

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 Broadway  
Albany, New York 12233-1550

In the Matter of the Proposed Modification of the  
State Pollutant Discharge Elimination System (SPDES)  
Permit of The Port Authority of New York  
and New Jersey, for discharges from the  
John F. Kennedy International Airport

DEC Application No. 2-6308-00019/00016  
SPDES # NY 000 8109

**Summary Hearing Report and Order of Disposition**

- by -

\_\_\_\_\_/s/\_\_\_\_\_  
Helene G. Goldberger  
Administrative Law Judge

September 19, 2007

## **Summary of Disposition**

The Port Authority of New York and New Jersey (Port Authority), the New York State Department of Environmental Conservation (DEC or Department) staff, the Natural Resources Defense Council (NRDC), the Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper), and the Airlines (American Airlines, Delta Air Lines, Federal Express Corp., JetBlue Airways, Northwest Airlines and United Airlines) worked cooperatively over several months to satisfy their varied concerns with respect to Department staff's proposed modified state pollutant discharge elimination system (SPDES) permit for the John F. Kennedy International Airport (JFK or airport). As a result of these efforts and resulting agreements, there will be no adjudicatory hearing. After the Port Authority has completed its study and submitted its report to DEC, Department staff's determinations to further modify the SPDES permit will be subject to another round of public comment and review. For now, staff will proceed to issue the permit as agreed to by these participants.

## **Background and Discharge Description**

These proceedings involve the DEC staff's proposed modification of the SPDES permit of Port Authority for discharges from JFK. The Port Authority is the operator of the airport located in Queens, New York.

## Deicing and Anti-Icing Activities

During the winter, the Port Authority uses deicing chemicals and anti-icing agents to address snow and ice buildup on airport runways and taxiways. Individual airlines use either ethylene glycol- or propylene glycol-based deicing agents for aircraft. It has been estimated that the airport uses approximately 1.6 million gallons of de-icing fluid each winter. Once these materials are used, they flow to and through the storm water collection systems and are discharged into Jamaica Bay, Class SB (saline, Class B), Bergen Basin, Thurston Bay, Head of Bay, and an unnamed tidal basin (all Class I waters). These chemicals degrade in the receiving water and in this process increase biological oxygen demand (BOD). In addition, other wastewaters are discharged to these waters from on-site treatment facilities, including but not limited to the Bulk and Satellite Fuel Farms, the KIAC energy generation facility, and a number of groundwater and soil remediation sites overseen by DEC Division of Environmental Remediation. To address the impacts of these discharges on receiving water bodies, the Department staff has proposed to modify the existing permit.

The airport, located on over 5,000 acres, is one of the largest in the country with 25 miles of taxiways and 30 miles of roadways. There are 26 storm water outfalls at JFK that are separate from the sanitary system that discharges into the Jamaica Bay Sewage Treatment Plant. JFK is the second largest storm water discharger (approximately 7 million gallons a day of storm water discharged during a storm event) into Jamaica Bay, one of the largest and most productive tidal wetland complexes in the northeastern United States. See, Steven testimony at legislative hearing, transcript (TR) p. 9.

### Jamaica Bay

Jamaica Bay is part of the federally-protected Gateway National Recreation Area and is designated a wildlife refuge. It is one of the largest coastal wetland ecosystems in New York State comprised of 16,000 acres of open water, several islands, salt marsh, grasslands, costal woodlands, maritime shrublands and freshwater wetlands. These areas support 91 species of fish, 325 bird species as well as habitat for many species of reptiles, amphibians, and small mammals. Jamaica Bay is an important stopover area along the Eastern Flyway migration route and hence one of the best bird-watching locations in the western hemisphere. See, NYCDEP, *Draft Jamaica Bay Watershed Protection Plan*, Vol. 1, pp. 1, 17 (March 1, 2007) (available [http://home2.nyc.gov/html/dep/html/dep\\_projects/jamaicabay.shtml](http://home2.nyc.gov/html/dep/html/dep_projects/jamaicabay.shtml).)

### Permit History

In 1987, the Department issued a SPDES permit to the Port Authority for its operations at JFK and modified the permit in 1993 and 1994. In 1996, 2001, and 2006, DEC renewed the permit administratively. As a result of review pursuant to the Environmental Benefit Permit Strategy (EBPS), the Department determined that the permit required modification and issued a notice of complete application on June 2, 2006. The draft modified permit was made available to the public and the Department received comments in July and August 2006. In response to the draft permit, the Port Authority, as well as NRDC, and a number of other organizations and individuals submitted comments requesting changes to various conditions in the draft permit. Thereafter, DEC staff drafted a response to comments as well as a revised draft SPDES permit modification, both dated October 12, 2006. Department staff also made the determination to refer this modification proceeding for a public hearing and issues conference.

## Request for Information and Development of Draft Permit Modifications

While Department staff, the Port Authority, and NRDC representatives were discussing logistics for the public hearing and issues conference to address the October 2006 proposed draft permit modifications, Department staff issued a request for information (RFI) to the Port Authority dated November 29, 2006. The RFI called upon the permittee to commence a sampling program that would result in a report to DEC and also form the basis for a model that the Port Authority would develop to ascertain the airport discharge's effects on water quality. Issues Conference (IC) Ex. 3. Based upon the results of this sampling exercise and the report that was submitted to DEC by the Port Authority in April and May 2007, Department staff further revised the draft modified permit and issued this version on June 1, 2007. See, IC Exs. 4, 5, and 13.

Primarily, the 2006 proposed modifications address monitoring requirements for carbonaceous biological oxygen demand<sub>5</sub> (CBOD<sub>5</sub>) and glycol. The draft permit required the Port Authority to perform modeling studies as well as submit reports, and adopt best management practices. In the June 1, 2007 version of the draft permit, based upon the results the Port Authority obtained in the 2007 sampling, Department staff expanded the sampling program to include additional outfalls for monitoring purposes and targeted additional pollutants for monitoring. Department staff had added toxicity testing for all the outfalls except the KP outfalls. Staff also added language to require reporting of daily glycol usage. The June 2007 version also added requirements addressing airport tenant responsibility via a vis aspects of the draft permit.

### **Legislative Hearing**

The legislative hearing was held on June 4, 2007 at 7:00 p.m. on the Kingsborough Community College campus, in Manhattan Beach, Brooklyn, NY. Administrative Law Judge (ALJ) Helene G. Goldberger of DEC's Office of Hearings and Mediation Services (OHMS) presided at this hearing as well as at the issues conference. There were approximately 30 people in attendance, including representatives of the Port Authority and the Department. Six people provided statements in addition to staff from the Port Authority and DEC.

Jim Steven, Program Manager of Plant, Structures and Airport Redevelopment for the Aviation Department of the Port Authority, provided a description of the airport including many details

about its size (over 5,000 acres), its economic contribution to the region (since 1947, \$5 billion invested in airport by Port Authority and there are 30,000 people working at JFK), and its service to thousands of travelers. While acknowledging that JFK was the second largest storm water discharger to Jamaica Bay, Mr. Steven contested a description of the airport as the biggest polluter of the Bay. He stressed that the Port Authority had dedicated staff to environmental matters and there was attention paid to operations and cleanups. Regarding winter operations, Mr. Steven stated that this was tightly regulated by the Federal Aviation Administration (FAA) which has created an advisory circular regarding methods for handling snow and ice at the airports and rules regarding these activities were strengthened last year. He explained that while the Port Authority handled snow and ice on the runways and roads at the airport, it was the airlines that were responsible for addressing these conditions on the planes.

Mr. Steven explained that deicing was the removal of ice from roads, taxiways, and aircraft and anti-icing activities were directed at preventing ice from building up. He stated that both of these activities can be performed with mechanical means as well as FAA-approved chemicals. Mr. Steven reviewed steps that the Port Authority has taken to reduce impacts of deicing on Jamaica Bay. To reduce the buildup of nitrogen in the Bay, the Port Authority banned the use of urea 7 years ago. He characterized propylene glycol, sodium acetate, and potassium acetate as relative nontoxic. With respect to salt, he emphasized that it is used on roadways on all highways throughout the state.

Mr. Steven acknowledged that BOD remains a concern and that propylene glycol used up dissolved oxygen (DO). However, he maintained that because levels of oxygen were greater in the winter months when these chemicals were used at the airport, the storm water does not reduce the water quality. Mr. Steven remarked that based upon the studies that had been done thus far at the airport, the conclusion reached is that the discharge of storm water containing spent deicing fluids does not reduce DO in Jamaica Bay below the water quality standards of 5 milligrams per liter.

He stated that the application of best management practices (BMPs) should help to reduce secondary applications and that efforts were underway to train those who apply these chemicals. In addition, he explained that there was new deicing equipment being utilized by the largest airline. This airline utilizes a dual nozzle for air and deicing fluid resulting in a reduction of

the volume of fluid used. A BMP already in place at the airport and described by Mr. Steven is careful coordination between the pilots and the FAA Control Tower to time takeoffs so that reapplication of deicing fluids is not required. He said that another effective strategy is the enhanced training for airline ramp workers in application of deicing fluids to reduce the volume used. Mr. Steven described the establishment of one radiant facility at the airport where planes can be brought in for deicing. This system works faster than traditional deicing techniques and reduces the deicing chemicals used by 90 percent. The Port Authority is hoping to construct another one of these facilities and is in the process of selecting a location at JFK.

He stated that in August 2006, based upon 16 site visits, the United State Environmental Protection Agency (EPA) determined that it would not pursue a national effluent limit guideline (ELG) for this category of discharges.

Mr. Steven stated that the Port Authority had operated the airport in accordance with the applicable SPDES permit for 25 years and that it supported the October 2006 draft except for three matters. The Port Authority wishes to see the inclusion of airlines that engage in deicing as co-permittees. He stated that this was a logical implication of the Clean Water Act requirements because the airlines had control over these actions.

With respect to the total suspended solids (TSS) levels, Mr. Steven stated that the proposed limit was too low and because there was no treatment for this storm water of any consequence, the Port Authority proposed 100 mg/l. With respect to the fuel farm outfalls, Mr. Steven agreed that the 45 mg/l limit was appropriate due to the treatment available for that runoff.

With respect to outfall 010, he represented that sampling there would be redundant of efforts that were already performed based upon remediation requirements.

Mr. Steven concluded by stating that the low dissolved oxygen levels in the Bay during the summer were unrelated to the airport activities and that overall, water quality had improved in New York Harbor. He stated that the Port Authority supported the phased approach set forth in the draft permit - collection of data, application of best management practices, and monitoring of discharge levels. He explained that since the draft was issued, the Port Authority and DEC staff had been working on a revised modification but that the June 1, 2007 draft had just arrived and the Port Authority had not had adequate opportunity to review it yet.

Mr. Terrance Pratt, a program attorney for the Department's Division of Water, spoke next explaining that the permit sets standards for discharges to Jamaica Bay, Thurston Bay, Bergen Bay and an unclassified receiving body of water. He stated that the permit had been modified twice and administratively renewed three times by the Department. Pursuant to Environmental Conservation Law (ECL) § 17-0817, the Department staff reviewed the SPDES permit and determined that further modifications were needed. The primary reason for this action is the storm water run-off and the lack of accounting for the deicing activities. He emphasized that the permit had significant requirements including monitoring of CBOD<sub>5</sub> and glycol; application of best management practices; sampling; and water quality modeling. He stated that the Department staff was reserving the right to modify the permit again after the results of the monitoring program and modeling was completed - anticipating that this would be in 2-3 years.

John Fazio, a member of Community Board 10, Chairman of the Gateway Park Committee, and a 71-year resident of Jamaica Bay, stated that the Port Authority was forced to be a good neighbor. He disagreed that they have no governance over the deicing of airplanes; comparing the relationship the Port Authority has to the airlines to one of landlord/tenant. As the landlord, Mr. Fazio expressed his view that the Port Authority had a lot of control over what the tenants did on the property and that these activities could be performed in an environmentally friendly manner. He emphasized that citizens who use the Bay would be heavily fined if they dumped only one gallon of a pollutant into the Bay but that the Port Authority had dumped thousands of gallons of pollutants without any consequence. Mr. Fazio requested that all the outfalls be monitored based on his view that all businesses are required to perform a close analysis and this facility should not be treated differently. Mr. Fazio accused the Port Authority of being responsible for the "death" of Joco Marsh due to oil spills from airport activities.

Ida Sanoff, Chair of the Natural Resources Protective Association, stated that her group had an interest in preserving and protecting the Jamaica Bay habitat. Ms. Sanoff criticized the use of grab samples as currently set forth in the permit, maintaining that this method was inadequate and flow-weighted composite samples should be used. Ms. Sanoff said that sampling should occur after storm events for an extended period of time. She maintained that there was no data regarding the length of time dissolved oxygen levels are affected by deicing chemicals and how long drops in DO persist. Ms. Sanoff requested that there be more oversight and enforcement of the permit. She identified outfall 007 as one that drains paved taxiways and

should be tested for glycols. Ms. Sanoff requested that the sampling report be made available to the public and noted that it was public outcry that gave rise to this modification process. She stated that a one-time modeling study was inadequate and that it was necessary to have a long term study over a course of years due to the variations in each year. Ms. Sanoff concluded by stating that JFK should be required to submit a plan for recovery and recycling of the deicing chemicals.

Dan Mundy, Jr. responded to the characterization of the deicing chemicals as benign stating that they had serious health impacts and had been identified as hazardous air pollutants. He cited a *New York Times* article written after the March 2007 storm in which it was reported that in one evening 50% of the amount of deicing chemicals typically used in one year at JFK were used. Mr. Mundy did not blame only the Port Authority. He stated that DEC issues the permit and that it took too long for the agency to address the runoff problem. He also commented on the heavy penalties sustained by fishermen for pollution violations and asked why the airport should not be treated equally. Mr. Mundy said the airport was causing great damage to the Bay and that the recommendations are woefully inadequate. He complained that the airport should be required to treat the runoff and not just monitor.

Dan Mundy, Sr. is the founder of the Jamaica Bay Ecowatchers as well as a Community Board member, co-chair of the Jamaica Bay Task Force, and an appointed member of the Jamaica Bay Advisory Committee on Watershed Protection established by the City Council. He stated that the draft permit was inadequate - only a beginning and not an end. Mr. Mundy criticized the permit for establishing protocols that would be unlikely to show adequate measurements. Moreover, he argued that the draft permit failed to require compliance with water quality standards. He stated that the public's input should be considered. Mr. Mundy wants to see the permit strengthened through the issues conference mechanism.

Michael Murphy, Esq. of Beveridge and Diamond, represents 6 airlines that have petitioned for party status in this proceeding. He stated that these petitioners support the October 2006 draft permit but wished to reserve their rights to submit comments on the June 1, 2007 draft. Mr. Murphy stated that the October 2006 draft fulfills the law's requirements and is consistent with what is required at other airports. He emphasized that the substantial additional monitoring required would ensure that there was not contravention of water quality standards. With respect to the Port Authority's request that the

airlines be made co-permittees, he expressed the view that DEC has appropriately exercised its jurisdiction in a manner that was no less protective of the environment than what is done in other permits.

Lawrence Levine, Esq., of NRDC stated that he was pleased that this hearing had finally taken place as the permit had remained static for 25 years. NRDC is part of the NY/NJ Bight Project that focuses on water quality in Jamaica Bay among other water bodies. He said that it took litigation to prompt action and that NRDC supports DEC's efforts to strengthen the permit. Particularly, he noted that the proposed conditions require important studies to ensure protection of water quality standards. However, he said that while NRDC supports these improvements the organization wants to be sure that the permit gets it right. He explained that the sampling and modeling must be done to ascertain representative samples. In particular, Mr. Levine maintained that because the storm water discharges over a period of time, composite rather than grab samples should be taken. Because this is an iterative process as DEC has drafted the proposed permit, he stressed that public input was needed at a later stage in order to review what the Port Authority study concluded.

In response to the Port Authority's comments, Mr. Levine noted that Mr. Steven did not dispute that the airport is the largest discharger into the Bay. He argued that because there is not adequate information about the precise pollutant loadings, it is fair to say that the airport is likely the second largest polluter based upon the volume of discharge from the airport. Mr. Levine noted that the storm water is not monitored currently and only a very small number of the 26 outfalls have been sampled. Mr. Levine noted that because deicing is required by FAA does not preempt regulation of discharge or application - other airports do it. He spoke favorably regarding the BMPs, particularly the dual spray device, but questioned why all airlines are not using this equipment. Mr. Levine maintained that there needed to be further evaluation of other BMPs with public input. Concerning the EPA study regarding deicing chemicals, Mr. Levine stated that the August notice had only been a preliminary outcome and that the expectation is that there will be a proposed rule in 2009.

Concerning the water quality in Jamaica Bay, Mr. Levine said it was misleading to characterize it as continuously improving. That was true of the Harbor as a whole but Jamaica Bay was impaired with respect to levels of DO and it was critical to move forward to address this issue.

At the conclusion of Mr. Levine's comments, the ALJ inquired as to whether anyone who had not filled out a registration card wished to make a comment. Mr. John Fazio asked to speak again. He noted that in the past all the "entities" left after making their statements leaving the public to speak but in this case everyone stayed and listened. He commented that this was "a good hearing."

After Mr. Fazio's remarks, because no others expressed a desire to speak, the ALJ concluded the legislative hearing and informed the audience of the issues conference scheduled for the following morning in the DEC's Region 2 offices in Long Island City. Due to a conflict in the room usage in the regional office, the ALJ announced that the conference was to take place in the main building at 47-40 21<sup>st</sup> Street instead of the Annex. Thereafter, the ALJ adjourned the legislative proceeding at approximately 8:40 p.m.

### **Issues Conference**

The issues conference was convened at the DEC Region 2 offices at 47-40 21<sup>st</sup> Street in Long Island City, New York at 10:00 a.m. on June 5, 2007.<sup>1</sup> The following individuals appeared on behalf of the participants: Gail Hintz, Assistant Regional Attorney for Department staff; Katherine Miller, Esq. for the Port Authority; Lawrence Levine, Esq. for NRDC; Daniel Estrin, Esq. and Betsy McDonald for the Raritan BayKeeper; and Michael Murphy, Esq. and Richard S. Davis, Esq. from Beveridge & Diamond, P.C. representing six airlines that are tenants at JFK: American Airlines, Delta Air Lines, Federal Express Corp., JetBlue Airways, Northwest Airlines, and United Airlines.

#### June 5, 2007 Conference

#### June 2007 Revised Draft Permit

Because the Department staff had presented the participants with a revised version of the draft permit on June 1, 2007, all the recipients agreed that they needed additional time to review the document and provide additional comments, if any. However, in order to ensure that everyone understood the basic reasoning underlying these changes which were made in response to Port Authority comments, I asked the Department staff to summarize

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<sup>1</sup> The room location was changed from the DEC Region 2 Annex due to a conflict with another event. The Annex door was posted with the changed information.

them. On behalf of the staff, Mr. Alan Fuchs of the Division of Water made this presentation.

At the conclusion of this summary, Ms. Miller replied that given the number of changes and their significance, the Port Authority wanted additional time to review them. She said that the Port Authority would need to retain the services of an expert to address the whole effluent toxicity (WET) testing requirement. Matt Masters of the Port Authority questioned a number of the new permit conditions including the number of outfalls, the toxicity testing, the potential for duplication of sampling efforts, and the ability of the Port Authority to provide the requested information on the amount of deicing materials used.

On behalf of NRDC, Mr. Levine responded to some of the points that Mr. Masters made regarding WET testing and FAA requirements. He stated that different outfalls captured flow from different drainage areas and it was necessary to get adequate representation of the discharges. He supported the condition requiring the permittee to provide information regarding the amount of deicing chemicals used.

Mr. Estrin, representing Baykeeper supported the comments made by Mr. Levine on behalf of NRDC. He questioned the manner in which the facility keeps track of the deicing fluids that are used.

On behalf of the six airlines that submitted a petition, with respect to the daily reporting requirement, Mr. Davis stated these entities would like to provide this information. The question from his viewpoint was to determine how the airlines collect the information now so as to know what uniform reporting would look like. Co-counsel Mr. Murphy agreed with Port Authority representative Edward Knoesel that during times of storms the paramount concern is safety at the airport and he was uncertain whether, given those constraints, the airlines could meet a daily recording effort. Regarding the number of outfalls that could be sampled during a given day, Mr. Murphy appeared to concur with the Port Authority that 5 outfalls were the maximum and then it depended on which were the most representative.

Concerning WET testing, counsel presented the airlines' expert Charles Pace, P.E. Mr. Pace expressed a number of concerns regarding the testing applicability.

DEC Division of Water staff member Al Fuchs responded to these issues. However, it was clear that additional opportunity was needed to allow everyone to assess with their respective

clients the newly revised draft permit and the reactions expressed by the participants at this meeting. Accordingly, it was agreed that the participants would submit any supplemental filings based upon these changes by July 20, 2007. Based upon my review of these submissions, I would make a determination whether or not we needed to continue to issues conference for another day of discussion. We reserved the date of July 26, 2007 in the event that we needed to reconvene.

#### Issues Proposed Based Upon October 2006 Version of Permit

During the June 5, 2007 conference, the participants also reviewed with the ALJ their positions based upon the October 2006 permit. As explained by Mr. Steven at the legislative hearing, the Port Authority's three objections were: 1) the need to add the airlines/tenants as co-permittees; 2) the TSS limit; and 3) sampling at outfall 010.

NRDC/Baykeeper petitioned regarding the sampling methodology; the need to include a permit condition requiring the Port Authority to obtain and provide data on daily glycol usage per drainage area during storm events; the need to clarify that violations of water quality standards would be both a violation of the permit and the applicable law and regulations; and the need to make the permit term coincide with the conclusion of the modeling work and plan submission so that there was an opportunity for public participation at this stage.

The Airlines had no objections to the October 2006 proposed modification.

The following documents were accepted as exhibits to this proceeding:

1. Hearing Request dated 10/25/06  
Documents used to draft permit modification  
Coastal Assessment Form and Negative Declaration  
Notice of Complete Application (6/2/06), Draft Permit (6/1/06) and Fact Sheet (3/20/06)  
Comment letters  
Port Authority response to comments dated 9/27/06  
Response to public comment dated 10/12/06  
Correspondence from Port Authority dated 2/7/97
2. Notice of Public Hearing dated 4/20/07  
ENB Notice - 5/2/07  
Affidavit of Publication - Newsday - 5/3/07

3. Request for Information dated 11/29/06
4. Letter dated 4/30/07 from Matt Masters, Port Authority to Stephen A. Watts, NYSDEC  
Region 2 - DER with  
EPA Form 2-C  
EPA Form 2-F  
Supplement A - Mixing Zone Requirements for Discharges to Estuaries  
RFI Sampling Summary Report, including effluent sampling results
5. Letter dated 5/22/07 from Matt Masters to Alan Fuchs, Division of Water, NYSDEC with:  
  
NY-2C Checklist  
Industrial Application Form NY-2C
6. Position Statement - The Port Authority of NY & NJ - JFK SPDES Hearing
7. Letter dated 5/21/07 from Michael Murphy, Esq., Beveridge & Diamond, P.C. with petition for full party status on behalf of American Airlines, Delta Air Lines, Federal Express Corp., JetBlue Airways, Northwest Airlines, and United Airlines
8. Letter dated 5/21/07 from Lawrence M. Levine, Esq. And Bradford H. Sewell, Esq., NRDC and Daniel E. Estrin, Esq., Pace Environmental Litigation Clinic with joint petition for full party status and adjudicatory hearing
9. Curriculum Vitae - Robert J. Pape, P.E.
10. CV - Christopher Painter, Manager Ramp Operations, American Airlines
11. CV - Kendra M. Kennedy, Senior Properties Counsel, American Airlines
12. E-mail from Stephen Watts to Daniel Estrin, et al dated 6/1/07 re: Draft SPDES Permit  
Changes Based on RFI
13. Draft Modified SPDES Permit - 6/1/07
14. Federal Register Notice dated September 29, 1995 - Vol. 60, No. 189

Final NPDES Storm Water Multi-Sector General Permit for Industrial Activities; Notice

15. NPDES Q & A Document - EPA - March 1992 (Port Authority to e-mail full document)
16. JFK Outfall Treatment Summary - 6/1/07
17. NYC Waterfront Revitalization Program Consistency Assessment Form (to be resubmitted by DEC staff)
18. Letter dated 7/19/07 from Matt Masters of the PA to Mr. Fuchs
19. Supplemental comments of Airlines dated 7/19/07
20. Supplement to Jt. Petition of NRDC and Baykeeper dated 7/20/07

July 26, 2007 Conference

On July 26, 2007, we reconvened in the DEC Region 2 offices and the participants requested an opportunity to continue their negotiations regarding the draft permit conditions. As a result of several hours of discussions, the participants reported that they had resolved most of the concerns. There were four matters remaining that needed to be addressed either as a result of more settlement discussions or in an issues ruling (it did not appear that any of these would require adjudication by hearing). These matters were:

- 1) Port Authority's continued desire to add the airlines as co-permittees.
- 2) Airlines' objection to permit language requiring tenant airlines to comply with aspects of the permit.
- 3) Port Authority and Airlines concerns re: timing of reporting on deicing chemical usage.
- 4) NRDC's request for clarification on whether the permittee is subject to enforcement action for violations of both the permit and the law/regulations when there is a violation of water quality standards in instances where there is no specific standard set forth in permit.

Based upon the agreements reached, the Department staff agreed to circulate a revised version of the permit by July 31, 2007. We planned to have a conference call on August 8, 2007 to

determine the status of the negotiations and whether any matters remained in contention.

#### August 8, 2007 Conference Call

During this call, the issues conference participants reported that only two matters remained in contest. This potential issue was whether the tenants could be added as co-permittees and whether directory language could be placed in the permit governing these third party entities. We agreed that the participants would submit post-issues conference memoranda by September 8, 2007 and replies by September 28, 2007 unless there was agreement on all the issues.

Concerning the narrative language addressing water quality standards that NRDC and the Baykeeper sought to include in the permit, the Department staff clarified that a violation of water quality standards would be viewed by the Department as a violation of both the permit and the regulations. The Department staff agreed to put that language in writing and I agreed that this interpretation would be included in my issues ruling/report. This agreement resolved this issue.

Mr. Levine had requested during the June 5, 2007 conference and during this call that the Department issue the permit to the Port Authority based upon the conditions that were resolved so that there would be no delay in the permittee going forward on the obligations contained in it. The Department staff declined to do this stating that there was no precedent to issue permits "piecemeal." I granted the participants permission to include this issue in any post-issues conference filings.

#### Post-issues Conference Filings

On September 7, 2007, I received a "supplement to joint petition for full party status and adjudicatory hearing" from Lawrence Levine, Esq. and Daniel E. Estrin, Esq. on behalf of NRDC and Baykeeper, respectively. On September 14, 2007 I received letters dated September 13, 2007, from Michael Murphy, Esq. on behalf of the Airlines and from Kathleen Miller, Esq. on behalf of the Port Authority.<sup>2</sup> On this same date, I received an

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<sup>2</sup> On September 5, 2007, Mr. Murphy requested a one week extension for the post-issues conference filings in order to have additional discussions with the Port Authority regarding the remaining co-permittee/'tenant shall' language. As no one objected to this request, I granted it and other than

undated memorandum from Department staff attorneys Gail Hintz and Terrance Pratt.

In its letter, the Port Authority acknowledges that the issue of co-permittees may not be properly before this forum because DEC did not include it as part of the modification that it initiated. Therefore, in the interest of resolving the permit, the Port Authority agreed to accept the "so-called 'tenants shall' language contained in Special Condition 2, under the heading, 'Permit Limits, Levels and Monitoring - Special Conditions' (page 18); Special Conditions - Best Management Practices: Conditions 5 [sic] 1, 3, 7, 7(A)(ii) and 7(b)(iii) (pages 25 and 27)." Ms. Miller confirms that the Port Authority reached agreement with the Airlines on this matter and that it would not be filing objections to any part of the revised draft permit.

Mr. Murphy confirmed this agreement while noting that the Airlines' agreement not to contest the "tenants shall" language contained in the draft permit does not indicate any admission that this language is enforceable. In his letter, Mr. Murphy advised that the Airlines' agreement is premised on two conditions to which all have agreed. The first is that the Port Authority withdraw its request to adjudicate the co-permittee issue and as noted above Ms. Miller took this step in her letter of September 13, 2007. The second condition requires that all parties agree that the Airlines' decision not to continue to contest the "tenants shall" language shall not constitute an admission or denial regarding the enforceability of these provisions "against the 'tenants and other entities who apply or otherwise use deicing and/or anti-icing materials.'" Mr. Murphy notes that at least in concept, all of the issues conference participants agreed. On September 17, 2007, I received letters from NRDC/Baykeeper and Ms. Hintz confirming their consent. Therefore, these matters are also resolved.

While acknowledging that the co-permittee issue has been resolved, in its post-issues conference memorandum, Department staff provides its legal arguments opposing the adjudication of this issue.

With respect to the water quality standards matter raised by NRDC and Baykeeper, Department staff confirms its position that "narrative water quality standards are incorporated by reference

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NRDC/Baykeeper, the participants submitted their filings on September 14, 2007.

in the State Pollutant Discharge Elimination System (SPDES) draft permit for John F. Kennedy International Airport referenced for public notice on October 12, 2006." The staff refers to language in the draft permit on page 1 that requires discharges to be "in accordance with: effluent limitations; monitoring and report requirements; other provisions and conditions set forth in this permit; and 6 NYCRR [Title 6 of the New York Compilation of Codes, Rules and Regulations] Part 750-1.2(a) and 750-2" and concludes that "[t]hese references set forth the water quality standards that must be met under the permit, and any failure to meet those standards by the Port Authority of New York and New Jersey, as the permittee, will result in a violation of the terms of the SPDES permit, as well as any other applicable laws."

In response to the continuing request of NRDC and Baykeeper to issue the permit immediately based upon the agreed upon terms (in the event there remain items to adjudicate), the staff maintains its position that it will not issue permits "piecemeal." Staff argues that there is no precedent for such action and that due to the interdependency of permit terms, the viability of certain aspects of a permit may be lost if it is not issued based on a resolution of all matters. Staff states that adoption of the suggestion of NRDC and Baykeeper would create problems as to determination of the permit's expiration as well as ripeness for court challenges. Staff also opines that the EPA national pollution discharge eliminations system (NPDES) delegation might be violated by adoption of this procedure.

NRDC and Baykeeper state their withdrawal of proposed issues identified in the May 2007 joint petition as well as the matters raised in their supplement to their joint petition dated July 20, 2007. IC Ex. 20. In footnote 1 to the September 7, 2007 submission, these intervenors state their reservation of rights to seek adjudication of matters concerning the method and timing of sampling of the permittee's monthly discharges as a result of the future modification of the SPDES permit by Department staff once the Port Authority has completed its study. In addition, these intervenors reserve the right to petition DEC pursuant to ECL § 17-0817(5) and 6 NYCRR § 621.13(b) to modify the permit before the expiration of the five-year term based upon the results of the modeling study.

With respect to issue 4 raised in the joint petition regarding the clarification of the permit and water quality standards regulations, these intervenors reiterate my agreement to incorporate into this report the interpretation as agreed to by staff during the August 8, 2007 conference call. In their September 17, 2007 letter to me, NRDC/Baykeeper express

satisfaction with DEC's statement in its September 14<sup>th</sup> filing and repeat the understanding that this interpretation will be contained in this report.

Finally, citing to all the tasks that are not in dispute and which the Port Authority must move forward on, NRDC and Baykeeper requested that the SPDES permit be issued immediately and that the limited dispute then pending between the Airlines and the Port Authority not delay issuance. These intervenors cite to the permit modification proceeding regarding New York City's 14 wastewater treatment plants as precedent. Interim Report of the Administrative Law Judge (Jan. 28, 1994), DEC Case No. 0026131, <http://www.dec.ny.gov/hearings/00579.html> (adopted as decision of the Commissioner, Fourth Interim Decision (Jan. 28, 1994), DEC Case No. 0026131, <http://www.dec.ny.gov/hearings/11579.html>). In their September 17, 2007 letter, NRDC/Baykeeper acknowledge that the resolution of all the disputes makes this request moot.

#### **CONCLUSION and ORDER OF DISPOSITION**

The Department staff, the Port Authority, and the other participants in the issues conference successfully resolved the many technical and complicated matters that the Port Authority and the intervenors raised as potential issues for adjudication. Accordingly, there is no need for an adjudication of any issues.

As set forth in the Department staff's memorandum and discussed above, I confirm that any violation by the permittee of water quality standards is a violation of both the permit and the applicable statute and regulations.

NRDC/Baykeeper and Department staff confirmed in letters submitted to me on September 17, 2007 that they agree with condition no. 2 in the Airlines' September 13, 2007 submission. This condition provides that the Airlines' agreement to not continue to contest the "tenants shall" language in the permit does not constitute an admission or denial regarding the enforceability of such language against the airlines or other tenants that use deicing and/or anti-icing agents.

With respect to the request of NRDC and Baykeeper to issue the version of the permit that represented the agreements so that the Port Authority could move forward on its obligations without waiting for the resolution of the co-permittee issue, as noted by these petitioners, because all the matters have been resolved there is no need to address this matter.

I am remanding the application back to Region 2 staff and the Division of Water for issuance of the permit to the Port Authority as soon as possible.<sup>3</sup> I commend all the participants for their diligence and willingness to work through the issues so that this permit could be issued without further delay.

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<sup>3</sup> Prior to issuing the permit, staff should confirm receipt of the Port Authority's complete certification of compliance with New York City's Local Waterfront Revitalization Plan. The Department staff completed its own coastal assessment form dated June 1, 2006. IC Ex. 1.