

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Proposed Department-Initiated
Modification of a State Pollutant Discharge
Elimination System ("SPDES") Permit Issued
Pursuant to Environmental Conservation Law
Article 17 and 6 NYCRR Parts 621, 624, and
750, et seq.

- to the -

City of Plattsburgh,

Permittee.

SPDES Permit # NY-0026018

INTERIM DECISION OF THE COMMISSIONER

September 12, 2006

INTERIM DECISION OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") has proposed to modify the State Pollutant Discharge Elimination System ("SPDES") permit issued to the City of Plattsburgh ("City") for its water pollution control plant ("WPCP").

The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. In his Ruling on Issues and Party Status dated August 25, 2004 ("Issues Ruling"), ALJ Garlick identified for adjudication issues relating to the proposed modification of the permit limits for carbonaceous biological oxygen demand ("CBOD₅"), total suspended solids and copper. The ALJ also ruled that the proposed permit effluent limit of 65.5 pounds per day ("65.5 lbs/day") for phosphorus was not adjudicable but that the timing of the implementation of that effluent limit was adjudicable.

Appeals were taken from the ALJ's ruling solely with respect to the proposed phosphorus effluent limit and the timing of its implementation. For the reasons discussed in this Interim Decision, no issues relating to the phosphorus effluent limit or the timing of its implementation will be adjudicated. The matter

is remanded to the ALJ for further proceedings consistent with this Interim Decision and the Issues Ruling.

BACKGROUND

The federal Clean Water Act ("CWA"), section 1251 et seq. of title 33 of the United States Code ("USC"), requires each State (a) to identify those waters that, after application of technology-based standards, fail to meet applicable water quality standards, and (b) to establish a priority ranking for such waters (see 33 USC § 1313[d][1][A]). For such waters, each State must, in accordance with the priority ranking, establish a total maximum daily load ("TMDL") (see 33 USC § 1313[d][1][C]; see also section 130.7 of title 40 of the Code of Federal Regulations ["CFR"][setting forth the process for developing and approving TMDLs]).

A TMDL must be established "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality" (see 33 USC § 1313[d][1][C]). The TMDL establishes a limit on the amount of a pollutant that may be released (loaded) into a waterbody from all contributing sources, including point sources, nonpoint sources and natural background

over a period of time (see Natural Resources Defense Council, Inc. v Muszynski, 268 F3d 91, 94 [2d Cir 2001]; see also 40 CFR 130.2[i][defining TMDL]). The concept behind the development of TMDLs is "to provide a rational basis for developing water quality-based controls for discharges into already impaired waters" (see In re City of Moscow, Idaho, NPDES Appeal No. 00-10 [United States Environmental Protection Agency ("EPA" or "USEPA") Environmental Appeals Board ("EAB"), July 27, 2001]).

In developing a TMDL for a waterbody, a State develops wasteload allocations for point sources of pollution and load allocations for nonpoint sources of pollution and natural background sources. The TMDL is the sum of the individual wasteload allocations and the load allocations (see id.). States are required to provide for public participation in developing TMDLs (see 40 CFR 130.7[c][1][ii]).

Once a State develops a TMDL and completes the public review process, the TMDL must be submitted to the United States Environmental Protection Agency ("EPA") for approval (see 33 USC § 1313[d][2]; 40 CFR 130.7[d]). Following EPA approval, the permits that a State issues pursuant to the CWA must be consistent with the TMDL (see 40 CFR 122.44[d][1][vii]).

Lake Champlain TMDL for Phosphorus

New York has promulgated a narrative water quality standard for phosphorus that prohibits discharges "in amounts that will result in growths of algae, weeds and slimes that will impair the waters for their best usages" (section 703.2 of title 6 of the Office Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"]).

With respect to Lake Champlain, phosphorus discharges from multiple point and nonpoint sources have been a longstanding problem and have contributed to excessive algal and vegetative growth. Numerous studies have documented the impacts of the discharges on the lake and the need to impose further limits on such discharges (see, e.g., Opportunities for Action: An Evolving Plan for the Future of the Lake Champlain Basin, Lake Champlain Steering Committee, April 2003, at 11-16).

To address the problems relating to phosphorus discharges, the DEC and the Vermont Department of Environmental Conservation ("VDEC") both identified Lake Champlain for development of a phosphorus TMDL. The two agencies jointly drafted a phosphorus TMDL for the Lake Champlain basin which identified the sources of phosphorus and the reductions necessary to meet water quality standards, and restore and protect the

lake's water quality. The phosphorus TMDL was made available for public review and comment in the spring of 2002 (see Environmental Notice Bulletin, May 1, 2002). Two public hearings were held, and eleven entities, including the City,¹ submitted comments. Responses to the comments were prepared (see Response to Public Comments on New York State Department of Environmental Conservation's Draft Lake Champlain Phosphorus Total Maximum Daily Load (TMDL) dated August 30, 2002 ["2002 Responsiveness Document"])).

Following consideration of the comments, the DEC and VDEC modified the proposed TMDL and submitted a final version (the Lake Champlain Phosphorus TMDL dated September 25, 2002 ["LCP TMDL"]) to EPA Region 1 (which has jurisdiction over the State of Vermont) and EPA Region 2 (which has jurisdiction over the State of New York) for approval. The LCP TMDL states that the implementation of a phosphorus TMDL "is necessary in order to attain water quality standards in [Lake Champlain]" (LCP TMDL, at 10²).

¹ See letter dated June 6, 2002 from Jonathan P. Ruff, P.E., Environmental Manager, City of Plattsburgh to Philip M. DeGaetano, P.E., Director, DEC Division of Water ("Ruff Letter"). In particular, the City objected to the draft TMDL's assignment of a phosphorus allocation of 65.5 lbs/day to the City's WPCP, arguing that a higher allocation was necessary and appropriate.

² Page citations are to the copy of the LCP TMDL that was provided to the ALJ in this proceeding and may not be consistent

The LCP TMDL was approved by EPA Region 1 and EPA Region 2 by letters dated, respectively, November 4, 2002 and September 30, 2002. EPA Region 2, in its September 30, 2002 approval letter ("EPA Approval Letter"), stated that the proposed TMDL "includes all of the required elements and is designed to ensure the attainment of the water quality standards for phosphorus in Lake Champlain," and meets the requirements of the CWA and the EPA's implementing regulations (EPA Approval Letter, at 1).

The EPA-approved LPC TMDL sets forth implementation plans for both Vermont and for New York, and includes, among other things, wasteload allocations for wastewater treatment facilities and other point sources in the Lake Champlain drainage basin (see LCP TMDL, Tables 7 & 8 [New York facilities], at 33-34), load allocations for nonpoint sources, and a monitoring plan. Following the approval of the TMDL, SPDES permits issued to facilities in the Lake Champlain drainage basin which do not meet the applicable wasteload allocations for phosphorus in the LCP TMDL are to be re-evaluated in accordance with the Department's Environmental Benefit Permit Strategy ("EBPS") (LCP TMDL, at 111).

with the pagination of the LCP TMDL available from internet sources.

No legal challenge to the LCP TMDL was commenced in either federal or State court by the City or any other party following EPA's approval of the LCP TMDL.

Proposed Modification of the City's WPCP SPDES Permit

The SPDES permit for the City's WPCP allows for discharges into the Saranac River near its confluence with Lake Champlain and into the lake (see revised draft SPDES permit dated January 2004, at 1-2). Subsequent to the approval of the LCP TMDL, Department staff, by letter dated June 4, 2003, advised the City of staff's intention to modify the SPDES permit for the City's WPCP.

Negotiations between Department staff and the City resolved some but not all of the issues relating to the proposed modification. With respect to phosphorus, Department staff proposed to modify the City's WPCP SPDES permit to establish a twelve-month rolling average limit of 65.5 lbs/day for phosphorus. The 65.5 lbs/day figure in the draft permit is identical to the wasteload allocation listed in the LCP TMDL (see LCP TMDL, at 34). As Department staff stated in its response to comments on the draft SPDES permit dated January 2004 ("2004 Response to Permit Comments"):

"The limit in the draft permit is based on the EPA-approved Lake Champlain TMDL for phosphorus, which

allocates 65.5 lbs/day to the City of Plattsburgh. The Department is required to include the TMDL allocation for phosphorus in the City's permit" (2004 Response to Permit Comments, at 1).

The City requested a hearing with respect to the unresolved modifications, including the proposed SPDES permit effluent limits for phosphorus, in addition to the limits for CBOD₅, total suspended solids, and copper.

The matter was referred to the Department's Office of Hearings and Mediation Services and assigned to ALJ Garlick. VDEC filed a timely petition seeking amicus status. No other petitions for party status were received.

Following an issues conference, the ALJ ruled that certain issues relating to CBOD₅, total suspended solids and copper were adjudicable. The ALJ, however, rejected the City's arguments that the proposed effluent limit for phosphorus was adjudicable (see Issues Ruling, at 5-11), concluding that the Commissioner was bound by, and could not vary from, the 65.5 lbs/day effluent limit in the LCP TMDL. However, the ALJ ruled that the timing of the implementation of the proposed phosphorus effluent limit was adjudicable (see Issues Rulings, at 1, 8-9). The ALJ also granted VDEC's petition to participate as an amicus party (see id. at 11).

Appeals from the ALJ's Issues Ruling

Appeals were taken from the ALJ's rulings on phosphorus by Department staff and the City. On appeal, Department staff argued that no issue existed with respect to the timing of the proposed modification for phosphorus and, accordingly, no adjudicatory hearing with respect to the proposed SPDES permit effluent limit for phosphorus was required (see Department Staff Appeal, dated October 28, 2004).

The City, in its appeal, disputed the ALJ's ruling that the proposed phosphorus effluent limit was not adjudicable (City Appeal, dated October 28, 2004). The City rejected the proposition that Department staff had to set a phosphorus effluent limitation at the same level as the wasteload allocation in the LCP TMDL. The City contested the technical basis for the WPCP's wasteload allocation in the LCP TMDL arguing that it was not calculated based upon the WPCP's full design flow. Furthermore, the City argued that it failed to account for the phosphorus load from wastes contributed by septage haulers which the WPCP handled. The City also maintained that no current or threatened violations of phosphorus-related water quality standards existed in that portion of Lake Champlain which received the discharges from the City's WPCP. Finally, the City contended that the Department, by establishing a numeric

phosphorus limit for the WPCP SPDES permit, would violate the terms of an agreement that the Department, the Quebec Ministry of the Environment and the Vermont Agency of Natural Resources signed in 1993 ("1993 Criteria Agreement").

Reply papers were filed by both the City and Department staff (see, respectively, City Reply dated November 15, 2004 and Department Staff Reply dated November 15, 2004).

DISCUSSION

For point sources, such as municipal water pollution control plants, a TMDL may establish specific wasteload allocations. In New York State, such TMDLs and their specific wasteload allocations are imposed as water quality-based effluent limits in SPDES permits for those point sources (see 6 NYCRR 750-1.11[a][5][ii]). The ALJ ruled that the LCP TMDL wasteload allocation for the City's WPCP must be incorporated in the SPDES permit as the effluent limit for phosphorus, and I hereby affirm that ruling.

Basis for Incorporating the 65.5 lbs/day Wasteload Allocation as a Numeric Limit in the SPDES Permit

Central to the City's appeal is the argument that the Department is not required to incorporate the LCP TMDL wasteload allocation of 65.5 lbs/day for phosphorus as an effluent

limitation in the SPDES permit for the City's WPCP. Although the City acknowledges that the implementation of the LCP TMDL is mandated (see City's Appeal, at 13), it argues that no State regulatory requirement exists to include a numeric permit limit equivalent to the TMDL-based wasteload allocation in the SPDES permit and objects to its incorporation.

The City contends that the Department has the discretion to adjust the phosphorus effluent limitation of 65.5 lbs/day. It cites, in support of its position: (a) the 1975 memorandum of agreement between New York and EPA that allows New York to administer the national pollutant discharge elimination system program; and (b) general statutory and regulatory authority that allows either a permittee to request modification of an existing permit or the Department to propose such modifications. The City also cites the language of the LCP TMDL which provides for changes to individual point source wasteload allocations in certain circumstances.

Contrary to the City's position, the CWA and the New York State Environmental Conservation Law ("ECL") require that the Department include the more stringent of technology or water quality-based effluent limitations in SPDES permits (see, e.g., 33 USC § 1311[b][1][C]; ECL 17-0809 & 17-0811; 6 NYCRR 750-

1.11[a][5][ii] & [a][9]). No one disputes that the LCP TMDL establishes a wasteload allocation to the City's WPCP of 65.5 lbs/day. This wasteload allocation constitutes a type of water quality-based effluent limitation (see 40 CFR 130.2[h]; see also Bravos v. Green, 306 F Supp 2d 48, 51 n2 [DDC 2004]).

Accordingly, the Department must set the discharge limit in the WPCP SPDES permit at a level not to exceed the wasteload allocation in the LCP TMDL (see 33 USC § 1311[b][1][C]; ECL 17-0809 & 17-0811; 6 NYCRR 750-1.11[a][5][ii] & [9]).

TMDLs provide a rational basis for developing water quality-based controls for discharges. According to federal regulation, effluent limits in a permit must be consistent with the "assumptions and requirements of any available wasteload allocation for the discharge" prepared by a state and approved by EPA (40 CFR 122.44[d][1][vii][B]). Department staff's proposed phosphorus effluent limit of 65.5 lbs/day for the WPCP's SPDES permit is identical to the LCP TMDL wasteload allocation of 65.5 lbs/day. Where, as here, the LCP TMDL allocates a specific wasteload allocation to a point source which is then directly incorporated into the permit as an effluent limit, there is no issue as to consistency (see also In re City of Moscow, Idaho, NPDES Appeal No. 00-10 [EAB, July 27, 2001][concentration-based allocations from the TMDL may be adopted as permit limits, while

noting that imposing even more stringent limits would not be inconsistent])).

The EPA also confirmed the appropriateness of incorporating the wasteload allocation of 65.5 lbs/day as an effluent limit in a letter dated April 20, 2004 to the Department's Division of Water ("April 2004 EPA letter"). EPA noted that the SPDES permit issued to the City "must include a phosphorus limit that is protective of the criterion and which conforms to the wasteload allocation in the TMDL" and that the phosphorus limit in the SPDES permit [for the City's WPCP] "is required by law and is appropriately based on the wasteload allocation in the approved TMDL" (April 2004 EPA letter, at 1).

Other Challenges to the LCP TMDL

Several of the City's arguments challenge the technical validity and substantive basis of the EPA-approved LCP TMDL, and disregard the procedures and standards set by the LCP TMDL. This administrative proceeding, however, is not the appropriate forum to review or reconsider a prior final federal or state agency determination (see Matter of James R. Lee [Allegro Oil and Gas, Inc.], Interim Decision of the Commissioner, December 12, 1989, at 1-2), and there is nothing that has been brought to my attention in this matter that justifies making any exception (cf.

In re City of Moscow, Idaho, NPDES Appeal No. 00-10 [EAB, July 27, 2001] [challenge to incorporation of phosphorus limits from TMDL into a (CWA) national pollutant discharge elimination system permit not appropriate for federal administrative proceeding]).

The draft TMDL for Lake Champlain was publicly noticed and a comment period provided. The City provided comments which were considered in the development of the LCP TMDL. Furthermore, the City had the opportunity to challenge the LCP TMDL, including but not limited to the wasteload allocation for its WPCP, following EPA's approval of the LCP TMDL. It failed to do so. The City's attempt to now reopen that prior final determination in this proceeding is rejected.³

³ Department staff maintains that the City's challenge to the LCP TMDL should have been commenced pursuant to the federal Administrative Procedure Act ("APA") in federal court (see, e.g., Scott v City of Hammond, 741 F2d 992, 997 [7th Cir 1984]) ("[t]he only recognized avenue for challenges to the substance of EPA's actions taken with respect to state submissions [of TMDLs] is a suit for judicial review under the [APA]"); United States Steel Corp. v Train ["Train"], 556 F2d 822, 836-37 [7th Cir 1977] [determinations approving or disapproving calculation of TMDLs reviewable in an action in district court under judicial review provisions of the APA]; Hayes v Browner, 117 F Supp2d 1182, 1197 [ND Okla 2000], aff'd, 264 F3d 1017 [10th Cir 2001]). Although the issue whether a state remedy is available to challenge TMDLs has been in dispute (see Train, supra, at 836 fn 16), this administrative proceeding is not the appropriate forum to pursue such a challenge.

- Best Management Practices

The City argues that wasteload allocations may be implemented through means other than numeric permit limits. It asserts that a variety of conditions, including best management practices, could be incorporated into the City's WPCP SPDES permit at this stage of LCP TMDL implementation, rather than the 65.5 lbs/day limit. As an example, the City references the non-numeric approach contained in a TMDL for certain portions of the Delaware River (see Total Maximum Daily Loads for Polychlorinated Biphenyls (PCBs) for Zones 2-5 of the Tidal Delaware River that was approved by EPA Regions 2 and 3 in 2003 ["PCB TMDL"]). According to the City, the PCB TMDL establishes that non-numeric best management practices are permissible water quality-based effluent limits.

No one disputes that best management practices may be utilized in certain circumstances (see, e.g., 33 USC 1342[p][3][B][iii] [permits for discharges from municipal storm sewers]; 40 CFR 122.44[k]). However, the LCP TMDL does not provide for best management practices for the City's WPCP but sets a numeric wasteload allocation which this Department must implement (see 6 NYCRR 750-1.11[a][5][ii]; see also Department Staff Reply, at 12-15 [reviewing applicable federal regulations governing best management practices at 40 CFR 122.44[k] and

demonstrating their inapplicability to the City's WPCP SPDES permit]).

The City's reliance on the PCB TMDL is misplaced as it is not relevant to this proceeding. The PCB TMDL addresses a different water body and a different pollutant (see PCB TMDL, Appendix 3 ["Permit Implications for NPDES Dischargers resulting from Stage 1 TMDLs for PCBs"], at iii [noting specific factors supporting a best management practices approach with respect to PCBs in designated zones of the Delaware River estuary]). What may constitute an appropriate TMDL for PCBs in the Delaware River does not provide a basis to ignore or otherwise circumvent the EPA-approved phosphorus TMDL for Lake Champlain.⁴

⁴ The LCP TMDL does incorporate best management practices for certain types of activities, including but not limited to agricultural operations and municipal stormwater discharges (LCP TMDL, at 101, 116-117). To the extent that the City believes that non-numeric best management practice conditions should have been incorporated in addition or as alternatives to a numeric limit for phosphorus, the appropriate time for consideration of those issues was during the development of the LCP TMDL, or in a challenge to EPA's approval of the LCP TMDL, and not in this administrative proceeding.

Also, in its discussion of best management practices, the City proposes that an engineering study could be required in lieu of a numeric limit to determine the necessary capital and operational modifications that would allow the WPCP to treat 16 million gallons per day of wastewater (its full capacity) and comply with a 65.5 lbs/day numeric limitation (City's Appeal, at 16-17). Again, the City's attempt to collaterally attack the final LCP TMDL which the Department is required to implement is rejected (see also Issues Ruling, at 9).

- Water Quality in Cumberland Bay

The City also maintains that no current or threatened violation of phosphorus related water quality standards exists in the Cumberland Bay segment of Lake Champlain, which is the receiving water for discharges from the City's WPCP. However, the City's argument overlooks the purpose of the LCP TMDL to protect and restore the water quality of the lake as a whole (see LCP TMDL, at 10). The waste load allocations that were established in the LCP TMDL are the result of a comprehensive evaluation of the problems arising from phosphorus discharges and the limits that will be necessary to achieve improvements in Lake Champlain (see LCP TMDL, at 19).

The various segments of Lake Champlain are not isolated, stand-alone bodies of water. The rationale for reductions in the Cumberland Bay segment was previously addressed in the 2002 Responsiveness Document:

"Each [lake] segment directly impacts adjacent waters and indirectly impacts all waters of the lake through advective transport and/or diffusive exchange. Although a given segment may be below its goal, continued reduction of the phosphorus input will aid in reducing the phosphorus level throughout the lake and helping all segments achieve their goals.

"Secondly, lake phosphorus concentrations are strongly determined by tributary phosphorus loads. These loads are highly variable from year to year as a result of natural differences in weather and runoff volumes. Depending on conditions, short term fluctuations, high or low, are likely. It is necessary to examine long

term monitoring data before making inferences about trends in lake segment concentrations" (2002 Responsiveness Document, at 2-3).

The target allocations and TMDL total loading capacities for the lake segments were fully addressed in the development of the LCP TMDL and shall not be revisited in this proceeding.

- Full Design Flow

The City contends that the effluent limit for phosphorus must be based on the full design flow of the Plattsburgh WPCP. However, the LCP TMDL sets forth the steps, in accordance with applicable federal requirements, that were undertaken to calculate the wasteload allocation for the water pollution control plants that discharge into Lake Champlain (see, e.g., LCP TMDL, at 31 [setting forth the calculations for the wasteload allocations], 44-45 [discussing the margin of safety component of the calculation]; see also Department Staff's Reply, at 7-10 [reviewing the methodology set forth in the LCP TMDL, including the design flow calculations for the City's WPCP]). The City's related attempt to now challenge the underlying methodology in the EPA-approved LCP TMDL in this administrative proceeding is rejected.

- Nonpoint Source Load Allocation

The City also argues that the proposed numeric permit

limit for phosphorus fails to include the nonpoint source load allocation in the LCP TMDL that is being treated at the City's WPCP. The City proposes to show that approximately 32% of the phosphorus currently received and treated by WPCP is from hauled wastes, primarily septage haulers. The City posits that much of the increase in the City's phosphorus load is due to these septage sources and that an adjustment to the City's 65.5 lbs/day limit should be made.

However, the City's proposed adjustment is not an appropriate matter for consideration in this proceeding. As stated in the LCP TMDL, "[o]nce the Lake Champlain Phosphorus TMDL is approved by the USEPA, any changes to the sum of the point source load allocations in a watershed, with corresponding changes to the sum of the nonpoint source load allocations, will require that a revised TMDL be submitted to the USEPA for approval" (see LCP TMDL, at 14). Even assuming that such adjustments should be considered, the Department cannot unilaterally make the changes proposed by the City. Rather, the proper means to consider any such adjustments is through the TMDL amendment process.

1993 Criteria Agreement

The City asserts that, based on the terms of the 1993 Criteria Agreement entered into by the respective environmental agencies of the States of New York and Vermont and the Province of Quebec, the Department is prohibited from setting numeric permit limits for phosphorus. The City argues that, pursuant to the 1993 Criteria Agreement, modifications to the City's WPCP permit may not proceed until formal adoption of numeric criteria by rule in New York State (see 1993 Criteria Agreement, at ¶ 2 ["Modifications of wastewater discharge permits in New York as a result of phosphorus load allocation for Lake Champlain may not proceed until formal adoption of numeric criteria by rule in New York"]).

The City's reading of the 1993 Criteria Agreement is too constrained. The purpose of the 1993 Criteria Agreement was to establish numeric, in-lake phosphorus criteria as interim management goals until a consistent set of state water quality criteria could be formalized by rule in New York and Vermont (1993 Criteria Agreement, at 1). It is not disputed that technology-based standards in SPDES permits for the Lake Champlain basin have been insufficient to address phosphorus problems in the lake. As a result, New York and Vermont, pursuant to federal law, jointly developed the TMDL for Lake

Champlain in accordance with the requirements of the CWA and its implementing regulations at 40 CFR 130.7. I read the language "formal adoption of numeric criteria by rule" to encompass the TMDL process whereby, through federal law and regulation, numeric criteria have been established and will be implemented by Vermont and New York through respective state regulatory procedures. Accordingly, the City's argument is rejected.⁵

In this regard, the two other signatories to the 1993 Criteria Agreement (the environmental agencies for Vermont and the Province of Quebec) have not raised any objections to the modification of the City's WPCP in this proceeding, nor has either contended that the LCP TMDL violates the 1993 Criteria Agreement. In fact, in 2003, the Prime Minister of Quebec provided a letter of endorsement for the Opportunities for Action: An Evolving Plan for the Lake Champlain Basin ("Opportunities for Action"). As its highest priority action, Opportunities for Action listed the implementation of the LCP TMDL (see id., at i, iii, & 17; see also Memorandum of Understanding on Environmental Cooperation on the Management of

⁵ The City's interpretation of the 1993 Criteria Agreement would prevent New York State from implementing numeric criteria developed pursuant to the federal TMDL process, thereby requiring New York to violate the CWA. If the City's interpretation were correct, the 1993 Criteria Agreement, or the relevant language thereof, would be invalid.

Lake Champlain among the State of New York, the State of Vermont and the Government of Quebec, executed in 2003 ["2003 MOU"] [committing the three governmental units to the implementation of the Opportunities for Action]). Likewise, in the present proceeding, VDEC has expressly supported the incorporation of the TMDL wasteload allocation into the City's WPCP SPDES permit as an effluent limit (see VDEC's Post-Issues Conference Reply Brief dated June 14, 2004).⁶

Timing of the Modification of the City's SPDES Permit

The ALJ ruled that the timing of the modification of the phosphorus effluent limit was adjudicable, based on language in the LCP TMDL which stated that all permits were to contain appropriate phosphorus limits within ten years of the date of the LCP TMDL. Specifically, the language cited by the ALJ reads as follows:

⁶ Department staff contends that the 1994 enactment of legislation creating the Environmental Benefit Permit Strategy ("EBPS") relieves the Department of its obligations under the 1993 Criteria Agreement. It also contends that the City is not a third party beneficiary to the 1993 Criteria Agreement and, accordingly, has no basis to raise any argument pursuant to that agreement. The City, in addressing Department staff's EBPS argument, argues that if the 1994 legislation so relieved the Department of its obligations, the legislation would constitute an impairment of a contract and would violate article I, section 10 of the United States Constitution. However, because I conclude that the language of the 1993 Criteria Agreement does not preclude the implementation of the LCP TMDL, I need not reach these further arguments raised by the parties.

"Upon issuance of the TMDL/WLA, SPDES permits in the Lake Champlain drainage basin which do not have a phosphorus limit or do not meet the WLA will be re-evaluated in accordance with NYSDEC's Environmental Benefit Permit Strategy (EBPS). The EPBS priority score will increase to reflect the requirements of the TMDL/WLA. As a result, the overall position of the Lake Champlain permits relative to the statewide SPDES priority ranking list will increase.

"When the Lake Champlain SPDES permits fall within the top ten percent of the statewide priority ranking list, NYSDEC will institute a comprehensive modification review for those permits. As a part of this comprehensive review, SPDES conditions to implement the TMDL/WLA will be analyzed and incorporated into the permits.

"It is projected that 23 of the 29 permitted source discharges will need revised phosphorus limits or have limits added to their permits to meet TMDL allocations. Based on current EBPS scores it is estimated that within three years, one-half of the permits will be brought into compliance, within five years three-quarters of the revisions will be completed, and all permits will contain the appropriate phosphorus limits within 10 years'" (see Issues Ruling, at 7-8, quoting the LCP TMDL, at 111-112).

The ALJ indicated that an adjudicable issue could exist if a permittee claimed that the process regarding timing of the permit modification was not properly followed (Issues Ruling, at 8). He concluded that the City, in arguing that the permit need not be modified at this time because the WPCP had achieved reduction goals for phosphorus through 2006, raised an adjudicable issue because the City was challenging the timing of the implementation of the 65.5 lbs/day limit in the SPDES permit.

I disagree with the ALJ's interpretation of the LCP TMDL. Based on a plain reading, the language in the LCP TMDL addresses the process at modifying the relevant SPDES permits in the Lake Champlain drainage basin and only estimates the length of time to fully implement the wasteload allocations for the point source discharges under the LCP TMDL. Although it would be preferable that every affected SPDES permit be modified immediately, the LCP TMDL recognized that this time-intensive modification process could not be completed all at once.

In 1994, the ECL was amended to direct the Department to develop "a priority ranking system of SPDES permits," that is, the EBPS (see ECL 17-0817[4]; see also section 1 of chapter 701 of the Laws of 1994 [noting that the statutory amendments to the SPDES permitting process "will deemphasize arbitrary calendar deadlines and replace them with important water quality and water body improvement initiatives"]; & 6 NYCRR 750-1.19 [setting forth the modification priority ranking system for SPDES permits]). The EBPS was specifically referenced in the LCP TMDL, stating that when Lake Champlain Basin SPDES permits fell within the top ten percent of the Statewide priority ranking list, the Department will institute a comprehensive modification review of those permits (LCP TMDL, at 111-112). As set forth by Department staff, the City's WPCP SPDES permit has been within the top ten

percentile in the priority ranking system for several years (see Department Staff Appeal, at 24-25 [citing ranking scores published in the Environmental Notice Bulletin]; see also 6 NYCRR 750-1.19[e][requiring the Department to annually publish the priority ranking list in the Environmental Notice Bulletin]; City Reply, at 9 [no dispute that, under EBPS, City's WPCP SPDES permit is appropriate for review]). Thus, Department staff's determination to proceed with permit modification proceedings at this time is justified.

The language relating to the time period for modifying all SPDES permits affected by the LCP TMDL represents estimates of implementation timelines rather than specific schedules and does not provide a basis or justification for a permittee to delay modification proceedings of its SPDES permit. Furthermore, a review of the record indicates that the appropriate EBPS ranking process was followed in this case, and the City fails to identify any factual issues requiring adjudication that suggest otherwise. Accordingly, the timing of the modification of the WPCP SPDES permit for phosphorus is not an issue for adjudication.

To the extent that other arguments have been raised on the City's appeal with respect to the phosphorus effluent

limitation, they have been considered and rejected.

CONCLUSION

Based on my review of the record, no issues relating to the modification of the effluent limit for phosphorus in the City's WPCP SPDES permit or the timing of its implementation shall be adjudicated. However, because no arguments were raised on appeal with respect to carbonaceous biological oxygen demand, total suspended solids and copper, those issues, as identified by the ALJ, shall proceed to adjudication. Accordingly, this matter is remanded to ALJ Garlick for further proceedings consistent with this Interim Decision and the Issues Ruling.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: _____
Denise M. Sheehan,
Commissioner

Albany, New York
September 12, 2006