

**In the Matter of Modification
of State Pollutant
Discharge Elimination System (SPDES)
Permits 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
City of New York's Department of
Environmental Protection**

**RULING ON PROPOSED
ADJUDICABLE
CSO ISSUES
AND PARTY STATUS**

(November 9, 2005)

| DEC ID | SPDES No. | NAME | LOCATION/ADDRESS | | |
|--------------|-----------|----------------------------|--------------------------|---------------|----------|
| 2-6007-00025 | NY0026191 | HUNTS PT WPCP | COSTER ST & RYAWA AVE | BRONX | NY 10474 |
| 2-6101-00023 | NY0027073 | RED HOOK WPCP | 63 FLUSHING AVENUE | BROOKLYN | NY 11205 |
| 2-6101-00025 | NY0026204 | NEWTOWN CREEK WPCP | 329-69 GREENPOINT AVE | BROOKLYN | NY 11222 |
| 2-6102-00005 | NY0026166 | OWLS HEAD WPCP | 6700 SHORE ROAD | BROOKLYN | NY 11220 |
| 2-6105-00009 | NY0026212 | 26 TH WARD WPCP | 122-66 FLATLANDS AVE | BROOKLYN | NY 11207 |
| 2-6107-00004 | NY0026182 | CONEY ISLAND WPCP | 2591 KNAPP STREET | BROOKLYN | NY 11235 |
| 2-6202-00007 | NY0026247 | NORTH RIVER WPCP | 725 W 135 STREET | NEW YORK | NY 10031 |
| 2-6203-00005 | NY0026131 | WARDS ISLAND WPCP | WARDS ISLAND | NEW YORK | NY 10035 |
| 2-6301-00008 | NY0026158 | BOWERY BAY WPCP | 43-01 BERRIAN BLVD | ASTORIA | NY 11105 |
| 2-6302-00012 | NY0026239 | TALLMAN ISLAND WPCP | 127-01 POWELLS COVE BLVD | COLLEGE POINT | NY 11356 |
| 2-6308-00021 | NY0026115 | JAMAICA WPCP | 150-20 134 STREET | JAMAICA | NY 11430 |
| 2-6309-00003 | NY0026221 | ROCKAWAY WPCP | 106-21 BEACH CHANNEL DR | ROCKAWAY | NY 11694 |
| 2-6401-00012 | NY0026107 | PORT RICHMOND WPCP | 1801 RICHMOND TERRACE | STATEN ISLAND | NY 10310 |
| 2-6404-00065 | NY0026174 | OAKWOOD BEACH WPCP | 751 MILL ROAD | STATEN ISLAND | NY 10306 |

Introduction

The Permittee, New York City Department of Environmental Protection (NYCDEP or Permittee) is a municipal agency operating and having responsibility for the City of New York's fourteen water pollution control plants (WPCPs), which treat sewage generated within the City of New York, as well as the City's combined and separate sanitary sewage collection facilities. The City owns the fourteen WPCPs. On or about June 27, 2002, the Staff of the New York State Department of Environmental Conservation (DEC Staff) provided the NYCDEP with notice of intent to modify the State Pollutant Discharge Elimination System (SPDES) permits for the fourteen WPCPs in accordance with New

York State's Environmental Benefit Permit Strategy (EBPS), and commenced negotiations with NYCDEP. By letters dated September 27, 2002 and October 22, 2002, the City (*i.e.*, the City of New York Corporation Counsel and NYCDEP; collectively, the City) preserved its right to object to several of the proposed modifications, and negotiations between the Department Staff and the City continued. The SPDES permit modification process has included lengthy negotiations with NYCDEP, and many of NYCDEP's objections have been resolved or withdrawn as a result of the negotiations.

Proceedings

The issues conference in this matter was convened on September 18, 2003 and was continued on October 19, 2003. Two prior issues rulings have been issued in this matter, an issues ruling dated January 28, 2004 (granting adjournment of CSO issues to allow DEC Staff and the City to attempt to resolve CSO enforcement violations by an administrative consent order [ACO]), and an issues ruling dated April 24, 2004 (addressing proposed nitrogen effluent reduction schedule issues). In January 2005, DEC staff announced the execution of a new ACO with the City regarding CSO regulation for the fourteen WPCPs. In February 2005, DEC staff issued revised draft SPDES permits to reflect the provisions of the recently executed CSO-ACO. The issues conference was reconvened on May 4 and 5, 2005 to consider proposed combined sewer overflow (CSO) issues. Pursuant to schedule, three intervenors filed supplemental petitions for party status regarding CSO issues: a joint petition for full party status of Riverkeeper, Inc., Soundkeeper, Inc., and New York/New Jersey Baykeeper (Keepers), a petition for full party status of Natural Resources Defense Council (NRDC) and a petition of the Interstate Environmental Commission (IEC), the latter petition seeking amicus status.

Upon motion of DEC Staff, and with no objection from NRDC or Keepers, those intervenors' petitions were consolidated for the CSO component of this proceeding only.

This ruling addresses proposed adjudicable CSO issues.

Pursuant to a schedule set at the conclusion of the issues conference session (and as subsequently modified), three issues were identified for further briefing. These issues are discussed below along with other proposed adjudicable CSO issues: 1) Is the January 2005 CSO-ACO the appropriate mechanism for CSO regulation, or must the terms and conditions of the ACO compliance schedule be explicitly set forth in the draft SPDES

permit; 2) Must any proposed changes to the ACO be subjected to an opportunity for full adjudicatory hearing, pursuant to 6 NYCRR Part 624, including the applicability or relevance of 6 NYCRR 750-1.18 and the former 750-1.18? This issue also includes consideration of the applicability of prior NYSDEC administrative or other relevant caselaw; and 3) Interpretation of the phrase "shall conform to Combined Sewer Overflow Policy" as that phrase appears in Clean Water Act (CWA) §402(q)(1), (federal Water Pollution Control Act §1342[q][1]).

Issues conference participants made the following filings: IEC filed a Supplement to the Record, dated June 10, 2005; NRDC filed a brief in Support of Supplemental Petitions for CSO Issues, dated June 10, 2005; and DEC Staff filed a Reply Brief dated July 29, 2005. Further, as agreed during the issues conference, by letter dated May 13, 2005, DEC Staff filed several documents referenced during the issues conference session and the City filed a response (dated May 20, 2005) to the Keepers' proposed issue regarding EPA's Nine Minimum Controls for combined sewer systems. Lastly, IEC filed a motion to file Sur-Reply and Sur-Reply, dated August 12, 2005 and NRDC filed a motion to file Sur-Reply and Sur-Reply, dated August 15, 2005.

Discussion

Environmental Interest

A proposed intervenor seeking full party status must demonstrate an environmental interest in the proceeding (6 NYCRR §624.5 (b)(1)(ii)) and must demonstrate that a substantive and significant issue exists regarding the permit application (6 NYCRR §624.4(c)). Environmental interest is one element of a successful petition for party status. Neither the Applicant nor DEC Staff objected to the environmental interest of any Petitioner.

The Oakwood Beach Permit

At the outset of the May 4, 2005 issues conference, DEC Staff made a motion to clarify that no issues remain with respect to the Oakwood Beach permit, and further, that this permit should be issued. The draft permit for the Oakwood Beach WPCP is not in contention because it treats waste from a municipal separate sewer system, not a combined sewer system. That is, the Oakwood Beach WPCP is in an area of the city with municipal separate storm and sewer systems (MS4), not combined sanitary and storm water sewer systems. No issues conference participant objected to the motion, and DEC Staff's motion to issue the Oakwood Beach

WPCP permit was granted during the May 4, 2005 issues conference.

Consolidation of Petitioners

During the May 4, 2005 issues conference, upon motion of DEC Staff, and with no objection from NRDC or Keepers, these petitioners were deemed consolidated petitioners, limited solely to the CSO component of this case.

Motions to file Sur-Replies

In addition to the scheduled briefing following the issues conference, IEC and NRDC filed a motion to file sur-reply briefs, including the proposed sur-reply briefs. Having received no objections to the motions, the motions are granted and the sur-reply briefs of IEC and NRDC are considered in this ruling.

The NPDES Phase I Permit Program

In response to the need for comprehensive National Pollutant Discharge Elimination System (NPDES) requirements for discharges of storm water, Congress amended the CWA in 1987 to require the USEPA to establish phased NPDES requirements for storm water discharges. To implement these requirements U.S. EPA published in the Federal Register on November 16, 1990 (40 CFR 122.26) initial permit application requirements for certain categories of storm water discharges associated with industrial activity, and discharges from municipal separate storm sewer systems serving a population of 100,000 or more. The regulations covered 173 cities and 47 urban counties and an estimated 100,000 industrial sources nationwide. Because New York is a NPDES delegated state, NYSDEC is currently implementing the federal storm water program.

- Municipal Regulated Entities

On the municipal side, the regulations cover discharges of storm water from municipal separate storm sewer systems. Large municipalities with a separate storm sewer system serving a population greater than 250,000 and medium municipalities with a service population between 100,000 and 250,000 must obtain NPDES permits. Application deadlines for large and medium municipalities were November 16, 1992 and May 17, 1993, respectively.

- Industrial Regulated Entities

The list of storm water discharges associated with industrial activity is extensive. All storm water associated with industrial activity that discharges to waters of the State or through a municipal separate storm sewer system are subject to NPDES permit requirements, including discharges from systems

serving populations less than 100,000. Discharges of storm water to a combined sewer system or to a publically owned treatment works (POTW) are excluded. Ownership of sources associated with industrial activity is not limited to the private sector and does include publicly owned sources.

As a result of changes made to the storm water regulations by the Transportation Act of 1991, municipalities with a population or service population less than 100,000 currently are only required to obtain storm water permits for three types of industrial activities that they own or operate: airports, power plants and sanitary landfills with uncontrolled leachate discharges.

Proposed Adjudicable Issues

Generally, many of the proposed issues discussed below are based upon applicability of EPA guidance documents. The intervenors advocate a strict mechanistic application of these guidance documents and argue that at least one EPA guidance document is equivalent to a federal rule. I reject the intervenors' strained interpretation of the guidance documents. Instead, the guidance documents are meant to guide the regulators and the regulated community (and other interested stakeholders) in applying the agency's laws and rules.

In addition, the EPA guidance documents addressing CSO control are largely premised upon a new municipal project. The New York City CSO program is the antithesis of a new municipal project in that upgrades to the system have been ongoing for decades. The system is extremely complex, and includes many water bodies and drainage basins. For these reasons, DEC Staff has reasonably varied from the suggestions or examples in the EPA guidance documents, but not from the intent and goals of the guidance documents. In fact, if the intervenors' view were correct, one would expect USEPA to be severely critical of the CSO ACO. Instead, EPA is supportive of the CSO ACO and has not voiced any of the concerns raised by the Intervenors.

NRDC and Keepers rely largely upon the proposed expert testimony of Bruce A. Bell, Ph.D., P.E. In my view, the Intervenors' proposed adjudicable issues, based upon Dr. Bell's proposed testimony, raise matters of policy choices rather than adjudicable legal issues. For example, the Intervenors, supported by Dr. Bell's offer of proof, argue that the CSO ACO compliance schedule results in unnecessary delays in completion of the City's Long Term Control Plan (LTCP) and consequently, in

the implementation of projects necessary to meet water quality standards. As discussed in greater detail below, I reject this argument. Inevitably, whichever schedule is applicable, the coordination of compliance in a system as complex as the City's will result in some delays or short term undesirable consequences. DEC Staff states that to proceed as the Intervenor's propose would likely result in litigation over proposed water quality standards before all projects of the CSO ACO are completed according to the compliance schedule. DEC Staff, as a policy matter, prefers to address the development of proposed water quality standards after all the compliance schedule projects are substantially in place. In sum, the Intervenor's concerns are best addressed through other forums.

A. Amicus Intervenor IEC's contends that IEC regulations should be included in the permit.

While the following language may not have been included in prior drafts, the February 2005 draft permits provide that pursuant to 6 NYCRR 750-2.1(d), "[i]f the discharge(s) permitted in a SPDES permit originate(s) within the jurisdiction of an interstate water pollution control agency, then the permitted discharge(s) must also comply with any applicable effluent standards or water quality standards promulgated by that interstate agency and as set forth in the permit for such discharge(s)." Moreover, the first page of each current draft permit references the water quality regulations of the IEC, 6 NYCRR Part 550, as one basis for issuance of the permit.

Ruling #1: It is not necessary to recite in the individual permits that IEC regulations apply to the permittee, because this is required by 6 NYCRR 750-2.1(d), as already referenced in the current draft permits. Moreover, the first page of each current draft permit references the water quality regulations of the IEC, 6 NYCRR Part 550, as one basis for issuance of the permit. This proposed issue is neither substantive nor significant, and the issue does not require adjudication.

B. Is the January 2005 CSO-ACO the appropriate mechanism for CSO regulation, or must the terms and conditions of the ACO compliance schedule be explicitly set forth in the draft SPDES permit?

NRDC contends that the proposed SPDES permits and the CSO ACO do not conform to the EPA CSO Control Policy, as required by CWA §402(q) and the EPA CSO Control Policy itself. The core of

the CSO Control Policy, NRDC contends, is the requirement that permittees develop and implement a LTCP, including CSO control measures, which have enforceable fixed-date implementation schedules.

CWA §402(q)(1) provides,

"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')."

In support of NRDC's proposed issue, IEC acknowledges that the ACO is an appropriate mechanism for CSO control and should be incorporated by reference into the SPDES permit. IEC Brief, page 5, June 10, 2005. Nonetheless, IEC contends, critical milestones of the CSO-ACO should be incorporated into the SPDES permit, and has identified proposed major milestones in Exhibit A of its brief. Id.

NRDC and Keepers contend that as a matter of law, CWA §402(q) requires that each permit must include all provisions necessary to implement the CSO Control Policy. NRDC and Keepers further contend that the draft SPDES permits are defective because they lack elements required in the CSO Control Policy. Specifically, these Intervenor point to CSO Control Policy sections addressing Nine Minimum Controls, development of a Long Term Control Plan and development of narrative water quality-based effluent limitations.

Moreover, NRDC and Keepers erroneously contend that because CWA §402(q)(1) requires that SPDES permits conform to the CSO Control Policy, the policy has the effect of a regulation and is mandatory and enforceable. This argument is unpersuasive and must be rejected. The policy on its face is not a requirement in the way that a regulation is.

NRDC and Keepers further contend that EPA Region 2 has stated its view that "[t]he long-term planning and implementation obligations in the order [CSO-ACO] should, by mutual consent, be contemporaneously incorporated into the [SPDES] permits governing discharges from the City's fourteen wastewater treatment plants." EPA Region 2 letter, W. Andrews (EPA Reg. 2) to J. DiMura (DEC), 10/6/04. This is not a statement of an EPA requirement, but instead a statement of an EPA recommendation or preference (i.e.,

the difference between "should" and "must").

The City responds to these arguments by asserting that the language appearing in the current draft SPDES permits exactly reflects the prior decisions of the DEC Commissioner and prior rulings of the ALJ. DEC Staff adds that CWA §402(q) does not require that the LTCP be included in a SPDES permit when, as here, the requirement already is set forth in an ACO.

Despite NRDC's arguments to the contrary, the CSO Control Policy is by definition a policy. It is a guidance document, not a rule (which must be duly promulgated). As to whether the CSO Control Policy is an unpromulgated rule, the central question is whether the agency action binds private parties or the agency itself with the force of law:

"Three criteria determine whether a regulatory action constitutes the promulgation of a regulation: '(1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.' See *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). "The first two criteria serve to illuminate the third, for the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." *General Motors Corporation v EPA*, 363 F.3d 442, 361 U.S. App. D.C. 6 (April 2, 2004), citing *Molycorp, Inc. v EPA*, 197 F.3d 543, 545; see also *American Portland Cement*, 101 F.3d 775, 776; *CropLife America v EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003); *General Electric Co. v EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002).

The issue of whether the CSO Control Policy is an unpromulgated rule is a matter to be decided by a court of law.

In addition, NRDC and Keepers cite state law and regulation in support of their position. They point to ECL §17-0811(5), contending that the terms and conditions of the ACO compliance schedule must be explicitly set forth in the draft SPDES permit. ECL §17-0811(5) provides that, "SPDES permits issued pursuant hereto shall include provisions requiring compliance with the following, where applicable . . . 5. any further limitations necessary to insure compliance with water quality standards adopted pursuant to state law."

NRDC and Keepers argue that the ACO compliance schedule is within the meaning of the general terms "limitations necessary to insure compliance with water quality standards adopted pursuant to state law" in ECL §17-0811(5). Additionally, the intervenors cite 6 NYCRR 750-1.14(a) and ECL §17-0813(2) in support of their contention that if water quality standards cannot be achieved immediately, the permit must include a compliance schedule with specific steps designed to attain compliance within the shortest reasonable time. However, this begs the question of what constitutes the "shortest reasonable time."

Ruling #2: NRDC's and Keepers' argument that the EPA guidance document is a rule is erroneous and must be rejected. Nonetheless, an adjudicable issue is raised as to whether DEC staff must incorporate the compliance schedule in permits, or in the alternative, include a statement in each permit that the compliance schedule represents the "shortest reasonable time" within which to achieve water quality for that WPCP's receiving waters. Adjudication of this issue would be avoided if DEC Staff incorporates the compliance schedule in each draft permit, or in the alternative, include a statement in each permit that the compliance schedule represents the "shortest reasonable time" within which to achieve water quality for that WPCP's receiving waters.

C. Whether the draft permits fail to satisfy the requirement of CWA §402(q) that a permittee develop a LTCP "as soon as practicable".

In addition to the above, NRDC contends that the CSO ACO and draft permits fail to satisfy the requirement of CWA §402(q) that a permittee develop a LTCP "as soon as practicable". NRDC notes that the ACO allows the City until 2017 to complete a LTCP. NRDC also raises this as a state law issue, citing ECL 17-0811(5). The language "as soon as practicable" is a qualitative standard. Reasonable minds may differ as to what constitutes "as soon as practicable" with respect to the permit modifications at issue. The ACO requires the City to submit drainage basin-specific LTCPs, in the form of Waterbody/Watershed Facility Plans for each of the twelve drainage basins by June 2007. NRDC notes, however, that the ACO allows for up to a decade of delay (until construction begins on the specific CSO facilities described in the ACO), to begin the water quality standards review process in each drainage basin. In conclusion, NRDC states that because a final City-wide LTCP cannot be prepared until the close of the water quality standards review process, this results in an

unnecessary gap of more than ten years between the time for the City's submission of draft "drainage basin specific" LTCPs and the time when a final City-wide LTCP is due.

In response, DEC Staff contends that its approach recognizes the concern of developing LTCPs "as soon as practicable" but does so in view of the City's ongoing overall CSO abatement program. DEC Professional Engineer DiMura explained that Staff's challenge with the City's sewage treatment SPDES program is managing a large list of ongoing projects that predate the USEPA guidance document and reconciling these ongoing projects with the USEPA's CSO Guidance for Long Term Control Plan issued in 1995.

Among DEC Staff's primary concerns is to assure no backsliding from the City's commitments under the 1992 CSO ACO. Staff contends that the Waterbody/Watershed Facility Plans are equivalent to LTCPs, except that they do not require a change in water quality standards, if necessary. In DEC Staff's view, to insert the public legal process of a possible change in water quality standards as a condition would unnecessarily delay going forward with capital improvement projects - and improvements in water quality - to which the City had previously committed. DEC Staff views regulation of the City's wastewater treatment plant SPDES permits as a tremendously complex program, not amenable to the general approach outlined in the USEPA guidance. Instead, DEC Staff contends that to insert the ongoing projects sequentially into each upgrade schedule, would delay water quality improvement in and around New York City. DEC Staff asserts the CSO ACO represents a practical solution that meets the DEC's objectives of completing the projects in a timely manner while complying with the policy objectives set forth in the USEPA guidance documents.

DEC Staff attributes greater importance to the Waterbody/Watershed Facility Plans than does NRDC. In DEC Staff's view, the Waterbody/Watershed Facility Plans are draft LTCPs, addressing all nine elements required by EPA to be present in a LTCP. Additionally, DEC Staff states that the CSO ACO requires the submission of "drainage basin specific" LTCPs by a date certain for each of the drainage areas set forth in Appendix A of the CSO ACO. In DEC Staff's view, this is the most expeditious way to proceed (i.e. "as soon as practicable"), because it requires that the City complete the long delayed CSO improvement projects without the potential for added delay caused by the regulatory review process associated with a proposed water quality standard revision -- in DEC Staff's view, likely a highly contentious review process.

In fact, DEC Staff's position is supported by the EPA. In commenting on the CSO ACO, EPA strongly endorsed the efforts of DEC and the City to come to final agreement on the terms of the CSO ACO so that CSO abatement can continue without delay. Letter, W. Andrews, EPA Region II, to DiMura, DEC, dated October 6, 2004. Moreover, EPA does not object to the length of the CSO ACO compliance schedule. Implicitly, for EPA, the CSO ACO compliance schedule is "as soon as practicable."

RULING #3: This proposed issue is neither substantive nor significant. In my view, it is sufficient for compliance with CWA §402(q) that the SPDES permit(s) incorporate by reference the CSO ACO. The determination whether the CSO Control Policy is an unpromulgated rule is a matter for federal court review. For purposes of this permit modification hearing, the CSO Control Policy remains a guidance document. NRDC's contention that "the policy has the effect of a regulation and is mandatory and enforceable," must be rejected.

The City will submit all draft LTCPs, in the form of the Waterbody/Watershed Facility Plans, no later than June 2007; thereafter, drainage basin specific LTCP submissions have been tied to the notice to proceed to construction. However, the draft permits should be revised to explicitly state that the Waterbody/Watershed Facility Plans are draft LTCPs. [See T-47-49, ACO Response to Comments, at 50]. The ACO provides sanctions for non-compliance with the milestones established therein. The approach advocated by the Department Staff complies with the CWA §402(q) requirement that LTCPs be developed "as soon as practicable" and state law requirements of "shortest reasonable time." The ACO CSO schedule for delaying the regulatory review process associated with proposed water quality standard revisions is appropriate and meets with EPA approval of the ACO CSO as set forth in the October 6, 2004 EPA letter to DEC Staff.

D. Whether the draft permits fail to conform to the EPA CSO Control Policy because the draft SPDES permits do not include narrative water quality based effluent limitations.

With this proposed adjudicable issue, NRDC contends that the CSO ACO does not include a requirement that the City's CSO discharges comply with water quality standards. Instead, NRDC argues, DEC Staff and the City project that the CSO ACO will not

reduce current city-wide CSO discharge volumes at all when fully implemented in 2023, but will merely help compensate for anticipated growth in dry weather flows through the combined sewer system. This approach, NRDC concludes, is contrary to the EPA's CSO Control Policy which requires that the City develop and implement a LTCP to meet water quality standards. NRDC urges that the CSO ACO (or draft SPDES permits) must be revised to provide for compliance with existing water quality standards, and may provide for alternative compliance with revised water quality standards only in the event that the standards are actually revised.

NRDC and Keepers assert that this issue is significant because including narrative water quality based effluent limitations in the individual SPDES permits will ensure that obligations addressed therein will be subject to citizen suit enforcement under the federal CWA (CWA §505, 33 USC §1365). They contend that all citizen suit rights would be preserved by incorporating the ACO-CSO requirements into the proposed SPDES permits. DEC Staff responds that the current draft SPDES permits do prohibit discharges that would violate water quality standards. Staff uses the example of the draft Newtown Creek Water Pollution Control Plant SPDES permit as typical of the draft permits. The first page of the permit authorizes effluent discharges from outfall 001 of the facility into receiving waters of the East River (a total of 86 outfalls discharging into the East River and other receiving waters) in accordance with the effluent limitations, monitoring requirements and other conditions set forth in the permit.

Regarding preservation of citizen suit rights, DEC Staff contends that the first page of each current draft permit references 6 NYCRR 750-1.2(a) and 750-2, which require the City to comply with effluent limitations. A narrative water quality based effluent limitation is set forth in 6 NYCRR 750-1.2(a)(31) (effective May 12, 2003): "[e]ffluent limitation means any restriction on quantities, quality, rates and concentrations of chemical, physical, biological, [sic] and other constituents of effluents that are discharged into waters of the state."

In addition, DEC Staff points to 6 NYCRR 750-1.2(a)(27) (effective May 12, 2003), and specifically to the definition of "discharges authorized by a SPDES permit," which includes discharges of wastewater or stormwater from sources listed in the permit through outfalls listed in the permit, that do not violate ECL section 17-0501 (as further limited therein). See 6 NYCRR 750-1.2(a)(27).

6 NYCRR 750-2.1(b) provides that, "[u]pon issuance of a SPDES permit, a determination has been made on the basis of a submitted application, plans, [sic] or other available information, that compliance with the specified permit provisions will reasonably protect classified water use and assure compliance with applicable water quality standards."

Therefore, these provisions are incorporated by reference in the permits as if fully set forth in the permits.

RULING #4: The narrative standards are set forth in the part 750 regulations, as discussed above. The standards are applicable to all SPDES permits. These issues, whether presented with reference to federal or state law, are neither substantive nor significant. The proposed issues do not raise doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would inquire further, nor do the issues have the potential to result in denial or major modification of the draft permits, nor result in imposition of significant new permit conditions in the draft permits.

E. Whether the CSO ACO improperly relies on a separate sanitary sewer and storm water system (SSS) performance standard as the best-case scenario for the evaluation of CSO control alternatives, thereby significantly skewing the selection of CSO abatement measures in the direction of less ambitious alternatives.

NRDC contends that use of the SSS performance standard does not represent a "reasonable range of alternatives" for attainment of water quality standards as required by the CSO Control Policy. NRDC asserts that the SSS performance standard distorts the analysis in favor of selecting weaker CSO abatement alternatives, thereby skewing the results of the LTCP in favor of less protective measures. In NRDC's view, the use of the SSS performance standard is inappropriate for New York City because it would result in discharge of large amounts of storm water to the water bodies. Further, NRDC asserts, it would shift the non-point source pollution currently being captured in the combined sewers and treated at the City's WPCPs to stormwater that would be discharged untreated to the receiving water bodies.

The City responds to this proposed issue by stating that no municipality treats, or reasonably could be required to treat, most or all of stormwater runoff in wastewater treatment plants.

The comparison to an SSS is logical, the City contends, as compared to a solution involving no CSOs. Moreover, the City argues, the comparison is practical, because sewer separation is the most commonly used CSO control measure in the nation. In sum, the City concludes that the analysis of complete sewer separation as an alternative that achieves zero CSO overflow events per year complies with guidance provided in the CSO Control Policy.

DEC responds to this proposed issue by citing the ACO CSO Response Summary. In the Response Summary, DEC Staff states,

"DEC will not approve Waterbody/Watershed Facility Plan reports that do not contain evaluation of a range of CSO control alternatives in the assessment of the attainment of water quality standards. One of these alternatives would be sewer separation, which is the CSO plan for the overwhelming number of CSO communities in the Country DEC expects that other alternatives would be evaluated. DEC expects that CSO retention, end-of-pipe treatment, Best Management Practices, and other alternatives would be evaluated in the assessment of the attainment of water quality. " Response Summary at 38.

Ruling #5: This proposed issue is neither substantive nor significant. As stated by the City and DEC Staff, I conclude that the use of the SSS performance as a comparison does represent one alternative in a "reasonable range of alternatives" for attainment of water quality standards as required by the CSO Control Policy. The proposed issue does not raise doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would inquire further, nor does the issue have the potential to result in denial or major modification of the draft permits, nor result in imposition of significant new permit conditions in the draft permits. No adjudicable issue is presented.

F. Whether "Knee of the Curve" analysis improperly limits the amount of control mechanisms to be applied to control of CSO events.

Here, the Keepers' concerns are that using knee of the curve analysis will result in a very lengthy delay failure of control of CSO discharges. Knee of the curve (KOC) analysis is a cost/benefit analysis of various technologies or strategies, in

this case, to achieve control of CSO discharges. Keepers are concerned, however, that KOC will be used not just to choose among alternatives, but also to limit the amount of assets the City commits to CSO control, resulting in a failure to meet water quality standards, and consequently, a change in water quality standards based upon the KOC analysis.

DEC responds to this proposed issue by citing the ACO CSO Response Summary. In the Response Summary, DEC Staff states,

"The commenter is mixing two related but separate concepts. To clarify, the 2004 ACO is consistent with the CSO Control Policy, in that it requires evaluation of cost/performance considerations. The "knee-of-the-curve" analysis is the method developed by EPA as part of the CSO Control Policy to evaluate the benefits attained from various CSO abatement alternatives in light of the cost of those alternatives. The "knee-of-the-curve" analysis was used by DEP only in the development of the CSO abatement projects required by the 2004 ACO.

The commenter's suggestion that the "knee-of-the-curve" analysis is used to determine the need for changes to WQS is misapplied. The Code of Federal Regulations, 40 CFR 131.10(g), lays out six criteria for testing whether water quality standards may be modified in development of a Use Attainability Analysis. "Social and economic impacts" represents only one of the six criteria set forth at 40 CFR 131.10(g). These six criteria, and not the "knee of the curve" analysis, will be used in the development of any Use Attainability Analysis". Response Summary at 38.

The City points to the Paerdegat Basin Use Attainability Analysis (UAA), as the only complete UAA to date, to show that the City has not used the KOC analysis or even suggested economic impact is a factor supporting modification of water quality standards in the Paerdegat basin.

Ruling #6: NRDC and Riverkeeper have misconstrued the policies, as explained in the Response Summary. DEC Staff and the City have clarified that Keepers are mistaken in assuming that the City or DEC proposes to use the KOC analysis to effect a change in water quality standards. This proposed issue is neither substantive nor significant. The proposed issue does not raise doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the

project such that a reasonable person would inquire further, nor does the issue have the potential to result in denial or major modification of the draft permits, nor result in imposition of significant new permit conditions in the draft permits. No adjudicable issue is presented.

G. Whether discharges of nitrogen and Biological Oxygen Demand (BOD) in treated effluent from the four Jamaica Bay WPCPs¹ act cumulatively with CSO discharges to impair water quality of Jamaica Bay, thereby requiring that these four SPDES permits must contain water quality-based effluent limitations for nitrogen and BOD addressing the cumulative impacts of CSO and WPCP discharges.

NRDC contends that in order to assure that CSO discharges will not contribute to water quality standards violations in Jamaica Bay, the four Jamaica Bay WPCP draft SPDES permits must be modified to contain water quality-based effluent limitations addressing the cumulative impacts of CSO and WPCP discharges. NRDC concedes that underlying this proposed issue is the same issue asserted by NRDC with respect to all the permits, discussed above, that there is no narrative water quality based limitation in the draft SPDES permits; nor in this instance, is there such a limitation in the Nitrogen Administrative Consent Order (N-ACO).

DEC Staff responds that the Jamaica Bay water quality problems associated with nitrogen are the subject of the N-ACO. N-ACO, 2002, Appendix C at 40. The N-ACO requires DEP to develop a comprehensive Jamaica Bay report, to be submitted to DEC for review and approval in 2006. Further, the N-ACO and the four Jamaica Bay draft SPDES permits require that upon approval of the comprehensive report, or as soon as possible thereafter, DEC will propose modifications to the four Jamaica Bay WPCP SPDES permits requiring implementation of the comprehensive report recommendations. See, for example, 26th Ward draft SPDES permit, February 2005, Page 8, footnote V. Because the technical report is currently being developed and will not be submitted to DEC until 2006, DEC Staff argues that consideration of this issue is premature.

DEC Staff water P.E., Mr. DiMura, stated that, the eutrophication problems in Jamaica Bay clearly point towards the four WPCPs and not CSO events as the primary cause of nitrogen

¹ The four plants are 26th Ward, Coney Island, Rockaway and Jamaica.

loading in the Bay. DEC Staff attorney Altieri contends that inserting a narrative water quality standard in the Jamaica Bay permits does not make sense; to do so would result in another enforcement situation, similar to the current circumstance of two combined administrative consent orders requiring development of a detailed program to resolve the problem.

Ruling #7: This proposed issue is neither substantive nor significant. No adjudicable issue exists regarding revision of the draft Jamaica Bay permits to recite a narrative water quality standard. The same argument as above applies to narrative effluent limits in the permit: the regulations are referenced on the first page of each current draft permit; the regulations contain the narrative water quality standards.

H. Whether the six Long Island Sound WPCP draft SPDES permits should include numeric limitations for CSO event nitrogen loading, in order to achieve compliance with the nitrogen total maximum daily load (TMDL) for Long Island Sound.

NRDC contends that because the TMDL provides waste load allocations (WLAs) for the six Long Island Sound WPCPs, numeric limitations must be included in the SPDES permits for relevant discharges.

DEC Staff counters, in sum, that because the draft SPDES permits explicitly state that offsets will be required at the WPCPs if CSO nitrogen discharges do not fall within the TMDL WLAs, this proposed issue is academic and therefore, not substantive and significant. The Nitrogen TMDL provides separate WLAs for both CSOs in Zone 8 and Zone 9 and for the WPCPs in Zone 8 and Zone 9.

DEC Staff explains that based upon approved methodology, the 2003 Total Nitrogen (TN) loads for the East River CSOs are far less than the 2004 WLAs for both Zones 8 and 9; if future CSO flow conditions remain similar to those encountered in 2003, the East River CSO TN loads will most likely remain less than the 2004 WLAs. DEC Staff describes 2003 as a relatively wet year. In addition, DEC Staff continues, the CSO ACO requires a specific list of further CSO abatement projects and any further measures prescribed by the applicable waterbody/watershed facility plans and the LTCs. DEC Staff expects these measures will further reduce TN loading to the East River after full project build-out under the CSO ACO. Lastly, DEC Staff notes that if these reductions do not achieve compliance with the CSO ACO WLAs, then, as noted above, nitrogen offsets will be required at the WPCPs.

Department Staff stated this position in the Response to Comments on the 2004 CSO ACO:

"DEC has not included requirements about CSO total nitrogen discharges in the ACO since this parameter is already regulated in DEP's SPDES permits. DEP is required by the SPDES permits to submit an annual report documenting the monthly average of the 12-month rolling average total nitrogen mass loadings to the LIS [Long Island Sound]. DEP has submitted the first of those reports in April 2004, which indicates that CSO loadings to these zones are in full compliance with the CSO Wasteload allocations ("WLA") for 2004. This report also indicates that if flow conditions remain similar to those in 2003, CSO total nitrogen loadings should be less than the 2009 CSO WLA for Zone 9 and slightly above the 2009 WLA for Zone 8. Further reductions in CSO total nitrogen loadings are anticipated from CSO control activities that direct CSO flows into the WPCPs. If these further reductions do not achieve compliance with the CSO WLAs for Zone 8 and 9, DEC will then require nitrogen offsets at the WPCPs." Response to Comments on the 2004 CSO ACO, at 56.

However, NRDC, joined by Keepers, states that one of its concerns is that DEC's representation that offsets will be required if the City does not achieve compliance with the CSO WLAs for Zone 8 and 9 by 2009 is not set forth in the CSO ACO or in the draft SPDES permits.

Additionally, Keepers contend that DEC Staff's position ignores the TMDL/draft SPDES permit requirement that the City must reduce nitrogen loading by 58.5% by 2014 and that the City is not planning to increase the capture rate of CSO over the long term. These factors, Keepers conclude, will make implementation of offsets a certainty under DEC Staff's regulatory proposal.

As noted above, DEC Staff points to additional CSO abatement requirements that will be phased in and will affect the East River to achieve compliance with the 2009 WLAs.

Ruling #8: This issue is held in abeyance until disposition of appeal of the nitrogen issues ruling. At that time this issue will be considered further with the issues conference participants, to determine, at a minimum, whether staff should incorporate language from the CSO ACO response to comments document (at page 56)

into the six Long Island Sound WPCP permits.

I. Whether the draft SPDES permits and the CSO ACO (executed January 14, 2005) Include Procedural Safeguards, as Required by Prior Orders of the DEC Commissioner.

NRDC's primary concern here, is whether subsequent modification of any City WPCP SPDES permit will require an opportunity for public hearing, including possibly, an adjudicatory hearing. NRDC relies upon an ALJ ruling from June 1993, which references 6 NYCRR Part 753.

NRDC contends that the CSO ACO was improperly executed by the Department's Commissioner because the process and procedures for public review of the draft ACO were inconsistent with the process afforded by prior Commissioner decisions and the rules and regulations of the Department because no public hearing process occurred.

In addition, NRDC contends that the proposed permit language providing that in the event of modifications to the CSO ACO, public participation would be permitted pursuant to 6 NYCRR Part 621 - - i.e., not necessarily a full (Part 624) adjudicatory hearing process.

IEC states that in the development of the 1992 CSO ACO, IEC requested an adjudicatory hearing on the draft permits, but DEC issued the ACO without any public hearing process. IEC sought review of this action pursuant to CPLR Article 78. IEC states that an outgrowth of the Article 78 proceeding was the hearings and decisions (the Third and Fifth Interim Decisions) now cited by the intervenors and DEC Staff. IEC contends that intervenors previously asserted that the process must include a right to have an adjudicatory hearing, and the argument was ignored by the DEC.

However, as DEC Staff notes, Part 753 has been repealed, effective May 12, 2003. DEC Staff contends that 6 NYCRR 750-1.18 is the applicable current provision, which provides that SPDES permits may be modified in accordance with 6 NYCRR Part 621. *See, for example, 26th Ward, Draft SPDES permit, Section IX, February 2005 (Modifications to the CSO Order on Consent will be publicly noticed for review and comment in accordance with Uniform Procedures Regulations, 6 NYCRR Part 621).* The reference to Part 621, NRDC contends, authorizes only public notice but not necessarily a full (Part 624) adjudicatory hearing process.

DEC Staff, in sum, states that the language which NRDC seeks is not required by the CWA nor by DEC Commissioner orders,

statutes or regulations. Instead, DEC Staff contends that the proposed permit provision cited above (Section IX of the February 2005 draft permits) harmonizes the prior Commissioners' decisions and the current SPDES regulations (i.e., 6 NYCRR 750-1.18), by citing to 6 NYCRR Part 621.

Ruling #9: This proposed issue is neither substantive nor significant. The proposed issue does not raise doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would inquire further, nor does the issue have the potential to result in denial or major modification of the draft permits, nor result in imposition of significant new permit conditions in the draft permits. No adjudicable issue has been identified.

J. Whether the draft SPDES permits include the Nine Minimum Controls (NMC) for a plan for pollution prevention.

Keepers and IEC concede that although the draft permits specifically address NMCs in the "Best Management Practices" (BMPs), the draft permits do not adequately address the seventh NMC, pollution prevention. The Keepers and IEC rely upon an EPA guidance document, "Combined Sewer Overflows, Guidance for Nine Minimum Controls" (NMC Guidance), EPA 832-B-95-003, issued May 1995, in asserting this proposed adjudicable issue. In the Intervenor's view, the permits must provide in-depth planning for pollution prevention in addition to CSO controls already identified in the draft permits.

DEC Staff cites the disclaimer/notice appearing at the beginning of the NMC Guidance that states, "The statements in this document are intended solely as guidance. . . EPA and State officials may decide to follow the guidance provided in this document or to act at variance with the guidance, based on an analysis of specific site circumstances." NMC Guidance. Furthermore, DEC Staff states that the NMC referenced in the 1994 CSO policy are implemented in New York through BMPs designed to minimize pollution. *See, for example* 26th Ward draft SPDES permit, Section VIII, February 2005. Also, EPA's report to Congress finds that in New York, pollution prevention is addressed through BMPs. *See EPA's Report to Congress on Implementation and Enforcement of the CSO Control Policy*, EPA 833-R-01-003 (<http://www.epa.gov/npdes/pubs/csorcappbl.pdf>).

DEC Staff explained that EPA's Combined Sewer Overflows

Guidance for Nine Minimum Controls (EPA 832-B-95-003), May 1995² provides that "most of the suggested measures involve behavioral change rather than construction of storage or treatment devices." NMC Guidance, at page 8-1. The draft permits include a requirement for the permittee to submit an annual report. See, for example, Bowery Bay draft SPDES permit, February 2005, Section IX (Best Management Practices for CSOs) (subparagraph 7[d]) Control of Floatables and Settleable Solids, Institutional, Regulatory and Public Education [within 24 months of the effective date of this permit, the permittee shall submit a report that examines institutional, regulatory and educational public education programs to reduce the generation [sic] floatable litter as identified in the *NYCDEP Phase I City-Wide Floatable Study*. The report should examine programs within the City's legal authority and recommend alternatives, and an implementation schedule that will reduce the water quality impacts of street and toilet litter. Upon approval by the Department the schedule shall become a requirement of this permit.] In addition, DEC Staff summarized the pollution prevention measures the City employs including street cleaning, public education programs, solid waste collection, commercial and industrial pollution prevention programs and catch basin repair and maintenance.

As noted above, EPA has agreed that in New York, pollution prevention (i.e., NMC) is addressed through several alternative BMPs designed to minimize pollution. See *EPA's Report to Congress on Implementation and Enforcement of the CSO Control Policy*, EPA 833-R-01-003 (<http://www.epa.gov/npdes/pubs/csorcappbl.pdf>).

Ruling #10: The NMC Guidance document is not binding on New York, by its own terms, quoted above. In any event, I find that pollution prevention is adequately addressed in DEC's regulatory oversight of the City's water quality programs. No substantive or significant issue has been identified regarding compliance with EPA's Nine Minimum Controls program.

Appeals

A ruling of the ALJ 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

² Available at <http://www.epa.gov/npdes/pubs/owm0030.pdf>.

be appealed to the Commissioner on an expedited basis.³ Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling.⁴

Allowing additional time for the filing of appeals and replies, as authorized by 6 NYCRR 624.6(g), any appeals must be received by Deputy Commissioner Carl Johnson (Office of the Deputy Commissioner, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, New York, 12233-1010 [Attention: Assistant Commissioner Louis A. Alexander]) before 3 p.m., on December 16, 2005. All replies to appeals must be received before 3 p.m., on January 6, 2006. One copy of each appeal or reply must be filed with the Deputy Commissioner. In addition, send one copy of any appeal and reply to the Chief Administrative Law Judge and two copies of any appeal and reply to the Administrative Law Judge. Participants who use word processing equipment to prepare their brief and/or reply must also submit a copy of their appeal and/or reply to the Administrative Law Judge in electronic form, by E-mail attachment formatted in either Adobe Acrobat, WordPerfect for Windows or Microsoft Word for Windows.

Alternatively, parties may file an electronic copy via E-mail at "kjcasutt@gw.dec.state.ny.us," to be followed by one paper copy to the Deputy Commissioner, Chief ALJ and (two copies) to the ALJ by first class mail, all postmarked by the date(s) specified above. This alternative service will satisfy service upon the Deputy Commissioner, Chief ALJ and the ALJ.

Also, send one copy of any appeal or reply to each person on the distribution list for this case. The participants shall ensure that transmittal of all filings is made to the ALJ and all others on the distribution list at the same time and in the same manner as transmittal is made to the Deputy Commissioner. No submissions by facsimile/telecopier will be allowed or accepted.

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

_____/s/_____
Kevin J. Casutto
Administrative Law Judge

Dated: November 9, 2005
Albany, New York

³ 6 NYCRR 624.8(d)(2).

⁴ 6 NYCRR 624.6(e)(1).

To: Attached NYCDEP SPDES Distribution List
(dated February 2, 2005)