**STATE OF NEW YORK**
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Application to Renew State Pollutant Discharge Elimination System Permit # NY0027901 by

**ORANGE COUNTY DEPARTMENT OF PUBLIC WORKS,**

Applicant.

**Ruling on Issues and Party Status and Order of Disposition**

DEC Application No. 3-3358-00038/00001

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## BACKGROUND

Orange County Department of Public Works (DPW or applicant) operates the Orange County Sewer District (OCSD) #1 Harriman Sewage Treatment Plant (Harriman STP or plant) located in the Town of Harriman, Orange County, New York. Applicant holds a State Pollutant Discharge Elimination System (SPDES) permit (permit # NY0027901) that authorizes the surface discharge of 6.0 million gallons per day of treated wastewater from the plant to the upper Ramapo River. Applicant submitted a timely and sufficient application to renew its SPDES permit and, therefore, in accordance with State Administrative Procedures Act § 401(2), applicant's existing SPDES permit remains in effect until the application has been finally determined by the Department. The Department determined the application to be complete on December 13, 2017 and published a Notice of Complete Application in the Environmental Notice Bulletin on December 20, 2017.

Based on its review of applicant's renewal application, Department staff made a tentative determination to issue a renewal permit with modifications. Staff also prepared a draft permit. Applicant objected to certain provisions of the proposed permit modification and requested a hearing.

## PROCEEDINGS

This matter was assigned to me on March 27, 2018. In consultation with applicant and Department staff, I prepared a Notice of Public Legislative Hearing, Issues Conference, and Deadline for Petitions for Party Status (Notice) for this proceeding. I then arranged to have the Notice published in the Department's Environmental Notice Bulletin on June 13, 2018. Applicant published the Notice in the Times Herald-Record on June 13, 2018.

The Notice advised that the Legislative Hearing would be held at the Orange County Emergency Services Center, 22 Wells Farm Road, Goshen, New York, on July 30, 2018. The Notice also advised that written comments on the application or draft permit would be accepted if received by the Office of Hearings and Mediation Services (OHMS) on or before August 1, 2018. Additionally, the Notice advised that the issues conference would be held at the Orange County Emergency Services Center on August 2, 2018. The Notice further advised that petitions for party status to participate in the issues conference and, if necessary, the adjudicatory hearing were to be filed with OHMS on or before July 25, 2018.

Both the applicant and Department staff are mandatory parties to this proceeding (*see* 6 NYCRR 624.5[a]). In accordance with 6 NYCRR 624.5(b), and as set forth in the Notice, any other person seeking full party status or amicus status must file a written petition with OHMS. No petitions for party status were received. Accordingly, only applicant and Department staff are parties to these proceedings.

The permit renewal with modifications is an unlisted action under Environmental Conservation Law (ECL) article 8 (State Environmental Quality Review Act [SEQRA]) and 6 NYCRR part 617. Department staff determined that the permit renewal would not have a significant adverse impact on the environment and, therefore, the permit renewal did not require further review under SEQR.

As stated in the Notice, application materials and the draft permit were made available for public review at the Department's Region 3 Office, 21 South Putt Corners Road, New Paltz, New York, and at the Department's Central Office, 625 Broadway, Albany, New York.

## Legislative Hearing

I convened the legislative hearing on July 30, 2018, at 5:30 p.m. at the Orange County Emergency Services Center, 22 Wells Farm Road, Goshen. There were approximately 30 people in attendance, including representatives of the applicant and the Department. Eight people offered comments and those comments are summarized below.

Laurie Tautel, Orange County Legislator, District 14, stated that the waters coming into the Harriman STP have higher levels of pollutants than the proposed effluent limitations under the draft permit. She also asserted that discharges to the Ramapo River should be addressed pursuant to section 303(d) of the Federal Clean Water Act (CWA) which governs impaired waters.

Daniel Miller, Water Supply Program Manager, Rockland County Department of Health, stated that the water quality of the Ramapo River is important for the water resources of Rockland County. He stated that Rockland County supports the Department's efforts to improve

water quality in the Ramapo River. He stated that more stringent discharge limitations could be part of the solution, but also urged DEC to undertake a comprehensive assessment of point source and non-point source contributions to pollutants in the river.

Mayor Stephen Welle, Village of Harriman, provided a copy of a sampling report that shows elevated sodium and chloride levels upstream of the Harriman STP outfall. He asserted that adding regulations and limitations to the SPDES permit for the plant will not address the problem that exists upstream. He also asserted that KJ Poultry Plant is releasing extraordinary amounts of sodium and chloride into the upper portion of the Ramapo River. He stated that stricter regulation needs to be imposed at the source of the problem.

Dennis Lindsay, Village Engineer, Village of Woodbury, stated that the majority of the village's residents are connected to the Harriman STP. He asserted that the village believes that DEC should use a uniform and fair approach to this regional water quality issue. A strategic plan should be developed that equitably distributes the burden to all contributors to the problem, rather than imposing the burden on a single permittee because they are scheduled for a permit renewal.

Henry Christensen, Esq., representing the Village of Chester and the Moodna Basin Joint Operation and Maintenance Commission, stated that modifications proposed under the draft permit would likely dramatically increase capital costs and the cost of operation and maintenance for the Harriman STP. He asserted that there is a lack of data to show whether (i) the upper Ramapo River is impaired, (ii) the effluent from the Harriman STP is a cause, or (iii) other point sources and non-point sources are more significant contributors to the water quality conditions being addressed. He also stated that the levels of total dissolved solids (TDS) and chlorides upstream of the plant exceed the proposed limitations in the draft permit. He maintained that imposition of the draft permit conditions without the underlying data to support the changes and without listing the Ramapo River as impaired under CWA § 303(d) is arbitrary and capricious.

Kyle Steimle, a consultant to the Village of Suffern, stated that the village is concerned about increases in chloride levels observed in its potable water wells. He asserted that there has been a continuous increase in the chloride levels since the thruway passed through the village. Mr. Steimle stated that the KJ Poultry Plant uses between five and twelve tons of salt per day and that discharges from that plant may impact all users downstream. He asserted that, although the village supports DEC's efforts to minimize the impact of upstream discharges on village wells, the draft SPDES permit will not fully address the problem. He also asserted that reverse osmosis on the scale needed to remove the TDS and chlorides from the Harriman STP waste stream would impose a catastrophic financial burden to all users. He stated that end of pipe solutions at the Harriman STP are not sustainable, efficient or cost effective.

Peter Touhy, Orange County Legislator, District 7, stated that the water flow into the Harriman STP is impaired. He asserted that the Ramapo River should be listed on the CWA § 303(d) impaired waters list for New York and that DEC should implement a holistic watershed-based approach to reducing TDS and chlorides. By refusing to take a holistic watershed approach to reducing these pollutants, the Department is placing the burden on the County Sewer District. This, he said, is contrary to law and he urged DEC to comply with the Clean Water Act.

Mayor Neil Dwyer, Village of Monroe, asserted that the testing required for TDS and chlorides under the draft permit does not offer a holistic review of contamination in the Ramapo River. He also stated that a much more comprehensive review is necessary to address the contamination. Mayor Dwyer stated that it was his understanding that the point of concern is not the outflow from the Harriman STP, but rather the upflow coming into the plant.

**Written Comments**

Six people, four of whom also spoke at the legislative hearing, submitted timely written comments to the Department. Those comments are summarized below.

Daniel Miller. In addition to submitting written comments, Mr. Miller spoke at the legislative hearing. His comments are summarized in the previous section.

William Prehoda, Hydrologist, SUEZ Water NY (SWNY), stated that SWNY is the primary supplier of potable water for Rockland County. He stated that up to 30 percent of the potable water in Rockland County is drawn from a well field that is adjacent to the Ramapo River. He stated that SWNY would be opposed to any action that would result in further degradation of water quality in the Ramapo River.

Mayor Stephen Welle. In addition to his comments at the legislative hearing (see above), Mayor Welle provided a copy of a sampling report for sodium and chloride in groundwater and surface water in the vicinity of the Village of Harriman. The report concludes that there is a continuing increase in sodium and chloride concentrations in both the shallow and deeper groundwater. The report also states that recharge from the Ramapo River and road salt appear to be contributing factors to the increasing concentrations.

Henry Christensen. In addition to submitting written comments, Mr. Christensen also spoke at the legislative hearing. His comments are summarized in the previous section.

Daniel Kraushaar, Esq., Village Attorney, Village of Suffern, stated that village wells have seen progressive increases in chloride levels and that the village strongly supports DEC's efforts to minimize the impact of upstream discharges to the Ramapo River. He stated, however,

that the draft permit conditions will impose a catastrophic burden on tax payers and would not fully address the problem. He asserted that the KJ Poultry plant uses five to twelve tons of salt per day and that discharges from the plant should be addressed. He concluded that it seems antithetical to place the financial burden on taxpayers to solve a problem that is likely caused by a private source.

Peter Touhy. In addition to submitting written comments, Mr. Touhy also spoke at the legislative hearing. His comments are summarized in the previous section.

## Issues Conference

In accordance with the Notice, I convened the issues conference at the Orange County Emergency Services Center on August 2, 2018 at 9 a.m. Applicant was represented by Gene Kelly, Esq., Harris Beach PLLC. Department staff was represented by Carol Conyers, Esq., Office of General Counsel.

During the issues conference the parties submitted 23 exhibits into the issues conference record. Additionally, I authorized Department staff to supplement the record with citations to specific authorities that staff referenced during the issues conference (*see* Department staff email, dated Aug. 3, 2018, with attached Supplemental Authority for Permit Limits or Conditions that Remain in Dispute Following the Issues Conference [staff supplemental filing]). I also authorized the parties to file post-issues conference briefs and to submit additional exhibits regarding legal questions that were raised at the hearing (*see* Applicant Brief on Clean Water Act §§303(d) and 305(b), Ramapo River Water Quality and Permitting Requirements [applicant brief], dated Aug. 23, 2018; Staff Reply Brief [staff reply[1]], dated Sept. 6, 2018; Applicant Reply Brief on Clean Water Act §§303(d) and 305(b), Ramapo River Water Quality and Permitting Requirements [applicant reply], dated Sept. 20, 2018).

A list of the exhibits submitted by the parties is appended to this ruling.

### Summary of the Positions of the Parties

Applicant argues that the effluent limitations proposed under the draft permit are unsupported by a valid assessment of the efficacy of such limitations to restore water quality in the upper Ramapo River, and that some of the proposed effluent limitations are impracticable because of the cost of compliance (applicant brief at 1-2, 15). Applicant argues that the Department has "failed to perform a mandatory duty" under CWA to assess the water quality

[1] By email dated October 9, 2018, Department staff filed corrections to its reply brief (hardcopy of the filing was received by this office on October 15, 2018). Applicant consented to the filing.

attainment status of the Ramapo River and that the Department must "holistically address the condition of impairment that exists" (*id.* at 1).

Department staff maintains that there are "few, if any, disputed issues of fact" that require adjudication (transcript [tr] at 7). Staff argues that the effluent limitations set forth in the draft permit are supported by State and federal law and that the proposed compliance schedule provides the maximum flexibility allowable to implement those limitations (*id.*). Staff argues that the draft permit needs to be finalized as written (tr at 11).

## ISSUES RULINGS

This ruling addresses issues that were raised by applicant at the issues conference concerning (i) "disputed issues of fact" that applicant proposed for adjudication (*see* 6 NYCRR 624.4[b][2][iii]); and (ii) legal issues "whose resolution is not dependent on facts that are in substantial dispute" (6 NYCRR 624.4[b][2][iv]).

To meet the standards for adjudication, an issue must (i) relate to a dispute between the Department and the applicant over a substantial term of the draft permit, (ii) relate to a matter cited by staff as a basis to deny the permit, or (iii) be proposed by a potential party and be both substantive and significant (*see* 6 NYCRR 624.4[c][1]). Here, staff has made a tentative determination to issue a renewal permit and there are no potential parties. Accordingly, only those issues that relate to a dispute between Department staff and applicant over a substantial term of the draft permit are eligible for adjudication.

The issues that applicant asserted should be adjudicated are discussed below in the order that the issues were discussed at the issues conference.

-- Clean Water Act §§ 303(d) and 305(b)

Applicant argues that the Department must first determine whether the upper Ramapo River is impaired before Department staff may impose certain effluent limitations proposed under the draft permit. Applicant maintains that, pursuant to CWA § 305(b), the Department must undertake a water quality assessment of the upper Ramapo River. Applicant further maintains that, pursuant to CWA § 303(d), the Department must list the upper Ramapo River as impaired and conduct a total maximum daily load (TMDL) analysis before imposing the effluent limitations proposed under the draft permit. Applicant argues that the Department's decision to modify applicant's SPDES permit effluent limitations without first assessing the water quality of the upper Ramapo River is contrary to law. (*See generally* applicant brief at 1-2.)

Department staff argues that the procedures established under CWA §§ 303(d) and 305(b) are not a bar to staff imposing the effluent limitations proposed under the draft permit.

Staff asserts that the process for establishing effluent limitations under CWA § 303(d) may be pursued only after the State has determined that (i) a receiving water is impaired, and (ii) that effluent limitations established under individual SPDES permits are insufficient to achieve the water quality standards applicable to the receiving water body. Here, staff notes, the Department has neither made an impairment determination for the upper Ramapo River nor ascertained whether SPDES permit effluent limitations are sufficient to achieve water quality standards. (*See generally* staff reply at 1-2.)

For the reasons set forth below, I hold that CWA §§ 303(d) and 305(b) do not preclude the Department from imposing modifications to applicant's SPDES renewal permit.

New York's SPDES program was established "to insure that the State of New York shall possess adequate authority to issue permits regulating the discharge of pollutants . . . into the waters of the state, upon condition that such discharges will conform to and meet all applicable requirements of the Federal Water Pollution Control Act" (ECL 17-0801). Among other things, SPDES permits are intended to ensure that discharges to New York State waters do not cause exceedances of State water quality standards. The Code of Federal Regulations defines water quality standards as:

> "[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the [CWA]" (40 CFR § 130.2[d]).

Applicant argues that, because the Department has not determined the upper Ramapo River to be impaired, Department staff may not impose the TDS and chlorides[2] effluent limitations proposed under the draft permit (applicant brief at 14-15).

Applicant states that Department staff acknowledged on the record that "there are some 5,500 water body segments in New York State for which §305(b) requires water quality assessments" and that "only *about half* of these have ever been assessed" (applicant brief at 14). The existence of a large number of water bodies without water quality assessments does not support applicant's argument. Rather, it serves to underscore the fact that the absence of a water quality assessment is commonplace. Despite this, applicant has failed to identify a single instance in which the absence of a water quality assessment was cited as the basis for striking down a proposed effluent limitation in a SPDES permit.

[2] Chlorides are a constituent of TDS (*see* draft permit, Municipal SPDES Permit Fact Sheet at 7). These two pollutants are generally discussed in tandem by the parties.

Applicant argues that "CWA simply does not allow for incremental achievement of water quality standards" (applicant brief at 15 [citing *Natural Resources Defense Council, Inc. v Fox*, 30 F Supp 2d 369, 381 (SDNY 1998) (*Fox*)]). Rather, applicant argues, water quality-based effluent limitations "must be determined to actually restore water quality to established standards" (*id*.). Applicant asserts that this point is "underscored by the EPA's comments on the subject draft permit [in which] EPA state[s], among other things, that permit terms must provide for 'immediate' compliance with water quality standards" (*id*. at 15-16 [citing exhibit Y]).

Applicant's reliance on *Fox* is misplaced. The issue before the court in *Fox* was whether a TMDL for an impaired water body was "'established at a level necessary to implement the applicable water quality standards'" (*Fox* at 381 [quoting CWA § 303(d)(1)(C)]). The court held that CWA "does not allow for incremental achievement of water quality standards through successive approval of TMDLs that fall short of the required standard" (*id.*). Unlike in *Fox*, the receiving water body at issue in this proceeding has not been designated as impaired and, therefore, the Department is not required to establish a TMDL for the river segment.

Applicant's reliance on EPA's comments on the draft permit is also unavailing. In accordance with 40 CFR 123.44, EPA reviews proposed SPDES permits and must notify the State of any objection to the issuance of a proposed permit. Notably, the comments that EPA provided on the draft permit do not object to the absence of a DEC determination regarding the impairment of the upper Ramapo River, nor does EPA object to DEC's proposed TDS effluent limitations on the basis of the lack of such a determination.

Rather, EPA's comments relate to the compliance schedule proposed under the draft permit for the TDS effluent limitations. The proposed compliance schedule provides applicant with more than four years to comply with the effluent limitations for TDS. In its comments, EPA states that SPDES permits "must require immediate compliance with (i.e., may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977" (exhibit Y at 1).

EPA's comments also state, however, that "[b]ased on discussions with NYDEC staff . . . the receiving water body for the Harriman STP . . . may have been reclassified to a water body class with a TDS [water quality] standard" after 1977 (exhibit Y at 2). EPA further states that "[d]epending on the details of the reclassification, *a compliance schedule may be allowable* for the TDS water quality-based effluent limitations" (*id.* [emphasis supplied]).

In its reply brief, Department staff confirms that the water quality standard for the upper Ramapo River was not adopted until after July 1, 1977 (staff reply at 17 n 27). Applicant, in reply, does not dispute the foregoing, but merely repeats its assertion that "Exhibit Y [EPA's comments] confirms . . . something that the County has long argued - that permit terms must

provide for 'immediate' compliance" (applicant reply at 12). I conclude that the use of a compliance schedule is allowable.

In its reply brief, applicant also argues that "since the Department's proposed permit proceeds from the informal treatment of the Ramapo River as impaired (which is directly contradicted by staff's historic unwillingness to perform a formal assessment), it will be necessary to resolve the issue of impairment" (applicant reply at 3).

This argument fails. Department staff did not propose the TDS effluent limitations in the draft permit on the basis of the "informal treatment of the Ramapo River as impaired." Rather, as explained by staff at the issues conference, the proposed TDS limitations were based upon the water quality standard for the upper Ramapo River, effluent sampling data from the Harriman STP, and the limited assimilative[3] capacity of the receiving waters (*see* tr at 119-126). These factors were considered by Department staff under the "reasonable potential" analysis, which considers whether a discharge may cause or contribute to an exceedance of a water quality standard. No determination of impairment is necessary to this process.[4]

Applicant also asserts that Department staff is relying on "horribly outdated and incomplete" data regarding the water quality of the upper Ramapo River, and further argues that this reliance is contrary to the Department's own assessment methodology guidance as set forth in the New York State Consolidated Assessment and Listing Methodology (CALM) (applicant reply at 5).

Department staff acknowledges that the water quality assessment is based upon data that is more than ten years old (tr at 82-83). Staff asserts, however, that the age of the data does not alter the fact that the Department has not made a determination regarding whether the upper Ramapo River is impaired and, therefore, the TMDL process is not implicated (*id.*).

Although applicant expressed frustration with the lack of an impairment determination for the upper Ramapo River, it is uncontested that no such determination has been made by the Department. Applicant cites no authority that precludes the Department from imposing the TDS and chlorides limitations proposed under the draft permit in the absence of an impairment determination.

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[3] The issues conference transcript reads "similar" rather than "assimilative" (*see* tr at 125). Both Department staff and applicant proposed errata to the transcript and neither party objected to the errata offered by the other. Accordingly, I accepted all proposed errata (*see* Kelly email dated Sept. 12, 2018; Conyers email dated Sept. 13, 2018; ALJ memorandum to file, dated Oct. 10, 2018). All references to, and quotations from, the transcript in this ruling reflect the transcript as corrected by the parities.

[4] The Department's application of the reasonable potential analysis to the proposed TDS and chlorides effluent limitations is discussed in the section on TDS and chlorides below (*see infra* at 13-16).

A recent case, *Matter of Natural Resources Defense Council, Inc. v New York State Dept. of Envtl. Conservation*, 35 Misc 3d 652 (Sup Ct, Westchester County 2012), *affd in part, revd in part*, 120 AD3d 1235 (2d Dept 2014), *affd* 25 NY3d 373 (2015) (*NRDC v DEC*), is instructive with regard to whether the Department may set interim effluent limitations in the absence of a TMDL determination. Supreme Court in *NRDC v DEC* considered whether the Department could set interim effluent limitations where a receiving water body was deemed impaired, but for which the Department had not yet established a TMDL.

The petitioners in *NRDC v DEC* objected to a "no net increase" interim effluent limitation that DEC included in the 2010 general permit for municipal separate storm sewer systems (MS4 General Permit) (*NRDC v DEC*, 35 Misc 3d at 669-670). The MS4 General Permit provided that, for those MS4s that discharged into an impaired water body for which a TMDL had not been established, a "no net increase" interim effluent limitation would apply.

Supreme Court, after noting the procedural steps that are necessary before establishing an effluent limitation pursuant to the TMDL process, held:

> "Meanwhile, as DEC contends, '[t]he adoption of the "no net increase" standard ensures that these waters do not become more polluted while DEC continues its sampling, source quantification and related studies' . . . This court finds that the 'no net increase' limitation represents a rational and reasonable interpretation of DEC's statutory mandate [to ensure compliance with applicable water quality standards] during the interim from initial authorization to the establishment of a TMDL" (*NRDC v DEC*, 35 Misc 3d at 670 [citation omitted]).

It should be noted that Supreme Court annulled the MS4 General Permit on other grounds (*NRDC v DEC*, 35 Misc 3d at 675), but that the annulment was reversed by the Appellate Division on appeal (*see NRDC v DEC*, 120 AD3d 1235, 1247 [2d Dept 2014], *affd* 25 NY3d 373 [2015]). Supreme Court's holding that the Department has authority to set interim effluent limitations was, however, affirmed by the Appellate Division (*see NRDC v DEC*, 120 AD3d at 1246 [holding that "the provisions of the General Permit challenged by the petitioners in their cross appeal with respect to effluent limitations and water quality standards are not contrary to law"]). The Court of Appeals affirmed the order of the Appellate Division (*NRDC v DEC*, 25 NY3d at 397).

I also note that, although the Court of Appeals affirmed, Judge Rivera dissented. In her dissent, however, Judge Rivera expressly states that she "concur[s] with the majority to the extent it affirms dismissal of petitioners' claims as related to the 'no net increase' provision" (*NRDC v DEC*, 25 NY3d at 398). Judge Rivera also observed that "petitioners and the State recognize [that] it can take years to determine a TMDL" (*id.* at 409). Thus, the record before the

Court evinced that the "no net increase" interim effluent limitation could be in place for many years before an effluent limitation would be established pursuant to the TMDL process.

Unlike in *NRDC v DEC*, in the instant proceeding the Department has not yet determined the upper Ramapo River to be impaired. Accordingly, the establishment of effluent limitations on the basis of a TMDL may never prove necessary. Moreover, assuming that the Department were to eventually determine that the upper Ramapo River is impaired, it may be years thereafter before the Department would establish a TMDL-based effluent limitation. In the interim, the Department may impose effluent limitations under the draft permit to ensure compliance with applicable water quality standards.

**Ruling:** The provisions of CWA §§ 303(d) and 305(b) do not preclude the Department from imposing the effluent limitations proposed in the draft permit.[5]

-- Cost of Compliance

Applicant argues that "[c]ost has to be a consideration" with regard to implementing the proposed effluent limitations in the draft permit (tr at 109). Applicant asserts that compliance with the proposed effluent limitations for TDS and chlorides can only be achieved through reverse osmosis, the cost of which "would be measured in the tens of millions of dollars" (tr at 110-112). Applicant also argues that "CWA §302(b) provides clear grounds for a modification of effluent limitations otherwise required under the Act using a cost-benefit analysis" (applicant brief at 16).

Department staff argues that cost is not a consideration under the law, although some flexibility is provided through compliance schedules which may delay the implementation of an effluent limitation (tr at 110-111). Staff also states that it has made no determination regarding the method that applicant is to use to achieve compliance with the TDS and chlorides effluent limitations, and that options other than reverse osmosis may be explored (tr at 112).

The TDS and chlorides limitations proposed under the draft permit are water quality-based effluent limitations (WQBELs). As Department staff notes (*see* staff reply at 15), the United States Court of Appeals for the Second Circuit recently held that:

> "WQBELs are set without regard to cost or technology availability. *See NRDC v. EPA*, 859 F.2d 156, 208 (D.C.Cir. 1988) ('A technology-based standard discards its fundamental premise when it ignores the limits inherent in the technology. By

[5] Applicant may, and does, challenge the legal and analytical bases cited by the Department for specific effluent limitations (and other provisions) proposed under the draft permit. Applicant's arguments in that regard are discussed below (*see infra* at 13-23).

> contrast, a water quality-based permit limit begins with the premise that a certain level of water quality will be maintained, come what may, and places upon the permittee the responsibility for realizing that goal.' (footnote omitted))"

(*Natural Resources Defense Council v United States Envtl. Protection Agency*, 808 F3d 556, 565 [2d Cir 2015]). Department staff also argues that applicant's reliance on CWA § 302(b) is misplaced because that section "applies only to WQBELs for 'toxic pollutants for a single period not to exceed 5 years' [and] TDS is not listed in 6 NYCRR § 703.5 among the toxic pollutants" (staff reply at 15).

As previously noted, I authorized applicant to file a reply to Department staff's brief. Despite this opportunity to challenge staff's assertion that CWA § 302(b) is inapposite, applicant's reply is silent on this issue. Rather, applicant states only that "DEC staff seek to require the County to implement what can only be seen as an extremely costly experiment" (applicant reply at 10-11). Applicant also fails to cite any other authority that would impose a cost consideration on the Department's determination to impose the effluent limitations proposed under the draft permit.

By its express terms, CWA § 302(b)(1) empowers the EPA Administrator, after public notice and a public hearing, to establish effluent limitations pursuant to CWA § 302(a). CWA § 302(b)(2)(A), which applicant cites (*see* applicant brief at 16), authorizes the EPA "Administrator, with the concurrence of the State, [to] issue a permit which modifies the effluent limitations required by [CWA § 302(a)] for pollutants other than toxic pollutants if . . . there is no reasonable relationship between the economic and social costs and the benefits to be obtained . . . from achieving such limitation." Accordingly, the cost consideration established under CWA § 302(b) is applicable to determinations made by EPA, not to determinations made by the Department (*see Homestake Min. Co. v. United States Envtl. Protection Agency*, 477 F Supp 1279, 1286 [D South Dakota 1979] [holding that "[CWA §] 302 guarantees a hearing only if the effluent limitations are adopted under EPA authority, not state authority"]).

Department staff argues that, although cost is not a consideration in relation to WQBELs, "time flexibility is provided in permit compliance schedules, variances, and seasonal limits" (staff reply at 16; *see also* tr at 113-116 [staff assertion that applicant may pursue a variance under 6 NYCRR 702.17 to provide more time for compliance]). As previously noted, staff has included compliance schedules in the proposed permit. The decision regarding whether to pursue a variance from an effluent limitation falls within applicant's prerogative.

Department staff's position is supported by the Appellate Division's holding in *Matter of Catskill Mountains Chapter of Trout Unlimited, Inc. v Sheehan*, 71 AD3d 235 (3d Dept 2010), *lv denied* 14 NY3d 713 (2010). Therein, the Court held that "there is no regulatory authority that allows for the inclusion of . . . exemptions from effluent limitations and state water quality

standards in a SPDES permit" (*id.* at 239-240). The court below noted that, in the absence of the exemptions that the Department included in the permit, the cost of compliance "could reach the better part of a billion dollars," and also noted that the efficacy of the technology proposed to achieve compliance had not been demonstrated (*Matter of Catskill Mountains Ch. of Trout Unlimited, Inc. v Sheehan*, No. 06-3601, 2008 WL 5592764 [Sup Ct, Ulster County, Aug. 05, 2008]). Nevertheless, the Appellate Division upheld Supreme Court's determination to vacate the Department's issuance of the SPDES permit containing the exemptions.

The Appellate Division, quoting 6 NYCRR 702.17, held that DEC "'may grant, to an applicant for a SPDES permit or to a SPDES permittee, a variance to a water quality-based effluent limitation or groundwater effluent limitation included in a SPDES permit' if it is shown 'that achieving the effluent limitation is not feasible' as a result of various conditions then in existence" (*id.* at 240). The Court concluded that "[s]ince the City has not obtained a variance, Supreme Court properly vacated DEC's determination to issue a SPDES permit that contained these exemptions" (*id.*).

As Department staff maintains, applicant's recourse with regard to water quality-based effluent limitations is to pursue a variance.

**Ruling:** CWA § 302(b) is not applicable to the Department's determinations regarding the proposed effluent limitations in the draft permit. Further, applicant offered no other authority for imposing cost considerations on determinations by the Department concerning water quality-based effluent limitations. Accordingly, cost is not a consideration.

-- TDS & Chlorides

In addition to applicant's objection to the potential costs of compliance with the proposed TDS and chlorides effluent limitations, applicant challenges the legal bases and data relied upon by Department staff to establish the limitations.

The draft permit proposes a 500 milligrams per liter (mg/L) concentration limitation and a 25,000 lbs/day mass loading limitation for TDS, and a 250 mg/L concentration limitation and a 13,000 lbs/day mass loading limitation for chlorides (draft permit at 4). The 2008 permit did not include limits on TDS or chlorides.

Department staff states that the TDS and chlorides effluent limitations are water quality-based effluent limitations that were calculated using the "reasonable potential" analysis (tr at 120). Staff states that the reasonable potential analysis includes an estimate of the projected effluent quality downstream (*id.*). The analysis was made based on the design flow of the plant, and under the assumption that no dilution was available in the receiving waters (tr at 125, 130). Staff asserts that the reasonable potential analysis that it undertook to establish the

plant's TDS and chlorides effluent limitations is consistent with both EPA and DEC guidance (tr at 121).

Applicant argues that Department staff has developed an "artificial construct" by electing to calculate TDS and chlorides effluent limitations under the assumption that the Harriman STP is discharging at its maximum design flow (tr at 128). Applicant asserts that the plant's actual discharge rate is "about 4.5 million gallons per day or roughly 25 percent less [than] . . . the number the Department is using" (*id.*). Applicant argues that staff's approach is "arbitrary at its highest" (*id.*).

Department staff asserts that using the plant's design flow for effluent limitation calculations is consistent with the Department's Technical and Operational Guidance Series (TOGS) 1.3.3 (tr at 130). Staff, quoting from TOGS 1.3.3, states that "[p]ursuant to 40 CFR.122.45[(b)(1)] and 6 NYCRR 754.1[(a)(5)(ii)],[6] permit limitations standards or prohibitions shall be calculated based on the design flow of the POTW" (tr at 130-131; *see* TOGS 1.3.3[I][B][1]).

The requirement that a facility's design flow is to be used to calculate effluent limitations is consistent with controlling regulation. Specifically, 6 NYCRR 750-1.11(a)(9) provides that "[t]he provisions of each issued SPDES permit shall ensure compliance with . . . the provisions or requirements of . . . 40 CFR part 122.45 - Calculating NPDES permit conditions." In accordance with 40 CFR 122.45(b)(1), "[i]n the case of POTWs, permit effluent limitations, standards, or prohibitions shall be calculated based on design flow."

Applicant also challenges staff's use of the seven-day, 10-year low flow calculation ($7Q10$[7]) to determine the assimilative capacity of the receiving waters. Applicant argues that, with regard to "[assimilative] capacity, you have to consider all of the circumstances that could be present, not just an extreme low flow event which we acknowledge is possible" (tr at 132). Applicant further asserts that the Department did not utilize 7Q10 in developing effluent limitations on applicant's prior SPDES permits (tr at 145-146).

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[6] 6 NYCRR part 754 was repealed in 2003. As discussed below, however, the requirement regarding use of a facility's design flow in accordance with 40 CFR 122.45(b)(1) is now codified at 6 NYCRR 750-1.11(a)(9).

[7] According to EPA's website, "Many states use . . . 7Q10 (the lowest 7-day average flow that occurs on average once every 10 years) to define low flow for setting permit discharge limits" (USEPA, Definition and Characteristics of Low Flows, https://www.epa.gov/ceam/definition-and-characteristics-low-flows#1Q10 [accessed Nov. 19, 2018]).

Department staff states that the 7Q10 calculation is consistent with TOGS 1.3.1 (tr at 136). Moreover, contrary to applicant's representation, staff states that the 7Q10 calculation was used to derive effluent limitations that were set forth in applicant's 2008 SPDES permit (tr at 148 [noting that the CBOD and ammonia limitations were derived using the 7Q10 estimation]). Staff asserts that the proposed addition of effluent limitations for TDS and chlorides was necessary because applicant's effluent monitoring data indicated that these pollutants were present in the plant's discharge at levels that required limitations (tr at 149).

Applicant states that the TOGS relied upon by Department staff is "guidance only; it's not a regulation" (tr at 138). Therefore, applicant argues, the TOGS is intended "to assist in developing proper permit conditions . . . It can't legally direct anything" (*id.*).

Although applicant is correct that TOGS are guidance documents, they are developed to ensure compliance with applicable laws, regulations, and case law (*see e.g.* TOGS 1.3.1 at 1 [stating that "[t]his document has been developed to provide Department staff with guidance on how to ensure compliance with statutory and regulatory requirements, including case law interpretations, and to provide consistent treatment of similar situations"]). Accordingly, determinations by staff that are consistent with the guidance set forth in TOGS should also be consistent with controlling law.

The "reasonable potential analysis" Department staff applied when establishing the effluent limitations in the draft permit is codified at 40 CFR part 122.44. Pursuant to 40 CFR 122.44(d)(1)(i), SPDES permit effluent

> "[l]imitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, *have the reasonable potential to cause*, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality" (emphasis supplied).

The EPA NPDES Permit Writers' Manual (Sept. 2010) (permit writers' manual) states that "[b]ecause of that regulation [i.e., 40 CFR 122.44(d)(1)(i)], EPA and many authorized NPDES states refer to the process that a permit writer uses to determine whether a WQBEL is required in an NPDES permit as a *reasonable potential analysis*" (permit writers' manual at 6-23 [section 6.3.1 -- Defining Reasonable Potential]).

The Municipal SPDES Permit Fact Sheet (fact sheet) that Department staff generated to accompany and explicate the draft permit states that "[i]f there is a reasonable potential for exceedances to occur, **water quality-based effluent limits (WQBELs)** must be included in the permit" (fact sheet at 4). The fact sheet cites the authority for, and provides a brief description of, the reasonable potential analysis (fact sheet at 5-6).

The fact sheet states that Department staff evaluated the plant's discharge to determine compliance with 40 CFR 122.44(d)(1) and 6 NYCRR 750-1.11 (fact sheet at 5). In accordance with 6 NYCRR 750-1.11(a)(9), each issued SPDES permit must ensure compliance with, among other things, "40 CFR part 122.44 – Establishing limitations, standards, and other conditions." Accordingly, the draft permit must include limitations to control TDS and chlorides if the plant's effluent has "the reasonable potential to cause . . . or contribute to an excursion above [the] State water quality standard" for those pollutants (*see* 40 CFR 122.44[d][1][i]).

The reasonable potential analysis is intended to be conservative by assessing potential impacts to receiving waters at times when the flow of those waters is critically low. As stated in EPA's permit writers' manual,

> "If a discharge is controlled so that it does not cause water quality criteria to be exceeded in the receiving water at the critical flow condition, the discharge controls should be protective and ensure that water quality criteria, and thus designated uses, are attained under all receiving water flow conditions.
>
> "Examples of typical critical hydrologically based low flows found in water quality standards include the 7Q10 (7-day average, once in 10 years) low flow for chronic aquatic life criteria" (*id.* at 6-18 [section 6.2.4.2 -- Receiving Water Critical Conditions]).

Consistent with the foregoing, Department staff states that it uses "[t]he critical flow or a worst-case condition . . . to be protective of the stream. So, that no matter what the flow condition the standards will be attained" (tr at 137-138). Staff also confirmed that the 7Q10 flow was derived from United States Geological Survey (USGS) stream gauge data (*id.*). This information was also expressly stated in the fact sheet accompanying the draft permit (*see* fact sheet at 2 [noting that the 7Q10 flow was derived from USGS data from 1979-2010 and that, at applicant's request, flow attributable to the Village of Kiryas Joel (KJ) was included in the 7Q10 estimate]).

The TDS effluent limitation proposed in the draft permit is 500 mg/L. There is no dispute between the parties that 500 mg/L is the water quality standard for TDS for the receiving waters (*see* tr at 124-125; 6 NYCRR 703.3 [providing that TDS "[s]hall be kept as low as practicable to maintain the best usage of waters but in no case shall it exceed 500 mg/L"]). The chlorides effluent limitation proposed in the draft permit is 250 mg/L. There is no dispute between the parties that 250 mg/L is the water quality standard for chlorides for the receiving waters (*see* fact sheet at 7; TOGS 1.1.1, Table 1 [New York State Ambient Water Quality Standards and Guidance Values]). Staff asserts that, because there is little assimilative capacity

at the discharge point, the water quality standard becomes the "end of pipe" TDS effluent limitation (tr at 125-126, 136-138).

Although applicant raises an objection to Department staff's use of the 7Q10 low flow calculation, applicant does not offer an alternative low flow calculation to challenge staff's determination, nor does applicant proffer data to challenge the data used by staff. Applicant states only that it "ha[s] some data during periods of time that we collected data" (tr at 139-140). Moreover, applicant does not assert that it collected stream data for the purpose of establishing a low flow estimate, nor that the data it collected could be used for that purpose (*id.*).

Applicant fails to raise an adjudicable issue. Applicant's arguments largely relate to the methods used by Department staff to derive the effluent limitations proposed for TDS and chlorides in the draft permit, not to facts that require adjudication. Applicant's argument that TOGS are guidance, not regulations, does not raise an adjudicable issue. While it is true that staff may deviate from guidance where such deviation does not otherwise contravene controlling law, staff is not required to deviate from Department guidance because a permittee would prefer a different outcome.

To require adjudication, there must be disputed issues of fact between the parties (6 NYCRR 624.4[b][2][iii], [iv]). Here, applicant does not proffer any facts that are in conflict with those proffered by Department staff. Applicant's vague assertion that it has "some data" is not sufficient to require an adjudicatory hearing.

**Ruling:** Applicant failed to raise an adjudicable issue regarding the TDS and chlorides effluent limitations proposed under the draft permit.

-- Copper

Under the draft permit, Department staff proposes a 20 micrograms per liter (µg/L) concentration limitation and a 1.0 lbs/day mass loading limitation for copper (draft permit at 4). Department staff states that the 20 µg/L concentration limitation for copper is new, but the 1.0 lbs/day mass loading limitation is carried forward from the 2008 permit in accordance with CWA's anti-backsliding requirement (tr at 160-161; *see* CWA § 402[o][1] [providing that "a permit may not be renewed . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit"]).

Applicant does not contest the 1.0 lbs/day mass loading limitation for copper (tr at 158-159, 162). Applicant does, however, contest the newly proposed concentration limitation. Applicant argues that the proposed concentration limitation of 20 µg/L is too restrictive.

Department staff states that the proposed concentration limitation for copper is mandated under 40 CFR 122.45(f)(1)(ii) (tr at 160). In accordance with 40 CFR 122.45(f)(1)(ii),

> "[a]ll pollutants limited in permits shall have limitations, standards or prohibitions expressed in terms of mass except . . . [w]hen applicable standards and limitations are expressed in terms of other units of measurement."

Department staff notes that "in the case of the limits for copper and all the metal limits [DEC] standards are expressed in concentration units" (tr at 161). Staff asserts that, because the applicable standard is expressed in terms other than mass, 40 CFR 122.45(f)(1)(ii) mandates that the draft permit include a concentration limitation. This was not contested by applicant. Accordingly, the need for a concentration limitation is not in dispute.

Although applicant does not contest the need for a copper concentration effluent limitation, applicant argues that the limitation proposed under the draft permit is too stringent. Specifically, applicant objects to the use of the plant's maximum permitted discharge of six million gallons per day to calculate the concentration limitation for copper (tr at 159). Applicant states that the total daily discharge from the Harriman STP is often significantly less than 6 million gallons and, therefore, under the proposed concentration limitation, the plant "could still meet the loading requirement of one pound per day yet violate the concentration standard" (tr at 162).

In response, Department staff notes that the water quality-based limitation for copper is 20 µg/L and, given the limited assimilative capacity of the river, discharging at a higher concentration "would be in violation of the water quality standard downstream" (tr at 162-163). As noted in the fact sheet for the draft permit (fact sheet at 5-6, 8), the limitation on copper is a water quality-based effluent limitation and, accordingly, the reasonable potential analysis applies (*see supra* at 15-16 [discussion of the reasonable potential analysis]).

Applicant also argues that Department staff has not demonstrated that copper presents a water quality issue (tr at 164-165). Applicant maintains that "[t]he Department has not supplied any data that suggests that copper is [causing a] water quality violation in the Ramapo even at low flow. Therefore, this [the proposed concentration limit] is simply to address a hypothetical situation" (tr at 165).

Department staff stated that it used TOGS 1.1.1 to calculate the ambient water quality value. As stated in TOGS 1.1.1, certain standards and guidance values are expressed as a function of hardness (*id.* at 4 [§ I.A.1. Explanation of Ambient Water Quality Standards and Guidance Values]). Staff stated that it increased the proposed copper concentration level to 20 µg/L after receiving data provided by Orange County regarding hardness (tr at 165). Use of

the County's data resulted in the proposed 20 µg/L limitation, which is a less stringent concentration limitation than staff had originally proposed (tr at 166).

Here again, applicant did not present data that differed from that used by Department staff, nor did applicant propose an alternate method for calculating the copper concentration.

**Ruling:** Applicant failed to raise an adjudicable issue regarding the proposed copper concentration limitation of 20 µg/L.

-- Total Phenolics

As noted by applicant, the limitations proposed for total phenolics are action levels rather than effluent limitations (tr at 167). Staff advised that action levels are typically proposed because data is insufficient to determine whether an effluent limitation is necessary (tr at 171). Staff stated that an exceedance of an action level does not constitute a violation of the permit, but will necessitate further review by the Department (tr at 172).

Department staff notes that the water quality standard for total phenolics under TOGS 1.1.1 is 1 µg/L, but because that is below the detection level of 5 µg/L, the detection level is used in the draft permit (tr at 169; *see* TOGS 1.1.1, Table 1 [water quality standard for "Phenolic compounds"]). The 5 µg/L concentration limitation converts to a mass loading limitation of 0.25 lbs/day (tr at 169; *see also* draft permit at 5). The 2008 permit did not contain a concentration action level, but did contain a mass loading action level of 0.9 lbs/day (tr at 168-169; *see also* 2008 permit at 5).

Applicant opposes the action level for total phenolics proposed under the draft permit and argues that exceedances of the mass loading action level under the 2008 permit occurred only during periods of high flow at the plant and that should be factored into the calculation (tr at 180-181).

Department staff states that the reduction of the mass loading action level from 0.9 lbs/day to 0.25 lbs/day is not because of exceedances at the plant (tr at 182). Rather, the proposed reduction in the mass loading action level "was based on the water quality based effluent limit" (*id.*).

Department staff acknowledges that it lacks data necessary to determine whether an effluent limitation is necessary for total phenolics at this time, and further acknowledges that additional data may demonstrate that an effluent limitation is not necessary (*see* tr at 171-173). Monitoring a pollutant that has been detected in a facility's discharge to ascertain whether an effluent limitation is needed is the very purpose of an action level (*see* TOGS 1.3.3 VI.C.6 [stating that an action level is a reporting level with monitoring requirements, "**not** an effluent

limit," and is used by the Department to determine whether a permit should be modified "to either increase the action level or to require a water quality based effluent limitation"]).

**Ruling:** Applicant failed to raise an adjudicable issue regarding the proposed action levels for total phenolics.

-- Lead

Applicant states that lead levels in the Harriman STP effluent are currently below water quality standards and questions why Department staff is seeking to impose an effluent limitation under the draft permit (tr at 182-183). Applicant notes that the draft permit states that lead analysis was "inconclusive" and questions how "an inconclusive analysis [can] result in a limit like this" (tr at 185).

Department staff states that, in accordance with EPA guidance, it applied the reasonable potential analysis to ascertain whether a lead effluent limitation was necessary (tr at 184; *see supra* at 15-16 [discussion of the reasonable potential analysis]). Staff acknowledges that the draft permit indicates that the lead analysis was inconclusive, but states that the discussion of the lead analysis contained in the draft permit is incomplete (tr at 188-190).

Staff states that the analysis for lead was only inconclusive at 2.2 µg/L, which is the average lead effluent as reported by the plant (tr at 188). Staff further states, however, that "the procedure that's outlined in the TSD [i.e., EPA's Technical Support Document for Water Quality-based Toxics Control] is to take the maximum detection, not an average value" (tr at 188). At the maximum detection level for lead reported by the plant, 6.8 µg/L, the analysis was conclusive (tr at 189-190).

Applicant objects to the Department's use of "cherry picked data" (tr at 186). As detailed above, however, the reasonable potential analysis is intended to be protective of the water resource. The "cherry picked data" was provided by the applicant and used by staff to conduct the reasonable potential analysis that resulted in the lead effluent limitations proposed in the draft permit. Applicant does not proffer an alternative methodology for deriving an effluent limitation for lead, nor does applicant assert that the maximum detection level used by Department staff is in error.

**Ruling:** Applicant failed to raise an adjudicable issue regarding the lead effluent limitation proposed under the draft permit.

-- Engineering Report

The draft permit includes a requirement that applicant submit an engineering report detailing applicant's plan to achieve the proposed effluent limitations for TDS and chlorides and that applicant implement the plan in accordance with Department approval. The draft permit further provides that applicant is to submit the engineering report within 24 months of the effective date of the permit, and that applicant implement the plan within 59 months (draft permit at 13). Applicant objects to these requirements.

Applicant states that it "already submitted an engineering report to the state which clearly shows, demonstrates that we cannot" meet the proposed TDS and chlorides effluent limitations (tr at 196). Applicant argues that "[i]t's an illogical requirement for us to . . . provide the DEC with a report that would get our effluent into compliance with the water quality standard of 500 milligrams per liter of TDS because the source water coming . . . into the effluent is what needs to have the salt removed" (tr at 197).

Department staff asserts that applicant "is not as helpless as it describes itself" (tr at 203). Staff argues that, as part of the engineering report process, applicant "can identify sources of TDS to its plant" and that it "can control or minimize those through its sewer use law" (tr at 199). Staff asserts that through the sewer use law, applicant can impose restrictions on domestic and industrial discharges to the plant (tr at 199).

Applicant disputes the foregoing, and states that the "TDS levels in the aquifer are growing as a result of the road salts and as a result of the salt coming from [Kiryas Joel]" (tr at 200). Applicant asserts that "salt gets in the aquifer and the aquifer pumps it to our homes . . . It comes out into the sewer system. It comes to the treatment plant . . . and passes through" to the effluent from the plant (tr at 201). Applicant argues that "these are the very conditions that [CWA §] 303(d) was designed to address. That's why the process of developing a TMDL is so critical here because it's the only way to attack the problem. You cannot attack the problem selectively going through point source discharges like the Harriman Sewage Treatment Plant" (tr at 202-203).

In large part, applicant's arguments here are tied to its arguments against the proposed TDS and chlorides effluent limitations. As discussed above, however, I have concluded that the Department has the authority to impose the TDS and chlorides effluent limitations proposed under the draft permit and that applicant failed to raise an adjudicable issue to challenge those proposed limitations (*see supra* at 6-11, 13-17).

The engineering report is an appropriate and necessary mechanism to ascertain whether, and if so, how, the effluent limitations proposed under the draft permit may be achieved.

Applicant does not challenge Department staff's authority to require the report, nor raise any issues of fact requiring adjudication.

**Ruling:** Applicant failed to raise an adjudicable issue regarding the engineering report. Applicant did not challenge Department staff's authority to require the engineering report, and there are no facts in dispute related to this issue.

-- Stream Gauge

There is currently no stream gauge in the Ramapo River in the vicinity of the Harriman STP. In prior years, the United States Geological Survey had operated and maintained a stream gauge downstream from the plant, but the gauge was washed out in 2011 (tr at 139-140, 213). The USGS plans to install a new stream gauge in the Ramapo River, just upstream from the Harriman STP (tr at 212). USGS will cover the cost of installing the gauge, but not the cost of operation and maintenance (O&M). The draft permit includes a requirement that applicant enter a 30-year joint funding agreement with the USGS to cover the costs of O&M for the gauge (draft permit at 14).

Applicant argues that the O&M costs should be borne by the public because the gauge would "serve purposes well beyond those that are limited to Orange County's interests" (tr at 209). Applicant does not challenge the Department's authority to require applicant to pay for O&M of the gauge and applicant "agree[s] that a stream gauge is needed" (tr at 209).

Department staff cites 6 NYCRR 750-1.13(a), among other authorities, as authority for imposing the stream gauge O&M costs on applicant (tr at 213-214; staff supplemental filing at 4 [staff quotes the text of 6 NYCRR 750-1.13[a], but cites 6 NYCRR 750.13[a] in error]). Pursuant to 6 NYCRR 750-1.13(a),

> "[a]ny discharge authorized by a SPDES permit shall be subject to such requirements for monitoring the . . . waters of the State . . . as may be reasonably required by the department to determine compliance with effluent limitations and water quality standards that are or may be [a]ffected by the discharge; including the installation, use, and maintenance of monitoring equipment . . . and if imposed shall be included as provisions of the SPDES permit."

Department staff states that, with a stream gauge installed, the Department would be "able to better . . . understand what the stream flow in the Ramapo River is [and] may be able to revisit the allowable dilution for different parameters" in the draft permit (tr at 210). As discussed above, the lack of available dilution is documented in staff's 7Q10 analysis. That analysis used data from the former USGS stream gauge which was washed out in 2011 (tr at 138).

**Ruling:** Applicant failed to raise an adjudicable issue regarding the stream gauge. Applicant did not challenge Department staff's authority to require applicant to assume the costs of O&M for the stream gauge, and there are no facts in dispute related to this issue.

-- Temperature

Applicant argues that the 70°F temperature limitation included in the draft permit is too restrictive. Applicant states that the effluent from outfall 002 often exceeds 70°F during the summer but that "the stream in itself is quite a bit higher than 70 degrees F" (tr at 220). Therefore, applicant asserts, "we are actually cooling the river" (*id.*).

Department staff notes that the 70°F effluent limitation in the draft permit is a carryover from the 2008 permit. Applicant acknowledges this but asserts that it had an understanding with the Department whereby "[a]s long as we didn't exceed it by a certain amount, that 70 degrees F, we would not be cited as a violation" (tr at 223).

Department staff states that, because the receiving waters are trout waters, 6 NYCRR 704.2(b)(2)(i) requires the effluent be limited to a maximum of 70°F (tr at 238). Staff further states that the Department's forbearance under the 2008 permit regarding enforcement of the 70°F effluent limitation at times when the receiving waters were warmer than 70°F was discretionary (tr at 223).

As noted by Department staff, the effluent limitation for temperature for outfall 002 is set by regulation. Specifically, pursuant to 6 NYCRR 704.2(b)(2)(i), "[n]o discharge at a temperature over 70 degrees Fahrenheit shall be permitted at any time to streams classified for trout." Applicant does not dispute that this provision applies to thermal discharges from outfall 002. I also note that relaxing the temperature limitation under the draft permit relative to the existing 2008 permit limitation would violate the anti-backsliding requirement.

**Ruling:** Applicant failed to raise an adjudicable issue regarding the 70°F temperature limitation included in the draft permit.

## Conclusion

As discussed above, I conclude that there are no issues for adjudication.

## ORDER OF DISPOSITION

In accordance with 6 NYCRR 624.4(c)(5), further hearings in this proceeding are canceled. The matter is remanded to Department staff to continue processing the application to issue the renewal permit.

## APPEALS

A ruling to include or exclude any issue for adjudication, or on the merits of any legal issue that is made as part of an issues ruling, may be appealed to the Commissioner on an expedited basis (6 NYCRR 624.8[d][2][i], [ii]). Any appeals from this ruling are to be filed with the Commissioner in writing on or before February 22, 2019, and replies are to be filed on or before March 15, 2019 (*see* 6 NYCRR 624.6[g]; 624.8[b][1][xv]). Appeals and replies should include citations to the issues conference transcript and to documents submitted by the parties during the issues conference and in the parties' post-issues conference briefs and replies.

An original and two copies of any appeal or reply must be filed with Commissioner Basil Seggos (Attention: Louis A. Alexander, Deputy Commissioner for Hearings and Mediation Services) at the New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010. In addition, one copy of each filing must be sent to the adverse party at the same time and in the same manner as they are filed with the Commissioner. Appeals and replies may be served by email provided that conforming hard copies are sent by regular mail and post marked by the applicable due date. Service by facsimile transmission is not permitted and will not be accepted.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
January 18, 2019

To: Service List

**Matter of Orange County Department of Public Works**
DEC Application No. 3-3358-00038/00001

**Issues Conference Exhibits**

| Exhibit | Description |
|---|---|
| A | Notice of Complete Application, dated December 13, 2017, and Draft Permit (under cover letter from DEC to Applicant, dated December 15, 2017) |
| B | Letter from Harris Beach to DEC, dated December 16, 2015 |
| C | Letter from DEC to Harris Beach, dated December 30, 2015 |
| D | Letter from Harris Beach to DEC, dated February 17, 2016 |
| E | Letter from Orange County DPW to DEC, dated March 1, 2016 |
| F | Letter from Harris Beach to DEC, dated June 14, 2017 |
| G | Letter from EPA to DEC, dated July 21, 2017 |
| H | Letter from Harris Beach to DEC, dated July 26, 2017 |
| I | Letter from Orange County DPW to DEC, dated September 8, 2017 |
| J | Letter from Orange County DPW to DEC, dated October 31, 2017 |
| K | Letter from Orange County DPW to OHMS, dated January 4, 2018 |
| L | Letter from DEC to OHMS, dated February 5, 2018 |
| M | Letter from Orange County DPW to DEC, dated February 15, 2018 |
| N | Letter from DEC to Village of Harriman, dated July 9, 2018 |
| O | Letter from Orange County DPW to DEC, dated July 30, 2018 |
| P | Hackensack-Passaic Rivers Watershed, River Segment List |
| Q | EPA Implementation of Quality Assurance Requirements |
| R | NYS Consolidated Assessment and Listing Methodology, Section 305(b) (2017) |
| S | NYS Consolidated Assessment and Listing Methodology, Section 303(d) (2015) |
| T | DEC Quality Assurance Management Plan, Division of Water (2014-2019) |
| U | DEC Response to Comments on 2016 Section 303(d) List |
| V | EPA Memorandum, Compliance Schedules, May 10, 2007 |
| W | Email chain (between DEC, EPA, and Orange County DPW), dated December 10, 2015 through January 5, 2016 |
| X | DEC Notice of Violation, dated August 12, 2011 |
| Y | Letter from EPA to DEC, dated January 16, 2018 |
| Z | Letter from Orange County DPW to Kiryas Joel Poultry Processing Plant, dated November 4, 2013 |
| AA | Letter from Orange County DPW to DEC, dated February 25, 2015 |