

**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  
NITROGEN ISSUES  
AND PARTY STATUS**

**(March 16, 2007)**

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 <sup>TH</sup> 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 <sup>1</sup>	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 (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. The City owns the fourteen WPCPs. On or about June 27, 2002, the Staff of the New York State Department of Environmental Conservation (DEC

<sup>1</sup> During the May 4, 2005 issues conference, DEC Staff's motion to issue the Oakwood Beach WPCP permit was granted.

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 DEC Staff and the City continued. The SPDES permit modification process has included lengthy negotiations, resulting in several iterations of the draft permits. 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. Three prior issues rulings have been issued in this matter, an issues ruling dated January 28, 2004 (granting adjournment of combined sewer overflow [CSO] issues to allow DEC Staff and the City to attempt to resolve CSO enforcement violations by an administrative consent order [ACO]), an issues ruling dated April 24, 2004 (addressing proposed nitrogen effluent reduction schedule issues), and an issues ruling dated November 9, 2005 addressing CSO issues.

In January 2006, a consent judgment was entered in *Matter of New York City Dept. of Environmental Protection v State of New York* (Sup Ct, New York County, Jan. 10, 2006, Feinman, J., Index No. 04-402174). Pursuant to the consent judgment, on April 3, 2006,<sup>2</sup> DEC Staff issued revised draft permits addressing both nitrogen and CSO issues.

At that time, one appeal by DEC Staff was pending before the Commissioner from the April 24, 2004 nitrogen issues ruling, and no appeal schedule had yet been set for appeals from the November 9, 2005 CSO issues ruling. Therefore, by interim decision of the Deputy Commissioner dated June 26, 2006, DEC Staff's appeal from the April 2004 nitrogen ruling was dismissed as academic in light of the April 2006 revised draft permits, and adjournment of the appeal schedule for CSO issues was continued. Lastly, the Deputy Commissioner remanded the case to the ALJ for further proceedings in view of the newly revised April 2006 draft permits.

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<sup>2</sup> On April 19, 2006, DEC Staff issued typographical corrections to these draft permits.

I convened a telephone conference on July 10, 2006, confirming that in going forward in this matter, any additional proposed adjudicable issues must be based upon revised terms and conditions in the April 2006 draft permits (as compared to the previous draft permits). A schedule was agreed upon providing that by August 24, 2006, intervenors could file supplemental petitions for party status that identified additional proposed adjudicable issues based upon revised language in the April 2006 draft permits. In addition, intervenors were requested to provide a letter confirming their continued assertion of proposed issues identified earlier in this proceeding (or if appropriate, confirming that earlier proposed issues have been addressed by revisions in the current draft permits, and therefore were withdrawn).

During the telephone conference, a date of September 27, 2006 was agreed upon for a reconvened issues conference to consider any newly proposed issues. This date was subsequently adjourned to November 1, 2006. I stated that following the reconvened issues conference and my ruling on newly proposed adjudicable issues, the parties and potential parties would be afforded an opportunity to file administrative appeals, including appeals of rulings on proposed CSO issues addressed in the November 2005 CSO Issues Ruling.

On August 24, 2006, three parties submitted supplemental petition filings in response to this schedule. The Natural Resources Defense Council (NRDC) and the Keepers (Riverkeeper, Inc., Soundkeeper, Inc., and New York/New Jersey Baykeeper) submitted a joint filing and the Interstate Environmental Commission (IEC) submitted a filing. By letter dated September 22, 2006, DEC Staff inquired whether issues raised in the supplemental petition filings might be addressed on papers, rather than at the scheduled reconvened issues conference. In response, I scheduled an October 10, 2006 telephone conference to discuss DEC Staff's proposal.

NRDC/Keepers proposed four new nitrogen issues in their supplemental petition, which the parties agreed to address via a briefing schedule. Additionally, regarding NRDC/Keepers' third proposed new issue, related to their CSO/nitrogen issue addressed in the November 9, 2005 CSO issues ruling (issue "G", ruling (7)), it was agreed that the parties could address the anticipated Jamaica Bay comprehensive report (since issued) in their filings on this proposed issue.

Regarding IEC's proposed issue IV, asserting that the current draft permits and compliance schedule represent a

backsliding from the nitrogen total maximum daily load (TMDL) nitrogen discharge limits, IEC and DEC Staff agreed to engage in further discussion to clarify that proposed issue. IEC addressed this matter further in their subsequent filings, summarized below.

Both IEC and NRDC/Keepers identified CSO issues for briefing or appeal. In addition, in their August 2006 filings NRDC/Keepers requested that I clarify rulings (2) and (3) of the November 9, 2005 CSO issues ruling. In ruling (2), I stated that, "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, includes 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." During the telephone conference, I stated that the April 2006 draft permits, containing the following language, satisfied the ruling and thus avoided adjudication of the issue:

"The CSO Order on Consent contains compliance schedules which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters."

In ruling (3), I stated that, "[t]he City will submit all draft LTCPs [long term control plans], in the form of the Waterbody/Watershed Facility Plans, no later than June 2007....However, the draft permits should be revised to explicitly state that the Waterbody/Watershed Facility Plans are draft LTCPs."

During the telephone conference, I stated that the April 2006 draft permits, containing the following language, satisfied this ruling:

"In addition to the Monitoring Requirements for CSO Regional Facilities...and the CSO Best Management Practices..., the CSO Order on Consent, which is attached hereto, governs the Permittee's obligations with regard to its CSO abatement program which includes, but is not limited to, design and construction of CSO abatement facilities and the submission

of Waterbody/Watershed Facility Plan Reports (i.e., CSO Draft Long-Term Control Plans), Drainage Basin Specific CSO Long-Term Control Plans, and the City-Wide CSO Long-Term Control Plans. The CSO Order on Consent contains compliance schedules which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters." (Emphasis supplied).

See for example, Hunts Point April 2006 revised draft permit, page 18 of 40, § IX.

NRDC/Keepers withdrew their proposed issue identified in the November 9, 2005 CSO issues ruling as issue "H" (ruling (8)).

The issues conference participants agreed that all remaining proposed issues could be addressed on papers, without reconvening the issues conference, except possibly IEC's proposed issue "IV" (Amended IEC Petition)(IEC subsequently indicated that reconvening would not be necessary on this issue).

All CSO issues identified were addressed in the November 9, 2005 CSO issues ruling. It was agreed that those issues could be appealed to the Deputy Commissioner on an appeal schedule I will set with this ruling on the newly proposed nitrogen issues.

The November 1, 2006 issues conference was canceled and a schedule for filings was set, and subsequently revised at the request of NRDC/Keepers. Initial filings were received January 31, 2007 and replies were received on February 14, 2007.

This ruling addresses proposed adjudicable nitrogen issues arising out of revisions to the draft permits. The appeal schedule at the conclusion of this ruling addresses appeals from this ruling and also appeals from my November 9, 2005 CSO ruling.

### **Discussion**

Environmental interest is one element of a successful petition for party status. See, 6 NYCRR 624.5(b)(1)(ii). As noted in the November 9, 2005 ruling in this matter, neither the Applicant nor DEC Staff objected to the environmental interest of any petitioner.

The DEC Staff filed an initial brief in support of issuance of the current draft SPDES permits and in opposition to proposed adjudicable issues asserted in the petitioners' supplemental

petitions. The New York City Department of Law filed a letter-brief dated January 31, 2007, regarding the proposed issue that the City of New York must be identified as a permittee with NYCDEP. The New York City Department of Law also filed a letter-brief dated January 31, 2007, regarding the Jamaica Bay Comprehensive Report, arguing that the Comprehensive Report cannot provide the basis for a substantive and significant issue until such time as it is approved by the DEC Staff.

Reply briefs were filed by NRDC and Keepers (jointly), NYCDEP (N.Y.C. Department of Law) and DEC Staff. In addition, IEC made a late filed reply by letter dated February 16, 2007.

#### The IEC Petition

The IEC has filed a petition seeking amicus status, and has not sought full party status in this proceeding. The IEC's January 31, 2007 filing provides a summary of recent proceedings in this matter regarding its nitrogen "issue IV", mentioned above. Previously, IEC stated in its October 24, 2006 letter addressed to me, that IEC would refrain from pursuing "issue IV"; essentially, that after further discussions with DEC Staff, IEC's concerns were satisfied. In its more recent January 31, 2007 filing, IEC confirms and acknowledges that this issue has been resolved. IEC January 31, 2007 filing, at 4.

In summarizing the resolution of its proposed nitrogen issue, IEC acknowledges that status as a full party would have enabled the IEC to be more fully engaged in the administrative hearing process. IEC January 31, 2007 filing, at 7. However, at the same time, IEC states its intention to pursue proposed CSO issues on appeal, essentially seeking a reservation of rights to appeal CSO issues. In my October 13, 2006 letter to the participants in this matter, I stated that CSO issues addressed in the November 9, 2005 CSO issues ruling may be appealed to the Commissioner with appeals from this ruling on newly proposed nitrogen issues. (That appeal schedule is set forth at the conclusion of this ruling.) However, DEC Staff correctly notes that amicus participation is limited to filing a brief and, at the discretion of the ALJ, presenting oral argument on the issue(s) identified in the ALJ's ruling on party status. See, 6 NYCRR 624.5(e)(2). Amicus parties do not have any other rights of participation or submission. *Id.*

**RULING #1:** The IEC is precluded from filing an appeal from this ruling or the November 9, 2005 CSO ruling. However, to the extent that other participants appeal CSO or nitrogen issues, IEC may file a reply brief on that issue according

to the schedule set forth below for filing replies to appeals. As has been discussed previously in this proceeding, the IEC has declined to pursue a change in its status from amicus to full party status so that it may pursue appeal of its concerns or proposed issues.

The Joint Petition of NRDC and Keepers

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. In view of the January 31, 2007 joint filing, NRDC and Keepers are deemed consolidated petitioners (the Consolidated Petitioners) on all remaining issues in this proceeding.

The Consolidated Petitioners assert four proposed adjudicable issues regarding regulation of nitrogen discharges from the 13 WPCPs.

**I. Expiration Date Must be Within Five Years of Date of Most Recent Permit Renewal**

The Consolidated Petitioners assert that each of the proposed SPDES permits must be assigned an expiration date not more than five years from the date of DEC's most recent renewal of the permit. The current draft permits do not contain expiration dates, which would be inserted in the final permits to be issued by the Department. In support of this issue, the Consolidated Petitioners note that, pursuant to Environmental Conservation Law (ECL) 17-0817(1), a SPDES permit for discharges to surface water must be "valid for a fixed term not to exceed five years." The Consolidated Petitioners make a distinction between renewal and modification of a SPDES permit. They contend that although proposed modifications provide interested members of the public with a right to a hearing only on substantive and significant issues concerning the proposed modifications, proposed renewals have no such limitation, allowing the public to raise for adjudication any substantive and significant issue concerning any aspect of the SPDES permit.

DEC Staff states that the proposed draft SPDES permits were issued without expiration dates because, pursuant to the State Administrative Procedures Act, when timely and sufficient application for renewal of an existing permit has been made, that permit is extended until the terms of the new permit have been determined by the permitting agency. See, SAPA § 401(2); 6 NYCRR 621.11(1). Of the original 14 WPCP SPDES permits that are the

subject of this permit modification proceeding, DEC Staff explains that one permit has been issued (see, November 9, 2005 CSO Issues Ruling, Discussion, Oakwood Beach Permit, in this matter.) Four permits were renewed with an effective date of January 1, 2006 and will expire on December 31, 2010; the other nine permits that have an expiration date of January 1, 2006, have not been renewed and are extended as a matter of law, pursuant to SAPA § 401(2). For these nine permits, DEC Staff explained, a new effective date will be set when the permits are issued and the expiration date will be five years from that date. See, DEC Staff Brief (1/31/2007) at 7 and DEC Staff Reply Brief (2/14/2007) at 3 - 7).

The Consolidated Petitioners reply that DEC Staff's explanation of permit renewal and expiration dates is new information presented for the first time in their initial brief filed January 31, 2007. Nonetheless, Consolidated Petitioners contend that all of the proposed SPDES permits must have an expiration date of December 31, 2010 (as DEC Staff has done for the four renewed permits). Additionally, they assert that NYSDEC's past practice concerning the City's SPDES permits has been to renew all of the permits 'on schedule,' even during the pendency of an administrative proceeding to modify the permits, and NYSDEC should not deviate from this practice now.

**RULING #2:** Renewal of the four SPDES permits for Coney Island, Owls Head, Rockaway and 26<sup>th</sup> Ward WPCPs and the three SPDES permits for Jamaica, North River and Port Richmond WPCPs has already been the subject of public notice. Thus, the opportunity for Consolidated Petitioners to comment has passed. The public, including the Consolidated Petitioners, will have the opportunity to comment upon the renewal of the six SPDES permits for Bowery Bay, Hunts Point, Red Hook, Newtown Creek, Tallman Island and Wards Island WPCPs when DEC Staff issues a public notice for these SPDES permit renewals.

Therefore, the effective dates of the four SPDES permits that already have been renewed will not change. The expiration dates of the nine SPDES permits that have not yet been renewed, will be determined through the renewal process, separate from this modification proceeding. These nine SPDES permits properly have been extended pursuant to SAPA § 401(2).

In sum, no substantive and significant issue for adjudication has been presented.



**II. The Proposed SPDES Permits Must State That the "Interim Effluent Limits" for Nitrogen are Enforceable as Terms of the Permits**

Six WPCPs discharge into Zones 8 and 9 of the Long Island Sound TMDL.<sup>3</sup> The Consolidated Petitioners contend that language in these six current draft permits is ambiguous regarding the phrase "interim effluent limits."

These effluent limits were derived from a judicial consent order (JCO) between the Department and the City. The interim effluent limits in the JCO would be in effect until January 1, 2017. Moreover, DEC Staff and the City have agreed that the relevant language should be interpreted as rendering the interim effluent limits enforceable terms of the permit. Nonetheless, the Consolidated Petitioners seek an explicit unambiguous ruling that the proposed terms of the current draft permits, including the phrase "interim effluent limits," are enforceable as terms of the permits themselves; that any violation of the interim effluent limits shall constitute a violation of the respective SPDES permit. In the alternative, the Consolidated Petitioners contend that these six current draft permits are inconsistent with state and federal law.

In support of this proposed issue, the Consolidated Petitioners assert that the federal Clean Water Act requires that point source discharge permits, such as SPDES permits, "apply and insure compliance with" the waste load allocations (WLAs) in any applicable TMDLs. CWA Section 303 (33 USC 1313(d)(1)(c)) [requiring each state to develop TMDLs at a "level necessary to implement the applicable water quality standards...."].

In addition, the Consolidated Petitioners contend that state law requires that SPDES permits include any water quality-based effluent limitations necessary to insure compliance with water quality standards, including any limitations "necessary to implement a [TMDL/WLA] . . . established pursuant to Section 303(d) of the [Clean Water] Act. . . ." (ECL 17-0811[5]), and, where compliance with such standards and limits cannot be achieved immediately, a compliance schedule with "specific steps. . . designed to attain compliance within the shortest reasonable time." 6 NYCRR 750-1.11(a)(5)(ii).

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<sup>3</sup> The six WPCPs are the Bowery Bay, Hunts Point, Tallman Island, Wards Island, Newtown Creek and Red Hook.

Their argument on this point is summarized below:

This issue presents a pure issue of law and/or policy that may be decided by the ALJ based upon post-issues conference briefing. DEC Staff and the City have both sent letters (dated 4/19/06 and 6/14/06, respectively) to NRDC and the Keepers clarifying their respective views that the interim limits for nitrogen (referenced in the Proposed SPDES Permits at footnote 1 of the section titled "Footnotes for Long Island Sound Water Quality Based Effluent limits and Monitoring", and which are also the interim limits) are enforceable under the permit as effluent limitations.

In order to avoid any future doubt as to the meaning of the above-referenced footnote, the Consolidated Petitioners request that the ALJ or Commissioner incorporate into a formal final agency determination, a finding that the interim limits for nitrogen referenced in the Proposed SPDES Permits at footnote 1 of the section titled "Footnotes for Long Island Sound Water Quality Based Effluent Limits and Monitoring" are enforceable under the permit as effluent limitations.

In the absence of such a ruling, Consolidated Petitioners contend that the Draft SPDES Permits unlawfully fail to ensure compliance with Water Quality Standards because they do not ensure implementation of the Long Island Sound TMDL through an enforceable compliance schedule. The Consolidated Petitioners acknowledge, in asserting this issue, that the interim limits represent a compliance schedule consistent with the relevant regulatory and statutory provisions, if the interim limits are incorporated into the permit as enforceable effluent limits.

Lastly, the Consolidated Petitioners contend that NYSDEC cannot lawfully draft a SPDES permit so as to render applicable effluent limits or compliance standards enforceable only by DEC as a party to the Consent Judgment, but not by other parties such as the Consolidated Petitioners that would have standing under the citizen suit provisions of the federal Clean Water Act to enforce any effluent limitations actually incorporated into the permit.

Finally, as set forth in the Consolidated Petitioners' June 10, 2005 Brief on CSO issues, incorporation of the

City's obligations under a separate enforcement order as terms of the proposed SPDES Permits is required to ensure that such obligations remain subject to citizen suit and EPA enforcement actions, subject to the full range of enforcement tools available to DEC, and subject to certain important provisions of DEC's SPDES permit regulations relating to modifications of permit terms.

The positions of NYSDEC and NYCDEP were clarified in letters of April 19, 2006 (NYSDEC) and June 14, 2006 (NYSDEP), that the enforceable limits for these six WPCPs are set forth in the text of the proposed permits. DEC Staff states that in addition to being set forth in the JCO, the interim effluent limits for the relevant six WPCPs are listed in the draft permit section "Footnotes for Long Island Sound Water Quality Based Effluent Limits and Monitoring", and are enforceable terms of the proposed SPDES permits.<sup>4</sup> In sum, the proposed SPDES permits for the six WPCPs that discharge into Zones 8 and 9 of the Long Island Sound do not merely reference the existence of the interim limits; the compliance schedule and interim limits are set forth in the text of the proposed permits.

However, the Consolidated Petitioners assert that the proposed permit language cited by NYSDEC and the City does not state that "the permittee shall comply with those limits" or that the "limits are incorporated herein as requirements of this permit."

Using the Bowery Bay permit as an example, the proposed language reads in pertinent part as follows:

"Interim limits and a compliance schedule to meet the final Nitrogen effluent limits are included in the Consent Judgment, Index No. 04-402174, ordered February 1, 2006. Under the Consent Judgment these limits will be in effect until January 1, 2017. The interim limits in the Consent Judgment are as follows: [A table setting forth the interim limits and corresponding dates appears in the permit.]"

Draft Bowery Bay SPDES permit, April 2006, Page 13 of 39, footnote 1.

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<sup>4</sup> See, for example, Bowery Bay draft SPDES permit, Item IV, footnote 1.

To assure that the interim limits are effective as conditions of the proposed permits, as opposed to a mere recitation of what is required by the Consent Judgment, the Consolidated Petitioners propose revised language such as the following:

"Interim limits and a compliance schedule to meet the final Nitrogen effluent limits are included in the Consent Judgment, Index No. 04-402174, ordered February 1, 2006 **and are incorporated herein**. Under the Consent Judgment **and this SPDES permit**, these limits will be in effect until January 1, 2017. The interim limits [~~deleting the phrase 'in the Consent Judgment'~~] are as follows: [A table setting forth the interim limits and corresponding dates appears in the permit.] (revisions in bold italics)"

**RULING #3:** The Consolidated Petitioners are correct that the proposed SPDES permits for the six WPCPs that discharge into Zones 8 and 9 of the Long Island Sound only recite the existence of the interim limits in the Judicial Consent Judgment. Moreover, DEC Staff and the City agree that the proposed permit language should be interpreted as rendering the interim effluent limits enforceable terms of the permit.

This proposed issue is substantive and significant. However, because it is a question of law, no adjudication is necessary. Instead, the interim limits must explicitly and clearly be incorporated by reference into these six proposed SPDES permits. To accomplish this incorporation, the proposed permit language must be revised as described above:

"Interim limits and a compliance schedule to meet the final Nitrogen effluent limits are included in the Consent Judgment, Index No. 04-402174, ordered February 1, 2006 and are incorporated herein. Under the Consent Judgment and this SPDES permit, these limits will be in effect until January 1, 2017. The interim limits are as follows: [A table setting forth the interim limits and corresponding dates appears in the permit.]"

Thereby, the interim limits of the Consent Judgment will be explicitly incorporated into these six proposed SPDES permits, with the interim limits clearly and unambiguously set forth in the proposed permits as enforceable conditions of the permits.

**III. The Proposed SPDES Permits for the Four Jamaica Bay WPCPs Must Be Modified to Ensure Compliance With Water Quality Standards, and Must Include a Schedule to Achieve Compliance "As Soon As Practicable"**

Jamaica Bay is a "Class SB" waterbody. Pursuant to 6 NYCRR 701.11, the best usages of Class SB waters are primary and secondary contact recreation and fishing; these waters shall be suitable for fish propagation and survival.

The Consolidated Petitioners contend that pursuant to state and federal law, the proposed SPDES permits for the four Jamaica Bay WPCPs<sup>5</sup> must include terms sufficient to ensure that the City's WPCP discharges and CSO discharges will comply with water quality standards in the Bay and its tributaries. Further, they contend that these discharges cannot immediately comply with water quality standards, and therefore, these four permits must also include a schedule of specific steps to achieve compliance "within the shortest reasonable time."

All SPDES permits issued by DEC must include such limitations as are "necessary to insure compliance with water quality standards adopted pursuant to state law." ECL 17-0811 (5). From this starting point, the Consolidated Petitioners cite a recent U.S. Second Circuit Court of Appeals holding for the proposition that "where technology-based effluent limitations prove insufficient to attain certain water quality standards, the Clean Water Act requires SPDES permits to include additional water quality based effluent limitations" and "the Clean Water Act demands regulation in fact, not only in principle. . . permits authorizing the discharge of pollutants may issue only where such permits ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards." *Waterkeeper Alliance, Inc. v U.S.E.P.A.*, 399 F.3d 486, 492, 498 (2d Cir. 2005)[emphasis in original text]. *Waterkeeper Alliance, Inc.*, is a challenge by various environmental groups and farm groups to a USEPA administrative rulemaking under the CWA in order to regulate the emission of water pollutants by concentrated animal feeding operations (CAFO).

The Consolidated Petitioners also rely upon 33 USC 1313(e)(3)(A), which requires that effluent limitations be "at least as stringent as any requirements contained in any applicable water quality standard" and 33 USC 1342(a)(I), which

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<sup>5</sup> The four WPCPs are 26<sup>th</sup> Ward, Coney Island, Rockaway, and Jamaica.

requires that permits include conditions on discharges sufficient to meet all applicable requirements under Sections 1311 and 1312. Finally, Consolidated Petitioners rely upon a USEPA letter for the proposition that a SPDES permit must include the more stringent of technology-based or water quality-based effluent limitations necessary to achieve the applicable water quality standard for the receiving waterbody and may not "sanction a pollutant discharge that does not meet applicable water quality standards." Letter dated 7/9/03 (W. Mugdan, EPA Region 2, to S. Allen, NYSDEC), stating the position of EPA Region that "it is critical to note that permits must, in the ultimate, ensure compliance with water quality standards."

In conclusion, the Consolidated Petitioners contend that if water quality standards cannot be achieved immediately, state law requires that the permit include a compliance schedule with "specific steps. . . designed to attain compliance within the shortest reasonable time." 6 NYCRR 750-1.14(a); ECL 17-0813(2); and further that if water quality standards cannot be achieved immediately, state law requires that the permit include a compliance schedule with specific steps designed to attain compliance within the shortest reasonable time. 6 NYCRR 750-1.14(a), ECL 17-0813(2).

With respect to the four Jamaica Bay proposed SPDES permits, the Consolidated Petitioners assert that discharges of nitrogen and Biological Oxygen Demand (BOD) in treated effluent from the sewage treatment plants act cumulatively with CSO discharges to impair water quality in Jamaica Bay. Therefore, to ensure that CSO discharges will not contribute to water quality standards violations in Jamaica Bay, the Consolidated Petitioners contend that these four WPCP SPDES permits must contain water quality-based effluent limitations addressing the cumulative impacts of CSO and treatment plant discharges.

In the Consolidated Petitioners' view, DEC Staff and the City already have recognized, in the draft SPDES Permits for WPCPs and CSOs discharging to the Upper and Lower East River, that a reduction in the aggregate nitrogen discharge of the WPCPs and CSOs is the pertinent factor to achieve water quality standards, and that total reductions in nitrogen discharges can be achieved from any combination of reductions in discharges from WPCPs and CSOs, within a given management zone. Consolidated Petitioners argue that the same logic should be applied to nitrogen discharges in Jamaica Bay, where nitrogen discharges from both WPCPs and CSOs in combination preclude achievement of water quality standards. Similarly, they argue, BOD discharges from the four Jamaica Bay WPCPs along with associated CSO events

act cumulatively to contribute to continuing non-compliance with water quality standards in Jamaica Bay (at least in instances where CSOs are in close proximity to the treatment plant outfalls).

The Consolidated Petitioners conclude that the four proposed Jamaica Bay SPDES permits fail to achieve water quality standards, and must be revised to correct that defect.

- The Jamaica Bay Comprehensive Report

The four proposed Jamaica Bay SPDES permits each refer to a 2006 Consent Judgment entered in State Supreme Court that requires the City to complete and submit a report making recommendations for "improving water quality" in Jamaica Bay. In addition, the Consent Judgment states that the NYSDEC intends to reopen the permit and propose modifications to the SPDES permits to implement the report, some time after the report's October 31, 2006 due date (*i.e.*, upon approval of the report by the NYSDEC, or as soon as possible thereafter).<sup>6</sup>

In October 2006, the City submitted the Comprehensive Report to NYSDEC. Importantly, at this point, NYSDEC is reviewing the report but has not yet approved it. In sum, the report remains non-final and subject to revision.

Nonetheless, assert the Consolidated Petitioners, nothing in the four Jamaica Bay proposed Draft SPDES Permits is aimed specifically at improving water quality sufficiently to meet water quality standards, nor on any particular schedule that could be deemed "the shortest reasonable time." Furthermore, contend the Consolidated Petitioners, the four Jamaica Bay proposed SPDES permits fail to include a narrative water quality-based effluent limitation. Therefore, Consolidated Petitioners conclude, the four Jamaica Bay proposed SPDES permits fail to ensure compliance with water quality standards as required by state and federal law. The Consolidated Petitioners assert as a remedy that the four Jamaica Bay proposed SPDES permits should be modified to include water-quality based

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<sup>6</sup> See, proposed SPDES Permits for Jamaica Bay treatment plants, at footnote 5 of the section entitled "Jamaica Bay WPCPs (Jamaica, Rockaway, Coney Island, 26th Ward) No-Net Increase Effluent Limits and Monitoring for Nitrogen;" Consent Judgment, Index No. 04-402174 (Feb. 1, 2006) at Appendix B (providing for October 31, 2006 deadline).

effluent limitations for nitrogen and Biological Oxygen Demand (BOD) that apply cumulatively to WPCP and CSO discharges.

- Narrative Water Quality Based Effluent Limitations

The Consolidated Petitioners take exception to the characterization in CSO Issues Ruling, Rulings #7 and #4, that the proposed SPDES permits already contain narrative water quality based effluent limitations, by reference to 6 NYCRR 750-1.2 and 750-2.

Next, Consolidated Petitioners rely upon the non-final Jamaica Bay Comprehensive Report ("Comprehensive Report"); submitted by NYCDEP to NYSDEC in October 2006). They contend that the Comprehensive Report demonstrates that current permit terms and conditions cannot achieve compliance with water quality standards, and therefore are unlawful. As summarized by the Consolidated Petitioners, the "baseline" scenario in the Comprehensive Report is defined as a "12-month rolling average loading of 45,300 lbs/day (measured as an aggregate discharge from the four Jamaica Bay plants)," which is identical to the nitrogen effluent limit in the proposed draft SPDES permits for the four Jamaica Bay WPCPs.

However, the Consolidated Petitioners continue, the Comprehensive Report concludes that for the baseline scenario, surface nitrogen levels in most of the central, northern and eastern portions of the Bay have a summer average dissolved inorganic nitrogen (DIN) concentration greater than 700 ug/L (microgram per liter). Comprehensive Report, at 70, §7.2.1.1. This concentration, the Consolidated Petitioners contend, is well above what would limit algal growth, contrary to the narrative water quality standard for nitrogen in Jamaica Bay. See 6 NYCRR 703.2 (the narrative water quality standard). Therefore, the Consolidated Petitioners argue, the City's Comprehensive Report constitutes a factual admission that the four proposed SPDES permits will not ensure that water quality standards are achieved either for nitrogen or dissolved oxygen, and consequently do not ensure such compliance "within the shortest reasonable time."

The Consolidated Petitioners seek a ruling that, as a matter of law, the nitrogen effluent limitations in the four Jamaica Bay proposed SPDES permits are insufficient or in the alternative, a ruling that the adequacy of the nitrogen effluent limits in the four Jamaica Bay proposed SPDES permits is a substantive and significant issue requiring adjudication.



The City relies upon its December 1, 2006 letter (Plache to Casutto) concerning relevance of the Comprehensive Report in this permit modification proceeding. The City's position is that consideration of the non-final Comprehensive Report in this proceeding is unnecessary and procedurally improper because the Comprehensive Report cannot form the basis for an adjudicable issue, apparently relying upon 6 NYCRR 624.4(b)(8), which provides, in pertinent part, that in modification proceedings the only issues that may be adjudicated are those related to the basis for the modification cited in the Department's notice to the permittee. In fact, in the City's view, this proposed issue is an attempt to circumvent NYSDEC's regulatory authority to review the Comprehensive Report; the City contends that the Consolidated Petitioners are seeking a ruling based upon the Comprehensive Report prior to the NYSDEC's evaluation and approval of that Report.

The City also cites the provisions in the Judicial Consent Judgment and the proposed permits that once the Comprehensive Report is approved, NYSDEC must propose modification of the four Jamaica Bay SPDES permits to implement the Comprehensive Report.

DEC Staff asserts that although the Consolidated Petitioners assert that this proposed issue is a "new" issue raising "mixed questions of law and fact," it really is a restatement of an issue that I have ruled upon previously, in the November 9, 2005 CSO Ruling (Rulings #4 and #7 on proposed issue "G").

Further, DEC Staff notes that the Consolidated Petitioners have mis-characterized the regulatory standard referenced in the proposed permits. Subdivision 6 NYCRR 750-2.1(b) provides,

"(s) satisfaction of permit provisions notwithstanding, if operation pursuant to the permit causes or contributes to a condition *in contravention of State water quality standards or guidance values* . . . the department may require such a modification and the Commissioner may require abatement action to be taken by the permittee and may also prohibit such operation until the permit has been modified pursuant to [6 NYCRR 621.13]." (emphasis supplied)<sup>7</sup>

Lastly, the four Jamaica Bay proposed SPDES permits and the Judicial Consent Judgment (Index No. 04-402174 [1/10/2007])

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<sup>7</sup> Section 621.14 of 6 NYCRR, referenced in 6 NYCRR 750-2.1(b), has been re-numbered as 6 NYCRR 621.13.

provide that once NYSDEC approves the Comprehensive Report, NYSDEC may propose a modification of the Jamaica Bay SPDES permits to require implementation of the Comprehensive Report. DEC Staff Brief (1/31/2007) at 12 - 13. In DEC Staff's view, the Comprehensive Report, once approved by NYSDEC, will provide the information necessary to develop water quality based effluent limits for the four Jamaica Bay WPCPs. DEC Staff Reply Brief (2/14/2007) at 8.

**RULING #4:** The proposed SPDES permits for the four Jamaica Bay WPCPs already include provisions ensuring compliance with water quality standards. To the extent Consolidated Petitioners disagree with Rulings #4 and #7) of the November 9, 2005 CSO issues ruling, they may appeal that ruling consistent with the appeal schedule set forth herein below.

*Waterkeeper Alliance, Inc.*, is a challenge to a USEPA administrative rulemaking under the CWA in order to regulate the emission of water pollutants by concentrated animal feeding operations (CAFO). It is not a WPCP SPDES permit case, and provides scant support as applied by the Consolidated Petitioners in this proceeding.

As provided in the four proposed Jamaica Bay SPDES permits and the Judicial Consent Judgment, once the Jamaica Bay Comprehensive Report has been approved by NYSDEC, DEC Staff will, as soon as possible, seek modification of the four Jamaica Bay WPCPs to implement the Jamaica Bay Comprehensive Report. The Comprehensive Report remains non-final and subject to revision. Use of the non-final Comprehensive Report at this point in the proceeding, as the Consolidated Petitioners advocate, is unpersuasive. Moreover, consideration of the non-final Comprehensive Report in this proceeding is unnecessary and procedurally improper, amounting to an attempt to circumvent NYSDEC's regulatory authority to review the Comprehensive Report.

Provisions in both the Judicial Consent Judgment and the proposed Jamaica Bay SPDES permits require that once the Comprehensive Report is approved, NYSDEC must propose modification of the four Jamaica Bay SPDES permits to implement the Comprehensive Report. In my view, use of the Comprehensive Report in this permit modification proceeding is inappropriate and improper. The Consolidated Petitioners' attempt to use the Comprehensive Report before it is approved only confuses the iterative regulatory process governing the City's WPCP SPDES permits for Jamaica Bay and Jamaica Bay water quality.

Instead, the Comprehensive Report, once approved by NYSDEC, will form the basis for a proceeding for modification of the four Jamaica Bay SPDES permits to implement the Comprehensive Report. This is the proper and appropriate process for implementation of the Comprehensive Report. This proposed issue is neither substantive nor significant.

**IV. The City of New York Must Be Added as a Named Permittee to Each of the Proposed SPDES Permits**

The Consolidated Petitioners reference their supplemental petition at pages 20 through 24 for a full discussion of their fourth proposed issue, which is a legal and policy issue. They begin by noting that the judicial Nitrogen Consent Judgment (NY Supreme Court, January 10, 2006, Index No. 04-402174) and the administrative CSO Order on Consent (NYSDEC Case No. CO2-20000107-8, January 14, 2005) both name the City of New York and the New York City Department of Environmental Protection as the permittees of the WPCPs.<sup>8</sup>

Primarily, the Consolidated Petitioners assert that the absence of the City of New York as a permittee is inconsistent with the CWA and creates inconsistencies in the enforcement of the permits and the enforcement orders referenced in the permits. These inconsistencies arise, the Consolidated Petitioners assert, because the City of New York's absence as a permittee fails to account for the City of New York's role via city agencies other than NYCDEP, in developing and implementing a Long Term Control Plan to reduce CSO contribution to aggregate nitrogen discharges.

The Consolidated Petitioners assert three arguments in support of their contention that the City of New York must be added as a named permittee to each of the proposed SPDES permits, summarized as follows:

The proposed SPDES permits are for the operation of publicly owned treatment works (POTWs) under the federal CWA. Pursuant to 40 CFR 122.2, for purposes of

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<sup>8</sup> For example, paragraph five of the CSO Order on Consent provides that "[NYCDEP], a municipal agency, and the City of New York . . . own, operate, and are responsible for the City's 14 [WPCPs], which process most of the sewage generated within the City, as well as the City's combined sanitary sewage system, related pump stations, sewer regulators, CSOs, and other appurtenances related thereto. . ." CSO Order on Consent (NYSDEC Case No. CO2-20000107-8, January 14, 2005), at page 2.

the NPDES (National Pollutant Discharge Elimination System) program (NYSDEC's SPDES program is the federally delegated analogue of NPDES), POTW is defined at 40 CFR 403.3. Pursuant to 40 CFR 403.3, a POTW is a "treatment works," as defined by CWA Section 212, and POTW also means the municipality as defined in CWA Section 502(4), which has jurisdiction over the indirect discharges to and the discharges from such a treatment works; CWA Section 212 defines "treatment works" as including, in addition to sewer systems and wastewater treatment plants, "any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal solid waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems." CWA Section 212.

The City of New York, apart from NYCDEP, has authority over reduction of stormwater runoff via other City agencies. For example, the City of New York, has authority over reduction of stormwater runoff from City-owned roads via the New York City Department of Transportation, has authority over the control of runoff in City-owned spaces (including the storage or filtration of runoff from other surfaces) via the New York City Department of Parks and Recreation and has authority over the prevention, abatement, reduction and storage of stormwater runoff from private properties via the New York City Department of Buildings and via other City agencies.

Lastly, because the judicial and administrative enforcement orders identify both NYCDEP and the City of New York, the proposed SPDES permits also should do so. The omission of the City of New York from the proposed SPDES permits presents particular compliance issues with the aggregate effluent limits for the six treatment plant and CSO discharges into Long Island Sound TMDL Zones 8 and 9, and with compliance with the CSO LTCP requirements of CWA Section 402(q).

In sum, the Consolidated Petitioners conclude that the entity with the legal and financial authority to implement all the terms of the proposed SPDES permits must be named as a permittee - - the City of New York.

Both the City of New York and DEC Staff object to this proposed issue. DEC Staff first objects to this issue as

untimely. With the current filing of proposed issues, I stated that any additional proposed adjudicable issues must be based upon revised terms and conditions in the April 2006 draft permits (as compared to the previous draft permits). Because the previous draft permits in this matter all have identified only NYCDEP as the permittee, Staff concludes that solely on untimeliness of the proposed issue, this is not an adjudicable issue.

In addition, DEC Staff argues that NYCDEP, as a subdivision of the City of New York, is the "operator" of the City's WPCPs, and therefore is the appropriate permittee, pursuant to regulation. Subdivision 750-1.6(a) of 6 NYCRR provides in part, that "[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." This provision requires that NYCDEP, as operator of the City's WPCPs, is a necessary permittee. However, it does not preclude naming the City of New York, as owner of the WPCPs, as a co-permittee.

The City explains that the New York City Charter establishes that the operation of the City's WPCPs is specifically within the powers and duties of NYCDEP; that the oversight and operation of countless City resources and facilities is necessarily delegated to the relevant mayoral agencies established under the New York City Charter.

Although DEC Staff has identified the minimum necessary persons identified as permittees for these permits and the City has explained the executive governmental structure of the City of New York, neither DEC Staff nor the City have addressed the Consolidated Petitioners' concerns summarized above.

Pursuant to 6 NYCRR 750-1.7(a)(17), requirements for SPDES permit applications may include "any other relevant information that the department deems necessary to make determinations about permitting said discharge and which the department is authorized by the Environmental Conservation Law to require." Arguably, NYSDEC, as a discretionary matter, could require the City to be added as a permittee pursuant to this regulatory provision. The Consolidated Petitioners provide valid legal and policy reasons for doing so. The City of New York, but not NYCDEP, has authority over reduction of stormwater runoff via other City agencies; and both the judicial and administrative enforcement orders identify NYCDEP and the City of New York as the regulated entities.

**RULING #5:** The Consolidated Petitioners' proposed issue is not untimely, as this issue was identified previously in

their August 2006 supplemental petition. The City of New York, but not NYCDEP, has authority over reduction of stormwater runoff via other City agencies. Both the judicial and administrative enforcement orders identify NYCDEP and the City of New York as the regulated entities. Moreover, the Consolidated Petitioners have identified valid legal and policy reasons for adding the City of New York as a permittee to the 14 WPCP permits, pursuant to NYSDEC's discretionary authority under 6 NYCRR 750-1.7(a)(17).

The omission of the City of New York as a permittee is at variance with the CWA and creates inconsistencies in the enforcement of the permits and the referenced enforcement orders. I adopt the Consolidated Petitioners' legal argument that a POTW is a treatment works, as defined by CWA Section 212, and that the City of New York is a municipality, as defined in CWA Section 502(4), which has jurisdiction over the indirect discharges to and the discharges from such a treatment works. The failure to include the City of New York as a permittee fails to account for the City's role, via city agencies other than NYCDEP, in developing and implementing a Long Term Control Plan to reduce CSO contribution to aggregate nitrogen discharges.

In conclusion, the City of New York is the entity with the legal and financial authority to implement all the terms of the proposed SPDES permits and therefore should be named with NYCDEP as a permittee on the City's fourteen WPCP SPDES permits. In sum, the Consolidated Petitioners have identified a legal and policy matter that is substantive and significant, and consequently are granted party status. Because this is a legal and policy issue, no factual issues are in dispute and, therefore, adjudication of this issue is unnecessary. Consequently, pursuant to the discretionary authority of 6 NYCRR 750-1.7(a)(17), DEC Staff is directed to add the City of New York as a permittee on the fourteen SPDES permits (including the already issued Oakwood Beach WPCP SPDES permit).

### **Appeals**

This appeal schedule applies to this issues ruling and also to the November 9, 2005 CSO issues ruling. As noted above, to the extent that other participants appeal CSO or nitrogen issues, amicus status participant IEC may file a reply brief on that issue according to the schedule set forth below for filing replies to 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.<sup>9</sup> Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling.<sup>10</sup> Allowing additional time for the filing of appeals and replies, as authorized by 6 NYCRR 624.6(g), any appeals must be received by the Commissioner (Executive Office, 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 April 4, 2007. All replies to appeals must be received before 3 p.m. on April 17, 2007.

One copy of each appeal or reply must be filed with the 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 electronically via E-mail to "laalexan@gw.dec.state.ny.us," "jtmcclym@gw.dec.state.ny.us," and "kjcasutt@gw.dec.state.ny.us," to be followed by one paper copy to the 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 Commissioner, Chief ALJ and the ALJ.

In addition, 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. In the event that no

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<sup>9</sup> 6 NYCRR 624.8(d)(2).

<sup>10</sup> 6 NYCRR 624.6(e)(1).

appeals are taken, this matter is remanded to DEC Staff for issuance of permits consistent with this ruling.

\_\_\_\_\_/s/\_\_\_\_\_  
Kevin J. Casutto  
Administrative Law Judge

Dated: March 16, 2007  
Albany, New York

To: Attached NYCDEP SPDES Distribution List  
(dated March 1, 2007)