

In the Matter of the Proposed
Department Initiated Modifications of
the State Pollutant Discharge
Elimination System (SPDES) permits

Ruling on Issues

of

ALBANY COUNTY SEWER DISTRICT,
(North and South Plant),

DEC #4-0126-00138 and
#4-0101-00020

Permittee.

March 24, 2008

SUMMARY

Staff of the New York State Department of Conservation (DEC Staff) is seeking to impose Department Initiated Modifications (DIMs) to two State Pollutant Discharge Elimination System (SPDES) permits issued to the Albany County Sewer District (ACSD or permittee) for two sewage treatment plants it operates, the North and South Plants. DEC Staff requested an administrative hearing due to objections from ACSD to portions of the DIMs. At the issues conference, ACSD raised issues in three categories: substantive issues, procedural issues, and payment of hearing costs. DEC Staff agreed that the permittee's proposed substantive issues were adjudicable and a hearing will be scheduled. DEC Staff argued that the proposed procedural issues were not adjudicable. DEC Staff is correct and no adjudication of the proposed procedural issues is required. At the issues conference, DEC Staff argued that ACSD should bear the hearing costs, but before briefs were received, DEC Staff relented and agreed to pay the hearing costs, resolving this issue.

PROJECT DESCRIPTION

ACSD has SPDES permits for two sewage treatment plants that it operates, the North Plant and the South Plant. These plants discharge into the Hudson River. These plants serve the combined municipalities of Albany, Cohoes, Green Island, and Watervliet as well as the separately sewered communities of Colonie, Guilderland and Menands. During wet weather, the contribution of stormwater in the combined sewer communities results in discharge of raw sewage to the Hudson River through the Combined Sewer Overflows (CSOs). It has been about 17 years since the last full review of these SPDES permits.

PROCEEDINGS

On July 8, 1999, DEC Staff sent ACSD two Requests For Information (I.C. Exh. 1). DEC Staff sought this information because the North Plant and the South Plant had become priorities under DEC's Environmental Benefit Permit Strategy (EBPS). These documents notified the permittee that a "modification may be necessary to assure that your permit complies with all applicable laws" and requested the permittee to submit the requested data by October 8, 1999.

ACSD responded to DEC Staff's requests for information on September 22, 1999 (I.C. Exh. 2). DEC Staff calls this response a new SPDES permit application, while ACSD insists it is just a response to a request for information (t. 6).

This matter was referred to DEC's Office of Hearings and Mediation (OHMS) by DEC Staff on June 14, 2006. By letter dated June 16, 2006, I was assigned.

By letter dated July 5, 2006, I advised the parties that I would hold the matter in abeyance because the permittee had not formally requested an administrative hearing and the referral to OHMS was made by DEC Staff in anticipation of the permittee's request.

By letter dated July 10, 2006, the permittee requested copies of all documents forwarded to me by DEC Staff. Under a cover letter dated July 14, 2006, I provided the requested copies.

On July 24, 2006, DEC Staff member Mary Jo Crance, from DEC's Division of Environmental Permits, wrote to the permittee two letters advising the permittee that DEC Staff proposed to modify the permits of the South Plant and the North Plant (I.C. Exhs. 4 & 5, respectively). Attached to these letters were: Notices of Intent to Modify; fact sheets; and revised draft SPDES permits.

By letter dated July 25, 2006, the permittee requested an extension of the deadline to publish the notice and request a hearing. After a conference call on August 3, 2006, the parties agreed to the extensions.

By letter dated September 15, 2006, the permittee responded to DEC Staff with seven pages of comments (I.C. Exh. 6).

On December 14, 2006, DEC Staff issued a Negative Declaration pursuant to SEQRA (ECL article 8) for the proposed DIMs.

By memorandum dated June 28, 2007, DEC Staff forwarded a hearing request, new draft SPDES permits and other documents to OHMS. Following a telephone conference in which the permittee requested a copy of DEC Staff's hearing request and other documents, I sent a copy of these documents to the permittee by letter dated July 5, 2007.

By email dated July 27, 2007, the permittee provided a list of issues it had with DEC Staff's draft permits.

By letter dated August 14, 2007, the permittee requested additional time so that it could retain outside counsel. DEC Staff objected by letter dated August 15, 2007. During a conference call on August 30, 2007, the permittee explained that the complex municipal rules for bidding and contracting with outside counsel were the cause of the delay.

The Notice of Legislative Hearing and Issues Conference was published in the Environmental Notice Bulletin on November 7, 2007 and the *Albany Times Union* on November 12, 2007 (Issues Conference Exh. 9).

By letter dated November 16, 2007, Assistant Commissioner Louis A. Alexander, who oversees OHMS, recused himself from this matter. By letter dated November 26, 2007, the permittee inquired as the grounds for recusal. By letter dated November 29, 2007, Assistant Commissioner Alexander responded that his recusal was based on his past affiliation with the law firm the permittee had chosen as outside counsel in this matter.

The deadline for the filing of petitions for party status was December 3, 2007 and none were received.

The legislative hearing occurred on December 13, 2007 and the issues conference the next day. Briefs were received from the parties by the deadline of February 6, 2007, closing the issues conference record.

LEGISLATIVE HEARING

The legislative hearing began at 7:00 p.m. on December 13, 2007 at DEC's headquarters, 625 Broadway, Albany in Room 129. Approximately twenty people attended the hearing and five made statements for the record. First, DEC Staff member Cheryl Webber

explained the rationale for the Department initiated modifications and outlined the points of disagreement between DEC Staff and the permittee. Next, Richard J. Lyons, the Executive Director of ACSD spoke about the permittee's goals of complying with applicable environmental laws while minimizing the cost to ratepayers. Third, Mayor John McDonald of the City of Cohoes spoke in favor of a clean and swimmable Hudson River, but at the same time spoke of the need to be extremely sensitive to the ratepayers' concerns. The fourth speaker, Katherine Nadeau, the Water and Natural Resources Program Associate with Environmental Advocates, spoke in support of DEC Staff's proposed permit modification. Finally, Rocco Ferrar, the Executive Director of the Capital District Regional Planning Commission, spoke about continuing efforts to coordinate among communities discharging to the Hudson River and lauded the ACSD for its role in the development of a Long-Term Control Plan. In addition to the oral comments, a written comment was received from Rebecca Troutman, Esq., Staff Attorney for Riverkeeper, in support of DEC Staff.

ISSUES CONFERENCE

The issues conference was held at 10:00 a.m. on December 14, 2007 at DEC's headquarters, 625 Broadway, Albany. DEC Staff was represented by Terrance Pratt, Esq. and Robyn Adair, Esq. Also present were DEC Staff members: Cheryl Webber, William Adriance, Alan Fuchs and Charles St. Lucia. ACSDS was represented by Robert Feller, Esq., of Bond, Schoeneck & King, PLLC, and Tonia Summers, Assistant Albany County Attorney. Also present were Richard Lyons and Timothy Murphy.

DISCUSSION

ACSD has proposed issues for adjudication that involve both the process by which DEC Staff sought to modify the SPDES permits and the substance of the proposed changes. In addition to the procedural and substantive issues, ACSD opposed DEC Staff's request that it pay the hearing costs. DEC Staff acknowledged that the substantive issues raised by the permittee met the standard for adjudication and later withdrew its request that the permittee pay the hearing costs, so only the procedural issues are in controversy.

Procedural Issues

Because no petitions for party status were filed in this case, only ACSD has proposed issues for adjudication. The standard for whether an issue is adjudicable in a DIM (624.4(c)(8)) is if:

"it relates to a dispute between DEC Staff and the applicant over a substantive term or condition of the permit" (6 NYCRR 624.4(c)(1)(i)).

In its brief, ACSD argues that its proposed procedural issues involve alleged defects in the notice of intent to modify, required by 6 NYCRR 621.13(c). This notice was so defective, ACSD argues, that the remedy is for the ALJ to issue a ruling dismissing the permit application and requiring DEC Staff to revise the DIMs to correct the alleged deficiencies. ACSD argues that because the application should be dismissed, which would affect the validity of the permit, these procedural issues meet the standard for adjudication found in 624.4(c)(1)(i).

DEC Staff argues that the proposed procedural issues do not meet the standard for adjudication because they do not address requirements in the draft permit, but rather the process by which the draft permit was presented to the permittee.

DEC Staff's alleged failure to comply with 621.13(c). ACSD argues that DEC Staff failed to comply with its own rules when in sent the July 2006 DIM packages (I.C. Exhs. 4 & 5) to ACSD. Specifically, ACSD claims DEC Staff failed to comply with 6 NYCRR 621.13(c) which states that a "notice [of intent to modify] must state the alleged facts or conduct which appear to warrant the intended action and must state the effective date, contingent upon administrative appeals, of the modification...." ACSD argues that the notice failed to provide the factual and legal basis for the proposed changes to its permit.

The July 2006 DIM packages (I.C. Exhs. 4 & 5) each contains a cover letter, two page Notice of Intent to Modify, eight page Fact Sheet, and 17 page revised draft SPDES permit.

Among the legal bases missing from the notice that ACSD cited were: (1) the citation to 6 NYCRR 750-1.18 in the Fact Sheet Narrative, enclosed in the DIM package, was legally insufficient (t. 19); and (2) the July 2006 DIMs (I.C. Exh. 4 & 5) do not cite any of the bases listed in sections 621.13(a) or 750-1.18(b) for permit modification. Among the factual information missing from the notice were: (1) DEC Staff's alleged failure to justify reimposing the coliform limits; and (2) DEC Staff's alleged failure to justify total residual chlorine limit and include information about downstream water quality.

DEC Staff responds that the DIM packages meet the requirements of section 621.13(c) and point to information contained in the fact sheets, which were part of the DIM

packages. DEC Staff pointed to language in the notice which states that the DIMs are "undertaken to mandate compliance with USEPA's CSO Control Policy and the 15 Combined Sewer Overflow (CSO) Best Management Practices (BMP) and Long term Control Plan (LTCP) element it contains. This DIM will also include disinfection requirements in the permits." DEC Staff also pointed to references to New York's Environmental Benefit Permit Strategy (EBPS) and the detailed description in the Fact Sheet Narrative with respect to CSOs, disinfection, total residual chlorine as well as providing factual and legal authority for the DIMs (t. 27). DEC Staff also cites section 402 of the federal Clean Water Act and USEPA's 1994 CSO control policy in the DIM (t. 39).

The DIM package was not the only opportunity for ACSO to get information from DEC Staff about the DIM. At the issues conference, ACSO admitted that since the DIMs were issued, there has been a lot of back and forth discussion between DEC Staff and ACSO about these points (t. 50). While the record does not contain a listing of the contacts between DEC Staff and the permittee since the requests for information were originally sent in 1999, the contacts appear to be "numerous" (hearing request form, p. 2).

The issues raised by ACSO can be distilled as a complaint about the sufficiency of the content of the July 2006 DIM package. ACSO acknowledges that many, if not all, of its questions have since been answered by DEC Staff. A disagreement remains regarding whether DEC Staff can meet its burden of proof at the hearing, but ACSO does not claim that it has asked for clarification from DEC Staff and not received it. ACSO only argues that the DIM package was insufficient.

Ruling #1: Upon review of the entire DIM packages, I conclude that DEC Staff complied with the requirements of 6 NYCRR 621.13(c). The DIM process for complex SPDES permits for large municipally owned sewage treatment plants involves an interactive process between DEC Staff and the permittee as information is requested and provided, modifications proposed and discussed, and negotiations continue. It would be impossible for DEC Staff to anticipate every possible question from the permittee and provide a pre-emptive written answer in the DIM. Rather, DEC Staff have complied with section 621.13(c) and informed ACSO regarding the proposed DIM. ACSO has a detailed understanding of the DIM as evidenced by both its comments to DEC Staff on the proposed DIM as well as participating in the issues conference. This issue is not adjudicable.

DEC Staff's alleged failure to comply with ACSD 6 NYCRR 631.13(a). ACSD argues that there is no basis for the modification because DEC Staff does not have one of the grounds set forth in 6 NYCRR 631.13(a). ACSD alleges that there is no newly discovered information of a material change in environmental conditions, relevant technology or applicable law or regulation since the SPDES permits were last issued. ACSD also argues that neither of its SPDES permits has attained a level of sufficient priority in accordance with the priority system set forth under section 750-1.19.

Ruling #2: Pursuant to section 624.9(b)(2), DEC Staff has the burden of proving that the proposed modification is supported by the preponderance of the evidence. Thus, while the issue proposed by ACSD does not meet the standards for adjudication, proving the basis for its proposed DIM will be part of a successful DEC Staff case. At this point in the hearing, ACSD will have the opportunity to confront DEC Staff's evidence. It is premature at this point to rule on what lines of inquiry may be permissible at the hearing.

Substantive Issues

In addition to the procedural issues discussed above, the permittee raises the following issues with respect to the substance of DEC Staff's proposed permit amendments. DEC Staff agrees these issues are adjudicable and each issue is advanced to adjudication.

Fecal Coliform Standard. The first substantive issue raised by the ACSD involves the fecal coliform standards in the proposed permits (South Plant, I.C. Exh. 4, p.3; North Plant, I.C. Exh. 5, p. 3). ACSD's permits contain these standards now, however, the limit has been suspended since April 9, 1987 (I.C. Exh. 10). DEC Staff now seeks to lift the suspension in this DIM because the water quality of the Hudson River has improved since the suspension.

Total Residual Chlorine Limit. The second substantive issue raised by ACSD involves the total residual chlorine (TRC) limit. The permittee raises three sub-issues: the daily limit for TRC, the number of days during the year that the limit is in place, and the effective date of the new TRC limits.

With respect to the first sub-issue, ACSD's permits now contain a daily maximum limit for total residual chlorine of 2.0

mg/l. DEC Staff is proposing to lower this limit to 0.6 mg/l (South Plant, I.C. Exh. 4, p.4; North Plant, I.C. Exh. 5, p. 4).

The second sub-issue involving TRC involves the number of days a year that the standard must be met. ACSD's existing permits impose this requirement between June 1 and September 15; DEC Staff seeks to increase this to May 1 through October 31.

The third sub-issue involving TRC involves DEC Staff's proposed effective date for the new permit, May 1, 2009. ACSD argues that an ongoing series of studies that have been undertaken by the permittee and other affected municipalities involving the Long-Term Control Plan (LTCP) for Combined Sewer Overflows (CSO) which will recommend new capital projects to be funded. Because both the revised permit and implementation of the LTCP will involve capital costs, the permittee argues, the decisions on capital expenditures should be made at the same time (t. 75).

Zinc and Copper. The third substantive issue raised by ACSD involves the daily limits for zinc and copper. Presently, ACSD's permits allow a discharge of 8.2 pounds per day of copper from the South Plant and 12.4 pounds per day of copper from the North Plant. DEC Staff proposes to lower these limits to 4.6 pounds per day and 4.0 pounds per day, respectively. Zinc discharges are also lowered to 8.2 lbs/day for the South Plant and 12.4 lbs/day for the North Plant (South Plant, I.C. Exh. 4, p.5; North Plant, I.C. Exh. 5, p. 5).

Best Management Practices for Combined Sewer Overflows. The fourth substantive issue raised by the permittee involves Best Management Practices (BMPs) for Combined Sewer Overflows (CSOs) (South Plant, I.C. Exh. 4, p. 6; North Plant, I.C. Exh. 5, p. 6). ACSD is concerned that this proposed permit condition will require industrial dischargers to withhold and store wastewater discharges during periods of wet weather. ACSD is concerned that: (1) its industrial users may not have the storage capacity for wastewater; and (2) storing waste water and then discharging it could cause industrial users to violate the terms of their pre-treatment permits (t. 80). ACSD also challenges the authority of DEC Staff to require industrial users who discharge to the North and the South Plant to undertake actions pursuant to ACSD's pretreatment program.

Long Term Control Plan. The final substantive issue raised by ACSD involves the Long-Term Control Plan (LTCP). As discussed above, a study is underway with other municipalities to determine the best way to control discharges from CSOs. ACSD is concerned

that because it does not own all the CSOs and other parts of the system, that it not be held responsible for implementing solutions on facilities it does not own (t. 84) (South Plant, I.C. Exh. 4, p. 8-9; North Plant, I.C. Exh. 5, p. 8-9). Discussions between DEC Staff and the permittee had not resulted in a negotiated solution at the date of the issues conference.

Hearing Costs

A third area of dispute between the parties involved which party was responsible for paying the costs of the administrative hearing, such as publishing notices, retaining stenographers and arranging for a hearing location. Initially, DEC Staff insisted that it was the permittee's responsibility. However, after the issues conference and before briefs were received, DEC Staff agreed to pay the hearing costs in this case in accordance with section 624.11(a). Accordingly, the issue is resolved.

APPEALS

Pursuant to 6 NYCRR 624.6(e) and 624.8(d)(2)(i), this issues ruling may be appealed in writing to the Commissioner. Appeals must be received on or before Monday, April 7, 2008. Any replies to appeals must be received on or before Tuesday, April 21, 2008. Any appeals and replies must be addressed to the Office of the Commissioner, NYSDEC, 625 Broadway, Albany, New York 12233-5500 (to the attention of Chief Administrative Law Judge James T. McClymonds), and must be received by that office by 4:00 p.m. on the dates indicated herein. The original and two copies of all such appeals, briefs and related filings must be sent to the Chief ALJ, and one copy sent to the ALJ at the Department's Office of Hearings and Mediation Services, and one copy to each person listed on the service list below. Transmittal of documents shall be made at the same time and in the same manner to all persons.

March 24, 2008
Albany, NY

_____/s/_____
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Administrative Law Judge

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