner, December 29, 2006 at 6). Conclusory statements or statements unsupported by the record, whether made by an applicant or by a petitioner, are insufficient to raise an adjudicable issue (see e.g. Matter of Sullivan County Division of Solid Waste, Interim Decision of the Deputy Commissioner, February 15, 2005 at 12). Conducting an adjudicatory hearing “where ‘offers of proof, at best raise [potential] uncertainties,’ or where such a hearing would

‘dissolve into an academic debate’ is not the intent of the Department’s hearing process” (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 [quoting Matter of AZKO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12]). Furthermore if a consultant or expert for an applicant (or a petitioner) takes a position in opposition to the position of Department staff, this alone does not of itself make an issue adjudicable.

Each issue raised is evaluated based on the record of the proceeding. The issues proposed are considered in light of the permit and accompanying documents, the content of the submissions of the applicant (as well as petitioners) including affidavits, affirmations and exhibits, and the evaluation of Department staff. In this matter, as evidenced by the analysis and review contained in the Issues Ruling and this decision, determinations were made in consideration of part 624 standards.

Neither an applicant nor a petitioner has any guarantee of or automatic right to an adjudicatory hearing. Part 624 establishes the legal process that ALJs, and the Commissioner or his/her designee, are obligated to follow in order to determine whether adjudication is necessary. No basis exists, in regulation or statute, that allows the ALJ to bypass 6 NYCRR part 624 and order an adjudicatory hearing (see Matter of the Application of Superintendent of Fish Culture, Interim Decision of the Deputy Commissioner, August 19, 1999, at 6).

It would be an abrogation of the responsibilities of an ALJ and a Commissioner or his/her designee, and would be contrary to the applicable regulations, to grant a blanket authorization to proceed to an adjudicatory hearing without an assessment of whether a factual issue has been properly proposed and supported. For an issues conference to serve a worthwhile function, it must not merely catalogue areas of dispute but rather make qualitative judgments regarding the disputes and arguments that an applicant and petitioner(s) raise. Accordingly, any argument that the Village is entitled to an evidentiary hearing as a matter of right is misplaced, ignores the language and intent of 6 NYCRR part 624, and is rejected.

Classification of Tributary

As a Class C water body, the tributary of the Ramapo River that receives the discharge from the Village WWTP is assessed and regulated by Class C water quality standards (see Fagel Affidavit ¶ 4). In its submissions to the ALJ, the Village challenged the stream’s classification as Class C. The Village argued that, because the Department failed to acknowledge the change in classification when it renewed the Village’s SPDES permit over time, the Department is now barred from regulating the stream as a Class C water body (see Village Brief at 7-8).

The ALJ ruled that a Part 624 permit hearing is not the appropriate forum for a challenge to a classification or a reclassification request of a waterbody (see Issues Ruling at 6). The ALJ also noted that the Village had not cited any authority for its position that the Department cannot now regulate the tributary as a Class C water body (see Issues Ruling at 6 n 11).

On appeal, the Village reiterates the arguments that it made before the ALJ and argues that the Department’s alleged misclassification of the stream as a Class C water body rather than

a Class D water body is a “key issue of fact” (Village Appeal at 5) in this proceeding because it led the Department to misapply the reasonable potential analysis (RPA) and set improper water quality based effluent limitations (WQBELs) (see Village Appeal at 3-5).

Department staff argues that the ALJ correctly found that the classification of the stream cannot be litigated in a 6 NYCRR Part 624 permit proceeding (see Department Staff Reply to Appeals at 3). I agree. The unnamed tributary that receives the Village WWTP’s discharge has been classified as a Class C waterbody since 1994. The Department was aware of the proposed upgrade of the classification when it initially issued the SPDES permit to the Village in 1994. The Department set effluent limits at that time that would meet the specifications for both a Class C and Class D stream (see Smith Affidavit ¶¶ 28-29; see also Fagel ¶¶ 4-6, 12). The Village’s argument that the Department “acquiesced” in the Class D stream classification and that the Department should be estopped from regulating the stream as a Class C waterbody is clearly contradicted.

Furthermore, Department staff in its response to the Village Appeal set forth the proper method by which a waterbody may be reclassified (see Department Staff Reply to Appeals at 3). Staff noted that a Part 624 permit hearing proceeding is not an appropriate forum for a challenge to a classification, or for reconsideration of a reclassification request, regarding this waterbody. The proper procedures are set forth in 6 NYCRR part 609, and the Village has not pursued that process (see e.g. Matter of Frank Adamo, ALJ Ruling, November 10, 2009 at 5).

Permit Renewal

In the proceeding before the ALJ, the Village argued that the permit should have been administratively renewed without change because the conditions and circumstances presented were not significantly different and there had been no change in applicable laws or regulations since the issuance of the prior permit. The ALJ held that the Village was not entitled to a “no change” renewal of the permit because, even if it had submitted a timely renewal application, “it would only be entitled to a no-change renewal of the permit if the technical review by Department staff indicated that no new conditions were warranted, which is not the case here” (Issues Ruling at 7).

On appeal, the Village again advances its argument that a permit renewal without change was appropriate. Department staff argues that the SPDES Permit Fact Sheet and DEC Responsiveness Summary “amply counter” the Village’s argument that it is entitled to a renewal of its permit without change (Department Staff Reply to Appeals at 4).

Based on this record, I conclude that the Village is not entitled to an administrative renewal of its permit without change. The Village has not demonstrated that the Department’s review was improper, or that any error occurred in the Department’s treatment of this application. At the outset, I note again that the Village failed to timely apply for a permit renewal.¹⁵ Department staff properly determined that a full technical review was warranted in

¹⁵ On appeal, the Village offers an explanation for its failure to timely file a renewal application, citing, among other things, its participation in meetings with Department staff and a pending federal Environmental Protection Agency (EPA) enforcement action (see Village Appeal at 6-7). I do not view the arguments that the Village has raised to be

accordance with the EPBS (see Smith Affidavit ¶ 23) and, as part of that review, Department staff concluded that new conditions were required (see Sterthous Affirmation, Exh V [letter dated October 16, 2019 from Teresa Diehsner, DEC Division of Environmental Permits to the Village Clerk of the Village of Kiryas Joel]).

In supporting documentation, Department staff provided detailed and comprehensive explanations and justifications for the modifications to the Village's SPDES Permit (see DEC SPDES Permit Fact Sheet [setting forth the information used to (a) determine the Village's SPDES Permit's effluent limitations and (b) establish other permit conditions]; see also DEC Responsiveness Summary [addressing public comments on the permit and its provisions]). The Village's argument for a permit renewal without change is rejected.

Mini Pretreatment Schedule

Both the Village and the KJP Petitioners challenged the mini pretreatment schedule that is contained in the Village SPDES Permit.

--Background

The Village SPDES Permit includes a new Pretreatment Mini Schedule (see Village SPDES Permit at 8). The schedule requires the Village to, among other things, develop procedures for attaining and ensuring compliance with applicable standards, submit results of industrial monitoring, draft a revised local sewer use law and implement the procedures set forth in the permit, including by issuing permits to significant industrial users (SIUs) of the Village WWTP that include limits, monitoring requirements and reporting requirements (see id.).

Based on its review, Department staff found that “a significant part of the solution to meeting the . . . TDS and Chlorides limit would be to implement the Mini Industrial Pretreatment Program proposed in the . . . Permit and require pretreatment for TDS at the [poultry facility]” (DEC Responsiveness Summary at 4 [I.A. General Comments on the Permit (Pretreatment) – Response 1]). In the SPDES Permit Fact Sheet, Department staff elaborated:

“The permittee is required to develop and implement a Mini-Pretreatment Program because it serves a [SIU]. . . . All industrial flow from [the poultry facility] is discharged exclusively to the Village's WWTP. [The poultry facility] is a significant source of pollutants, such as TDS, that are newly regulated under this SPDES permit for the Village's WWTP. A SPDES permittee must regulate the industrial wastes it receives at its WWTP. Therefore, the Village's new permit includes a mini-pretreatment local permitting program” (SPDES Permit Fact Sheet at 11).

The SPDES Permit Fact Sheet acknowledged that the Orange County Department of Public Works (DPW): (1) implements a pretreatment program pursuant to its own SPDES permit for industrial users of the Harriman wastewater treatment plant (Harriman WWTP); and (2) issues

an adequate or justifiable explanation of its failure to file a timely renewal application. Based on the record, the Village did not, in fact, file a timely renewal application (see Sheeley Affidavit ¶ 12; see also SPDES Permit Fact Sheet at 4).

the local permit for the poultry facility, which is the sole SIU that discharges to the Village WWTP (see id.). The SPDES Permit Fact Sheet stated:

“Since the Village’s new permit includes mini-pretreatment program requirements, Orange County DPW may remove [the KJP Petitioners] from its own pretreatment program in the next Industrial Wastewater Pretreatment Program Semi-Annual Report to [the US Environmental Protection Agency]. If the business arrangements between the Village and Orange County DPW remain unchanged, then Orange County DPW, as the operator of the [Village WWTP], may perhaps be the entity that carries out the local permitting program in the Village’s new permit” (id. at 11-12).

--Village Position before the ALJ

The Village asserted that the Department lacks the authority to include a mini pretreatment program in the Village SPDES Permit. The Village argued that the authority to impose an industrial pretreatment program is reserved exclusively to the EPA pursuant to the federal Clean Water Act (CWA) and that the EPA has already exercised jurisdiction over the poultry facility’s effluent (see Village Brief at 26-33).

--Petitioners’ Position before the ALJ

The KJP Petitioners also challenged the Department’s inclusion of the mini pretreatment program in the permit (see KJP Petitioners Petition for Party Status at 9-14, 16-22). Among other things, Petitioners argued that, because their industrial wastewater is already regulated by the County, the Village SPDES Permit, as written, “will leave [the KJP Petitioners] guessing about which pretreatment program and compliance schedule apply” (id. at 3). Petitioners posited that “the Permit establishes a regime where two local Control Authorities – Orange County and the Village – each have separate SPDES permits issued by the Department which directs [Petitioners] to undertake a pretreatment program aimed at reducing TDS and chlorides in [the poultry facility’s] wastewater” and “there is nothing that protects [Petitioners] from being whipsawed between these two programs” (id. at 18).

Petitioners further asserted that the Department lacks the authority to subject Petitioners to two pretreatment programs and that the County and the EPA have exclusive jurisdiction over the pretreatment of [the poultry facility’s] discharge (see id. at 20-22).

--ALJ Ruling

In considering the arguments of the Village and the KJ Petitioners, the ALJ determined:

“[W]ith regard to [publicly owned treatment works (POTWs)] that do not have an approved pretreatment program, and SIU’s that are not subject to national categorical pretreatment standards, the Department has lead responsibility for compliance monitoring and enforcement, and the authority to require a POTW, through its SPDES permit, to develop and implement a ‘mini’ pretreatment program” (Issues Ruling at 8).¹⁶

¹⁶ The Village WWTP is a POTW.

The ALJ cited DEC's Division of Water Technical and Operational Guidance Series (TOGS) 1.3.3 for this proposition (see Issues Ruling at 8). The ALJ held that, in the circumstances here, the Department has the authority to establish a mini pretreatment program through the Village's SPDES Permit (see id.). The ALJ similarly rejected the Petitioners' contentions (see id. at 16-17 n 22).

--Arguments on Appeal

On appeal, the Village contends that a factual issue exists as to whether Orange County's EPA-approved pretreatment program applies only to the Harriman WWTP (see Village Appeal at 7). In addition, the Village argues that the record reveals the existence of a factual dispute as to "the relationships and underlying authority of and between the various agencies, including the EPA, the Department, Orange County, and the Village" (Village Appeal at 8).

The Village also repeats its arguments concerning the Department's authority to impose a pretreatment program in the Village's SPDES Permit. The Village asserts that the County's existing, EPA-approved pretreatment program specifically governs the poultry facility's discharge to the Village WWTP (see Village Appeal at 24-25). The Village claims that the ALJ overlooked that fact and that the Department lacks the authority to impose the mini pretreatment program in the Village's SPDES Permit (id. at 22-27).

The KJP Petitioners, on appeal, contend that the ALJ erred by failing to address Petitioners' primary argument, namely that the Village SPDES Permit "creates a legally impermissible arrangement by subjecting [Petitioners] to two pretreatment programs, with no mechanism for coordination between EPA, the Department, the Village and/or Orange County leaving [Petitioners] caught in the middle" (KJP Petitioners' Appeal at 2; see also id. at 4-5). Petitioners urge that, because their discharge is already regulated under the County's pretreatment program, and their facility is the sole SIU in the Village, the mini pretreatment program contained in the Village's SPDES Permit is unnecessary (see id. at 5).

In addressing KJP Petitioners' and the Village's appeals, Department staff maintains that the ALJ properly resolved this legal question and that ample authority exists for the inclusion of the mini pretreatment program in the Village's SPDES Permit (see Department Staff Reply to Appeals at 4-8; see also Smith Affidavit ¶¶ 88-90). In addition, Department staff contends that the "dual control" objection to the mini pretreatment program is meritless, and that there is no reason to view the pretreatment program governing the Village WWTP and the pretreatment program governing the Harriman WWTP as competing.

--Discussion

Upon review, I hold that the Department properly included the mini pretreatment program in the Village SPDES Permit. Contrary to the Village's argument, the Department's authority to include the mini pretreatment program in the Village's SPDES Permit is fully supported by the law. The CWA and its regulations set forth pollutant discharge limits for industrial (non-domestic) users of POTWs, with the objective of preventing the introduction of pollutants into POTWs which will pass through the treatment works or interfere with the

operation of a POTW (see 33 USC 1317 [b][1]; 40 CFR part 403). These limits are imposed upon all industrial users regardless of whether the POTW to which they discharge is required to develop a pretreatment program pursuant to 40 CFR 403.8 (see 40 CFR 403.5[a][1]; see also 40 CFR 403.8).¹⁷ The Department’s regulations provide, in turn, that “[a]ll POTWs shall comply with the provisions contained in 40 CFR 403.5 (a), (b), (c), and (d)” (6 NYCRR 750-2.9 [b] [1]).

The CWA allows the states to impose requirements, including pretreatment standards, so long as the requirements are “at least as stringent as federal law demands” (Matter of Natural Resources Defense Council, Inc. v New York State Dept. of Env’tl. Conservation, 25 NY3d 373, 381 [2015]; see also 33 USC § 1370). Specifically, CWA § 307(b), pertaining to the promulgation of federal pretreatment standards for POTWs, provides: “Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standards established under this subsection” (33 USC 1317 [b][4]; see 40 CFR 403.4 [“Nothing in this regulation is intended to affect any Pretreatment Requirements, including any standards or prohibitions, established by State or local law as long as the State or local requirements are not less stringent than any set forth in National Pretreatment Standards, or any other requirements or prohibitions established under the Act or this regulation”]).

In addition, although New York State has not received delegation from the EPA to administer the federal pretreatment program, the Department and EPA have agreed to share responsibilities with respect to implementing the federal regulations and CWA (see Smith Affidavit ¶ 88, DEC Exhs Q and R [agreements between EPA and DEC regarding the conditions and procedures to be followed in implementing 40 CFR Part 403 general pretreatment regulations]). Pursuant to an Interim Memorandum of Understanding (IMOU) entered into between the EPA and the Department on November 24, 1992, it is the responsibility of the Department to

“[i]dentify non-local^[18] POTW[s] where partial pretreatment program development and implementation is needed. Under the SPDES permit, require industrial user surveys and pretreatment controls as resources permit” (id., DEC Exh Q [1992 IMOU at III A.2.b.]).

The IMOU further states, with respect to non-approved (non-local) pretreatment programs:

“DEC, in accordance with the annual workplan, will continue to require through SPDES permits the development of ‘mini’ pretreatment programs to aid EPA and DEC in tracking [SIU] compliance where needed. These mini (or partial) pretreatment programs will not only identify SIU[s], but will determine whether legal authority controls (e.g. sewer use laws) are adequate and will require industrial users pe[r]mits and implementation oversight. This mini pretreatment program oversight requires local limit

¹⁷ In this case, the Village WWTP does not have a total design flow greater than 5 mgd and therefore is not required to establish a pretreatment program under the federal regulations (see 40 CFR 403.8 [a]).

¹⁸ The IMOU refers to non-Approved Pretreatment Program areas as “non-locals,” as opposed to Approved Pretreatment Programs, which it refers to as “locals” (see DEC Exh Q at 1992 MOU at I [fourth paragraph]).

development (to include categorical pretreatment standards), monitoring and inspection of SIU[s] and enforcement according to DEC approved procedures” (id. at III D.1.b.).

In 1997, the Department’s Division of Water issued a guidance document, TOGS 1.3.3, which addressed SPDES permit development for POTWs. TOGS 1.3.3 provides, in relevant part:

“Where a local municipal authority does not have a[n EPA] approved pretreatment program, but serves industry(s) subject to federal standards (categorical industry) or has a non-categorical significant industrial user and the Regional Water Engineer feels that it would be beneficial, that local authority will be required to develop a mini pretreatment program.

Such a program will be required though permit modification utilizing the boiler plate contained in **Appendix C**” (TOGS 1.3.3 at 18 [emphasis in original]).

In this proceeding, Department staff has submitted a communication from an EPA representative confirming that “EPA and DEC agree that it is DEC’s responsibilit[y] to administer the mini-pretreatment programs. The [I]MOU defined the shared roles and responsibilities on the oversight of the pretreatment programs. EPA has not experienced any implementation or enforcement issues with the federal pretreatment programs because of the existence of DEC’s mini-pretreatment programs” (Affirmation of Carol Conyers in Sur-Reply dated February 23, 2021 [Conyers Affirmation] attaching DEC Exh HH [EPA Response to Question 5]). In addition, the record indicates that EPA was provided with the SPDES permit for the Village WWTP and did not provide any comments objecting to the permit (Smith Affidavit ¶ 91; see also SPDES Permit Fact Sheet Appendix at 30 [Industrial Mini Pretreatment Program] referencing supporting federal and state regulations).

The record establishes that, while the poultry facility is not subject to federal categorical pretreatment standards (see Smith Affidavit ¶ 98),¹⁹ it is an SIU because it discharges an average of 25,000 gallons or more of process wastewater per day to the Village WWTP (see Petition at 4-5; Smith Affidavit ¶¶ 99-101; 40 CFR 403.3 [v][1][ii]).²⁰ Therefore, it is subject to federal pollutant discharge limits and is prohibited from introducing into the Village WWTP any pollutant which will pass through the treatment works or interfere with the operation of the WWTP (see 40 CFR 403.5 [a][1]).

¹⁹ DEC Engineer Smith states, in ¶ 98 of her affidavit, as follows:

“The Meat and Poultry Products Point Source Category is defined in 40 CFR Part 432. KJ Poultry engages in both Poultry First Processing . . . and Poultry Further Processing . . . which are defined activities under this industrial category. However, since the pretreatment standards for discharges to POTWs are “reserved,” there are no numeric limits at this time that would be applicable, so KJ Poultry is not subject to Categorical Pretreatment Standards.”

²⁰ Department staff assert that the poultry facility also satisfies the criteria for a SIU because it contributes a process waste stream which makes up 5% or more of the average capacity of the Village WWTP (see Smith Affidavit ¶ 101; 40 CFR 403.3 [v][1][ii]).

Although the Village argues that the poultry facility is already subject to an existing EPA-approved pretreatment program under the Orange County SPDES permit for the Harriman WWTP, such that the mini-pretreatment program included in the Village's new SPDES permit is unnecessary, there is no record support or legal authority for the Village's assertion. The Orange County Sewer District No. 1 received EPA approval for a pretreatment program for the Harriman WWTP in 2008 (see Conyers Affirmation, DEC Exhs HH [response to Question 1], JJ) and the approved pretreatment program was incorporated into the County's SPDES permit for the Harriman WWTP (see Sterthous Affirmation, Village Exh K at 10-12). However, KJP Petitioners do not discharge to the Harriman WWTP as all industrial flow from the poultry facility is discharged "exclusively" to the Village WWTP (SPDES Permit Fact Sheet at 11). There is nothing in the Village's SPDES Permit, the County's SPDES permit or the permit issued by the County under the County Sewer Use Law to the poultry facility which indicates that the County's existing EPA-approved pretreatment program for the Harriman WWTP covers the poultry facility's discharges to the Village WWTP.²¹ There is also nothing in the record indicating that the EPA has authorized the County's application of its EPA-approved pretreatment program to the Village WWTP. Indeed, an EPA pretreatment program audit report, prepared April 23, 2015, specifically provides that the Harriman WWTP "is the only POTW covered under the approved pretreatment program, therefore, the Kiryas Joel Meat Market is not covered under the approved pretreatment program" (DEC Exh W at 2).

Although not subject to an EPA-approved pretreatment program, the poultry facility, as an industrial discharger to a POTW located in the Orange County Sewer District No. 1, is subject to pretreatment requirements pursuant to a permit issued to the poultry facility by the County under the County Sewer Use Law (see Sterthous Affirmation, Village Exh O [Orange County Department of Public Works Industrial Wastewater Discharge Permit -- Significant Industrial User]; Village Exh J at 2). However, this permit does not impose specific discharge concentration limits for various parameters, including TDS and chlorides which are of primary concern here (see Sterthous Affirmation, Village Exh J at 38-39; Village Exh O at 1-2). The SPDES Permit Fact Sheet notes that the poultry facility is a significant source of pollutants, such as TDS, "that are newly regulated under this SPDES permit to the Village's WWTP" (id. at 11; see also id. at 20-21 [referencing new requirements for TDS and chlorides]).²²

Under the circumstances presented here, I find that it was appropriate and authorized for the Department to include the mini pretreatment program in the Village's SPDES Permit in order to impose pretreatment requirements upon the poultry facility's discharge to the Village WWTP.

²¹ The Village argues that 40 CFR 403.8 supports its position that the County is required to implement a pretreatment program for both the Village WWTP and the Harriman WWTP because it operates both of them and their combined flow exceeds 5 mgd (see Village Appeal at 25-26). Section 403.8 of 40 CFR contemplates that a "combination of POTWs operated by the same authority" may be considered as one POTW for purposes of determining whether the POTW is required to develop a pretreatment program (40 CFR 403.8 [a]). It does not follow that an EPA-approved pretreatment program applicable to one POTW necessarily applies to another POTW operated by the same municipality.

²² The SPDES Permit Fact Sheet states that the existing effluent quality of the Village WWTP discharge for TDS, based upon sampling collected between 2014 and 2017, was 5,000 mg/L, well above the water quality standard (WQS) of 500 mg/L (see SPDES Permit Fact Sheet at 20).

In accordance with 6 NYCRR 750-2.9(b)(1) and 40 CFR 403.5, the Village is required to ensure that the industrial discharges to its WWTP comply with State and federal requirements and will not cause pass through, interference or any other violation of the Village's SPDES Permit (see DEC Responsiveness Summary at 4 [Response 1]). The Department's mini pretreatment program ensures that TDS discharges from the poultry facility to the Village's WWTP do not pass through, interfere with the operation of, or otherwise be incompatible with the WWTP and is necessary and warranted for the protection of the State's waters. I do not see any legal argument that has been presented in this proceeding that would preclude the Department from requiring a mini pretreatment program in the Village's SPDES Permit as has been imposed here.²³

Discharge Limits and Monitoring Requirements

In this proceeding, the Village challenged the discharge limits imposed in the Village SPDES Permit for ammonia (N), TDS, bis (2 ethylhexyl) phthalate, nitrite, copper, cyanide, phenolics (total unchlorinated), dissolved oxygen and total phosphorus, the imposition of testing for whole effluent toxicity (WET) and the imposition of new monitoring requirements for ultimate oxygen demand (UOD), total Kjeldahl nitrogen (TKN), chloride, sodium, bis (2 ethylhexyl) phthalate, nitrite, cyanide and phenolics (see Issues Ruling at 8-9). The ALJ considered the Village's objections including but not limited to objections to sampling, reporting and monitoring requirements (see Issues Ruling at 9-13). The ALJ concluded that nothing in the record supported the Village's assertion that the limits set by Department staff are affected by an error of law or unreasonable (see id. at 13).

Department staff provided a detailed and comprehensive review for each effluent limit, as well as for the whole effluent toxicity testing and monitoring requirements (see Smith Affidavit ¶¶ 41-87). Furthermore, the technology based effluent limitations (TBELs), water quality-based effluent limitations (WQBELS), existing effluent quality, and a discussion of the selected effluent limitation for each pollutant present in the discharge from the Village WWTP are set forth in the SPDES Permit Fact Sheet Pollutant Summary Table (see pages 14-23; see also pages 10-12 ["Permit Requirements"] and pages 24-30 ["Appendix: Regulatory and Technical Basis of Permit Authorizations"]). The DEC Responsiveness Summary presented a thorough evaluation of the public comments, including comments directed to specific permit limits, levels and monitoring (see Section II. Specific Comments on the Permit at 7-20). On this record, I see no basis to disturb the limits or monitoring and testing requirements established by Department staff.²⁴

²³ As of 2019, mini pretreatment programs had been incorporated into over 75 permits across the State (see DEC Responsiveness Summary at 5 [Response 1 – top of page]).

²⁴ In its appeal, the Village reiterates its argument before the ALJ that there is a factual dispute with respect to "the data relied upon by the Department in justifying the permit conditions" as to TDS, noting that the Department, in its reply in this proceeding, cited to a report that was published after the permit was issued (see Village Appeal at 8-9). The ALJ rejected this argument in a footnote, stating: "While the Smith Affidavit references a report dated July 1, 2019, it does not indicate that Department staff relied upon the data in that report in setting the TDS limit" (Issues Ruling at 10 n 17). I agree with the ALJ that the Village's argument in this respect is without merit. Significantly, Department staff advises that staff did not consider or rely on the 2019 stream sampling report or the underlying data in preparing the draft or final permit in this matter (see Department Staff Reply to Appeals at 10).

TDS Limits

The KJP Petitioners argued before the ALJ that the Village SPDES Permit “fails to properly account for background levels of TDS,” and that a hearing on that issue is required (KJP Petitioners’ Petition for Party Status at 14). The KJP Petitioners further noted that “upstream sampling conducted by the Village in 2017 and reported to DEC as part of the Village’s May 2017 headworks analysis report indicate that there may be upstream non-industrial sources contributing TDS to the receiving waters” (*id.* at 15; *see also* Meinert Affidavit ¶ 22). The KJP Petitioners contended that the SPDES permit requires them to address all TDS in the receiving waters not just the TDS that the poultry facility “caused or contributed” (KJP Petition at 16). According to the KJP Petitioners, a background sampling program should be undertaken before the Department establishes any WQBEL for purposes of the Village’s SPDES Permit.

The ALJ rejected the KJP Petitioners’ arguments, finding that petitioners “failed to provide legal support for the assertion that background conditions must be considered in establishing a WQBEL for TDS” (Issues Ruling at 18). The ALJ concluded that petitioners had not raised a substantive and significant issue with regard to the establishment of the TDS effluent limit, noting that petitioners had not provided sampling data and had not demonstrated that there are upstream sources of TDS from another SIU (*see id.*).

In their appeal, KJP Petitioners argue that the ALJ erred in finding that no factual issues existed for adjudication with respect to the WQBEL for TDS that was included in the Village SPDES Permit (*see* Petitioners’ Appeal at 3). Petitioners argue that the proffer of their expert and that of the Village’s expert provided sufficient specificity to raise a disputed factual issue as to the TDS limit that the Department has set (*see id.* at 3, 5-6). Petitioners further argue that the ALJ impermissibly shifted the burden to KJP Petitioners and the Village to provide data on background and in-stream conditions (*see id.* at 3, 6-7). Petitioners posit that TOGS 1.3.3 requires a background sampling program before the establishment of a WQBEL where there are indications that significant non-industrial sources are impacting the receiving waters (*see id.* at 7).

Department staff argues that the ALJ correctly concluded that it was appropriate for staff to set the WQBEL for TDS at the water quality standard where the Village WWTP discharges to an intermittent stream and staff determined that there is a reasonable potential for the permittee’s effluent to exceed the published water quality standard (*see* Department Staff Reply to Appeals at 22-24). Staff also addresses what it characterizes as Petitioners’ misinterpretations of the Smith Affidavit (*see id.* at 23-24).

Petitioners have not raised a substantive and significant issue with regard to the establishment of the TDS effluent limit. As I have stated before, in areas of Department staff expertise, Department staff’s evaluation of the application and supporting documentation is important in determining the adjudicability of an issue (*see e.g. Matter of Crossroads Ventures, LLC*, Interim Decision of the Deputy Commissioner, December 29, 2006, at 6). Pursuant to CWA regulations, Department staff, in developing effluent limits, must assess whether a pollutant is or may be “discharged at a level which will cause, have the reasonable potential to

cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality” (40 CFR 122.44[d][1][i]).

The record before me reflects that Department staff appropriately undertook a reasonable potential analysis to determine whether an effluent limit was necessary to protect the receiving waterbody (see Smith Affidavit ¶ 9; see also DEC Responsiveness Summary at 23-24 [DEC Response Nos. 48 and 49]). Where, as here, there is a reasonable potential for a violation of the water quality standard, a WQBEL is developed (see Smith Affidavit ¶¶ 10-11 [explaining the WQBEL process]; see also SPDES Permit Fact Sheet at 27-28 [same]).

Department staff set a maximum daily effluent limit for TDS at 500 mg/L, which is the water quality standard for a Class C waterbody (see SPDES Permit at 3, SPDES Permit Fact Sheet at 20; see also 6 NYCRR 703.3). The WQBEL for TDS, as all WQBELs in the permit, was set at the water quality standard, consistent with Department guidance, because the Village WWTP “discharges to an intermittent stream that has no assimilative capacity at critical low-flow conditions” (Smith Affidavit ¶ 12; see TOGS 1.3.1 at 8 [“If no dilution is available (intermittent flow stream), standards should become end of pipe limits”]).

Furthermore, Department staff’s position that “[u]pstream background data, when available, does not affect the development of the WQBEL under these circumstances because the receiving waterbody at critical low-flow conditions is dry” (Smith Affidavit ¶ 11) is well supported by Department guidance (see TOGS 1.3.1). Petitioners’ assertion that the ALJ improperly shifted the burden of proof to them is rejected. The assertions of KJP Petitioners’ expert that “the available data is sufficient to demonstrate that there may be upstream non-industrial sources contributing TDS to the receiving waters” for the Village WWTP and that further investigation should be conducted in this regard (Meinert Affidavit ¶ 22) are conclusory. No specific sources were identified and the speculation about such sources is insufficient to demonstrate that a factual dispute exists as to the TDS effluent limit.²⁵

SEQRA

On appeal, the Village also challenges, as it did before the ALJ, the sufficiency of the Department’s SEQRA review of the Village SPDES Permit application. Specifically, the Village contends that the Department failed to comply with SEQRA’s procedural and substantive mandates inasmuch as the determination of significance contained only four sentences that do not, according to the Village, amount to a reasoned elaboration of the Department’s determination (see Village Appeal at 16-18). The Village contends that the Department failed to take the requisite hard look at potential adverse environmental impacts. The Village argues that the Department specifically failed to consider the potential impacts to community character that

²⁵ As Department staff indicates, “[i]n the absence of background data, staff assume there is no pollutant present upstream of the discharge. If background data is available and it shows the pollutant is present upstream of the discharge, the WQBEL is reduced – made more stringent – to ensure the water quality standard is met downstream” (Smith Affidavit ¶ 10). Accordingly, if Petitioners presented background data demonstrating that there was an upstream source of pollution, it would have led to a permit condition that would be more restrictive (and less favorable to Petitioners) than what is imposed here. In any event, no such upstream discharges have been identified.

it contends will result from the Village's efforts to achieve compliance, and instead took an "outcome-driven approach" (id. at 18).

The Village identifies a number of "consequential actions and potential impacts" that it asserts may arise as a result of the modification of the Village SPDES Permit and which were not considered by Department staff in its SEQRA review (Village Appeal at 20). According to the Village, these include: (a) the cost and energy implications of the Village's installation of reverse osmosis technology; (b) the social and economic impacts of the potential shutdown of the poultry facility and resulting social and economic impacts to the Village; (c) the possibility that the poultry facility may need to divert its wastewater to the Harriman WWTP; and (d) the possible shutdown of the Village WWTP and diversion of all the wastewater it receives to the Harriman WWTP (id. at 20-21).

Pursuant to SEQRA, "[a]s early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement [(EIS)] need be prepared for the action" (ECL 8-0109 [4]). The accompanying regulations provide that "[t]o determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (6 NYCRR 617.7 [a][2]). In making this determination, the lead agency is required to "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment . . . and . . . set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7 [b] [3], [4]).

The ALJ considered the Village's objections to the SEQRA process that Department staff followed. The ALJ determined that, since the maximum design flow of the Village WWTP (0.97 mgd) remained unchanged under the new permit and the modifications to the permit would result in improvements to water quality, staff's determination that the permit would not have an adverse impact upon the environment, community character or existing population distribution or growth was reasonable (see Issues Ruling at 14). The ALJ also found that the adverse impacts cited by the Village "are solely economic and speculative in nature" (id.), and concluded that the Department's SEQRA determination was rational and not affected by an error of law (id. at 15).

The record demonstrates the comprehensive and thorough nature of Department staff's SEQRA review, as is well reflected in the affidavit of Scott Sheeley, the Department's Chief Permit Administrator (see Sheeley Affidavit, ¶¶ 19-22, 24-29 [setting forth the steps in staff's SEQRA review and analysis]). Staff completed a Short EAF dated April 6, 2018 which, among other things, indicated that no impact, or only small impacts, may occur with respect to each of the eleven designated impact categories, including the character or quality of the existing community (see Short EAF Part 2). In its Determination of Significance, Department staff stated:

"Following a full technical review, this renewal and modification will bring the permit up to date reflecting applicable laws and regulations. There are no physical disturbances to the sites. The permit limits are protective of water quality. For these reasons, no

significant adverse environmental impacts are associated with [DEC's] action to renew and modify this permit" (Short EAF Part 3).

The potential adverse economic impacts identified by the Village are beyond the scope of SEQRA review in this matter. These do not relate to impacts on existing community character but to the costs that the Village anticipates that it and the KJP Petitioners will incur in order to comply with new permit conditions and requirements and the possible consequences if they are not able to afford those costs. As has been previously held, "SEQRA review is a vehicle to address adverse environmental impacts and consideration of adverse economic impacts that are unrelated to environmental impacts is not within its purview" (Matter of Hyland Facility Associates, Interim Decision of the Commissioner, August 20, 1992, at 5; see also Matter of Sithe/Independence Power Partners, L.P., Interim Decision of the Commissioner, November 9, 1992, at 2; Sheeley Affidavit ¶ 32 [scope of review under SEQRA "does not include the evaluation of purely economic impacts, let alone evaluating the type of speculative, secondary impacts conjectured by the Village that might someday arise solely due to the potential cost of compliance"]; Department Staff Reply to Appeals at 13-15 [addressing the speculative and cost compliance issues raised by the Village]).

Based on this record, the Department's SEQRA review and analysis was clearly rational and not affected by an error of law.

Economic Considerations

The Village argued before the ALJ that the significant changes with respect to effluent limitations required by the modified permit will cause substantial financial and economic impacts to the Village community. The Village contended that the permit should have contained an economic cost analysis, and, because the Department neglected to consider such economic impacts, the permit should be annulled and the matter remanded to the Department (see Village Brief at 39-41; see also KJP Petitioners Petition at 12 n 8). The ALJ rejected this argument (see Issues Ruling at 15-16).

Other than some general references to cost (see e.g., Village Appeal at 9), the Village did not expand upon its economic arguments on appeal. The focus here is the cost of implementing the WQBELs set forth in the Village SPDES Permit. As I have referenced previously and reiterate here, it is well settled that WQBELs are set without regard to cost or technology availability (see Matter of Orange County Dept. of Public Works, Decision of the Commissioner, January 29, 2020 at 4).

Schedule of Compliance

Pursuant to ECL 17-0813, SPDES permits may contain compliance schedules. Such schedules "shall require that the permittee within the shortest reasonable time consistent with the requirements of the [CWA] conform to and meet," among other things, applicable effluent limitations and pretreatment effluent standards (ECL 17-0813; see also 6 NYCRR 750-1.14 [a][DEC "shall establish specific steps in a compliance schedule designed to attain compliance within the shortest reasonable time, consistent with the act and ECL, article 17"]).

The SPDES Permit for the Village WWTP contains a schedule of compliance that sets forth the parameters affected, interim effluent limits, compliance action and due dates (see Village SPDES Permit at 9-10). The provisions in the Village SPDES Permit were the subject of an extensive, multi-year review by Department staff, and the Permit was developed in accordance with the statutory and regulatory requirements, and in recognition of the significant environmental impacts of the discharges from the Village WWTP.

Questions about the sufficiency of the time periods in the compliance schedule were raised during the comment period and were addressed in the DEC Responsiveness Summary (see DEC Responsiveness Summary at 15-16, 20 [DEC responses to comments 24-28, 40]). DEC staff noted that there is flexibility in the compliance schedule as the Village may apply for a variance from the WQBELs following the procedure in 6 NYCRR 702.17 (DEC Responsiveness Summary at 15 [response to comment 26], 16 [response to comment 28]). None of the public comments proposed alternative schedules of compliance that could be incorporated into the Village SPDES Permit (see Smith Affidavit ¶ 36). A further discussion of the schedule of compliance and the rationale for the schedule is set forth in the SPDES Fact Sheet (see SPDES Fact Sheet at 12).

The Village, in this proceeding, objected to the schedule of compliance set forth in the permit (see Village Brief at 33). Specifically, the Village challenged: (1) the requirement that certain compliance items were required “in as little as one month from the effective permit date;” (2) the 6-month deadline for the submission of an Engineering Report and Construction Schedule detailing a plan to meet various permit limits; and (3) the 27-month deadline for the Village to meet the final permit limits for various parameters (see Village Brief at 33-34). The Village further argued that no rational basis existed for the shorter schedule of compliance in its permit when compared with the schedule of compliance established in the SPDES permit for the County’s Harriman WWTP (see id.).

The KJP Petitioners, in turn, argued that the timeframes set forth in the mini pretreatment schedule were arbitrary. The Petitioners argued that these were “adopted wholesale” from TOGS 1.3.3 Appendix C without regard to the facts of this case (Petition at 10). Petitioners also noted that the County was provided a 59-month period for compliance with TDS limits in its permit, where the Village was given a lesser time to comply with the TDS limits (see id. at 11). Petitioners argued, as did the Village, that the Village SPDES Permit’s deadline is “impossible to meet” especially since it is reliant on Department action for which there is no deadline (id. at 12).

In response, Department staff argued that the compliance schedule in the permit is appropriate, “although significant flexibility remains available,” and noted that the Village had not submitted an alternative schedule during the review process (Department Staff [Issues Conference] Reply Brief dated November 6, 2020, at 37). Staff underscored that the Village had not submitted any specific alternate schedule that provides compliance with the Village SPDES Permit’s WQBELs within the five-year term of the SPDES Permit nor an application for a variance (see id. at 37). Staff further argued that the compliance schedule for the pretreatment implementation was supported by 6 NYCRR 750-1.14 and consistent with TOGS 1.3.3. Staff asserted that the two-year compliance term was imposed in light of the fact that the industrial discharge to the Village WWTP is a known, important contributor of TDS and chlorides to the

Village WWTP's effluent (see id. at 37-38). Department staff stated that the KJP Petitioners had been on notice since 2013 that the poultry facility would be subject to pretreatment of TDS and chlorides (see id. at 38; Smith Affidavit ¶ 113; see also Smith Affidavit ¶ 114). According to Department staff, the Village's lack of cooperation, "rather than engag[ing] in specific compliance schedule negotiations or variance application efforts during the application process or during the public comment period for the new permit," has impeded resolution of the TDS issue (Department Staff [Issues Conference] Reply Brief at 39).

As to the contrast in timeframes between the permit issued for the Village WWTP and the permit issued for the Harriman WWTP, Department staff noted:

"With respect to the five-year deadline in [the County's Harriman WWTP] SPDES Permit . . . , as opposed to the two-year deadline in the Village's permit, both permits include the same SPDES permit effluent limits for TDS and chlorides. . . . Because the industrial discharge to the Village WWTP is acknowledged to be an important contributor of TDS and chlorides to the influent of the Village's [WWTP], the Village's permit requires the Village to come into compliance with the modified effluent limits within two years" (id. at 38).

In its issues conference submissions, the Village submitted an affidavit of Steven E. Adams,²⁶ sworn to July 31, 2020 (Adams Affidavit) which set forth modifications to the schedule of compliance on behalf of the Village (see Adams Affidavit ¶¶ 72, 73 [timing for engineering report], 77 [same], 79 [preparation of final plans and specifications], and 80 [construction period after approval of the engineering report and plans and specifications]). DEC Engineer Carrie E. Smith, in response, recommended granting an extension of the timeframes for the engineering report submission from 7 months to 18 months and the Plans and Specifications submission from 6 months to 12 months (see Smith Affidavit ¶¶ 37, 38). DEC Engineer Smith recommended denying the request for an extension of the allowable time for construction as the requested time was "speculative" and the Village "would need to demonstrate more time was necessary following the selection of the preferred technology" (id. ¶ 39). Ms. Smith stated that, in light of the foregoing, the schedule regarding that item should be maintained as proposed (see id.). In its reply, Department staff indicated that it would have no objection to the first two proposed time extensions but that, as to the construction time period, "[it] requires a showing of need but is not foreclosed" (Department Staff [Issues Conference] Reply Brief at 39).

The ALJ determined that the Village's objections to the schedule of compliance set forth in the permit were to advance to adjudication (see Issues Ruling at 15). The ALJ noted that some of the dates set forth in the permit had already passed and "the parties are in agreement that some adjustments to the compliance schedule are in order" (id.). The ALJ further found that the Village had raised an issue "with regard to whether compliance with the timeframes contained in the permit is reasonable" (id.). The ALJ also found that Petitioners had demonstrated that they can make a meaningful contribution to this issue (see id. at 17).

²⁶ Mr. Adams is a New York State licensed professional engineer employed by Laberge Group (see Adams Affidavit ¶ 1).

Under these circumstances here, where the Village is not able to immediately comply with the permit's effluent limitations, such a schedule of compliance is required, appropriate and authorized (see ECL 17-0813; see also 6 NYCRR 750-1.14). Department staff have presented arguments in their reply to these appeals that serve as a basis to consider whether there are any adjudicable issues in this proceeding (see Department Staff Reply to Appeals, at 16-19). The scope of my review in this matter includes determining whether the ALJ has properly assessed the adjudicability of an issue.

The ALJ in the Issues Ruling references three factors in discussing the schedule of compliance issue:

“some of the dates in the schedule of compliance have passed during the pendency of [the] issues conference. Moreover, the parties are in agreement that some adjustments to the compliance schedule are in order. Finally, I find that the Village has raised an issue with regard to whether compliance with the timeframes contained in the permit is reasonable” (Issues Ruling at 15).

As discussed below, each of these considerations is addressable without a need for an adjudicatory proceeding.

--Passage of Time

The effective date of the Village SPDES Permit that is the subject of this proceeding is November 1, 2019, and the schedule of compliance contained in the Village SPDES Permit sets forth compliance action due dates which include dates in 2020, 2021 and 2022 (see Village SPDES Permit at 9).

Department staff has, in its papers, stated that “staff ha[s] no objection to a modification of the effective date and corresponding compliance schedule dates . . . such that they follow the issuance of the Commissioner's Decision” (see Department Staff Reply to Appeals at 16).

In consideration of the foregoing, I am remanding this permit to Department staff to modify the Village SPDES Permit as follows:

(a) set the effective date of the Village SPDES Permit to a date subsequent to the date of the issuance of this decision (but no later than April 5, 2023) (modified Village SPDES Permit); and

(b) use the effective date of the modified Village SPDES Permit as the starting point for the schedule of compliance. The time period for the completion of each compliance action that was set in the Village SPDES Permit shall be the same time period (months or years) in the modified Village SPDES Permit,²⁷ except for the two modifications (engineering report

²⁷ For example, if the Village SPDES Permit originally provided for a six month period starting from the effective date of the Village SPDES Permit for the completion of a compliance action, the modified Village SPDES Permit is to similarly provide for a six month period starting from the effective date of the modified Village SPDES Permit for completion of the compliance action.

timeframe, and plans and specifications submission timeframe) discussed in the following subsection (Village Requested Modifications to Specific Schedule of Compliance Due Dates).

These modifications to the SPDES permit and the schedule of compliance resolve any concern associated with the passage of time.²⁸

--Village Requested Modifications to Specific Schedule of Compliance Due Dates

With respect to the schedule of compliance, Department staff has accepted two of the three adjustments requested by the Village – extending the Engineering Report submission timeframe from 7 to 18 months, and extending the Plans and Specifications submission timeframe from 6 to 12 months (see Department Staff Reply to Appeals at 16). Department staff is hereby instructed to revise the schedule of compliance to incorporate the agreed-upon extensions of these two submission timeframes.

With respect to the Village’s third requested schedule adjustment – to extend the construction completion deadline -- staff declined to do so on the ground that any such extension was premature “given that no proposed compliance project has yet been proposed by the Village or approved by Staff” (Department Staff Reply to Appeals at 16). DEC Engineer Smith had recommended that the schedule for this task be maintained as proposed, while encouraging the Village to consider the construction timeline “as it looks at engineering alternatives and propose reasonable alternative dates, if desired” (Smith Affidavit ¶ 39). It should be noted that, if additional time is needed for construction beyond what is provided in the schedule of compliance, the Department’s regulations allow for the modification of a SPDES permit, including a permit’s schedule of compliance (see 6 NYCRR 750-1.18). The construction completion deadline in the Village’s SPDES permit is appropriately based on the extensive review that Department staff undertook of this permit. To adjudicate the construction completion deadline now, prior to the selection of the preferred technology for the Village WWTP, would not be meaningful and would be no more than an academic exercise (see Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8).

--Whether Compliance with the Schedule of Compliance Dates is Reasonable

Lastly, the ALJ found that an adjudicable issue had been raised as to whether compliance with the timeframes contained in the schedule of compliance is reasonable. It is clear that the schedule of compliance was designed to appropriately achieve compliance with the applicable water quality standards. Based on the extensive scope of Department staff’s review of the Village SPDES Permit, the detailed evaluation of appropriate parameter standards, the thorough consideration of public comments, and the recognition of the significant and ongoing impacts of the Village WWTP effluent discharges on the unnamed tributary, the schedule of compliance was clearly anchored to address the environmental needs present here.

²⁸ Where scheduled dates contained in a permit that is the subject of an ongoing Part 624 proceeding have passed, it is within the authority of the ALJ or the Commissioner (or his/her designee) to direct that the dates be adjusted to account for that passage of time.

The new effective date of the modified Village SPDES Permit, the modification of the due dates in the schedule of compliance, and the two agreed-upon extensions of submission timeframes as set forth herein, further accommodate the Village's concerns.

Based on my review of the record, these timeframes are reasonable.

--Village WWTP and Harriman WWTP

Both the KJP Petitioners and the Village argue that it is arbitrary or irrational that the schedule of compliance for the Village WWTP is shorter than that established for the Harriman WWTP. This argument is misplaced. Each individual SPDES permit is evaluated based on the specific circumstances and operations of the facility under review. Such permits are not "cookie-cutter" replicas, but are subject to evaluative Department staff review, consideration of environmental impacts arising from the facility's operation (notably here the discharge of TDS, for example), and the concerns raised by public comment, among other relevant factors (see Department Staff Reply to Appeals, at 18-19 [individual SPDES permits are developed independently]). KJP Petitioners and the Village have provided no basis which would support a finding that the schedule of compliance for the two facilities should be identical.

--Conclusion

Upon a review of this record, I hold that the schedule of compliance is not an adjudicable issue. The modification of the Village SPDES Permit which provides for a new effective date and a schedule of compliance that uses the new effective date as a starting point, addresses the concerns that have been raised regarding the passage of time. The two revisions to the schedule of compliance advanced by the Village in this proceeding and accepted by the Department (engineering report timeframe and plans and specifications submission timeframe) provide an appropriate resolution to those two scheduling concerns. As discussed, adjudication of the Village's third proposed revision (extending the construction completion deadline) would be speculative and an academic exercise that would not be appropriate for adjudication. Any further arguments for adjudication of the schedule of compliance are unavailing.²⁹

To the extent that the Village and Petitioners have raised any additional issues in their appeals, these have been considered and found to be lacking in merit.

²⁹ As there are no issues that are adjudicable, the issue of the party status designation of KJP Petitioners is moot. Petitioners were granted full party status based on a "meaningful contribution" with respect to the reasonableness of the compliance schedule (see Issues Ruling at 18). Based on my review of the record, it is not clear that KJP Petitioners satisfied the requirements for full party status designation pursuant to Part 624, or whether an amicus party status or a rejection of the party status request would have been appropriate in the alternative. However, as no issues have been determined to be adjudicable, I do not need to reach the merits with respect to their designation as a party in this proceeding.

Accordingly, I find that there are no issues for adjudication in this proceeding. I hereby remand this matter to Department staff to modify the SPDES Permit for the Village of Kiryas Joel's wastewater treatment plant consistent with this decision. Department staff is hereby directed to mail the modified Village SPDES Permit to (a) the Village of Kiryas Joel, (b) the attorneys for the Village, KJP Petitioners, and Department staff, and (c) the undersigned no later than close of business on Wednesday, April 5, 2023. Department staff is also directed to email the modified Village SPDES permit to the attorneys for the Village of Kiryas Joel, KJP Petitioners, and Department staff and to the undersigned no later than close of business on Wednesday, April 5, 2023.

For the New York State Department
of Environmental Conservation

/s/

By: _____

Louis A. Alexander
Deputy Commissioner

Dated: March 22, 2023
Albany, New York