

In the Matter of the Proposed  
Modification of the State Pollutant  
Discharge Elimination System (SPDES)  
Permit of

RULING ON ISSUES AND  
PARTY STATUS

**CITY OF PLATTSBURGH**

August 25, 2004

SPDES Permit # NY-0026018

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**SUMMARY**

This case involves the proposed modification by the Staff of the Department of Environmental Conservation ("DEC Staff") to the State Pollutant Discharge Elimination System ("SPDES") permit issued to the City of Plattsburgh's ("City") waste water treatment plant ("WWTP"). The City has proposed three issues for adjudication. In this ruling, the Administrative Law Judge ("ALJ") finds the proposed issues related to: (1) carbonaceous biological oxygen demand ("CBOD<sub>5</sub>") and total suspended solids ("TSS") and (2) copper are both adjudicable. The third issue proposed by the City relating to a proposed phosphorous limit is partially adjudicable. Specifically, the question of when the proposed modification should be included in the permit may also be examined in an adjudicatory hearing, but issues related to the limit itself may not be adjudicated. Finally, the ALJ grants the petition of the Vermont Department of Environmental Conservation ("VDEC") for amicus status in the upcoming adjudicatory hearing.

**PROCEEDINGS**

On May 30, 2003, DEC Staff issued a negative declaration pursuant to the State Environmental Quality Reivew Act ("SEQRA") for the proposed permit modification

By letter dated June 4, 2003, DEC Staff informed the City that it was planning to modify the City's SPDES permit. Notice of the proposed modification appeared in the *Plattsburgh Press Republican* and DEC's electronic *Environmental Notice Bulletin* on June 11, 2003. By letter dated June 27, 2003, the City requested an administrative hearing on the matter. Negotiations occurred over the next few months which resolved some but not all issues.

On February 5, 2004, a Hearing Request Form was received in DEC's Office of Hearings and Mediation Services and Administrative Law Judge ("ALJ") P. Nicholas Garlick was

assigned. After a delay to allow the City to retain outside counsel, a legislative hearing and issues conference were scheduled.

With a cover letter dated April 14, 2004, VDEC filed a petition for amicus status in this case. The substance of the petition and the rationale for granting VDEC amicus status is discussed below.

In a letter dated April 20, 2004, the City summarized its disputes regarding the proposed modification and identified the three issues discussed below.

### **PUBLICATION OF PUBLIC NOTICE**

The "Notice of Legislative Public Hearing and Issues Conference" was published in DEC's electronic *Environmental Notice Bulletin* on March 17, 2004 and in the *Plattsburgh Press Republican* on March 18, 2004.

### **LEGISLATIVE HEARING**

The legislative hearing took place on April 21, 2004 in the City's Common Council Chamber in City Hall. Approximately 25 people attended, including about a dozen who were not affiliated with either the City or DEC Staff. Following remarks by DEC Staff and the City, six members of the public spoke. Mr. Garry Douglas, President of the Plattsburgh-North Country Chamber of Commerce and Vice-Chairman of the New York Citizens Advisory Committee for Lake Champlain, spoke against the proposed permit modification because he believes it will curb economic development and hurt job creation. Mr. Robert Davis, Project Manager for Subdivision and Infrastructure with the Plattsburgh Airbase Redevelopment Corporation ("PARC"), read a statement on behalf of R. Bruce Steadman, PARC's Executive Vice-President opposing the proposed permit modification because it would have deleterious effects on redevelopment efforts at the former airbase. Mr. Robert Moore, the Lake Champlain Lightkeeper and staff member of the Conservation Law Foundation spoke in favor of the proposed modification, citing the benefits to the overall health of the lake and the importance of a healthy lake to the economy of the area. Mr. Michael Winslow, the Staff Scientist for the Lake Champlain Committee, also spoke in favor of the proposed permit modification arguing that because the City's WWTP is the largest contributor of phosphorus to the lake, it is appropriate to seek reductions from it in order to protect the

lake's ecology. Two area men who owned septic pumping businesses, Mr. Barry White and Mr. Michael Gagnon, spoke against the proposed permit modification on the grounds that it could limit the quantity of septage they could haul to the City's WWTP and raise the price for their customers, increasing the time between pumpouts and causing environmental damage.

In addition to the oral comments, two sets of written comments were received. Mr. Edward Collins submitted a folder of materials to the ALJ at the hearing which supplemented a number of other materials he had previously mailed. Ms. Karen Dickinson, VP/General Manager of Plattsburgh Tissue, Georgia-Pacific Corporation, wrote to oppose the modification and instead argued that the permit should only be modified if and when deterioration of lake conditions was identified and attributed to the City's WWTP.

### **ISSUES CONFERENCE**

The issues conference occurred on April 22, 2004 in the City's Common Council Chamber in the City Hall.

DEC Staff appeared through Steven L. Brewer, Esq. and Michael J. Altieri, Esq. In addition, the following members of DEC Staff were present: Cheryle Merkle, Ed Riley, Shane Mitchell, Al Fuchs, Denise Wagner and Dominic Fontana.

The City appeared through Robert S. McEwan, Jr., Esq. of the law firm Nixon Peabody, LLP. Also in attendance for the City were Libby Ford and Jonathan Ruff.

The VDEC appeared through Warren T. Coleman, Esq.

### **CLOSING OF THE RECORD**

Closing briefs were received June 1, 2004. Reply briefs were received on June 14, 2004. The record was held open until June 23, 2004 to receive sur-replies from DEC Staff to respond to what it claimed was a new legal issue raised by the City in its reply brief and for the City to respond to issues it claimed were new in VDEC's reply brief.

## **STANDARD FOR ADJUDICATION AND PARTY STATUS**

In this case, where the Permittee challenges conditions proposed by DEC Staff to modify an existing permit, a relatively low threshold exists to determine if an issue is adjudicable. The Permittee must only show a dispute exists between it and DEC Staff over a substantial term or condition of the draft permit (6 NYCRR 624.4(c)(1)(i)).

Both DEC Staff and the Permittee are automatically full parties to the proceeding (6 NYCRR 624.5(a)). In this case, where a petition has been received requesting amicus status, the ALJ's ruling must be based upon whether: (1) the petitioner has filed an acceptable petition; (2) the petitioner has identified a legal or policy issue which needs to be resolved at the hearing; and (3) the petitioner has sufficient interest in the resolution of such issue and has expertise, special knowledge or a unique perspective that may contribute materially to the record (6 NYCRR 624.5(d)(2)). If a party is granted amicus status, it has the right to file a brief and, at the discretion of the ALJ, present oral arguments, but does not have any other rights of participation and submission (6 NYCRR 624.5(e)(2)).

## **DISCUSSION**

As mentioned above, the City proposes three issues for adjudication. Each is discussed below.

### *CBOD<sub>5</sub> and TSS*

The first issue proposed by the City relates to DEC Staff's proposal to modify the permit limits for CBOD<sub>5</sub> and TSS. With regard to CBOD<sub>5</sub>, DEC Staff have proposed lowering the monthly CBOD<sub>5</sub> limit from 27 mg/l to 25 mg/l and the CBOD<sub>5</sub> mass loadings limit from 3,603 to 3,300 lbs/day, and lowering the seven day average CBOD<sub>5</sub> limit from 41 mg/l to 40 mg/l and the mass loadings limit from 5,471 to 5,300 lbs/day. With regard to TSS, DEC Staff proposes lowering the TSS monthly average limit from 39 mg/l to 30 mg/l and the mass loading limit from 5,204 to 4,000 lbs/day. The proposed modification would also lower the seven day average TSS limit from 59 mg/l to 45 mg/l and the mass loading limit from 7,873 to 6,000 lbs/day. The City argues that the current limits should remain unchanged in the modified permit.

It is not disputed that the City's WWTP receives more than 10% of its loading from industrial sources. Nor is it disputed that federal law sets the CBOD<sub>5</sub> and TSS limits, but allows for an

upward adjustment of these limits if a WWTP receives more than 10% of its waste from industrial sources (40 CFR 133.103(b)) at the discretion of the Commissioner. DEC Staff asserts that the lower permit levels are justified because the industrial flow to the City's WWTP has dropped since the original levels were set. Therefore, DEC Staff decided to incorporate the lowest limit in the modified permit.

DEC Staff opposes adjudicating this issue, arguing that this dispute is legal in nature and not properly the subject of adjudication. However, the City has demonstrated that a dispute exists regarding proposed permit conditions regulating the discharges of CBOD<sub>5</sub> and TSS. It is not contested that the Commissioner has regulatory authority and latitude in setting permit limits for these constituents. DEC Staff have chosen to include in the draft modified permit discharge limits at the lowest end of the spectrum of what is legally allowable and the City seeks a higher, but still legal limit. The City has demonstrated that this proposed issue is adjudicable and will be allowed to develop a record at hearing so that the Commissioner can exercise this discretion in deciding whether or not to include DEC Staff's proposed levels in the final permit.

### *Copper*

The second issue proposed by the City for adjudication relates to DEC Staff's proposed modification of the permit's copper limit. According to the City, the present permit allows a discharge of 17 lbs/day and DEC Staff's proposed modification lowers this limit to 2.4 lbs/day. The limit for copper is developed using a "translator," which translates a water quality standard into an end-of-the pipe limit on the quantity of the metal that may be discharged. The City questions whether the correct translator was used, whether the empirical information used to perform the translation was reliable and, therefore, whether the permit limit should be adjusted upward. DEC Staff assert that the translator and permit limit for copper are valid, but concede that the City has shown that an adjudicable issue exists (t.45). I concur. The City has demonstrated that factual disputes exist involving a substantial term or condition of the permit relating to the limit for copper.

### *Phosphorus*

The third issue proposed by the City for adjudication relates to the proposed permit limit of 65.5 lbs/day of

phosphorous. The City asserts that since this limit appears in the proposed modified permit, this issue is adjudicable. The City proposes four alternative phosphorous-related permit conditions to replace the one proposed by DEC Staff.

DEC Staff argues that because the 65.5 lbs/day standard for the City's WWTP appears in the "Lake Champlain Phosphorus TMDL" which was prepared by DEC and VDEC and then approved by USEPA Regions 1 & 2 in November and September of 2002, respectively, the proposed permit limit is required due to a final agency action of a federal agency. Therefore, DEC Staff concludes, the challenge to the proposed permit limit is really a challenge to the federal agency action and should be heard in federal court, not in this state administrative forum.<sup>1</sup> It is useful at this point to review the history of the Lake Champlain TMDL, or Total Maximum Daily Load.

A TMDL is a regulatory tool in the federal Clean Water Act that requires states to identify waterbodies, like Lake Champlain, where additional limits on discharges are necessary to achieve water quality standards. The presence of nuisance algae in the lake during the summer months has been attributed to excessive levels of phosphorous. After over a decade of study, the TMDL for the lake was approved by USEPA Regions 1 and 2. This document apportions to the City's WWTP the largest allocation for any point source on the Lake and explicitly sets the level at 65.5 lbs/day.

DEC Staff make a compelling argument that the Commissioner does not have any discretionary authority to alter the 65.5 lbs/day limit. DEC Staff argues that the TMDL anticipates the phosphorous limits included in it will be incorporated into SPDES permits (TMDL p.99) and that these limits are necessary to achieve water quality standards. The incorporation of SPDES permit limits to meet water quality standards and TMDLs is required by both New York State and federal law (ECL 17-0811 & 6 NYCRR 750-1.11(a) and 33 U.S.C. 1311(b)(1)(C) & 1313(e)(3)(A) & 40 C.F.R. 122.44(d)(1)(vii)(b), respectively). DEC Staff goes on to assert that because the 65.5 lbs/day limit is a result of the discretionary action of USEPA in approving the TMDL, any challenge to the limit should be heard in federal court and the

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<sup>1</sup>DEC Staff provides a federal administrative case (In re City of Moscow, Idaho, NPDES Appeal No. 00-10 (EAB, July 27, 2001) and a decision of the West Virginia Supreme Court (Monongahela Power Co. v. Chief, Office of Water Resources, 211 W.Va. 619, 2002) in support of this point.

City's attempt to have the matter heard in a state administrative forum is an impermissible collateral attack on a federal agency action. In essence, DEC argues that the Commissioner is compelled by federal law to implement the 65.5 lbs/day limit on the City's WWTP. DEC Staff acknowledges that if a draft permit were proposed with a limit other than that approved by USEPA, an administrative hearing could consider whether the TMDL was properly applied. VDEC agrees with DEC Staff's position.

The City agrees with DEC Staff that the ALJ could consider whether a TMDL was properly translated into a permit limit. The City argues that the Commissioner has flexibility in setting the permit limit for the City's WWTP because there is no legal requirement that SPDES permit limits be consistent with TMDLs. The City does acknowledge that these limits cannot conflict with an approved water quality management plan (40 CFR 130.12(a)). The City also argues that the Commissioner has flexibility in setting the schedule for when TMDL derived limits can be placed in permits. The City's argument fails because the TMDL explicitly contemplates a phosphorous limit of 65.5 lbs/day and provides no mechanism for the unilateral adjustment of this limit by the DEC Commissioner. Nor can the City cite any statutory or regulatory authority for such a variance.

The TMDL is in many ways similar to the interstate compacts found in Article 21 of the ECL. The TMDL is an agreement the form of which is created in federal law to which both the executive branches of New York State and Vermont have agreed. An interstate compact requires the approval of state legislatures and the approval of Congress. Since a compact creates a contract-like relationship among the parties, by analogy it is reasonable to conclude that the TMDL also creates these duties. To understand the exact nature of the duties, one must examine the language of the TMDL itself. The section entitled: "New York Implementation Plan" reads in relevant part:

"Upon issuance of the TMDL/WLA, SPDES permits in the Lake Champlain drainage basin which do not have a phosphorous limit or do not meet the WLA will be re-evaluated in accordance with NYSDEC's Environmental Benefit Permit Strategy (EPBS). 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 part of the 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 point source discharges will need revised phosphorous limits added to their permits to TMDL allocations. Based on current EPBS 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 phosphorous limits within 10 years."

As stated above, the TMDL also includes phosphorous limits for all New York point sources, including the 65.5 lbs/day limit for the City's WWTP. The TMDL states that this limit will be placed into the City's permit and does not include language to allow for the unilateral adjustment of this numerical limit by the DEC Commissioner, so presumably the only method for adjusting this limit is for NYSDEC, VDEC and USEPA to agree to the change. Since it is not within the Commissioner's authority to unilaterally adjust the 65.5 lbs/day permit limit, this issue is not adjudicable.

With respect to when the permit limit must be included in the permit, the TMDL sets forth a process by which SPDES permits will be reviewed and modified and states that all permits must be modified within ten years (September 12, 2012). Therefore, an adjudicable issue could exist if a permittee claimed that the process regarding the timing of the permit modification was not properly followed.

In this case, the City proposes four alternative phosphorous related permit conditions that it asserts would be appropriate and consistent with the TMDL. First, the City proposes modifying an existing Stipulation between DEC and the City (dated May 23, 1996) and not including the 65.5 lbs/day limit in the permit. As discussed above, the Commissioner does not have the authority to issue the permit sought by the City, so this issue is not adjudicable.



The second alternative is not to modify the permit now, but rather to wait because the reduction goals for phosphorous have been already met through 2006. Since this proposed alternative relates to timing only, it is adjudicable. The issue is limited in that at most the City could only seek an extension of about eight years, since the TMDL states all permits shall have limits within ten years of the date of the TMDL.

Third, the City suggests establishing a permit limit of 107 lbs/day at least until the 12 month rolling average waste load allocation (0.0014mg/l) set in the TMDL is exceeded in the central, open-water region of the Cumberland Bay segment of Lake Champlain. Given the earlier discussion regarding the lack of authority for the Commissioner to vary from the 65.5 lbs/day limit set in the TMDL, this suggestion is not within the Commissioner's power to grant and, thus, not adjudicable.

Finally, the City suggests inclusion of a compliance schedule in the permit requiring the City to do an engineering study to determine the phosphorous discharge from the WWTP if the plant were to operate at full capacity (16 mgd). The study would use as a discharge limit the 65.5 lbs/day (plus additional for hauled in waste) and any future upgrades to meet the phosphorous limit would be conditioned upon the City receiving state or federal funds. Again, the City's proposal would require the Commissioner to exceed her authority. While the desire of the City to protect its taxpayers is commendable, the Commissioner does not have the authority to include such a condition which is at variance with the TMDL. This issue is not adjudicable.

In addition to arguing that the Commissioner has the authority to institute a SPDES permit limit at variance with the TMDL limit, the City makes a series of other arguments in support of adjudicating the proposed phosphorous permit limit. None of these arguments lead to the conclusion that this issue should be adjudicated. Each is discussed below.

First, the City argues that because there is no evidence that the TMDL has been incorporated into the state's Water Quality Management Plan, the TMDL cannot be used to establish SPDES permit limits. The City cites to federal regulations (40 CFR 130.6(c)(1)) to support its contention. However, a reading of this regulation does not support the City's contention. The regulations require TMDLs to be included in a state's Water Quality Management Plan, but do not state that a valid TMDL limit cannot be placed in a SPDES permit until the Plan has been updated. This argument is rejected.

Second, the City argues that the SPDES permit must be based upon the design flow for the City's WWTP. The City argues that the 65.5 lbs/day limit on phosphorous will create a situation where its WWTP can only operate at 60% of capacity without significant capital modifications. The City argues that the phosphorous it should have been allocated was either distributed to other dischargers or retained by the state to bolster its "margin of safety." Again, this is a challenge to the phosphorous limit in the TMDL and not reviewable in this forum.

Third, the City argues that the TMDL is based on outdated data and assumptions known to be false. The City states that independent monitoring shows that phosphorous levels in Cumberland Bay are below the target water quality criteria and dropping. Regardless of the veracity of this claim, as discussed above, a state administrative forum is not the proper venue to hear this challenge. Because 65.5 lbs/day limit comes from the TMDL, and the TMDL approval is a federal agency action, challenges must be heard in federal court. Arguments about whether the 65.5 lbs/day standard is correct are not adjudicable.

Fourth, the City asserts that DEC Staff is prohibited from setting numeric permit limits for phosphorous by a 1993 agreement among New York State, Vermont and Quebec. This agreement states that modifications of wastewater discharge permits in New York as a result of a phosphorous load allocation for Lake Champlain may not proceed until formal adoption of numeric criteria by rule in New York. DEC Staff counter that this agreement is no longer valid and is superceded by the enactment of a 1994 state law, Chapter 701 of the Laws of 1994, which created the Environmental Benefit Permit Strategy ("EBPS") for SPDES permits, and that DEC has waived its rights under the agreement by agreeing to the TMDL. Indeed, the actions of New York, Vermont and USEPA in approving the TMDL also seem to moot the 1993 agreement.

Fifth, the City argues that the proposed permit limit does not provide for the phosphorous load contributed by septage haulers. The City claims that 32% of the phosphorous entering the WWTP is from hauled wastes, primarily septage haulers and that over the past three years, 90% of this waste originated in Vermont. According to the City, the TMDL did not anticipate this level of haulage and the City is entitled to an upward adjustment of its phosphorus limit since it is treating waste from other sources. Again the City faults the TMDL, a federally approved document.

Sixth, the City argues that the permit must allow the City's WWTP to use its full capacity. This is really a policy argument.

The City argues that the area it serves is growing faster than the TMDL anticipates and, without costly capital improvements, phosphorus limit will cap the flow to the WWTP. According to the City, this could impact the economic development of the area. The City contends further that because no state or federal money has yet been secured to upgrade the WWTP, local taxpayers will have to pay a disproportionate share of the costs imposed by the TMDL. While an interesting policy argument, it is not adjudicable because the question of funding to upgrade the plant is not a permit condition.

### ***Vermont DEC's Request for Amicus Status***

As mentioned above, Vermont's Department of Environmental Conservation ("VDEC") filed a petition seeking amicus status. In its petition, VDEC asserts a substantial interest in this case because it involves TMDLs for Lake Champlain that were jointly submitted by New York and Vermont to USEPA on November 4, 2002. These TMDLs were implemented to meet state water quality standards.

DEC Staff does not object to granting VDEC amicus status, but the City does. Specifically, the City asserted that VDEC failed to identify its interest in the proceeding sufficiently and failed to identify a substantive and significant issue in its petition. At the issues conference, the ALJ asked counsel for VDEC to verbally supplement its petition, and counsel did so. After hearing this supplemental information, the City restated its objection to granting VDEC amicus status.

I find that: (1) VDEC's petition, as supplemented, is an acceptable petition; (2) VDEC has identified a policy interest in the water quality of Lake Champlain and that this permit may impact water quality and the regulatory methods (including the TMDLs) for achieving water quality standards; and (3) VDEC, as the regulatory agency with jurisdiction over much of Lake Champlain, has expertise, special knowledge and a unique perspective that will materially contribute to the record. Accordingly, VDEC is granted amicus status.

### **APPEALS**

Pursuant to 6 NYCRR 624.6(e) and 624.8(d), these rulings on party status and issues may be appealed in writing to the Commissioner on an expedited basis. While 6 NYCRR 624.6(e)(1)

provides that such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling, this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Any appeals must be received at the office of the Commissioner no later than 4:00 P.M. on Friday, September 24, 2004, at the following address: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010. Any replies must be received no later than 4:00 P.M. on Friday, October 1, 2004 at the same address.

The parties are to transmit copies of any appeals and replies to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner, with two copies being sent to my address. Service by fax is not authorized.

Albany, New York  
August 25, 2004

\_\_\_\_\_/s/\_\_\_\_\_  
P. Nicholas Garlick  
Administrative Law Judge

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