

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

In the Matter

- of -

the Proposed Department-Initiated Modification
of the State Pollutant Discharge Elimination System Permit
for the Rensselaer County Sewer District No. 1
Wastewater Treatment Plant,

RENSSELAER COUNTY SEWER DISTRICT NO. 1,

Permittee.

DEC No. 4-3832-11/1
SPDES No. NY-0087971

DECISION OF THE COMMISSIONER

September 18, 2009

DECISION OF THE COMMISSIONER

Pursuant to section 621.13 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department" or "DEC") initiated a Notice of Intent to Modify, dated July 24, 2006, with respect to the State Pollutant Discharge Elimination System ("SPDES") permit issued to Rensselaer County Sewer District No. 1 ("RC Sewer District") for its wastewater treatment plant.

In response to the Department-initiated modification ("DIM"), the RC Sewer District, by letter dated November 9, 2006, submitted comments on the DIM, in addition to requesting a hearing. Department staff re-issued the DIM with a cover letter dated May 6, 2008, by which Department staff corrected the earlier notice to state that permittee's wastewater treatment plant is located in a coastal management area (and subject to the Waterfront Revitalization and Coastal Resources Act). The RC Sewer District responded to the re-issued DIM with a cover letter dated June 12, 2008, which was substantially the same as its prior November 9, 2006 response.

Department staff prepared a draft SPDES permit that incorporated its proposed modifications. Among the draft permit conditions were fifteen (15) Best Management Practices ("BMP"), a majority of which were designated as "Not applicable." Among those designated as "Not applicable" was BMP No. 6 ("Prohibition of Dry Weather Overflow").

The matter was referred to the Office of Hearings and Mediation Services, and assigned to Administrative Law Judge ("ALJ") Daniel O'Connell. Following public noticing of the DIM and the conclusion of the public comment period on June 13, 2008, Department staff in a June 16, 2008 e-mail to the RC Sewer District stated that it had changed its position on the applicability of BMP No. 6. As a result, Department staff proposed to replace the language "Not applicable" with language to prohibit dry weather overflows, require prompt abatement of any impairment in the functioning of regulators, and establish a notification requirement with respect to such overflows. Department staff did not publicly notice this proposed change or publicly circulate the replacement language.

Department staff did not advise the ALJ of the proposed change to BMP No. 6 until an August 11, 2008 conference call, several weeks after the legislative hearing and issues conference. Following consideration of subsequent submissions by

Department staff and the RC Sewer District on Department staff's proposed rewrite, ALJ O'Connell, in an Issues Ruling dated December 5, 2008 ("Issues Ruling"), recommended that BMP No. 6 be revised to include Department staff's proposed replacement language, with certain additional revisions.¹

The ALJ did not identify any issues for adjudication. He stated that, if no appeals were filed, he would remand the matter to Department staff, with the recommended new language concerning BMP No. 6, "to complete the applicable procedures related to modifying [the RC Sewer District's] SPDES permit" (see Issues Ruling, at 18).

The RC Sewer District appealed from the Issues Ruling. Based upon my review, I conclude that Department staff's proposed change as to the applicability of BMP No. 6 should have been publicly noticed and subject to a public comment period and, accordingly, it will not be considered in this proceeding. I hereby modify the Issues Ruling and remand the matter to Department staff to issue the modified SPDES permit to the RC Sewer District, with BMP No. 6 to read "Not applicable."

BACKGROUND

Department staff, in its 2006 and 2008 correspondence to the RC Sewer District, stated that its proposed modifications to the SPDES permit were classified as major, and that public notice and opportunity for comment with respect to the modifications would be required. Department staff prepared a draft SPDES permit that incorporated the proposed modifications. As noted, BMP No. 6 ("Prohibition of Dry Weather Overflow"), was referenced in the draft SPDES permit as "Not applicable."

¹ The ALJ's recommended language, which generally paralleled Department staff's proposal, read as follows:

"Prohibition of Dry Weather Overflows - Dry weather overflows from the combined sewer system are prohibited. Upon the Permittee's inspection, the Permittee shall promptly abate any impairment in the operation or function of a regulator, and report the abated action within 2 hours to (1) the Regional Water Engineer in accordance with 6 NYCRR Part 750-2.8(b)(2); and (2) the tributary community" (see Issues Ruling, at 16).

The RC Sewer District commented on the proposed modifications, and requested that, if its issues with the proposed language could not be resolved, an adjudicatory hearing be held.

Proceedings

Notice of the DIM appeared in the Albany Times Union during the week of May 12, 2008 and the Department's Environmental Notice Bulletin on May 14, 2008. A notice of public hearing was subsequently published on June 11, 2008 in the Department's Environmental Notice Bulletin and in the Albany Times Union. The public comment period ended on June 13, 2008.

Representatives of Department staff, the RC Sewer District, and the Town of Brunswick spoke at the legislative hearing that was held on July 15, 2008. An issues conference was held on July 16, 2008 to identify any issues for adjudication concerning the DIM. Participating in the issues conference were Department staff and the RC Sewer District. No individual or organization filed a petition for party status in this proceeding, and no one other than Department staff and the permittee participated in the issues conference. At the legislative hearing and issues conference, no objection to the designation of BMP No. 6 as "Not applicable" was received.

At the issues conference, Department staff and the RC Sewer District reported that many proposed issues had been resolved (see Issues Conference Transcript, at 10-17 [identifying resolved issues]). Department staff and the RC Sewer District requested additional time to attempt to settle the remaining issues (see id., at 31-32). The ALJ granted the request and scheduled a followup status conference call for August 11, 2008.

During the August conference call, Department staff contended that BMP No. 6 relating to the prohibition of dry weather overflow, which in the draft permit read "Not applicable," was in fact applicable. Department staff proposed to the ALJ that the language "Not applicable" be deleted from the draft SPDES permit and replaced with new language to prohibit dry weather overflows, require prompt abatement of any impairment in the functioning of regulators, and provide for a notification requirement with respect to such overflows (see also Affidavit of Cheryle Webber, P.E. dated September 12, 2008 ["Webber Affidavit"], ¶31). The RC Sewer District objected to any change from the previous designation of "Not applicable."

As noted, the ALJ, in the Issues Ruling, recommended modification of BMP No. 6 to include Department staff's proposed language, with certain revisions (see Issues Ruling, at 16-17).

Appeal

The RC Sewer District filed an appeal dated December 23, 2008 from the Issues Ruling ("Appeal"). It contended that Department staff, having publicly noticed a DIM with respect to the RC Sewer District's SPDES permit, could not unilaterally change provisions of the DIM during the course of the proceedings that were neither challenged by the RC Sewer District nor commented on by the public (Appeal, at 1). The RC Sewer District also contended that "relevant facts and law" did not support the substantive change with respect to dry weather overflows contained in Department staff's proposed replacement language for BMP No. 6 (id., at 2).

Department staff filed a response dated January 20, 2009 in opposition to the appeal ("Department Staff January Response"). Department staff maintained that the Issues Ruling should be upheld. It argued that authority existed to modify a SPDES permit following the close of the public comment period (see Department Staff January Response, at 1-3). Department staff contended that the new language did not change the grounds for the publicly noticed modification, did not change the technologies and treatment required by the SPDES permit, and was required by law. Department staff further maintained that the responsiveness summary for the permit modification would set forth the basis for the revisions to BMP No. 6, and that an adjudicatory hearing was the proper proceeding to resolve this contested provision (see id., at 4-5). It also discussed the legal bases requiring the modification of BMP No. 6.

The RC Sewer District subsequently filed an affidavit dated March 11, 2009, sworn to by Philip H. Dixon, Esq. ("Dixon Affidavit"). By that affidavit, the RC Sewer District requested that "newly available" information pertaining to the SPDES permits for the North and South Plants of the Albany County Sewer District that were issued on February 24, 2009, and the applicability of BMP No. 6 to those permits, be considered on the appeal (see Dixon Affidavit, ¶6).

Pursuant to a scheduling conference call, Department staff was provided until March 30, 2009 to file its response. Under cover of a letter of that date, Department staff filed a response ("Department Staff March Response") in which it raised various objections to the Dixon Affidavit. It contended that an

affidavit of counsel was not the proper means to submit such information (see id., at 1-2). Department staff further contended that the information offered regarding the Albany County Sewer District's SPDES permits was not relevant or timely to the proceeding on the RC Sewer District's SPDES permit (see id., at 2-4). Department staff also set forth additional facts and legal argument in the event that the information contained in the Dixon Affidavit was received into the record (see id., at 4-8).

DISCUSSION

The threshold question is whether Department staff's change of position on the applicability of BMP No. 6, and its proposed rewrite of that BMP, required public notice.

Relevant here is the recent procedure that Department staff followed in issuing a DIM to the Albany County Sewer District (South and North Plant) ("Albany DIM") in March of 2009. Under cover of a letter dated March 20, 2009 from DEC's Division of Environmental Permits to Albany County ("March 2009 Letter"), Department staff forwarded a Notice of Intent to Modify the Albany County Sewer District's SPDES permits with respect to BMP No. 6 ("Prohibition of Dry Weather Overflow)." Similar to the RC Sewer District proceeding, Department staff seeks to delete the current "Not applicable" language for BMP No. 6 in the Albany County Sewer District's SPDES permits and insert language to require abatement of the impairment of any regulator and reporting of the abated action to the Department and tributary community.

I am hereby taking official notice of the Department's March 2009 Letter and the Notice of Intent to Modify with respect to the Albany County Sewer District's SPDES permits (see 6 NYCRR 624.9[a][6]). As set forth in the March 2009 Letter, Department staff classified the modification of BMP No. 6 as "major." It further stated that "[p]ublic notice and opportunity for comment are required" (see March 2009 Letter). That position taken with respect to the Albany County Sewer District supports requiring public noticing of the change to BMP No. 6 in the RC Sewer District SPDES permit, and providing a period for public comment on the proposed replacement language.

Requiring public notice of the proposed change is additionally supported by the specific circumstances relating to BMP No. 6's consideration in the RC Sewer District proceeding. The Department's regulations governing permit modifications are

set forth in 6 NYCRR 621.13. Pursuant to the regulations, Department staff must send a notice of intent to modify to the permittee (see 6 NYCRR 621.13[d]). If an administrative hearing is held on a Department-initiated modification, the only issues that may be adjudicated "are those related to the basis for modification . . . cited in the department's notice to the permittee" (see 6 NYCRR 624.4[c][8]).

The ALJ, in his Issues Ruling, correctly states that, in general, the purpose of an administrative hearing is to draw out additional information and legal argument "that may, and often does, lead to further modifications or revisions to [a] draft permit" (Issues Ruling, at 7). Department staff also properly states on this appeal that draft permits often change throughout an administrative hearing process and that each correction and revision does not need to be separately and iteratively noticed (see Department Staff January Response, at 2).

The situation here is distinguishable, however. This is not a hearing on an application for a new project, where all draft permit conditions are under consideration and where new conditions may be added or revised during the administrative review process. Here, where the subject of an administrative hearing proceeding is a Department-initiated modification of a SPDES permit, the scope of the hearing is expressly limited to the permit conditions that the Department has proposed to delete, modify or add and has cited in its notice to a permittee (see 6 NYCRR 624.4[c][8]).

Not all modifications require public notification. Where public notification is required, however, both the permittee and the public must have the opportunity to consider and comment on proposed permit language that change the terms of the original permit. This ensures fairness and an orderly consideration of the Department-initiated modification.

Clearly, proposed modification language which is available prior to the close of any public comment period may be revised based on public comment or issues raised during the permit hearing process. In this matter, if, during the public comment period, comments had been received about Department staff's determination that BMP No. 6 was "Not applicable," consideration of proposed replacement language would have been appropriate and may not have required further public notice.

The determination of further public notice is made on a case-by-case basis. According to Department staff, it would "potentially re-notice [a] DIM if further revisions were deemed

necessary during or after the public comment period which would make the permit less stringent" (see Webber Affidavit, ¶30 [emphasis in original]). However, "where a further revision during the hearing process . . . makes the permit more stringent, the Department would not typically re-notice it but would rather address the further revision in [its] responsiveness summary" (see id.).

Although Department staff indicates that it would "not typically" re-notice more stringent conditions, the specific circumstances relating to the RC Sewer District SPDES permit are relevant to additional notice requirements. Department staff's new determination that the BMP was now applicable (after several years of designating it as "not applicable") and the specific implications of the proposed replacement language on potential municipal liabilities and responsibilities relating to overflows, among other issues, support public notice of the change (see, e.g., Affidavit of Gerard S. Moscinski, Administrative Director of the RC Sewer District, dated October 10, 2008, ¶33 [liability considerations] & ¶¶ 31, 36 & 38 [contributing factors to dry weather overflows from Troy and City of Rensselaer sewer pipes]).

I also note that Department staff should have promptly advised the ALJ of its change in position with respect to the applicability of BMP No. 6. Such notification would have benefitted the administrative hearing process, and would have allowed for consideration of public notice opportunities prior to the legislative hearing and issues conference.

I conclude, for the reasons set forth in this Decision, that Department staff's proposed change in the applicability of BMP No. 6 in the RC Sewer District's SPDES permit must be publicly noticed, and a public comment period provided. Remanding the matter to the ALJ for notice and comment, and further proceedings, however, would delay the implementation of those SPDES permit modifications to which the parties have already agreed. Accordingly, to avoid any delay, I have determined that the proposed replacement language to BMP No. 6 shall not be further considered in this proceeding.

I am not reaching the merits of Department staff's proposed change regarding the applicability of BMP No. 6 or the replacement language. Department staff is not, by this Decision, precluded from addressing the applicability of BMP No. 6, and proposing any revised language thereto, in a subsequent DIM.

I hereby modify the Issues Ruling and remand the matter to Department staff to issue the modified SPDES permit to the RC Sewer District, exclusive of the new language recommended in the Issues Ruling for BMP No. 6. Consistent with this Decision, BMP No. 6 shall read "Not applicable" in the SPDES permit to be issued.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/
Alexander B. Grannis
Commissioner

Dated: September 18, 2009
Albany, New York