STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Modification of the Fourteen State Pollutant Discharge Elimination System (SPDES) Permits Pursuant to Environmental Conservation Law Article 17 and 6 NYCRR Parts 621, 624 and 750 *et seq.*, for the City of New York's 14 Publicly Owned Sewage Treatment Plants Operated by the City of New York Department of Environmental Protection (NYCDEP)

RULING ON PROPOSED ADJUDICABLE ISSUES AND PETITIONS FOR PARTY STATUS AND RULING ON MOTION FOR STAY

(January 28, 2004)

DEC ID	SPDES No.	NAME	LOCATION		
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	26TH 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 14 water pollution control plants (WPCPs), which treat sewage generated within the City of New York, as well as the City of New York's combined and separate sanitary sewage collection facilities. The City of New York owns the 14 WPCPs. On or about June 27, 2002, the Staff of the Department of Environmental Conservation (DEC

Staff) provided the NYCDEP with notice of intent to modify the SPDES permits for the 14 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 DEC Staff's permit modification process has included lengthy negotiations with NYCDEP, and many of NYCDEP's objections have been withdrawn as a result of the negotiations.

Proceedings

A DEC Notice of Public Hearing and Availability of Proposed Modified Permits appeared as a legal notice in the New York *Daily News* on August 13, 2003 and was published in the DEC's electronic *Environmental Notice Bulletin* on August 14, 2003. Briefly, the permit modifications incorporate changes to the SPDES permits for the fourteen WPCPs in order to achieve compliance with the total maximum daily load (TMDL) and water quality standards for dissolved oxygen in Long Island Sound. The modifications address nitrogen effluent levels, combined sewer overflow events (to address storm water) and several additional, minor modifications. DEC Staff asserts that collectively, the modifications are intended to substantially improve the health of receiving waters, including the Long Island Sound and other waters surrounding New York City.

As advertised in the public notice, a legislative hearing was convened on September 17, 2003, and an issues conference was convened on September 18, 2003. Several people attended the legislative hearing, and three people, each representing party status applicants, provided public comments. The three speakers all spoke in support of DEC Staff's proposed modifications; some speakers expressed concern with the City's lengthy implementation time for achieving water quality standards, and expressed the view that the modifications do not go far enough or are too lax.

Prior to the issues conference, Pace Environmental Litigation Clinic, Inc., requested an extension of time to review the draft permits and file its petition for party status. Pace's request was granted and the filing date for petitions was extended from September 10, 2003 to September 23, 2003. As a result, although the issues conference record was opened on September 18, 2003, discussion of proposed issues was adjourned to October 9, 2003.

Timely petitions were received from five entities: the State of Connecticut, appearing by Assistant Attorney General John M. Looney; Interstate Environmental Commission (IEC), appearing by Eileen D. Millett, General Counsel; a joint petition of Riverkeeper, Inc., and Long Island Soundkeeper, Inc., represented by Pace Environmental Litigation Clinic (the Keepers), appearing by Karl S. Coplan, Esq., and Kirstin Etela; Save the Sound, Inc., appearing by Leah M. Lopez, Esq.; and Natural Resources Defense Council (NRDC), appearing by Brad H. Sewell, Esq. (collectively, the Intervenors).

DEC Staff appeared by Michael J. Altieri, Esq.

The City of New York appeared by William S. Plache, Esq., Gail Saunders, Esq., and Judah Prero, Esq., of the New York City Department of Law. The New York City Department of Environmental Protection appeared by Marcella R. Eckels, Esq.

The City raised several objections to the proposed modifications, and requested a hearing. The Intervenors' proposed adjudicable issues focused upon control of nitrogen loaded effluent and combined sewer overflow events.

The IEC, NRDC, the Keepers, Save the Sound and the State of Connecticut each sought amicus status on the City's issue that the permit limitations in the modified permits improperly extend beyond the five-year term of the permit. On October 9, 2003, neither the City nor DEC Staff objected to amicus status for these party status applicants, and amicus status was granted to the IEC, NRDC, the Keepers, Save the Sound and the State of Connecticut on this issue, in the event the issue is adjudicated or briefed.

The stenographic record of the September 17, 2003 legislative hearing and the September 18, 2003 and October 9, 2003 issues conference were received by October 22, 2003. At the conclusion of the October 9 issues conference session, the DEC Staff was provided an opportunity to make a supplemental filing by October 31, 2003 (as discussed further below), to which other issues conference participants could respond by November 7, 2003. Subsequently, at DEC Staff's request, an extension was granted to November 14, 2003 (for the DEC filing) and November 25, 2003 for any responsive filings. On November 14, DEC Staff filed a letter stating that Staff has opted not to submit any additional information to supplement the issues conference record. No responses were received on November 25, 2003, and the issues conference record closed on that date.

Background

In December 2000, the states of Connecticut and New York issued "A Total Maximum Daily Load Analysis to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound" (the TMDL Analysis or the TMDL). On April 3, 2001, the U.S. Environmental Protection Agency (USEPA) approved the TMDL for implementation.

The following description, summarized from the TMDL, provides context for the discussion of nitrogen issues that follows this section. In 1985, Congress appropriated funds for the USEPA to carry out a program to research, monitor and assess the water quality of the Sound in concert with the states of Connecticut and New York (through the Connecticut Department of Environmental Protection and the New York State DEC). This undertaking is known as the Long Island Sound Study (LISS).

In 1987, amendments to the federal Clean Water Act (CWA), section 320, established the National Estuary Program. Later that year, at the request of the states of Connecticut and New York, Long Island Sound was designated an "Estuary of National Significance" under this program.

In 1988, a Management Conference consisting of federal, state, interstate and local agencies, universities, environmental groups, industry and the public was convened and charged with developing a Comprehensive Conservation Management Plan (CCMP) to protect and improve the environmental quality of Long Island Sound while ensuring compatible human uses. The CCMP was approved in 1994 and focused on seven topics: (1) low dissolved oxygen (hypoxia), (2) toxic contamination, (3) pathogen contamination, (4) floatable debris, (5) the impact of these water quality problems and habitat degradation and loss on the health of living resources, (6) land use and development resulting in habitat loss and degradation of water quality, and (7) public involvement and education.

One of the most important of these topics is hypoxia. Hypoxia is a common occurrence in Long Island Sound bottom waters during the late summer, and is linked to an overabundance of nitrogen combined with the naturally occurring density stratification of the water column. While nitrogen is essential to a productive ecosystem, too much nitrogen fuels the excessive growth of algae. In turn, the microbial decay of algae and the respiration of oxygen-breathing organisms exhaust the available oxygen in the lower water column and in the bottom sediments,

eventually reducing the dissolved oxygen concentration to unhealthy levels. Consequently, excessive nitrogen impairs the function and health of Long Island Sound. The LISS has estimated that the load of nitrogen delivered to the Long Island Sound has more than doubled since pre-colonial times. Discharges from sewage treatment plants, atmospheric deposition and runoff are the primary sources of nitrogen enrichment to Long Island Sound.

Connecticut and New York have identified Long Island Sound as "water quality limited" due to hypoxia. As a result, developing a nitrogen TMDL to achieve water quality standards for dissolved oxygen in Long Island Sound is a priority. By definition, a TMDL specifies the allowable nutrient (pollutant) loading from all contributing sources (non-point and point sources) to a receiving waterbody that will not violate (or will attain) the applicable water quality standards, with seasonal variations and a margin of safety.

In the larger context, the USEPA released a draft document entitled "Draft Ambient Water Quality Criteria for Dissolved Oxygen (Saltwater): Cape Cod to Cape Hatteras", in January 2000. The LISS sponsored the development of a coupled three-dimensional, time variable hydrodynamic/water quality model called LIS 3.0. The basis of LIS 3.0 is an extension of a model of Chesapeake Bay that was developed by the U.S. Army Corps of Engineers and HydroQual, Inc. The LIS 3.0 model was used to simulate the effect of reducing nitrogen impacts on dissolved oxygen levels in Long Island Sound. As a result of LIS 3.0 modeling analyses, in February 1997, the LISS released for public comment a proposal for "Phase III Actions for Hypoxia Management," including a nitrogen reduction target of 58.5% to be achieved in 15 years. On February 5, 1998, following a year of public review, comment and revision, the Policy Committee for the LISS adopted the final plan for Phase III Actions for Hypoxia Management.

Consistent with the LISS's final plan for Phase III Actions for Hypoxia Management, DEC Staff seeks to modify NYCDEP's 14 SPDES permits by, among other things, requiring a nitrogen reduction of 58.5% for the City's WPCPs to be achieved over a permit period of 15 years.

The Motion for Stay

On December 5, 2003, DEC Staff filed a motion to stay the proposed combined sewer overflow (CSO) issues component of this proceeding for a period of 120 days. Briefly, CSOs are discharges to state waters of untreated sewage combined with

storm water. CSOs are caused by wet weather flows in excess of WPCP treatment capacity. During CSO events, pollutants are released in liquid form and as floatable, suspended or settleable solids to state waters.

The DEC Staff recently served a notice of violation upon the City alleging WPCP SPDES permit violations related to CSO events. DEC Staff proposed a 120-day schedule to the City to negotiate a consent order to resolve the alleged violations and address future CSO regulation and control. Additionally, DEC Staff filed a December 22, 2003, letter from the City indicating its intent to negotiate with DEC Staff.

The Keepers filed an objection to DEC Staff's motion, dated December 11, 2003 and NRDC filed an objection to Staff's motion, dated December 17, 2003. The Keepers contend that the enforcement proceeding and the permit modification proceeding are two separate actions which bear no relation to each other, and that the enforcement action is not a substitute for the permit modification proceeding. In its objection to the motion, NRDC contends that DEC Staff's requested stay is more likely to delay than expedite the permit modification proceeding. In NRDC's view, it is extremely unlikely that the consent order renegotiation will resolve or even address the CSO concerns identified by the Keepers and NRDC in their petitions. Specifically, NRDC notes that DEC Staff's recent notice of violation does not reference the new CSO federal requirements or CWA section 402(q), both of which were created subsequent to the 1992 CSO Abatement Administrative Consent Order (R2-3351-90-12, et al.).

Lastly, NRDC contends that because the CSO and nitrogen issues - - both factual and legal -- overlap, granting a stay of the CSO issues would result in redundancy and expense, possibly including the recalling of fact and expert witnesses. In NRDC's view, if DEC Staff intends a renegotiated administrative consent order to incorporate a process to design a long-term control plan, that process must not only be consistent with the federal requirements but must be incorporated into the permit itself.

While the Keepers are correct that DEC Staff's enforcement action is not a substitute for the permit modification proceeding, enforcement and permit actions concerning a single entity are not necessarily separate actions bearing no relation to each other when applicable to the same facility. It is appropriate for the regulatory agency to consider enforcement related factors in permitting and the permit status of an entity charged with environmental violations. For example, 6 NYCRR part

621 provides that in a permit proceeding, the regulatory agency may consider factors related to enforcement proceedings. *See* 6 NYCRR 621.14(a)(5) (noncompliance with previously issued permit conditions, orders of the Commissioner, provisions of the ECL or regulations of the Department related to the permitted activity may form the basis for modification, suspension or revocation of a permit).

The granting of a motion for stay, while not specifically addressed in Part 624, is within the discretionary authority of the ALJ. *See generally* 6 NYCRR 624.6(c). This permit proceeding is a modification proceeding initiated by Department Staff. Regulation of NYCDEP's WPCP SPDES permits has a lengthy history. The Department Staff contends that the proposed stay will result in judicial economy and administrative efficiency; NRDC argues to the contrary. Nonetheless, I find that it is appropriate to allow DEC Staff an opportunity to pursue its regulatory goals regarding the City's 14 WPCPs through a negotiation process with the City, as Staff has requested in its motion.

Ruling on Motion for Stay

Ruling #1: The DEC Staff's Motion for Stay is granted. Review of the proposed CSO issues in this proceeding will be stayed until April 9, 2004, or until the enforcement matter is resolved, whichever is sooner. DEC Staff will provide a status report to the Distribution List at the conclusion of the stay period.

I will provide a further procedural schedule following review of the status report. At a minimum, the Intervenors will be provided an opportunity to comment on any resulting consent order and will have an opportunity to submit revised proposed CSO issues taking into account the terms and conditions of a resulting consent order.

Discussion of Proposed Adjudicable Issues and Rulings

At the beginning of the October 9, 2003 issues conference, the City announced that as a result of additional negotiations with the DEC Staff, the City was withdrawing or had resolved by stipulation or negotiation several of its remaining objections to the draft modified permits. These issues included the time frame for submittal of wet weather operation plans and a definition of the term "approvable" in the draft permits (both issues withdrawn

by the City), and the method for calculating total nitrogen in the effluent, resolved by stipulation referencing the method set forth in the April 2002 nitrogen consent order (DEC Case No. CO2-20010131-7). Last, the issue of measurement of action concentrations for certain parameters of volatile organic compounds (VOCs) was resolved by modification of draft permit terms to specify that the action levels for corresponding VOCs are based upon the USEPA standard analysis methods currently employed by NYCDEP.

The City identified four remaining objections to the draft permits, each of which the City asserts are substantial terms and conditions of the modified permits and, therefore, raise adjudicable issues.

I. Long Island Sound Trading Ratio

The City requests that the Long Island Sound approved nitrogen trading ratio should be in effect for the duration of the permits and should be used to determine compliance with effluent limits in the permits. Essentially, the City asserts that this is an omission in the draft permits.

Under the TMDL limits, the Long Island Sound was divided into eleven separate management zones. The City's upper East River plants[1] are in zone eight and the City's lower East River plants[2] are in zone nine. The City contends that the LISS and the TMDL Analysis envisioned nitrogen trading among management zones, provided an explicit procedure and formula for such trading between zones, and anticipates that such trading should be authorized in the modified permits.

DEC Staff views this as a purely legal issue. DEC Staff responds that trading among management zones is not required under state or federal regulatory programs. Instead, implementation of such a trading program is within the discretion of the respective states. For example, in Connecticut, the General Assembly enacted a statute whereby the 79 plants in the state of Connecticut that impact Long Island Sound could upgrade their facilities, and the state would purchase the excess credits from them. The state "banks" the credits so that municipalities

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[1] The upper East River WPCPs are Talman Island, Wards Island, Bowery Bay and Hunts Point.

[2] The lower East River WTCPs are Red Hook and Newtown Creek.

unable to meet their effluent limits could purchase these credits from the state.

The New York legislature has not created any similar statute. Staff of the DEC Division of Water has not adopted any guidance on the concept of trading, nor has the Department promulgated any regulations on nitrogen trading.

Ruling #2: The City's proposed Long Island Sound Trading Ratio issue does not rise to the level of a dispute over a substantial term or condition of the draft permit. The proposed issue does not concern a substantial permit term or condition, because the City has not identified any statute or regulation that would require such trading. Instead, as DEC Staff has argued, such trading is permissible under the TMDL, but has not been implemented in New York. To grant the City's relief, more than permit conditions would be necessary. DEC Staff would have to establish a trading system through guidance or a rulemaking or a legislative initiative. In sum, the City's concern amounts to a policy dispute with the Department. The DEC adjudicatory hearing is not the appropriate forum to pursue such an issue. Instead, the City may pursue this policy issue between the agencies' executive offices or counsel offices, as the City deems appropriate.

II. Nitrogen Consent Order Effluent Limitations

The City asserts that the modified permit terms are inconsistent with the April 2002 nitrogen consent order and that the nitrogen effluent limitations of the consent order should be referenced in the modified permits as the enforceable limits. The City contends that the nitrogen consent order contemplates upgrades to the City's upper East River WPCPs. The plants will continue to operate during the upgrades, but certain capabilities to remove nitrogen might be reduced during construction resulting in increased nitrogen discharges, referred to as an effluent "bulge" of nitrogen. *See* Nitrogen Consent Order (April 2002, DEC Case No. CO2-20010131-7), Appendix B-1.

DEC Staff acknowledges that the draft modified permits contain different requirements than the Nitrogen Consent Order. DEC Staff explains that subsection XI(A) of the Nitrogen Consent Order contains a reservation of rights to the Department with regard to proposing effluent limitations pursuant to law, and a

reservation of rights to the City, to contest imposition of such limitations through the permit process.

DEC Staff asserts that the modified SPDES permits incorporate the requirements of law, specifically, the SPDES regulations and state law, whereas the Nitrogen Consent Order recognizes the realities of the upper East River WPCP upgrades, including the bulge effect. DEC Staff contends that the modified permits must contain the regulatory or statutory requirements. Moreover, DEC Staff points out that the draft permit language clarifies that, "[T]hese are the final water based effluent quality limits, based on the waste load limitations developed pursuant to the TMDL. The schedule of compliance for design, construction and operation of the water pollution control plants and interim effluent limitations are specified in the administrative order on consent, DEC Case No. CO2-20010131-7 [the Nitrogen Consent Order]."[3]

The City responds that if the draft modified permits are issued, this language would, by definition, place the City in violation for bulge events and subject the City to potential citizen lawsuits under the federal CWA. To address these concerns, the City proposes to add the phrase "and only enforceable thereunder," to the draft modified permit language set forth in the preceding paragraph, with the intent to limit federal CWA citizen suits.

Ruling #3: The City's proposed Nitrogen Consent Order Effluent Limitation issue does not rise to the level of a dispute over a substantial term or condition of the draft permit. The City's proposed language intended to limit citizen lawsuits does not appear to have any basis in law. In my view, a state administrative agency lacks authority to limit the scope of CWA citizen suits in this manner. No party has provided any citation or authority in support of the requested relief.

III. Permit Limitations Extending Beyond the Five-Year Term of the Draft Modified Permits.

The draft permits contain provisions consistent with the LISS's final plan for Phase III Actions for Hypoxia Management,

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[3] See, e.g., Red Hook WPCP Draft Modified Permit (July 30, 2003), at 14 of 40.

requiring a nitrogen reduction of 58.5% for the City's WPCPs in zones 8 and 9 to be achieved over a permit period of 15 years. The City contends that because the draft modified permits will have a permit term of five years, the provisions for nitrogen reduction should not exceed the five-year permit term. The TMDL, the City asserts, is subject to reassessment: "A critical component of phased implementation is the reassessment of management goals and actions based on new information." TMDL Analysis, at 46. Therefore, the City concludes, the Phase I, Phase II and Phase III nitrogen effluent limitations, culminating in the Phase III 58.5% limit, may be revised during the course of implementation. However, if the TMDL is revised, then-existing permits could be modified to reflect the revision. The City did not respond to the argument that this would cure any problem or inconsistency with having the complete 15-year TMDL limits set forth in the current draft modified SPDES permits (and future permits).

DEC Staff counters that the 58.5% TMDL nitrogen effluent reduction is required, ultimately, as a final water quality based nitrogen effluent limitation, necessary to achieve consistency with the TMDL Analysis and waste load allocations. The 58.5% TMDL nitrogen effluent reduction represents the final water-based effluent limit necessary to achieve water-based effluent quality standards for Long Island Sound.

Ruling #4: The City's proposed issue regarding permit limitations that extend beyond the five-year term of the draft modified permits does not rise to the level of a dispute over a substantial term or condition of the draft permit and, therefore, does not require adjudication. The City has not identified any statute or regulation that would preclude such permit terms. In addition, as the DEC Staff and the Intervenors have asserted, in view of the ongoing nature of the regulated activity and the history of permit review, inclusion of such permit limitations in these modified permits and in future permits is reasonable and appropriate.

During the October 9, 2003 issues conference, amicus status on this issue was conditionally granted to NRDC, IEC, the Keepers, Save the Sound and Connecticut, conditioned upon further adjudication of this issue. Because the issue of permit limitations that extend beyond the five-year term of the draft modified permits will not

be adjudicated, the amicus party briefs on that issue will not be necessary.

IV. The Schedule for Nitrogen Reductions in the Draft Permits and the Schedule for Reductions in the Nitrogen Consent Order

The City contends that the schedule for nitrogen effluent reduction in the draft permits differs from the schedule in the Nitrogen Consent Order. DEC Staff asserts that the draft permits require the TMDL-recommended 58.5% reduction to be achieved by August 2014. However, DEC Staff and the City disagree about interpretation of the Nitrogen Consent Order schedule.

The City points out that the Consent Order schedule requires that the upgrade work is to be completed by 2012 and the City is to submit a plan for plant operation to achieve optimized nitrogen reductions. Nitrogen Consent Order (April 2002, DEC Case No. CO2-20010131-7), Appendix A, Paragraph 8. Then, by August 1, 2014, the City will begin operating according to that plan. Nitrogen Consent Order, Appendix A, Paragraph 10. The City contends that operation under this plan is not intended to meet the 58.5% TMDL reduction limit. Instead, the City asserts that the Consent Order requires operation for two years, and then, by October 1, 2016, the City must submit the two years of operational performance data to DEC. Nitrogen Consent Order, Appendix A, Paragraph 11. Finally, the City concludes that by January 1, 2017, DEC will calculate final effluent limits for operation. Nitrogen Consent Order, Appendix A, Paragraph 12. The City proposes to present the testimony of City officials who participated in the negotiations that culminated in the Nitrogen Consent Order (DEC Case No. CO2-20010131-7).

Regarding DEC Staff's interpretation of the Nitrogen Consent Order schedule, DEC Staff requested additional time after the issues conference to consult with other Staff who engaged in the negotiations culminating in the Consent Order. DEC Staff was to make this filing by October 31, 2003, later extended at Staff's request to November 14, 2003. However, on November 14, DEC Staff filed a brief letter stating that no additional filing would be made.

Ruling #5: Because the terms and conditions of the 2002 consent order are not ambiguous, there is no reason to adjudicate extrinsic evidence regarding the negotiations culminating in that consent order. Instead, the City has presented a legal issue - whether the nitrogen reduction schedule in

the draft permits differs from the compliance schedule in the 2002 consent order, the resolution of which is not dependent upon facts that are in substantial dispute and which can be resolved after arguments on the merits of the issue. *See* 6 NYCRR 624.4(b)(2)(iv) and 624.8(b)(1)(ix).

This legal issue must be briefed by the City and DEC Staff. The briefs should focus upon the specific differences and conflicts between the terms and conditions of the draft permit, and terms and conditions of the compliance schedule in the 2002 consent order, and whether those differences, if any, can be reconciled with or without modifications to the draft permits. Initial briefs are due on March 1, 2004; replies are due on March 12, 2004. Following my review of the briefs, I will prepare an issues ruling on this legal issue.

Other proposed adjudicable issues pertain to regulation of combined sewer overflow (CSO) events, and were asserted by the Keepers and NRDC. In view of Staff's motion for stay, discussed above, these issues will be addressed further following the stay period.

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 be appealed to the Commissioner on an expedited basis.[4] Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling.[5]

Allowing extra time for the filing of appeals and replies, as authorized by 6 NYCRR 624.6 (g), any appeals must be received by the Commissioner (Office of the Commissioner, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, New York, 12233-1010) before 3 p.m., on February 11, 2004. All replies to appeals must be received before 3 p.m., on February 20, 2004. One copy of each appeal or reply must be filed with

[4] 6 NYCRR 624.8(d)(2).

[5] 6 NYCRR 624.6(e)(1).

the Commissioner. In addition, send three 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 or on a 3.5-inch computer "floppy" disk formatted in either 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 Commissioner and three paper copies to the ALJ by first class mail, all postmarked by the date(s) specified above. This alternative service will satisfy service upon the Commissioner 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 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: January 28, 2004
Albany, New York

To: Attached NYCDEP SPDES Distribution List
(dated December 15, 2003)