

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.

RULING OF THE COMMISSIONER ON MOTION FOR CLARIFICATION
AND PARTIAL RECONSIDERATION

SEPTEMBER 2, 2010

RULING OF THE COMMISSIONER ON MOTION FOR CLARIFICATION
AND PARTIAL RECONSIDERATION

This ruling is in response to a motion made by the Natural Resources Defense Council, Riverkeeper, Inc., Long Island Soundkeeper Fund, Inc., and NY/NJ Baykeeper (collectively, the "Consolidated Petitioners") for clarification and partial reconsideration of my decision dated June 10, 2010, in Matter of Department of Environmental Protection of the City of New York. That decision addressed 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").

For the reasons discussed in this ruling, the motion of the Consolidated Petitioners is denied.

BACKGROUND

As set forth in the June 10, 2010 decision, Consolidated Petitioners failed to raise any substantive and significant issues for adjudication in their appeal from the issues rulings of Administrative Law Judge ("ALJ") Kevin J. Casutto. In addition, I reversed the ALJ's ruling requiring the City to be named as a co-permittee, together with NYCDEP, on the SPDES permits for the WPCPs. Because no adjudicable issues were identified, the matter was remanded to staff of the New York State Department of Environmental Conservation ("Department") for issuance of the permits to NYCDEP, consistent with the draft permits prepared by Department staff and the decision.

Consolidated Petitioners subsequently filed a motion dated July 15, 2010 ("Motion"), requesting that I do the following:

- clarify that the SPDES permits prohibit discharges of pollutants in amounts that cause or contribute to violations of State water quality standards in receiving waters (see Motion, at 1). Specifically, Consolidated Petitioners request that I clarify the decision to state that "pursuant to the terms of the

[SPDES] Permits, a discharge that causes or contributes to a violation of water quality standards is a violation of *the Permits*" (italics in original)(see Motion, at 3)("First Clarification Request");

- clarify that the decision requires that notice be given to Consolidated Petitioners of any proposed modification to the January 2005 administrative consent order on combined sewer overflows (see Motion, at 3-4)("Second Clarification Request"); and
- reconsider my determination that the NYCDEP is qualified to be the sole permittee on the SPDES permits, and that the City does not have to be listed as co-permittee (Motion, at 4-5) ("Reconsideration Request").

In support of the Reconsideration Request, Consolidated Petitioners attach two exhibits to the Motion. The first exhibit includes pages 7-8 to 7-16 and 8-1 to 8-2 from the "Coney Island Creek Waterbody/Watershed Facility Plan Report" dated June 2009, and the second includes a related notice of responsiveness summary and final document availability from the Environmental Notice Bulletin dated August 19, 2009.

Responses dated August 11, 2010, were received from Department staff and NYCDEP in opposition to the Motion.

DISCUSSION

A Commissioner's decision issued pursuant to 6 NYCRR 624.13 represents a final action of the agency. Following its issuance, no express authority exists in 6 NYCRR part 624 or the Environmental Conservation Law for the Commissioner to reconsider a decision, or to entertain other post-decision motion practice.

Commissioners have, however, recognized the inherent authority to reopen a hearing or otherwise reconsider a final decision (see, e.g., Matter of Mohawk Valley Organics, LLC,

Commissioner Ruling, September 8, 2003, at 5; Matter of Charles Pierce, Sr., [Commissioner] Ruling on Motion for Reconsideration, June 9, 1995, at 1-2). Similarly, the Commissioner has the inherent authority to clarify a final decision where the Commissioner deems it necessary. That authority is only exercised in very limited circumstances, none of which are present here.

Consolidated Petitioners' First Clarification Request seeks to reword the decision. Consolidated Petitioners propose to add language to the decision stating that, pursuant to the terms of the SPDES permits, a discharge that causes or contributes to a violation of water quality standards is a violation of the SPDES permits. The decision speaks for itself, and fully addresses the issue that was before me on appeal (see Decision, at 11-13 [noting that the issue was "whether the draft [SPDES] permits failed to conform with the [combined sewer overflow control policy ("CSO Control Policy") of the [U.S. Environmental Protection Agency ("EPA")] because the draft permits did not include narrative water quality based effluent limitations," and addressing relevant legal authority]). The decision holds that NYCDEP is obligated to comply with State water quality standards, whether pursuant to the SPDES permits for the City's WPCPs or pursuant to State law and regulation. The First Clarification Request is denied.

With respect to the Second Clarification Request, the decision is clear with respect to the scope and procedures relating to public participation, including notice (see Decision, at 17-18). No clarification is necessary or warranted.

Finally, the Reconsideration Request is also denied. Consolidated Petitioners had a full opportunity at the hearing and during the appeal process to address the co-permittee issue for which they now seek reconsideration. The grounds for vacating a civil judgment set forth in Civil Practice Law and Rules ("CPLR") § 5015 have been applied in the Department's permit proceedings under 6 NYCRR part 624 (see Matter of Monroe County [Mill Seat Solid Waste Landfill], [Commissioner] Ruling on Motion to Reopen the Hearing, April 14, 1993, at 1-2). The CPLR 5015 standards include excusable default; newly-discovered

evidence which, if introduced at trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification, or vacatur of a prior judgment or order upon which the judgment or order is based (see CPLR 5015 [a][1]-[5]). Consolidated Petitioners make no showing that any of these five standards are applicable here. I note that the information that Consolidated Petitioners attach to their motion was available prior to the issuance of the decision, and does not constitute "newly-discovered" evidence. Accordingly, the submission of this information does not serve as a basis for reopening the hearing record.

Reopening the hearing record may also be appropriate where a decision-maker misapprehended the facts or law (see Matter of Mohawk Valley Organics, LLC, Commissioner Ruling, September 8, 2003, at 6; Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]; see also CPLR 2221). No law or fact, however, was overlooked or misapprehended in this proceeding.

Accordingly, the motion of Consolidated Petitioners is denied in its entirety.

New York State Department of
Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Albany, New York
Dated: September 2, 2010