

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. NY0026191, et al.

RULING OF THE COMMISSIONER ON (I) MOTION BY
CONSOLIDATED PETITIONERS FOR LEAVE TO FILE
A SURREPLY BRIEF; (II) MOTION BY CONSOLIDATED PETITIONERS
AND CONNECTICUT FUND FOR THE ENVIRONMENT, INC. ("CFE")
FOR LEAVE TO SUPPLEMENT REPLY TO APPEALS OF STAFF OF
THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND
THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION; AND
(III) NOTICE OF FILING BY CONSOLIDATED PETITIONERS AND CFE

January 18, 2008

RULING OF THE COMMISSIONER

BACKGROUND

The New York City Department of Environmental Protection ("NYCDEP" or "Permittee") is a municipal agency of the City of New York ("City"). The Permittee operates the City's fourteen water pollution control plants ("WPCPs"), which treat sewage generated within the City, as well as the City's combined and separate sanitary sewage collection facilities. In 2002, staff of the New York State Department of Environmental Conservation ("DEC" or "Department") provided NYCDEP with notice of intent to modify the State Pollutant Discharge Elimination System ("SPDES") permits for the fourteen WPCPs. Lengthy negotiations between the Department and NYCDEP ensued, resulting in several iterations of the draft permits and the resolution of many of NYCDEP's objections to the modifications.

The matter was referred to the Department's Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto who presided over the issues conference. Parties to the proceeding have filed appeals from the ALJ's issues ruling dated November 9, 2005, addressing combined sewer overflow issues ("CSO Issues Ruling") and the ALJ's issues ruling dated March 16, 2007, addressing nitrogen issues ("Nitrogen Issues Ruling"). Consolidated Petitioners¹ filed an appeal from both the CSO Issues Ruling and the Nitrogen Issues Ruling. The City and Department staff both filed appeals from the Nitrogen Issues Ruling.

This ruling determines the following two motions, both dated August 14, 2007, filed after the appeals were taken: (i) the motion for leave to file a surreply brief ("Motion for Surreply") by Consolidated Petitioners, in further support of their appeal of the issues rulings; and (ii) the motion for leave to file a supplemental reply ("Motion to Supplement") by Consolidated Petitioners and Connecticut Fund for the Environment, Inc. ("CFE"), in further support of their reply to the appeals of Department staff and NYCDEP. This ruling will also address the notice of filing ("Notice of Filing"), dated

¹ The Consolidated Petitioners are Natural Resources Defense Council ("NRDC"), Riverkeeper, Inc., Long Island Soundkeeper Fund, Inc., and NY/NJ Baykeeper.

October 31, 2007, submitted by Consolidated Petitioners and CFE.

For the reasons set forth below, I deny Consolidated Petitioners' Motion for Surreply but grant Consolidated Petitioners' and CFE's Motion to Supplement. Further, while the Notice of Filing was not submitted as a motion (i.e., it did not request a ruling or an order [see 6 NYCRR 624.2(u)]), I have determined that the document submitted with the notice should be accepted for consideration in these proceedings.

POSITIONS OF THE PARTIES

Motion for Surreply

Consolidated Petitioners assert that granting leave to file a surreply brief "is appropriate under the circumstances and would meaningfully assist the Commissioner's decisionmaking" (Motion for Surreply, at 1). Although Consolidated Petitioners acknowledge that the legal arguments they seek to address in the surreply "were briefed thoroughly by all parties and petitioners before [the ALJ]," they argue that allowing the surreply is nevertheless appropriate because Department staff and the City have raised issues in their respective replies that Consolidated Petitioners did not raise in their appeal (id.).²

Consolidated Petitioners assert that the Motion for Surreply should be granted because "customarily in this proceeding [parties] have been afforded an opportunity to respond in writing to the legal arguments presented by [other parties]" (id. at 2-3). Consolidated Petitioners also argue that affording them the opportunity to file a surreply brief "would be consistent with both state and federal appellate court practice" (id. at 3). In addition, Consolidated Petitioners note that, in 2004, staff was allowed to submit a surreply in further support of a staff appeal pending at that time. Finally, Consolidated Petitioners argue that "the interests of justice are best served by affording the Commissioner an opportunity to fully consider all sides of the issues presented" (id.).

Department staff submitted a memorandum ("Staff Memorandum") in opposition to both the Motion for Surreply and

² Consolidated Petitioners do not object to the appellees' raising such issues and expressly state that they "do not suggest that the appellees' presentation of these arguments was improper in any way" (id. at 2).

the Motion to Supplement. With respect to the Motion for Surreply, staff opposes the motion, in part, "due to the excessive time Consolidated Petitioners . . . waited to make [the motion]" (Staff Memorandum, at 1). Staff notes that the reply briefs giving rise to the motion were served on May 10, 2007 and that the motion was not served until mid-August, more than three months later. Staff asserts that Consolidated Petitioners did not advise staff that the motion was being contemplated, nor did Consolidated Petitioners seek staff's consent to file the motion. Staff also notes that Consolidated Petitioners failed to offer any explanation regarding why there was such a protracted delay in making the motion.

Department staff argues that the proposed reply "just reiterates and restates arguments that the parties have been writing about throughout this process" (*id.* at 4). Staff states that although it "does not necessarily disagree" with allowing parties to file responsive pleadings (*id.*), it does oppose such a filing here given that the ALJ established "a set structure for the written responses to legal arguments presented by the parties; appeal and reply" (*id.* at 5). Staff further notes that this structure was set forth by the ALJ in the Nitrogen Issues Ruling "without objection from Consolidated Petitioners" (*id.*).

Staff argues that Consolidated Petitioners' attempt to analogize the appeals process here with that of the civil courts is inappropriate as civil court rules are not applicable to this administrative proceeding. Further, staff notes that even where a surreply is authorized under court rules, limits are placed on the timing of such. Staff cites the State appellate court rules for the Second, Third and Fourth Departments, all of which require an appellant to file a surreply brief within ten days of respondent's brief (*id.* at 1 n 1).

By letter dated August 24, 2007, the City joined in Department staff's request that both motions for leave be denied. The City states that it supports staff's position, but does not offer further argument.

Motion to Supplement

Consolidated Petitioners and CFE (collectively, the "movants") request leave to file a supplement to their reply brief "to inform the Commissioner of admissions made by NYCDEP" concerning the extent of NYCDEP's authority to comply with and implement the provisions of the draft SPDES permits (Motion to Supplement, at 1). Attached to the Motion to Supplement are

excerpts from several reports that were submitted to the Department by NYCDEP; one report is dated October 2006 and the remainder are dated June 2007. Movants argue that the reports contain admissions by NYCDEP that "it does not, acting alone, possess the legal and financial authority necessary to comply with all the terms of the Proposed SPDES Permits and related regulations" (id. at 4 [emphasis supplied by movants]). Movants conclude by requesting that I "take official notice of the admissions of NYCDEP described herein" (id.)

Department staff argues that the Motion to Supplement is untimely and should be denied. Staff also notes that the reports were submitted to the Department by NYCDEP for approval and that approval is still pending. Absent approval by the Department, staff argues that the text of the reports should not be considered in this proceeding. Staff also argues that, given NYCDEP's ongoing obligation to submit reports to the Department, there may be no end to requests by Consolidated Petitioners and CFE to supplement the record. Staff concludes by noting that the excerpts cited by movants are "just portions of much larger, more comprehensive reports" and that "[i]n the context of this entire administrative proceeding, these citations cannot be considered meaningful" (id. at 3-4).

As noted, by letter dated August 24, 2007, the City joined in Department staff's request that this motion for leave be denied.

Notice of Filing

Together with the Notice of Filing, Consolidated Petitioners and CFE submitted excerpts of a NYCDEP report entitled *Jamaica Bay Watershed Protection Plan* (the "Jamaica Bay Report"). The Notice of Filing states that the Jamaica Bay Report contains an admission by NYCDEP that stormwater control "is a shared responsibility that crosses five major City agencies'" (Notice of Filing, at 2 [emphasis removed][quoting the Jamaica Bay Report, at 162]).

Under cover letter dated November 5, 2007, Department staff filed a statement in opposition to the Notice of Filing. Staff argues that Consolidated Petitioners and CFE failed to follow proper administrative procedure in seeking to add the Jamaica Bay Report to the record and that the Notice of Filing is untimely. Staff also objects to statements in the Notice of Filing that draw conclusions from statements contained in the Jamaica Bay Report.

By letter ("Letter") dated November 8, 2007, the City joined in Department staff's opposition to the Notice of Filing. The City states that it supports staff's position, but does not offer further argument. In the event that the Notice of Filing is accepted, the City "requests adequate time to respond, and that any additional administrative rights applicable to NYCDEP be preserved" (Letter, at 2).

DISCUSSION

Motion for Surreply

Neither the appeals procedure set forth in 6 NYCRR part 624 nor the ALJ's Nitrogen Issues Ruling provide for further responsive pleadings as of right after responding parties have filed replies to an appeal. Pursuant to 6 NYCRR 624.6(e), upon filing of an appeal "the other parties may submit briefs or other arguments in support of or in opposition to the appealed issues within five days." No further responsive filings are provided for. The ALJ also provided for only appeals and replies (see Nitrogen Issues Ruling, at 23). Accordingly, acceptance of Consolidated Petitioners' surreply brief is at the discretion of the Commissioner (see also 6 NYCRR 624.6[c][3] [providing that, after service of a motion and the response thereto, "no further responsive pleadings will be allowed without permission of the ALJ."]).

Consolidated Petitioners' arguments in favor of the Motion for Surreply are unpersuasive. Both Consolidated Petitioners and Department staff state that the proposed surreply brief does not raise a new issue or present new information, but rather revisits issues that were "briefed thoroughly" before the ALJ (see Motion for Surreply, at 1; Staff Memorandum, at 4). As such, there is little, if anything, to be gained by granting the Motion for Surreply. Consolidated Petitioners' argument that the Motion for Surreply should be granted because civil court rules allow an appellant to file a surreply brief is inapposite. The rules of appellate practice in State or federal civil courts are not controlling in this administrative proceeding.³

³ Notably, under the Appellate Division rules cited by Consolidated Petitioners, the Motion for Surreply would have been untimely by over two months (see, 22 NYCRR 600.11[c] [First Department rule requiring appellant's reply to be filed within nine days after service of respondent's brief], 670.8[b] [Second Department rule requiring appellant's reply to be filed within 10

Additionally, while not determinative, consent of the parties would weigh in favor of granting the motion and Consolidated Petitioners did not seek nor obtain consent here.

Consolidated Petitioners offer no explanation regarding their extended delay in filing the Motion for Surreply. Staff's reply to the appeal is dated May 10, 2007 and Consolidated Petitioners' Motion for Surreply is dated August 14, 2007. Under the facts and circumstances presented here, this delay, without good cause shown, is fatal to Consolidated Petitioners' motion.

Motion to Supplement

On balance, I am persuaded that the Motion to Supplement should be granted. Department staff raises valid concerns regarding the timing of the motion and the content and reliability of the reports. Most of staff's objections, however, speak to the appropriate weight to be given to the supplemental material, not to its admissibility (see 6 NYCRR 624.9[a]). While staff questions the import of the reports in the context of this proceeding, staff's objections do not challenge the relevancy of the material or raise other evidentiary concerns. The reports were submitted to the Department by NYCDEP in due course of the Department's business and no challenge has been raised relative to the authenticity of the reports or to their authorship. As such, I am granting the Motion to Supplement. Staff's objections to the weight and import of these materials are duly noted.

Notice of Filing

For reasons similar to my determination on the Motion to Supplement, the Jamaica Bay Report will be considered in these proceedings. The Jamaica Bay Report was prepared by NYCDEP in due course of its business and no challenge has been raised relative to the report's authenticity or authorship. Staff's objections are, again, duly noted and the Jamaica Bay Report shall be accorded only such weight as is appropriate in the context of these proceedings.

days after service of respondent's brief], 800.9[c] [Third Department rule requiring reply to be filed within 10 days after service of respondent's brief] and 1000.2[e] [Fourth Department rule requiring reply to be filed within 10 days after service of respondent's brief]).

With regard to Department staff's objections to Consolidated Petitioners' characterization of selected statements in the Jamaica Bay Report, and the City's request to respond to such, I note that the report speaks for itself. The Consolidated Petitioners' comments on the Jamaica Bay Report will not be considered in this proceeding and, therefore, no response from staff or the City is necessary or authorized.

CONCLUSION

The motion by Consolidated Petitioners for leave to file a surreply brief in further support of their appeal of the issues rulings is denied. The motion by Consolidated Petitioners and CFE to supplement their reply dated May 10, 2007 is granted. Additionally, the NYCDEP report entitled *Jamaica Bay Watershed Protection Plan* is accepted into the record.

For the New York State Department
of Environmental Conservation

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

Dated: January 18, 2008
Albany, New York

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