

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Proposed
Department Initiated Modification
of the State Pollutant Discharge
Elimination System (SPDES) permit
for the Rensselaer County Sewer
District No. 1 Wastewater Treatment
Plant located in the Town of
North Greenbush, Rensselaer County.

Issues Ruling

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

Rensselaer County Sewer District No. 1
Permittee.

December 5, 2008

Proceedings

Staff of the Department of Environmental Conservation (Department staff) issued a Notice of Intent to Modify (NIM), dated July 24, 2006, concerning the State Pollutant Discharge Elimination System (SPDES) permit issued to Rensselaer County Sewer District No. 1 (Rensselaer County). With a cover letter dated November 9, 2006, Rensselaer County responded to Staff's July 24, 2006 NIM, and requested a public hearing concerning the proposed modification. Subsequently, Department staff referred the captioned matter to the Office of Hearings and Mediation Services to schedule a public hearing. The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell. Staff reissued the NIM with a cover letter dated May 6, 2008, notice of which appeared in the *Albany Times Union* during the week of May 12, 2008 and in the Department's *Environmental Notice Bulletin (ENB)* on May 14, 2008. Rensselaer County responded to the reissued NIM with a cover letter dated June 12, 2008, which was substantially the same as the previous response dated November 9, 2006.

A Notice of Public Hearing dated June 9, 2008 (the Notice) was published in the *ENB* and the *Albany Times Union* on June 11, 2008. The Notice announced the availability of the proposed draft modified SPDES permit and a fact sheet for public review and comment. According to the Notice, the public comment period extended until June 13, 2008. In addition, the Notice scheduled a legislative hearing session for July 15, 2008 at the Town of Brunswick Family Community Center. The purpose of the legislative hearing session was to provide members of the public with an opportunity to comment about Staff's proposed modification to Rensselaer County's SPDES permit. The comments received at the July 15, 2008 legislative hearing session were summarized in a Memorandum and Briefing Schedule dated August 14, 2008.

The June 9, 2008 Notice also scheduled an issues conference for July 16, 2008. The purpose of the issues conference was to identify issues for adjudication concerning the proposed draft modified SPDES permit. The issues conference commenced as scheduled, and the participants were Department staff and Rensselaer County. No one requested party status. (See title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 624.5.)

During the July 16, 2008 issues conference, Rensselaer County was represented by Philip H. Dixon, Esq. (Whiteman, Osterman and Hanna, LLP, Albany, New York). Department staff was represented by Carol Conyors, Esq., Assistant Counsel, and Robyn Adair, Esq.

Prior to the issues conference, representatives from Rensselaer County and Department staff met to resolve the issues raised by Rensselaer County with respect to the NIM and the draft modified SPDES permit. During the issues conference, the parties' representatives reported that many issues were resolved, and the resolved issues were identified on the record. In addition, significant issues related to the long-term control of combined sewer overflows (CSOs), disinfection and the effluent limit for total residual chlorine, and pre-treatment were resolved. (Issues Conference Tr. pp. 10-19; 21-22.)

When the issues conference adjourned, the parties were not able to resolve outstanding issues related to flow management (see 6 NYCRR 750-2.9), and best management practices (BMPs) (Tr. pp. 22-29). However, during a telephone conference call on August 11, 2008, Rensselaer County withdrew its request for a hearing concerning flow management. Mr. Dixon, who is counsel for Rensselaer County, stated during the August 11, 2008 telephone conference call that Rensselaer County accepts the proposed draft modified SPDES permit conditions concerning the long-term control plan outlined on Pages 9 of 17 and 8 of 17, which require a study and the development of the long-term control plan.

As a result of the August 11, 2008 conference call, only one dispute remains unresolved concerning best management practices. In a Memorandum and Briefing Schedule dated August 14, 2008, I authorized the parties to file briefs and responses concerning this issue. With cover letters dated September 12, 2008, Rensselaer County and Department staff timely filed their respective briefs. Staff also submitted supporting documents including an affidavit by Cheryle Webber dated September 12,

2008, and Exhibits A - E. Timely filed replies were received from each party on October 14, 2008. Rensselaer County's reply included an affidavit by Gerard S. Moscinski dated October 10, 2008 and Exhibits A - C. These filings complete the issues conference record and are considered below.

Issues Ruling

The unresolved dispute concerning best management practices (BMPs) concerns a threshold procedural question, as well as an issue concerning BMP No. 6, which prohibits dry weather overflows.

I. Procedural Issue

During the August 11, 2008 telephone conference call, the parties discussed BMPs in general, and specifically discussed BMP No. 6, which prohibits dry weather overflows. As initially written, the proposed draft modified SPDES permit states that BMP No. 6 does not apply. According to Department staff, the basis for the initial determination was that Rensselaer County did not own and maintain the regulators¹ that are part of the inter-municipal combined sewer system. Consequently, Rensselaer County did not comment specifically about BMP No. 6 in its June 18, 2008 reply, because Rensselaer County accepted Staff's initial determination of non-applicability.

Subsequent to the commencement of the public comment period for the proposed draft modified SPDES permit, Department staff contends that it learned that Rensselaer County owns and maintains the regulators. Based on this information as well as the guidance outlined in *Combined Sewer Overflows, Guidance for Nine Minimum Controls*, United States Environmental Protection Agency ([EPA] May 1995), and in the Division of Water's Technical and Operational Guidance Series (TOGS), Department staff changed its position about the applicability of BMP No. 6, and proposes to revise the draft modified SPDES permit.

Rensselaer County objects to the proposed revision, and argues, among other things, that it would withdraw its request for hearing with respect to best management practices. Under

¹ If regulators become impaired, they can divert wastewater from the interceptor sewer lines to the combined sewer system, and bypass the wastewater treatment facility. Dry weather overflows may then result.

these circumstances, Rensselaer County argues further that Department staff is procedurally barred from changing the language of the proposed draft modified SPDES permit in the absence of a request for hearing. Because the hearing request has been withdrawn, Rensselaer County concludes, in general, that the original language of the proposed draft modified SPDES permit should remain unchanged and, in particular, that BMP No. 6, which prohibits dry weather overflows, would not apply.

Therefore, the procedural question, briefed by the parties, is whether, and if so, how the draft modified SPDES permit may be revised in the absence of a request for hearing after the draft modified SPDES permit has been noticed for public review and comment.

A. The Parties' Briefs and Replies

In addition to the comments summarized above, the parties' briefs and replies provide additional argument. Before Staff can revise the proposed draft modified SPDES permit, Rensselaer County argues that Staff must follow the procedures outlined in 6 NYCRR part 621 (Uniform Procedures). Specifically, Rensselaer County maintains that it must have the opportunity to submit a written statement about the proposed revision (see 6 NYCRR 621.13[d]). In addition to the requirements outlined in 6 NYCRR part 621, Rensselaer County notes that the proposed revision may also require Staff to review its initial determination of significance made pursuant to Environmental Conservation Law (ECL) article 17 (State Environmental Quality Review Act [SEQRA]) and 6 NYCRR part 617. Citing the federal Clean Water Act (CWA) at 33 USC § 1215(e) and ECL 17-0805(2), Rensselaer County asserts further that Department staff's proposed revision to the draft modified SPDES permit at this point in the proceeding is contrary to the legislative intent of these statutes because it would improperly limit public participation.

Rensselaer County does not accept Staff's claim that information concerning ownership of the regulators is new. Rensselaer County observes that with respect to BMP No. 1, the original draft modified SPDES permit refers to the "County-owned pump stations, interceptors and regulators." Therefore, Rensselaer County concludes that Staff may not rely on newly discovered information as a basis to further revise the draft modified SPDES permit (see 6 NYCRR 621.13[a][4]).

In its brief, Department staff explains that Staff would issue a responsiveness summary at the close of the public hearing

consistent with the requirements at 6 NYCRR 621.10(e). Staff explains further that the responsiveness summary would address the public comments received during the hearing process, and identify any conditions in the final modified SPDES permit that differ from the conditions in the draft modified SPDES permit. In this instance, Staff stated that the responsiveness summary would, therefore, explain the basis for the change regarding the applicability of BMP No. 6.

In addition to citing to 6 NYCRR 621.10(e), Staff also references TOGS 1.2.2 (*Administrative Procedures and the Environmental Benefit Permit Strategy for Individual SPDES Permits* [June 4, 2003], p. 14), which states that Staff must finalize a SPDES permit after addressing comments and other regulatory requirements. Staff cites a number of administrative cases where the original version of a draft permit was revised after the permit hearing commenced.

In its reply brief, Rensselaer County argues that these cases are distinguishable from the captioned matter on the facts. For example, with respect to *Matter of City of Niagara Falls* (Commissioner's Decision, May 27, 1993 [1993 WL 281933]), Rensselaer County notes that the matter was resolved by stipulation, which is not the case here. Rensselaer County notes further that the *Matter of Occidental Chemical Corporation Niagara Falls, New York* (Commissioner's Decision, July 9, 1990 [1990 WL 186023]) and the *Matter of Eastman Kodak Company* (Commissioner's Decision, January 31, 1989 [1989 WL 66954]) concerned air and hazardous waste permits, rather than SPDES permits, and that any disputes were likewise resolved by stipulations. According to Rensselaer County, the administrative cases cited by Department staff do not address the question of whether Staff may unilaterally revise the draft modified SPDES permit after the draft modified SPDES permit has been noticed for public review and comment.

Staff characterizes the procedural issue raised by Rensselaer County as one of notice. Staff observes that Rensselaer County requested a hearing about various terms of the original version of the draft modified SPDES permit, and that subsequent to that request and during the pendency of the hearing, Staff advised Rensselaer County of the proposed revision concerning BMP No. 6. After being advised of the proposed revision, Department staff contends that Rensselaer County is properly availing itself of the hearing process to challenge Staff's proposed revision.

Department staff argues further that the July 21, 2006 and May 6, 2008 Notices of Intent to Modify identified Staff's concerns about dry weather overflows given the draft permit language for BMP No. 1 (System Maintenance/Inspection). Staff notes that Rensselaer County has not objected to the language for BMP No. 1. Staff contends that the proposed revision is minor but, nonetheless, necessary so that the language in the draft modified permit concerning best management practices (*i.e.*, BMP Nos. 1 and 6) is consistent.

In its reply, Department staff maintains that the terms and conditions of the draft modified SPDES permit related to the captioned matter may be revised during the course of the administrative hearing, and that revisions that occur during the hearing do not have to be re-noticed. Staff argues that it would comply with the provisions outlined at 6 NYCRR 621.10(e)(1), which require the preparation of a responsiveness summary to address this proposed revision, and any others, to the draft modified SPDES permit before issuing the final permit.

In its reply brief, Rensselaer County reiterates its position that Staff may not *sua sponte* revise the draft modified SPDES permit without re-noticing the proposed revision concerning BMP No. 6. Referring to 6 NYCRR part 621, Rensselaer County argues that re-notification is necessary to preserve and protect its rights as well as those of other permittees and the public.

B. Discussion and Ruling

Pursuant to ECL 70-0119(2), "[r]easonable notice of the hearing shall be given to the applicant and ... notice to the public shall be given by publication of a notice of hearing...." Based on the following, I conclude that Rensselaer County had reasonable notice of how Staff intended to modify Rensselaer County's current SPDES permit including the proposed revision to BMP No. 6.

First, on July 24, 2006 and May 6, 2008, Staff advised Rensselaer County of its intent to modify the SPDES permit for the wastewater treatment plant. With each NIM, Staff provided Rensselaer County with a copy of the draft modified SPDES permit, fact sheets, a copy of the completed Short Environmental Assessment Form, and a copy of the Negative Declaration.

Subsequently, the June 9, 2008 Notice of Public Hearing was published in the *ENB* and the *Albany Times Union* on June 11, 2008. The June 9, 2008 Notice announced the availability of the

proposed draft modified SPDES permit and the fact sheet for public review and comment. The public comment period extended until June 13, 2008. In addition, the June 9, 2008 Notice scheduled a legislative hearing session for July 15, 2008 to provide members of the public with an opportunity to comment about Staff's proposed modification to Rensselaer County's SPDES permit.

Because Rensselaer County has been provided reasonable notice of the hearing, Rensselaer County may, as Staff correctly notes, avail itself of the hearing process to challenge the proposed revision to BMP No. 6. The general purpose of the administrative hearing is to draw out additional information and legal argument that may, and often does, lead to further modifications or revisions to the draft permit. Modifications and revisions to the draft permit may be advocated by any party. Ultimately, upon review of the hearing record, the Commissioner will determine whether any proposed modification or revision should be adopted into the final permit.

Therefore, Rensselaer County's draft modified SPDES permit will be refined through the iterative process of the hearing. As in all permit proceedings, including the instant matter, the draft permit, which is defined in the regulations at 6 NYCRR 624.2(m), is a working document subject to modification based on the public comments and the adjudicatory hearing. In addition, an adjudicable issue may arise in relation to potential modifications of a draft permit, even in circumstances where Department staff has determined that the proposed project conforms to all applicable legal requirements (see 6 NYCRR 624.4[c]).

To re-notice every change to the draft permit that may occur during the adjudicatory hearing would result in an extremely inefficient permit review process that would be contrary to the intended purpose of the Uniform Procedures Act ([UPA] ECL article 70).² Consistent with the intended purpose, Staff, at the conclusion of the hearing, will prepare a responsiveness summary

² The purpose of the Uniform Procedures Act is to establish uniform review procedures and time periods in which to take action (see ECL 70-1010), with the intended result of assuring the fair, expeditious and thorough administrative review of regulatory permit applications (see ECL 70-0103[1]).

that identifies conditions in the final SPDES permit that are different from those proposed in the draft modified SPDES permit.

Accordingly, I conclude that Staff may revise its position with respect to the applicability of BMP No. 6 regarding the prohibition of dry weather overflows at this point in the proceeding. Based on the rationale provided above, the proposed revision to the draft modified SPDES permit concerning Best Management Practice No. 6 does not need to be re-noticed.

Furthermore, Rensselaer County may withdraw its hearing request with respect to BMP No. 6. Withdrawing the hearing request, however, does not bar Staff from revising the draft modified SPDES permit. Staff has provided a rationale for the proposed revision with respect to BMP No. 6. If Rensselaer County withdraws its hearing request at this point in the proceeding, the effect would be to withdraw any objection related to Staff's proposed revision to the draft modified SPDES permit. Accordingly, Staff could then issue the revised draft modified SPDES permit after complying with all applicable procedural requirements (see 6 NYCRR 621.13[d]). In the alternative, the hearing would continue, and I would consider the second issue which, for purposes of efficiency, is discussed below (see 6 NYCRR 621.13[e]).

II. Best Management Practice No. 6 (Dry weather overflows)

A. Infrastructure

In its September 12, 2008 brief, Rensselaer County provides information about the wastewater infrastructure in the Cities of Troy and Rensselaer. Rensselaer County explains that before the wastewater treatment facility was constructed, the Cities of Troy and Rensselaer operated sewer lines that carried untreated sewage and stormwater in a generally east to west direction from the Cities to the Hudson River. When the wastewater treatment facility was constructed, interceptor sewer lines were constructed in a generally north and south direction, parallel to the Hudson River. The Cities' sewer lines and Rensselaer County's interceptor lines interface at regulators owned and maintained by Rensselaer County.

According to Rensselaer County, it owns and operates 58 regulators, which are located primarily within the Cities of Troy and Rensselaer. Interceptors are chambers that intercept combined sewer and stormwater flows, and divert the wastewater to Rensselaer County's interceptor lines. The interceptor lines

convey the wastewater to Rensselaer County's facility for treatment before discharge to the Hudson River. During storm events, the volume of wastewater in the Cities' combined sewer lines cannot always be accommodated by Rensselaer County's regulators and interceptor lines. The excess, untreated wastewater overflows from the regulators, and is discharged to the Hudson River via the Cities' sewer lines. These overflow discharge points are identified in the Cities' respective SPDES permits as outfalls.

Rensselaer County states further that it does not maintain any of the Cities' combined sewer and stormwater lines. Consequently, Rensselaer County does not control the Cities' combined sewer lines upstream or downstream from the regulators. Rensselaer County notes that debris can enter the Cities' sewer lines upstream from its regulators, and this debris can impair the function of Rensselaer County's regulators. As a result of regulator impairment, wastewater from the Cities' sewer lines may not be diverted to Rensselaer County's interceptor lines. During dry weather conditions, overflows may occur when the flow through the regulators is impaired. In order to avoid overflows, and dry weather overflows in particular, Rensselaer County has developed and implemented a program to inspect its regulators for debris and, as necessary, remove the debris so that the regulators operate properly. Rensselaer County subsequently notifies the respective tributary community who owns the sewer.

In its brief, Rensselaer County identifies several witnesses, who would testify about the inter-municipal infrastructure related to the combined sewers in the Cities of Troy and Rensselaer as well as the infrastructure associated with Rensselaer County's wastewater treatment facility.

B. Best Management Practices (BMPs)

Department staff explains that BMPs are intended to minimize combined sewer overflows. According to Staff, BMPs were added to the draft modified SPDES permit to comply with guidance issued by EPA entitled, *Combined Sewer Overflows, Guidance for Nine Minimum Controls* (May 1995)³, and the Department's TOGS 1.6.3, *Combined Sewer Overflows (CSO) Control Strategy*.

³ From the *Combined Sewer Overflow Control Policy* (April 1994 [59 FR 18688]), EPA developed a series of guidance documents, one of which is entitled, *Combined Sewer Overflows, Guidance for Nine Minimum Controls* (May 1995).

In its September 12, 2008 brief (p. 8), Department staff recommends the following language for BMP No. 6:

Prohibition of Dry Weather Overflows - Dry weather overflows from the combined sewer system are prohibited. The occurrence of any impairment in the operation or function of a regulator shall be promptly abated and reported to (1) the Regional Water Engineer in accordance with 6 NYCRR Part 750-2.8(b)(2); and (2) the tributary community within 2 hours of becoming aware of the dry weather overflow.

According to Staff, the proposed revised language complies with TOGS 1.3.3 and 1.6.3, and is consistent with EPA's guidance for permit writers, as well as with the current SPDES permits issued to the tributary communities. The tributary communities include the Cities of Troy and Rensselaer, among others. Staff contends that the proposed revised language would encourage Rensselaer County to enter into a notification agreement with tributary communities so that they would become aware of when dry weather overflows could potentially occur, which is significant because the cause of such events may originate upstream.

In its reply, Rensselaer County objects to the first sentence of the proposed language for BMP No. 6 because the prohibition of dry weather overflows from the combined sewer system implies that Rensselaer County would be liable for events over which it has no control to prevent. Rensselaer County argues that the proposed language would impose a blanket prohibition despite the cause and regardless of whether a regulator contributed to the dry weather overflow. In addition, the blanket prohibition does not identify a standard for measuring compliance. Rensselaer County argues further that the proposed language of BMP No. 6 is not consistent with the current wording of BMP No. 1. If, for example, Rensselaer County complies with the inspection, maintenance and reporting requirements in BMP No. 1, Rensselaer County contends that Department staff could still allege that Rensselaer County was in violation of BMP No. 6.

Rensselaer County does not object to developing a program to inspect its regulators, to clean them out as necessary, and to report these activities to the tributary communities. Rensselaer County contends that such a program has been in place for 30 years, and refers to Mr. Moscinski's affidavit in support. Accordingly, Rensselaer County does not object to the current language concerning BMP No. 1 (System Maintenance/Inspection)

because the requisite inspection program is already in place and well established. Rensselaer County, however, objects to including the notification requirement in BMP No. 6 because it is redundant of what would be required by BMP No. 1. By making the reporting requirement part of BMP No. 6, Rensselaer County argues further that by implication, Rensselaer County would be responsible for dry weather overflows and that an impairment of one of the regulators equates to a dry weather overflow, which it does not.

In its reply, Department staff argues that the inspection and maintenance program is not voluntary, as Rensselaer County contends, but would be a requirement of the draft modified SPDES permit. Staff notes that proper functioning regulators are crucial to the overall effective operation of the inter-municipal combined sewer system. Because Rensselaer County has exclusive control over the regulators, Staff asserts that Rensselaer County has a significant responsibility to ensure that dry weather overflow events do not occur.

C. Discussion and Rulings

1. Factual Disputes for Adjudication

When the issue concerning best management practices was discussed at the issues conference, and subsequently framed for briefing, it was not clear whether any factual disputes existed that would need to be resolved by an adjudicatory hearing. Consequently, I authorized the parties to include offers of proof concerning any factual disputes as part of their respective submissions.

In its papers, Rensselaer County has outlined the infrastructure related to the combined sewers owned and maintained by the Cities of Troy and Rensselaer, and the regulators, interceptor lines, and wastewater treatment facility owned and operated by Rensselaer County. Department staff does not offer any proof to substantially rebut Rensselaer County's factual description of the wastewater collection and treatment facilities collectively referred to as the inter-municipal combined sewer system. Therefore, I conclude there are no substantive factual disputes that require adjudication. As a result, the issue becomes whether Department staff has the legal authority to incorporate a condition in Rensselaer County's modified SPDES permit concerning best management practices that prohibits dry weather overflow events.

2. Technical and Operational Guidance Series (TOGS)
1.3.3 and 1.6.3

As noted above, Department staff references, in its papers, two Technical and Operational Guidance Series (TOGS) documents issued by the Division of Water. The Department's program policies, such as the Division of Water's TOGS, however, do not have the force of law (see *Matter of Pete Drown, Inc.*, Interim Decision of the Commissioner, Jan. 27, 1994, at 1; see also Commissioner's Policy CP-1, March 2002). Rather, program policies provide guidance to Staff and the regulated community to assure consistent methods and procedures in the exercise of the Staff's discretion. The ultimate standards governing permit application review and approval are those provided by the statutes that the Department implements, and not by the terms of the Department's policies. (See *Matter of Besicorp-Empire Development Company, LLC*, Decision of the Commissioner, Sept. 23, 2004, at 16.)

With respect to the captioned matter, Staff's statutory authority is the federal Clean Water Act (33 USC §§ 1251 to 1387). The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 USC § 1251[a]). To accomplish this goal, the CWA authorizes the development of national water quality standards and establishes a permit program referred to as the National Pollutant Discharge Elimination System (NPDES) program. EPA administers the NPDES permit program. This permit program regulates the daily wastewater discharges from facilities.

The CWA also provides for the delegation of the NPDES permit program to the states (33 USC § 1342[b]; 40 CFR part 123). Under the delegation, EPA suspends its issuance of permits, but retains residual enforcement authority and may oppose a state's decision to issue a permit. Since 1975, New York has had a federally approved permit program, established pursuant to ECL article 17, title 8 (State Pollutant Discharge Elimination System [SPDES]), to control wastewater and stormwater discharges to the State's surface and ground waters. Department staff administers the SPDES program, consistent with the requirements of the federal Clean Water Act.⁴ Accordingly, Staff's reliance on the guidance

⁴ Implementing state regulations are outlined at 6 NYCRR part 750 (State Pollutant Discharge Elimination System [SPDES] Permits) and its subparts. Subpart 750-1 is entitled, *Obtaining a SPDES Permit*, and Subpart 750-2 is entitled,

outlined in TOGS 1.3.3 and 1.6.3 assures that the draft modified SPDES permit for Rensselaer County's wastewater treatment plant has been developed in a manner consistent with the CWA and the Department's federally approved SPDES permit program.

TOGS 1.3.3 is entitled, *SPDES Permit Development for Publicly Owned Treatment Works (POTWs)*, and dated March 1997. Its purpose is to provide Department staff from the Division of Water with technical guidance in drafting SPDES permits for POTWs, such as Rensselaer County's.

TOGS 1.3.3 states that pollution from CSOs is controlled by implementing the best management practices outlined in TOGS 1.6.3. According to TOGS 1.3.3, best management practices consist of a set of thirteen technology based requirements developed in accordance with best professional judgment. They are generally non-structural measures that are designed to maximize pollutant capture and removal from combined sewer systems. The guidance set forth in TOGS 1.3.3 states that all combined sewer overflows, or POTWs that serve collection systems with combined sewer overflows, should be subject to the best management practices by including all applicable BMPs into the SPDES permit.

In TOGS 1.3.3, the best management practices are outlined in Appendix E. With respect to dry weather overflows, the model language in Appendix E states in full:

Prohibition of Dry Weather Overflows: Dry weather overflows from the combined sewer system are prohibited. The occurrence of any dry weather overflow shall be promptly abated and reported to the NYSDEC Region Office __ within 24 hours. A written report shall also be submitted within fourteen (14) days of the time the permittee becomes aware of the occurrence. Such reports shall contain the information listed in the General Conditions (Part II), Section 5(b) of the SPDES permit.

TOGS 1.6.3 is entitled, *Combined Sewer Overflow (CSO) Control Strategy*, and dated October 1, 1993. The primary purpose of TOGS 1.6.3 is to provide guidance for drafting SPDES permit conditions to abate water quality problems associated with combined sewer overflows. The secondary purpose of TOGS 1.6.3 is

Operating in Accordance with a SPDES Permit.

to implement the EPA approved CSO control strategy in New York consistent with the requirements outlined in EPA's National CSO Control Strategy dated August 10, 1989.⁵

The guidance provided in TOGS 1.6.3 states that all SPDES permits for CSOs, and POTWs with CSOs, shall contain best management practice requirements. TOGS 1.6.3 states further that BMPs (1) are designed to implement operation and maintenance procedures; (2) use the existing treatment facility and collection system to the maximum extent practicable; and (3) implement sewer design and replacement so as to minimize the water quality impact of combined sewer overflows.

Among the terms defined in TOGS 1.6.3 is "combined sewer overflow." According to TOGS 1.6.3 (p. 3), combined sewer overflows are "flows from a combined sewer caused by inflow which is in excess of interceptor or regulator capacity that are discharged into receiving waters without going to the tributary publicly owned treatment works."

With respect to permit issuance, TOGS 1.6.3 advises that a single, system-wide SPDES permit should be issued whenever possible. Under such circumstances, TOGS 1.6.3 notes that a county or other regional authority may acquire ownership of overflows from municipalities. When, as here, different parts of a single system are owned by more than one municipal authority, TOGS 1.6.3 recommends that Department staff require joint implementation of elements of the strategies to limit CSOs. For example, the SPDES permits issued to CSO-only permittees should

⁵ On December 21, 2000, the CWA was amended to incorporate the federal CSO Control Policy (see Paragraph 3 of Ms. Webber's Affidavit; 33 USC § 1342[q]). Pursuant to the amendment, 33 USC § 1342(q) states in full that:

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

The federal CSO Control Policy can be found at 59 FR 18688.

require cooperation with the POTW, according to TOGS 1.6.3. (See 59 FR 18695 [April 19, 1994].)

I conclude that the guidance outlined in TOGS 1.3.3 and 1.6.3, which is based on the December 2000 amendments to the CWA requiring the abatement of untreated combined sewer overflow discharges, is relevant to the drafting of Rensselaer County's SPDES permit. Rensselaer County operates a POTW that serves collection systems in the Cities of Troy and Rensselaer with combined sewer overflows. Therefore, Rensselaer County's SPDES permit should include all applicable BMPs, as recommended in TOGS 1.3.3.

Staff, however, cannot issue a single, system-wide SPDES permit to Rensselaer County, as recommended in TOGS 1.6.3, due to the inter-municipal nature of the combined sewer system that serves the county. Therefore, I conclude further that Staff's proposed revision of BMP No. 6 in Rensselaer County's draft modified SPDES permit is consistent with the alternative guidance outlined in TOGS 1.6.3, which recommends joint implementation of elements of the strategies limiting CSOs (see 59 FR 18695 [April 19, 1994]).

I do not accept Rensselaer County's contention that its SPDES permit should be exempt from regulating dry weather overflows simply because the probable cause of overflow events could be from debris that collects in the Cities' sewer lines, which could subsequently impair Rensselaer County's regulators. As required by BMP No. 1, Rensselaer County would have the continued responsibility of monitoring and maintaining its regulators and interceptor lines while the Cities monitor their respective sewer lines. Through the maintenance of their respective components, the Cities and Rensselaer County would jointly preserve the overall integrity of the inter-municipal combined sewer system. Consequently, the respective SPDES permits issued to these government entities must include conditions that will hold them responsible for the potential failures of their respective components and the contribution that these failures could have on dry weather overflow events (see 33 USC § 1342[q][1]).

Rensselaer County objects to Staff's proposed language for BMP No. 6 that would prohibit dry weather overflows. However, dry weather overflows are expressly prohibited by the federal CSO Control Policy (59 FR 18697 "Discharges during dry weather have always been prohibited by the NPDES program"), which was incorporated into the federal Clean Water Act (see 33 USC §

1342[q][1])). Therefore, Rensselaer County's attempt to avoid regulation of dry weather overflows is misplaced. To accept Rensselaer County's assertion that its SPDES permit should not regulate dry weather overflows if Rensselaer County's regulators become impaired with debris conveyed from the tributary communities' combined sewer systems would essentially condone bypasses, which are prohibited except under very limited circumstances (see e.g. 6 NYCRR 750-2.8[b]; TOGS 1.6.2, *Bypasses* [November 1988]). Given the nature of the inter-municipal combined sewer system, Rensselaer County's SPDES permit must prohibit dry weather overflows because components of the inter-municipal combined sewer system over which Rensselaer County has exclusive control may be associated with such events.

Although Rensselaer County's SPDES permit must regulate dry weather overflow events, I agree with Rensselaer County's argument that the second sentence of Staff's recommended language for BMP No. 6 implies that any regulator impairment equates to dry weather overflow events. I believe that Staff's proposed language, which is similar but not exactly the same as the model language outlined in TOGS 1.3.3, Appendix E, overstates the likelihood of dry weather overflow events simply based upon the discovery of an impaired regulator. Other factors such as the location of the regulator, the degree of impairment, its proximity to other regulators, and the degree of impairment, if any, of other, proximate regulators would also be relevant in determining whether any dry weather overflow events have occurred. Accordingly, this language should be modified.

It appears that the reporting requirement is intended to advise, in this case, the DEC Region 4 Water Engineer and the tributary community, that Rensselaer County discovered an impaired regulator, and that Rensselaer county abated the impairment. Therefore, I recommend that the proposed language concerning BMP No. 6 as set forth in Staff's September 12, 2008 brief be revised 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.

Upon receipt of a report, Department staff, the tributary community, and Rensselaer County would then need to investigate whether any dry weather overflow events occurred because of the impaired regulator. In other words, the report would prompt further inquiry about whether any dry weather overflow events actually occurred and, if so, whether the impaired regulator contributed to the dry weather overflow events. The recommended revised language is intended to avoid the implication that any impairment of a regulator would have the de facto result of directly causing dry weather overflow events.

Appeals

During a hearing, a ruling by the administrative law judge to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (see 6 NYCRR 624.8[d][2]). Such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling as required by 6 NYCRR 624.6(e)(1). However, this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party, and I choose to modify the time frame here.

Therefore, any appeals in this matter related to these issues rulings must be received at the office of Commissioner Alexander B. Grannis (attention: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1550, by 4:45 p.m. on December 23, 2008. Moreover, responses to the initial appeals will be allowed and such responses must be received as above by 4:45 p.m. on January 20, 2009.

The appeals and any responses sent to the Commissioner's Office must include an original and one copy. In addition, one copy of all appeal and response papers must be sent to Chief ALJ James T. McClymonds at the Office of Hearings and Mediation Services, to the opposing parties' representative, and to me at the same time and in the same manner as service is made upon the Commissioner. Service upon the Commissioner of any appeal or response by facsimile transmission (FAX) or e-mail is not permitted and that service will not be accepted.

Appeals and any responses should address the ALJ's rulings directly, rather than merely restate a party's contentions.

Further Proceedings

If no appeals from these issues rulings are properly filed with the Commissioner, I will remand the matter to Department staff, with the recommendation outlined above concerning BMP No. 6, to complete the applicable procedures related to modifying Rensselaer County's SPDES permit.

If timely appeals are filed with the Commissioner, I will advise the parties about the need for any further proceedings consistent with the determination provided in the Commissioner's Interim Decision.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
December 5, 2008

To: Philip H. Dixon, Esq.
Whiteman, Osterman and Hanna, LLP
One Commerce Plaza
Albany, New York 12260

Carol Conyers, Esq.
Assistant Counsel
Robin Adair, Esq.
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New, York 12233-5500