

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 Broadway  
Albany, New York 12233-1010

In the Matter

- of -

the Renewal  
of the State Pollutant Discharge Elimination System Permit  
for the Orange County Sewer District #1 Harriman  
Sewage Treatment Plant,

ORANGE COUNTY DEPARTMENT OF PUBLIC WORKS,

Applicant.

DEC Application No. 3-3358-00038/00001  
SPDES No. NY0027901

DECISION OF THE COMMISSIONER

January 29, 2020

## DECISION OF THE COMMISSIONER

This proceeding involves the application of the Orange County Department of Public Works (applicant) to the New York State Department of Environmental Conservation (Department or DEC) for the renewal of its State Pollutant Discharge Elimination System (SPDES) Permit (SPDES No. NY0027901) for the Orange County Sewer District #1 Harriman Sewage Treatment Plant (plant). The plant, which is located in the Town of Harriman, Orange County, New York, would be authorized to discharge 6.0 million gallons per day of treated wastewater through Outfalls 001 and 002 to the Ramapo River (*see* Issues Conference Exhibit [Exhibit] A [Notice of Complete Application and Draft Permit]).

Pending before me is an appeal by applicant from the January 18, 2019 Ruling on Issues and Party Status and Order of Disposition (Issues Ruling) of Administrative Law Judge (ALJ) Richard Sherman. In the Issues Ruling, ALJ Sherman held that:

- the provisions of the federal Clean Water Act (CWA) §§ 303(d) and 305(b) did not preclude the Department from imposing the effluent limitations as proposed in the draft permit (*see* Issues Ruling at 6-11);
- the cost considerations contained in CWA § 302(b) were not applicable to the effluent limitations proposed in the draft permit (*id.* at 11-13); and,
- applicant failed to raise adjudicable issues with regard to any of the permit conditions that staff proposed (*id.* at 13-23 [including effluent limitations for total dissolved solids (TDS) and chlorides, copper concentration limitations, action levels for total phenolics, lead effluent limitation, engineering report requirement, operation and maintenance of a stream gauge, and a 70 degree Fahrenheit temperature limitation]).

Applicant submitted an application to renew its SPDES permit which Department staff determined to be complete on December 13, 2017. Based on its review, Department staff made a tentative determination to issue a renewal permit with modifications. Applicant objected to certain provisions of the proposed permit modification and requested a hearing. Following referral to the Office of Hearings and Mediation Services, the matter was assigned to ALJ Sherman.

A legislative hearing was held on July 30, 2018, and written comments were received until August 1, 2018 (*see* Issues Ruling at 2-6). No individual or organization filed a petition for party status in this proceeding, and only Department staff and applicant participated in the issues conference on August 2, 2018. ALJ Sherman concluded that there were no issues for adjudication and remanded the matter to Department staff to continue processing the application for the SPDES renewal permit in accordance with 6 NYCRR 624.4(c)(5) and to issue the permit (*see* Issues Ruling at 23-24).

Applicant filed an appeal, dated February 22, 2019 (Appeal), from the Issues Ruling challenging “so much of the [Issues] Ruling as determined that there are no issues for adjudication concerning [a]pplicant’s application to renew [its SPDES permit]” (*see* Appeal at 1). Applicant also contended that the ALJ misapprehended various legal mandates relating to the CWA and this permit application (*see* Appeal at 17-21).

Department staff filed a response (Staff Reply) dated March 15, 2019, in opposition to the Appeal, and maintained that the Issues Ruling should be affirmed. Department staff contended that applicant’s legal arguments concerning the CWA are contrary to the plain meaning of the statute and unsupported by the relevant legal authority (Staff Reply at 4-8). Department staff further argued that applicant failed to identify any disputed issues of fact that required adjudication (*id.* at 8-11).

Based upon my review of the record in this matter, I affirm the ALJ’s Issues Ruling subject to my comments below.

### **DISCUSSION**

The Issues Ruling addresses: (a) legal issues “whose resolution is not dependent on facts that are in substantial dispute” (6 NYCRR 624.4[b][2][iv]); and (b) issues concerning “disputed issues of fact” that applicant proposed for adjudication (6 NYCRR 624.4[b][2][iii]).

#### ■ LEGAL ISSUES

##### CWA §§ 303(d) and 305(b)

Pursuant to CWA § 305(b), each state is required to periodically provide reports on its water quality. CWA § 303(d) requires states to identify and list those waterbodies where water quality standards are not met. This CWA § 303(d) impaired waterbody list includes those waters that require the development of a total maximum daily load (TMDL).

Applicant, on its Appeal, has for the most part reiterated the arguments it presented at the issues conference. Applicant contends that the Department has failed to comply with the requirements of CWA §§ 303(d) and 305(b) (*see* Appeal at 2, 17-22). According to applicant, DEC has not assessed the water quality of the Ramapo River and that failure bars staff from imposing the effluent limitations at issue in this proceeding (*see id.* at 2, 18). Applicant maintains that Department staff must determine water quality-based limits that would “actually restore water quality to established standards” (Appeal at 19). Applicant contends that Department staff has “arbitrarily imposed a numerical limit that is unsupported by any reasonably current and complete scientific data” and that the proposed effluent limits for chloride and total dissolved solids “cannot be said to be calculated to restore water quality” (Appeal at 18; *see also id.* at 19 [applicant contention that it is being selectively targeted to the exclusion of other contributory sources]).

Applicant further contends that if an impairment determination is made, CWA § 303(d) requires that the Department establish a TDML for waters that fail to achieve water quality

standards (*see id.* at 21-24).

Department staff rejects applicant's interpretation of CWA §§ 303(d) and 305(b) with respect to this proceeding and maintains that those sections of the CWA do not bar staff from modifying the effluent limits at issue (*see* Staff Reply at 5-8). Staff asserts that its implementation of CWA §§ 303(d) and 305(b) is "not germane to this administrative SPDES permit hearing . . . because that implementation is not a prerequisite to Staff's establishment of [water quality based effluent limits] in this SPDES permit" (Staff Reply at 6). According to Department staff, the effluent limits were developed utilizing the reasonable potential analysis embodied in 40 CFR 122.44(d) and 6 NYCRR 750-1.25(c) (*id.* at 7). Based on the reasonable potential analysis, staff can establish water quality based effluent limits for any pollutants "where there is the potential to exceed water quality standards, regardless of whether the receiving water body is deemed impaired or not" (*id.*). Department staff also rejects applicant's arguments relating to TMDL analyses, cost-benefit analysis requirements, and the Department guidance TOGS 1.3.1 (*see* Staff Reply at 6-8).

ALJ Sherman reviewed the legal requirements pursuant to CWA §§ 303(d) and 305(b), and their interplay, and, based on his analysis and in consideration of the arguments raised by applicant and Department staff, rejected applicant's position (*see* Issues Ruling at 6-11). The ALJ's analysis is sound, and I see no reason to disturb his determination that CWA §§ 303(d) and 305(b) do not preclude the Department from imposing the proposed modifications to the renewal of applicant's SPDES permit.

SPDES permits are intended to ensure that discharges to New York State waters do not cause or contribute to exceedances of State water quality standards. The lack of a water quality assessment (in this case, for the upper Ramapo River) is not a legal basis for rejecting a proposed effluent limitation in a SPDES permit.<sup>1</sup>

#### Cost of Compliance – CWA § 302(b)

Pursuant to CWA § 302(b)(1), the Administrator of the United States Environmental Protection Agency (EPA), after public notice and hearing, has the authority to establish effluent limitations pursuant to CWA § 302(a). CWA § 302(b)(2)(a) provides for a modification of the effluent limits if at the hearing the applicant "demonstrates . . . there is no reasonable relationship between the economic and social costs and the benefits to be obtained . . . from achieving such limitation."

Applicant, with regards to the implementation of effluent limitations for total dissolved solids (TDS) and chlorides, argues on its appeal that the costs of compliance must be taken into consideration (Appeal at 19-21). Furthermore, applicant states that CWA § 302(b) is clear that a cost-benefit analysis is a valid ground for seeking elimination or relaxation of a potentially burdensome requirement, even if that requirement was proposed in support of a valid water quality attainment objective (*id.* at 20).

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<sup>1</sup> I note also that applicant has failed to provide legal authority to the contrary (*see* Issues Ruling at 7; *see also id.* at 8 [rejecting applicant's reliance on *Natural Resources Defense Council, Inc. v Fox*, 30 F Supp 2d 369 (SDNY 1998)]).

Department staff, in its reply maintains that CWA § 302(b) does not require a cost-benefit analysis for these new effluent limitations (*see* Staff Reply at 1, 7).

In reviewing the arguments relating to the costs of compliance with the proposed permit revisions, the ALJ concluded that CWA § 302(b) is not applicable to the proposed water quality based effluent limitations (WQBELs) proposed by Department staff (*see* Issues Ruling at 13). He noted that WQBELs are set without regard to cost or technology availability (*see* Issues Ruling at 11-12). Moreover, the cost analysis contained in CWA § 302(b) is applicable when the determination regarding an effluent limitation is made by EPA pursuant to federal law (*see* Issues Ruling at 12). In this instance, however, the effluent limitations are being proposed by Department staff pursuant to State authority (*id.*).

I have considered the arguments presented by Department staff and reviewed the analysis of the ALJ on this record, and find no reason to disturb the ALJ's determination with respect to CWA § 302(b).

#### ■ ADJUDICABLE ISSUES<sup>2</sup>

The standards for adjudicable issues that relate to an applicant and Department staff are set forth at 6 NYCRR 624.4(c)(1)(i) and (ii). An issue is adjudicable if: “(i) it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit;” or “(ii) it relates to a matter cited by the department staff as a basis to deny the permit and is contested by the applicant.” The ALJ noted that, because Department staff has made a tentative determination to issue a renewal permit, only those issues relating to a dispute between Department staff and applicant over a substantial term of the draft permit are eligible for adjudication (*see* Issues Ruling at 6).<sup>3</sup>

#### Effluent Limits for Total Dissolved Solids (TDS) and Chlorides

The draft permit proposes (i) for TDS, a 500 milligram per liter (mg/L) limitation and a 25,000 pounds (lbs)/day, daily maximum; and (ii) for chlorides, a 250 mg/L limitation and a 13,000 lbs/day, monthly average (*see* Issues Ruling at 13; Exhibit A [Draft Permit at 4 and Municipal SPDES Permit Fact Sheet at 7]). Department staff stated that the TDS and chlorides effluent limitations are water quality-based effluent limitations that were calculated using the “reasonable potential” analysis (*see* Issues Ruling at 13; *see also* Issues Conference Transcript [Transcript] at 119-121; Exhibit A [Municipal SPDES Permit Fact Sheet at 6-7]). Staff stated that the reasonable potential analysis included an estimate of the projected water quality downstream, and the analysis was made based on the design flow of the plant and under the

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<sup>2</sup> To the extent that any of applicant's arguments, on its appeal, could be perceived to challenge the proposed SPDES renewal permit conditions relating to the copper concentration limitation of 20 µg/l, the action levels for total phenolics or the lead effluent limitation (*see* Issues Ruling at 17-20), any such arguments would not alter the ALJ's analysis or conclusions.

<sup>3</sup> An issue is also adjudicable if it is proposed by a potential party and is both substantive and significant (*see* 6 NYCRR 624.4[c][1][iii]). Because no potential parties petitioned for party status, and the only parties to the proceeding are Department staff and applicant, this provision is not applicable here.

assumption that no dilution was available in the receiving waters (*see* Issues Ruling at 13; *see also* Transcript at 125-126, 130-131).

On appeal, applicant contests the ALJ's determination that no issues for adjudication exist (*see* Appeal at 1). Applicant argues that "the parties are in agreement that the primary issues in dispute relate to DEC staff's imposition of conditions relating to effluent limits for Chlorides and Total Dissolved Solids ("TDS"), as well as conditions requiring submission of an engineering report detailing a plan for achieving the final effluent limits of 250 mg/l for Chlorides and 500 mg/l TDS" (*id.* at 9-10). Applicant challenges the permit terms for "these two parameters on factual, legal, technical, feasibility and cost grounds" (*id.*).

In response, Department staff argues that applicant's "appeal points to no unresolved factual disputes that warrant an evidentiary hearing" (Staff Reply at 8). Staff maintains that no dispute exists between staff and applicant regarding any of the data that is being utilized to calculate the proposed effluent limits for TDS and chlorides (*see id.* at 8). Department staff addresses four sets of data relevant here, including applicant's effluent data, the Department's recent water body assessment data, applicant's water body sampling data, and the Department's preliminary water body sampling (*see id.* at 8-9).

A review of the record demonstrates that the use of the reasonable potential analysis is appropriate here. Department staff's effluent limitation calculations are consistent with Department guidance, the TDS and chloride limitations proposed are appropriate water quality standards for the receiving waters, and the methods that Department staff utilized in its analysis are authorized and appropriate. To the extent that applicant contends that it has some other data (*see* Transcript at 139-140), that bare assertion is insufficient in and of itself to raise an adjudicable issue.

Accordingly, I concur with the ALJ that applicant has not raised any issues with respect to the proposed TDS and chlorides effluent limitations that require adjudication.

I also note that the permit as drafted provides flexibility to applicant through permit compliance schedules relative to the implementation of effluent limitations for these two parameters. The draft permit includes interim limits that will be in effect for a specified period (*see* Exhibit A [Draft Permit at 5 (footnote 4), 13 (Schedule of Compliance table)]).

Furthermore, staff has not made any determination regarding the method that applicant is to use to achieve compliance with the TDS and chlorides effluent limitations. The draft permit includes a compliance schedule that affords time to applicant to complete an engineering report and achieve final compliance with the effluent limits. Applicant will have two years from the effective date of the permit to prepare an engineering report to analyze alternatives available to meet the effluent limitations and to evaluate their cost (*see* Exhibit A [Draft Permit at 13]). Under the terms of the draft permit, applicant will have nearly five years (59 months) from the effective date of the permit to implement the alternative selected (*see id.*)<sup>4</sup>

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<sup>4</sup> In the course of the issues conference, a change to the Schedule of Compliance for total residual chlorine was agreed to by the parties (*see* Transcript at 154-157).

### Stream Gauge and Temperature Limit

Applicant, on its Appeal, notes that other disputed issues include DEC staff's requirements that applicant "enter into a 30-year Joint Funding Agreement with the United States Geological Survey for the annual operation and maintenance of a stream gauge and that the County meet a discharge effluent temperature limit of 70 degrees [Fahrenheit] for its effluent from Outfall 002, even during those months when the receiving waters already exceed that temperature" (Appeal at 11).

Department staff counters that while applicant contests the stream gauge and the 70-degree Fahrenheit temperature limit, applicant fails to identify the nature of the dispute or provide any additional information in support of its position (*see* Staff Reply at 11).

Applicant's conclusory statement that the proposed permit conditions relating to a stream gauge and a temperature requirement are in dispute, without more, is insufficient to raise an adjudicable issue (*see Matter of Sullivan County Division of Solid Waste*, Interim Decision of the Deputy Commissioner, February 15, 2005, at 12 [conclusory statements alone are insufficient to raise an adjudicable issue]).

The record before me provides ample justification for these two permit provisions (*see* Issues Ruling at 22-23). I note that the 70 degree Fahrenheit temperature limitation is a carryover from the current permit. The effluent limitation for temperature at outfall 002 is prohibited by regulation from exceeding 70 degrees Fahrenheit in that receiving waters at that outfall are trout waters (*see* 6 NYCRR 704.2[b][2][i] ["No discharge at a temperature over 70 degrees Fahrenheit shall be permitted at any time to streams classified for trout"]; *see also* Exhibit A [Municipal SPDES Permit Fact Sheet at 1 (II.B)]; Issues Ruling at 23). With respect to the stream gauge, sufficient authority exists in the Department's regulations to require applicant to assume the costs for the operation and maintenance of the gauge (*see* Issues Ruling at 22 [*citing* 6 NYCRR 750-1.13(a)]).

Applicant has raised no legal or factual issues regarding the operation and maintenance of a stream gauge by applicant or the 70° F temperature limitation. Accordingly, I concur with the ALJ that no adjudicable issues are presented.

To the extent that applicant has raised any additional arguments on its appeal, these have been considered and found to be lacking in merit.

**CONCLUSION**

I hereby affirm the ALJ's Issues Ruling and remand the matter to Department staff for the processing and issuance of the SPDES renewal permit for the Orange County Sewer District #1 Harriman Sewage Treatment Plant.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: January 29, 2020  
Albany, New York



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