STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the New York State Department of Environmental Conservation State Pollutant Discharge Elimination System (SPDES) Renewal Permit, Issued Pursuant to Article 17 of the Environmental Conservation Law (ECL) and Part 750 of Title 6 of the Official Codes, Rules and Regulations of the State of New York (6 NYCRR),

- to -

ROCKLAND COUNTY SEWER DISTRICT #1,

Permittee.

Ruling on Issues and Party Status and Order of Disposition

DEC Permit ID No.: 3-3924-00052/00005

SPDES No: NY0031895

BACKGROUND

Rockland County Sewer District #1 (District or applicant) operates the Rockland County Sewer District #1 Wastewater Treatment Plant (plant or facility) located in the City of Orangeburg, Rockland County, New York. The District holds a State Pollutant Discharge Elimination System (SPDES) permit (NY Permit NY0031895) that authorizes the surface discharge of 29 million gallons per day (mgd) of treated sanitary wastewater from the plant to the Hudson River via outfall 001.

The District's SPDES Permit underwent full technical review before December 2007, and a SPDES permit modification was issued to the District effective December 10, 2007, with an expiration date of December 1, 2008. The permit was renewed effective December 1, 2008, with an expiration date of November 30, 2013. Before the expiration of that permit term, the SPDES permit was modified in 2011 and 2012. On January 10, 2013, the Department sent the District a notice for renewal requesting the District to submit a NY-2A permit application to renew the municipal SPDES permit. On May 22, 2013, the District submitted a timely and sufficient NY-2A permit application, and the permit issued December 1, 2008, as modified on May 1, 2011, was extended pursuant to State Administrative Procedure Act (SAPA) § 401(2). The Department suspended the Uniform Procedures timeframes to conduct a full technical review of the District's SPDES permit pursuant to the Environmental Benefit Permit Strategy. (*See* Issues Conference [IC] Exhibits B at 3, C, D.)

On June 20, 2018, the Department published a notice of complete application in the Environmental Notice Bulletin (ENB), which included information on the proposed changes from the previous permit and where to access the draft permit online. The thirty-day public comment period on the application and draft permit closed with no public comments received by the Department. The District requested, and was granted, extensions to comment on the draft permit. (*See* IC Exhibit B at 4.)

The Department issued a final SPDES Permit with modifications to the District on February 5, 2021 (*see* IC Exhibit A). The District objected to certain modifications of the final permit and by letter dated March 2, 2021 requested a hearing pursuant to 6 NYCRR part 621 (*see* IC Exhibit DDD). The Department's Region 3 office referred the matter to the Office of Hearings and Mediation Services (OHMS) for permit proceedings pursuant to 6 NYCRR part 624 (Part 624), and the undersigned was assigned to the matter.

PROCEEDINGS

In consultation with the District and Department staff, I prepared a Notice of Legislative Public Comment Hearing, Issues Conference, and Deadline for Petitions for Party Status (Notice) for this proceeding. I then arranged to have the Notice published in the Department's Environmental Notice Bulletin on April 14, 2021. Applicant published the Notice in *The Journal News* on April 14, 2021. (*See* IC Exhibits EEE, FFF.)

The Notice advised that the legislative public comment hearing would be conducted electronically through the Webex Events electronic webinar platform on May 20, 2021. The Notice also advised that written comments on the application or draft permit would be accepted if received by OHMS on or before May 27, 2021. Additionally, the Notice advised that the issues conference would be conducted electronically through the Webex Events electronic webinar platform on June 3, 2021. Petitions for party status to participate in the issues conference and, if necessary, the adjudicatory hearing were to be filed with OHMS on or before May 27, 2021. (*See id.*)

Both applicant and Department staff are mandatory parties to this proceeding (*see* 6 NYCRR 624.5[a]). In accordance with 6 NYCRR 624.5(b), and as set forth in the Notice, any other person seeking full party status or amicus status must file a written petition with OHMS. No petitions for party status were received. As directed by the undersigned, the District timely submitted a statement of issues on May 27, 2021 (*see* IC Exhibit GGG). Accordingly, only applicant and Department staff are parties to these proceedings.

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

As stated in the Notice, application materials and the final permit were made available for public review at the Department's Region 3 Office, 21 South Putt Corners Road, New Paltz, New York, and at the Department's Central Office, 625 Broadway, Albany, New York. The documents were also made available on the Department's web site. (*See* IC Exhibit EEE.)

Legislative Public Comment Hearing

I convened the legislative public comment hearing on May 20, 2021, at 1:00 p.m. by Webex Events webinar platform. There were approximately 24 people in attendance, including representatives of the District and the Department. No one pre-registered to speak at the legislative public comment hearing. I advised the people in attendance that if anyone wished to place oral comments on the record, they would be allowed to do so. The record was held open for thirty minutes. No oral comments were received during the hearing. (*See* Legislative Public Comment Hearing Transcript.)

In addition, no written comments were received during the comment period.

Issues Conference

In accordance with the Notice, I convened the issues conference by Webex Events webinar on June 3, 2021, at 10 a.m. Applicant was represented by Steven A. Torres, Esq. and Jillian Jagling, Esq., West Group Law PLLC. Department staff was represented by Ashley Johnson, Esq., Office of General Counsel.

Prior to the issues conference, the parties submitted 56 exhibits that were received into the issues conference record. During the conference, the District presented proposed issues for adjudication regarding permit conditions as well as arguments regarding permitting procedures. Department staff responded to each of the issues and arguments raised by the District. I authorized the parties to file post-issues conference briefs regarding legal questions that were raised at the hearing.

A list of the exhibits submitted by the parties is appended to this ruling. In addition to the exhibits submitted by the parties, during the conference I added IC Exhibits EEE and FFF, the Notices published in the ENB and *The Journal News*, respectively. After the issues conference, I added the District's written statement of issues as IC Exhibit GGG.

Summary of the Positions of the Parties

The District argues that there are issues of law and issues of fact to be adjudicated in this matter. The District further argues there are issues of law dependent upon facts that are in dispute and must be adjudicated. Therefore, the District argues that this matter may only be decided after a full evidentiary hearing on the mixed issues of law and fact. In particular, the District argues that the effluent limitations for ammonia contained in the draft and final permit, are not supported by the facts or law and that the Department should have issued a revised draft

permit based on the District's proposal to reconfigure the outfall that would modify the effluent limit for ammonia contained in the draft SPDES permit. The District also claims that the Department reneged on an agreed upon path forward regarding the District's outfall proposal.

Department staff argues that there are no facts in dispute and that the District has failed to offer opposing facts that would require a hearing. Staff also argues that any legal questions should be resolved in favor of the Department and the final SPDES permit should be undisturbed. Staff argues that the effluent limitations set forth in the final permit are supported by law, and that the proposed compliance schedule provides the District with the time to further develop its proposal to reconfigure the outfall and submit a request to modify the permit. Staff argues the permit, as issued, must be upheld.

Issues Rulings

As previously noted, there were no petitions for party status filed by potential parties. In this matter, where the only parties are the applicant and Department staff, the central purpose of the issues conference is to determine whether disputed issues of fact raised by the applicant require adjudication. The only issues that are adjudicable are those issues that relate to a dispute between Department staff and applicant over a substantial term or condition of the draft permit (6 NYCRR 621.10[a][2]; *see also* 6 NYCRR 624.4(c) (1) (i)]). A secondary purpose of the issues conference in this instance is to determine legal issues whose resolution is not dependent on facts that are in substantial dispute (*see* 6 NYCRR 624.4[b][2][iv], [5][iii]). In this matter, the Department has issued a final SPDES permit with conditions to the District, and the District objected to some of those conditions. Therefore, any objection to a significant permit condition which is based on a factual dispute between Department staff and the District, will advance to adjudication (6 NYCRR 624.4[b][2][iii], [iv]; *see also* DEC Office of Hearings Comments/Response Document on Part 622 and Part 624, Dec. 1993, at 17). Any objection that relates to a legal issue whose resolution is not dependent on factual disputes, will be resolved in this ruling.

Regarding factual disputes, a Part 624 issues conference is akin to summary judgment (*see Matter of Terry Hill South Field*, First Interim Decision of the Commissioner, Dec. 21, 2004, at 9-10). "Similar to summary judgment, the focus is on issue finding, not issue resolution. As provided in the regulations, the issues conference may be used to resolve disputed issues of fact, but '<u>without resort to taking testimony</u>' (6 NYCRR 624.4[b][2][ii] [emphasis added])." (*Matter of Finger Lakes LPG Storage, LLC*, Ruling of Chief Administrative Law Judge on Issues and Party Status, September 8, 2017, at 14.)

In summary judgment proceedings, the New York State Court of Appeals has repeatedly held that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A shadowy semblance of an issue, or bald conclusory assertions, even if believable, are not enough to raise a triable issue of fact (*Metropolitan Bank of Syracuse v. Hall*, 52 AD2d 1084 [4th Dept 1976]). At the issues conference stage evidentiary proof is not required, but the proponent of an issue has the burden of persuading the judge that a disputed issue of fact over a

substantial term or condition of the permit exists. When Department staff demonstrates that the permit at issue is necessary to comply with the law and regulations, and staff has made a prima facie showing that the disputed conditions are supported by the law, regulations and administrative record, the burden shifts to the party, including the applicant, proposing the issue to provide an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or, as in this instance, the challenged condition is required by law and supported by the record such that a reasonable person would inquire further (*see e.g. Matter of Terry Hill South Field*, First Interim Decision of the Commissioner, Dec. 21, 2004, at 10).

In addition, it is well settled that the standard of review of legal issues raised by the parties is:

> "whether the agency's determinations were 'affected by an error of law' (*Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 NY2d 398, 404-405 [1979]). An agency's discretionary acts and policy decisions are reviewed under the 'abuse of discretion' standard and may be set aside only if there is no rational basis for the exercise of discretion or the act complained of is arbitrary and capricious (*see Matter of Peckham v Calogero*, 12 NY3d 424, 430-431 [2009]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [the test is one of rationality]). Similarly, the review of the construction of statutes and regulations by the agency responsible for their administration are adjudged against the rationality and reasonableness standard (*see Matter of Natural Resources Defense Council, Inc. v New York State Dept. of Envtl. Conservation*, 25 NY3d 373, 397 [2015])." (*Matter of Rensselaer Resource Recovery, LLC*, Ruling of the Chief ALJ, December 22, 2020, at 9.)

Discussion

On May 22, 2013, the District submitted a timely SPDES renewal application to the Department (IC Exhibit E). The Department suspended the Uniform Procedures Act (UPA) timeframes to conduct a full technical review of the permit pursuant to the Environmental Benefit Permit Strategy. On May 14, 2018, Department staff advised the District that the draft permit would include new effluent limitations for ammonia (IC Exhibit J). On May 23, 2018, the District submitted a FOIL[1] request for documentation that supported the Department's determination to include the ammonia effluent limits in the permit (IC Exhibit K). On June 20, 2018, the Department published a notice of complete application in the ENB and provided a draft permit for public review and comment in addition to information regarding the proposed changes from the previous permit.

[1] The District requested document production pursuant to the Freedom of Information Act (FOIA) rather the State's Freedom of Information Law (FOIL) (Public Officers Law article 6). Department staff processed the request pursuant to FOIL.

Following the notice of complete application, the District and Department engaged in discussions regarding the necessity for the new ammonia effluent limitations with the District challenging the basis for the effluent limitations (IC Exhibits Y, Z, AA, BB). In part, the District argued that the mixing zone analysis was outdated. The District provided a new mixing zone analysis in May 2019, which determined there was a slightly higher dilution, but the improvement was not significant (IC Exhibits B at 5, GG). In addition to the mixing zone analysis, the District also indicated it was considering a change to the outfall design. As a result of meetings between the parties, staff asked the District to propose a schedule for submitting an evaluation of the feasibility of the proposed outfall diffuser, including a quality assurance project plan for a mixing zone analysis and a constructability analysis for the outfall design. (IC Exhibit II.)

The District submitted a proposed schedule on May 24, 2019. On June 11, 2019, Department staff advised the District that the schedule was acceptable with the following changes: the District must submit an approvable outfall design, along with required elements, by August 2, 2019, and must submit an approvable constructability analysis by October 3, 2019. At that point, the Department advised the District, "[a]ssuming the above deadlines are met and NYSDEC approves the constructability analysis, NYSDEC will proceed to publicly notice a revised draft permit that contains conditions consistent with the constructability analysis, including water quality based effluent limitations for Ammonia and TRC [total residual chlorine]." The Department further advised the District, "[i]f all information has not been supplied by October 3, 2019 and there is no agreement on the draft outfall design, NYSDEC will proceed to issue the final permit as publicly noticed on June 20, 2018, with dilution reflective of the current outfall. The permit would also contain a schedule of compliance with an alternatives analysis to provide time to meet the final effluent limitations for Ammonia and TRC. An alternative may include the modification of the outfall under the schedule of compliance. If that alternative becomes viable, you may request a modification of the permit to reflect the dilution of the chosen alternative." (IC Exhibit JJ.)

On August 2, 2019, the District submitted a draft outfall design and mixing zone analysis. The District also determined that a new outfall construction would involve various State and federal permits and further SEQRA review. (IC Exhibit OO.) Department staff determined the mixing zone analysis was incomplete, and the District submitted the missing items on September 17, 2019 (IC Exhibits B at 5, PP). By letter dated September 30, 2019, Department staff accepted the mixing zone analysis, subject to the Department's recalculation of the chronic dilution ratio (from 55:1 to 53:1) and determined that the construction of the proposed outfall would result in final ammonia as N effluent limits of 19 mg/L and 4,600 lb/d for summer and 38 mg/L and 9,200 lb/d for winter. The Department also advised the District that the final TRC limits would remain at 0.5 mg/L because the current technology in place is capable of meeting the effluent limitation, and that no other parameters would be affected by the change in dilution and agreed that the proposed outfall design concept was feasible. The Department further advised the District that dilution alone may not be sufficient for meeting the ammonia limits and recommended that sampling be conducted to assess the facility's current operations. (IC Exhibit SS.)

The September 30, 2019, letter extended the October 3 deadline to October 10 and expressly stated:

> "Consistent with the Department's June 11, 2019 letter, the Department expects the October 10, 2019 submission to include the following:
>
> > "1. Notification that the District intends to pursue outfall improvements.
> > "2. Listing of all permits that will be necessary for the project.
> > "3. A constructability analysis that considers both the permitting viability and the physical constructability of the final outfall.
> > "4. A reasonable schedule for the permitting and construction of outfall improvements.
> > "5. A reasonable schedule for assessing the WWTP's existing performance and identifying improvements.
>
> "By October 31, 2019, the District must submit a permittee-initiated modification request with final versions of all supporting documentation. Following receipt of the submission, the Department will modify the draft permit to include the limitations identified above and a modified Schedule of Compliance based on the schedule submitted as Item 4 above and agreed to by the Department.
>
> "Department acceptance of the conceptual design is contingent upon similar acceptance by other permitting authorities. If changes are necessary due to other regulatory requirements, a modified CORMIX model will need to be submitted and accepted by the Department. Modifications to the CORMIX model may result in a modified dilution." (IC Exhibit SS.)

The deadline for submitting the constructability analysis was further extended until October 17, 2019. The District timely submitted the analysis which provided an overview of the anticipated various State and federal permits required for the construction of the outfall and SEQRA review of the project. (IC Exhibits B at 5, TT.) The District, however, did not submit a permit modification request. (Issues Conference Transcript [IC Transcript] at 46, 112; Department staff's post-issues conference brief [Staff's Brief] at 16, 19.) In addition, the Department did not approve the constructability analysis referenced in the June 11, 2019 letter. (IC Transcript at 111.)

In February and March of 2020, Department staff and the District discussed how the District could move forward with the proposed outfall design in compliance with the SPDES framework and the UPA. By letter dated May 22, 2020, the District requested the Department to change the status of the SPDES permit renewal application from complete to incomplete based on the new information provided to the Department regarding the proposed reconfiguration of the outfall and the need for SEQRA review of that proposal. The District explained that upon the submittal of a draft environmental impact statement (DEIS), the SPDES permit renewal application would be complete and the Department could re-notice the draft permit as modified. The District further requested that the Department allow the SPDES and SEQRA process to run

"concurrently, and upon issuance of a Final FEIS, issue the final permit, as modified." The District provided a memorandum of law in support of the District's request. (IC Exhibit WW.)

In August 2020, the parties met to discuss the matter. Staff explained that there was no basis to change the status of the renewal permit application from complete to incomplete because the permittee had not submitted a permit modification application to the Department for review. (IC Exhibit B at 6.)

The District continued to provide comments on the draft permit and fact sheet, which were addressed or otherwise responded to by Department staff (IC Exhibit AAA). In a January 28, 2021, correspondence to the District's chairman, the Department's Regional Director noted that based on the District's submissions, the District was not ready to submit an application to modify the permit because additional time was needed for the District to develop the applications and supporting plans and implement SEQRA review. The Director also explained that Department staff's final SPDES permit would allow the District the flexibility to seek modification of the permit because the schedule of compliance allows time for the District to submit a basis of design engineering report and apply for the modification consistent with the District's own projected timeframes. In addition, the Director explained that the additional information provided by the District was not submitted during the Department's review of the permit renewal application for completeness but was submitted to evaluate whether modifying the facility and the SPDES permit was feasible. Because the District had not submitted a modification application, the additional information cannot be considered for the purpose of determining completeness. (IC Exhibit BBB.)

On February 2, 2021, the District opined that the ammonia effluent limits for the proposed diffuser, as determined by Department staff in the September 30, 2019 letter, should be included in the final permit rather than the effluent limits included in the draft permit (IC Exhibits SS, CCC).

As noted above, the Department issued the final SPDES permit to the District on February 5, 2021. The permit includes effluent limitations for ammonia (as N) of 5.8 mg/L and 1,400 lb/d (June 1-Oct. 31) and 12 mg/L and 2,900 lb/d (Nov. 1-May 31) subject to footnote 4. Footnote 4 reads, in relevant part, "For ammonia an interim limit of 'monitor' is effective until the treatment system is upgraded to the [sic] meet the final WQBELs. See compliance schedule for more details." (IC Exhibit A at 1, 5, 7.)

The compliance schedule provides the District three years from the effective date of the permit to complete the following:

> "The permittee shall submit an approvable Basis of Design Engineering Report, prepared by a Professional Engineer licensed to practice engineering in New York State, identifying a selected design to meet final effluent limitations for ammonia and TRC, as set forth in the Permit Limits, Levels, and Monitoring table of this permit or as may be modified through a permittee-initiated modification request. The Basis of Design Report shall contain a schedule for submission of approvable Engineering Plans and Specifications. The Basis of Design Engineering Report

shall, by this reference, be made part of this permit once approved by the Department.

"Should the selected design identified in the Basis of Design Engineering Report necessitate changes to the SPDES permit, including effluent limitations, permittee shall submit a SPDES permit modification request (NY-2A) with all of the necessary supporting information for the Department to consider and process that request. The supporting information shall include any applications for related permits and a completed SEQR analysis." (IC Exhibit A at 17.)

In addition, the interim effluent limits for ammonia (as N) require the District to monitor the effluent. (*Id.* at 18.)

The District's Proposed Issues for Adjudication

In its pre-issues conference statement of issues, the District proposed the following as "issues in dispute":

"1. RCSD was denied the procedural protections of the Uniform Procedures Act to run the SPDES Renewal Process concurrent with SEQR review based upon additional information regarding configuration of outfall affecting effluent permit conditions. The Department requested and received new and additional information from the District during its review of the SPDES renewal application.
"2. In applying the applicable, Water Quality Standard and generating a Water Quality Based Effluent Limitation for Ammonia, NH-3, applicable to the Final Permit, the NYSDEC failed to properly conduct site based testing or conduct a reasonable potential analysis to determine that ammonia discharge in excess of the limit prescribed in the Final Permit would cause harm to the protected interest in the class of waters at the discharge point.
"3. NYSDEC failed to establish, as a factual and scientific matter, that ammonia limits in excess of those prescribed in the Final Permit have the reasonable potential to cause harm.
"4. NYSDEC acted in an arbitrary and capricious manner in reneging on its commitments contained in both the June 11, 2019 and September 30, 2019 letters to reissue a Draft Permit upon receipt of the Constructability Analysis from the District, since, as a factual matter, precedents exist for such practice.
    "a. Nothing in the UPA or SEQR statutes or regulations prevented NYSDEC from issuing the Draft Permit as it committed to doing in the September 30, 2019 letter.
    "b. As a factual matter, SPDES permit renewals or applications and SEQR review have been permitted and conducted simultaneously for other project applications in NYSDEC permitting history.
    "c. As a factual matter, NYSDEC has a history in practice of issuing Final Permits that contain effluent limits or conditions that rely for their implementation on design and construction otherwise subject to yet-to-be-conducted SEQR review.
"5. Unlike other lower-Hudson facilities burdened with stricter ammonia limits, no cost benefit analysis considering the ratepayers in the service area was conducted for the Rockland County facilities that use Outfall 01.

"a. The economic impact to upgrade the District's Wastewater Treatment Facility to reduce ammonia effluent to the concentrations prescribed in the Final Permit is excessive based upon the lack of reasonable potential to cause harm to protected interests identified in the Act.

"b. This failure to afford the District and its ratepayers the same cost/benefit analysis process before imposing significant capital costs, given the lack of potential toxicity is an arbitrary and capricious act.

"6. NYSDEC, without explanation, also failed to properly address or adjust numerous other concerns raised by the District in its comments on the Draft and Final Permits, including but not limited to:

"a. The 12 Month Rolling Average for total flow was changed despite being in place prior to the Administrative Consent Order regarding the District's inflow and infiltration (which consent order has been resolved favorably to the District).

"b. In Footnote 5 of the Permit, without explanation or justification, the NYSDEC added "Action Levels" and additional monitoring requirements not contained in the prior permit.

"c. In Footnote 6 of the Permit, the NYSDEC added "Acute" to WET testing when the prior permit contained only Chronic WET." (IC Exhibit GGG.)

In its post-issues conference brief, the District framed its issues for adjudication as follows:

" a. Whether the District is entitled to an adjudicatory hearing as a matter of right because it disputes the necessity for and the process used by the Department to develop the water quality based effluent limitation for ammonia, including the procedures used for water effluent testing.

"b. Whether the Department acted arbitrarily and capriciously in its failure to allow a concurrent State Pollutant Discharge Elimination Systems and State Environmental Quality Review process to occur, substantially prejudicing the District's rights under both laws.

"c. Whether the District was denied procedural protections under the Uniform Procedures Act when the Department failed to issue a revised permit with the ammonia effluent limitations agreed upon through the construction of a diffuser." (Rockland County Sewer District No. 1 Post-Issues Conference Brief [District Brief] at 1.)

1. Uniform Procedures Act (UPA) and State Environmental Quality Review Act (SEQRA)

The District argues that it was denied the procedural protections of the UPA to run the SPDES permit renewal process concurrent with SEQRA review of the District's proposal to reconfigure the outfall for the facility. The District takes the position that because the District submitted additional information proposing a reconfiguration of the outfall that would change the permit effluent limits for ammonia, the Department was required to rescind its completeness determination and notice a revised draft permit. Because the reconfiguration of the outfall would require additional permits from the Department, the District argues that the Department is also required to allow SEQRA review for the outfall reconfiguration and associated permits to be performed concurrently with the review of the revised draft SPDES permit.

The District cites ECL 70-0109 and 6 NYCRR 621.3 to support its argument that the clock restarted on the Department's review of the SPDES renewal application when the District submitted new information to the Department exploring the permittability of an outfall redesign to meet ammonia effluent limitations (District Brief at 11-13). ECL 70-0109(1)(d), relied upon by the District, reads, "the resubmission of the application or the submission of such additional information shall commence a new fifteen calendar day period for department review of the additional information for purposes of determining completeness." Because the proposed outfall reconfiguration required addition permits and SEQRA review, the District also argues that Department staff's determination that the renewal application remained complete was contrary to 6 NYCRR 621.3(a)(7). Paragraph 621.3(a)(7) provides, for projects subject to SEQRA and the requirements of 6 NYCRR part 617, that an application is not complete until a completed environmental assessment form has been submitted and a lead agency has been established; and a negative declaration or conditioned negative declaration has been filed, or a DEIS has been accepted by the lead agency. Where the Department is the lead agency and requires a DEIS from the applicant, the application is not complete until the Department determines that the DEIS is acceptable for public review.

The District argues that the newly submitted information related to the outfall reconfiguration caused two things to happen. The information submission "moved the application from a completed, to an incomplete status" and "triggered a new clock for completion of compliance items, including the submission of a DEIS" (*see* IC Exhibit WW, memorandum of law at 7, citing ECL 70-0109[1][d]; *see also* District Brief at 14). The District argues that the Department has the discretion to rescind its notice of complete application, and submits that the Department should have exercised that discretion and rescinded the completeness determination to allow the District more time to develop its proposed outfall design while the previous SPDES permit would continue in effect pursuant to SAPA. (District Brief at 12-13).

For the first time in its brief, the District argues that 6 NYCRR 624.4(c)(7), which states, in part, that the completeness of an application will not be an issue for adjudication, is contrary to the legislative intent of the ECL. The District argues that the law authorizes the Department to request information, while the prohibition on litigating completeness denies the applicant the procedural protections of the law that mandates a new completeness review. (District Brief at 14.) The District claims to understand the provisions for modifications and variances, "but the dispute here lies with factually, whether the Department could and should have rescinded its completeness determination" (*id*. at 15).

Department staff argues that there are no disputed facts regarding the UPA and SEQRA, and the District's proposed procedural roadmap is legally deficient. Department staff argues that an application to modify the SPDES permit would be required for the District's proposed outfall redesign project and any potential new effluent limits would not go into effect until the proposed outfall diffuser project was completed. It is undisputed that the District to date has not submitted a modification application for the proposed outfall project. Staff further points out that any modification request in this instance will require other permit applications that must be submitted

simultaneously with the SPDES modification request, which also have not been submitted by the District. (Staff Brief at 16-18.)

Department staff also argues that staff did not request "additional information" for the purposes of Part 621 or the UPA. According to staff, the District is incorrectly framing the legal issue around a proposed future project that is speculative and not pending before the Department in a permit application of any sort. Department staff cites provisions of the ECL and Part 621 in support of staff's position that any information regarding the proposed outfall reconfiguration provided by the District was not additional information necessary to review the renewal application or make findings or determinations required by law related to the SPDES renewal application. The Department cannot make a completeness determination regarding a modification request until the request is actually submitted. (*See* Staff Brief at 19-21, citing ECL 70-0109[1][d], 70-0117[2]; 6 NYCRR 621.4, 621.6, 621.14[b], 750-1.6[d]). In short, the discussions and information related to a proposed reconfiguration of the District's outfall were not part of the SPDES renewal application or necessary for the Department's review of the renewal application (Staff Brief at 19-20.).

Department staff argues that the District's objections to 6 NYCRR 624.4(c)(7) are beyond the scope of this proceeding because those objections need to be raised in a CPLR Article 78 proceeding. Because the regulation has been in effect since at least January 1994, staff argues that any court challenge to the regulation would also be untimely. Staff also notes that the Office of Hearings Comments/Response Document on Part 622 and Part 624 (Dec. 1993) at 20-21, rejects the notion that completeness should be adjudicated. (Staff Brief at 22.)

Discussion

The issue presented by the District is not a factual dispute over a substantive condition of the permit. The District's reading of ECL70-0109 is not supported by the law or administrative record in this matter. The Department determined the application was complete on June 20, 2018. Nothing in the language of the statute implies that additional information provided after a completeness determination automatically moves the application to an incomplete status. The District is correct that the Department possesses the discretion to rescind a notice of complete application. The Department, in its discretion, may decide that additional information submitted after an application is deemed complete raises the possibility that the proposal and permit as drafted will not comply with the law and regulations in a material way and, therefore, cause the Department to rescind the completeness determination and revisit the draft permit. That is not the case here.

Department staff determined that the application was complete, and the draft permit met the legal and regulatory requirements for a SPDES permit. Because the draft SPDES permit includes an effluent limitation for ammonia, the District wanted to explore the possibility of changing the outfall rather than redesigning the treatment facility to meet the new ammonia effluent limitations. The Department entered into discussions with the District regarding the feasibility of the outfall project, which resulted in the development of supplemental information regarding the proposal and submission of that information to the Department. At no time was this information needed to make a completeness determination on the SPDES renewal

application. The District did not revise its renewal application or submit a modification application that included the proposed changes to the outfall. What occurred from May to October 2019 was the conceptual development and review of a proposal that may affect the ammonia effluent limitations if the District decided to move forward with the outfall modifications.

Accordingly, the threshold question is whether the District submitted an application to modify the permit as instructed in the Department's September 30, 2019 letter. To date, the District has not submitted a modification application for the outfall reconfiguration that would trigger new UPA timeframes and SEQRA review. In addition, there is nothing in the record indicating that the District has applied for the other State and federal permits needed for the construction of a new outfall. Because the District has not submitted a permit modification application, the District's proposal is not before me, and the proposal remains speculative.

It is also noteworthy that Department staff does not direct permittees to pursue any specific technology to meet effluent limitations. Permittees are allowed the flexibility to choose their own preferred treatment technologies or alternatives to meet permit limits. (IC Transcript at 116; Staff Brief at 15.)

More importantly, Department staff provided the District with a procedural path forward when staff's September 30, 2019 correspondence advised the District to submit a permittee-initiated modification request by October 31, 2019, with final versions of all supporting documentation. Following receipt of those submissions, the Department would modify the draft permit to include the ammonia effluent limitations referenced in the letter and a modified schedule of compliance. The District did not submit the modification request. When it became apparent to Department staff that the District was not ready to move forward with the modification request, the Department issued the final SPDES permit as referenced above. Contrary to the assertions of the District, Department staff continues to provide the District with a procedural path forward by including a compliance schedule in the final SPDES permit for the District to submit a permittee-initiated modification request for redesigning the outfall, which if completed and the dilution ratio changes as anticipated during the conceptual review, a new water quality based effluent limitation (WQBEL) for ammonia will be calculated. The permit does not require the District to meet the new effluent limits for ammonia. The permit only requires the monitoring of ammonia until completion of the compliance schedule items.

The District argues that the Department has the discretion to rescind the notice of complete application and, given the additional information provided by the District, the law also mandates that the Department rescind the notice of complete application. The District also argues Department staff was arbitrary and capricious when it did not exercise its discretion as requested by the District. The District's reading and application of the ECL and regulations is not supported by the plain language of the law. There is nothing in the ECL or regulations that supports or would result in an automatic rescission of a notice of complete application when an applicant submits additional plans for staff's conceptual review that are outside the scope of the renewal application. I conclude that Department staff acted reasonably in rejecting the District's request to rescind the completeness determination. I also find the District's argument that the District was denied procedural protections under the UPA when the Department failed to issue a

revised permit with the ammonia effluent limits associated with a yet to be proposed or constructed diffuser is without merit. The record in this matter demonstrates that the District was provided a procedural path forward consistent with ECL article 70 and 6 NYCRR part 621, but the District failed to submit the required modification request. I conclude that the District was provided the procedural protections of the UPA.

Pursuant to 6 NYCRR 624.4(c)(7), completeness of a permit application is not an issue for adjudication. The District argues that provision is contrary to the legislative intent of the ECL. In support of its position, the District provides a statutory construction argument regarding an agency's interpretation of its own regulations (District Brief at 14-15). The law, however, is well settled, "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 NY2d 577, 583 (1998); *see Matter of Jansen Ct. Homeowners Assn. v. City of New York,* 17 AD3d 588, 589). The language of paragraph 624.4(c)(7) is unambiguous, clear on its face, and requires no interpretation by Department staff or an administrative law judge. As discussed above, there is no language in the ECL or 6 NYCRR part 621 that mandates or implies an automatic rescission of a notice of complete application as presented by the District. Therefore, the argument that 6 NYCRR 624.4(c)(7) is contrary to the legislative intent of the ECL is without merit.

Although it is well settled that "the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of 427 W. 51st St. Owners Corp. v Division of Hous. & Community Renewal,* 3 NY3d 337, 342, [internal quotation marks omitted]; *see Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Envtl. Protection of City of N.Y.,* 11 NY3d 327, 334, ; *Matter of Visiting Nurse Serv. of N.Y. Home Care v. New York State Dept. of Health,* 5 NY3d 499, 506,), it is also clear that "courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" (*Matter of Visiting Nurse Serv. of N.Y. Home Care,* 5 NY3d at 506). Here, I conclude that the District's statutory and regulatory arguments propose a construction that conflicts with the plain meaning of the law and regulations.

Accordingly, I conclude that the District's argument that the plain language of 6 NYCRR 624.4(c)(7) is contrary to the legislative intent of the ECL is without merit as a matter of law. The prohibition on litigating completeness determinations is clear, unambiguous and needs no interpretation. It is also notable that paragraph 624.4(c)(7) is a shield protecting applicants from collateral attacks on the completeness of an application from potential intervenors. Such attacks would cause unreasonable delay and uncertainty in the permitting process. (*See e.g. Matter of Bath Petroleum Storage Facility*, Interim Decision of the Deputy Commissioner, November 6, 2000, at 6-7.)

> "The purpose of the prohibition where an application is deemed complete is to give an applicant comfort and certainty that its application cannot be undone at the hearing stage, i.e., assertions by intervening parties to adjourn the hearing on incompleteness grounds. *See, Matter of Applications of Department of Sanitation Southwest Brooklyn Incinerator*, Interim Decision, March 2, 1994. "...the

> completeness determination...is intended to reflect the point at which the application contains sufficient information to commence regulatory review." *Matter of LaFever Excavating, Inc.*, Interim Decision, October 28, 1991. "...once the completeness determination is made, there is no turning back." *Matter of Applications of NYC Department of Environmental Protection*, Preliminary Ruling of ALJ, March 24, 1994; *See also, Matter of Applications of Fulton County Board of Supervisors*, Decision of Commissioner, February 13, 1987." (*Id.*)

The record supports Department staff's completeness determination on the District's SPDES renewal application, and nothing has been presented that would lead me to determine staff exercised its discretion in an unreasonable manner in making a completeness determination in the first instance and in declining to rescind its completeness determination when requested to do so.

I have reviewed the District's arguments related to SEQRA and SAPA, and find those arguments are without merit. If the District had submitted a timely modification application, then concurrent SEQRA review of the proposed outfall reconfiguration and associated permits would be an appropriate course. The District argues that the new information regarding the proposed outfall configuration triggered SEQRA review and required the Department to pause the renewal application until the SEQRA process began (Rockland County Sewer District No. 1 Post-Issued Conference Reply Brief [District Reply Brief] at 6-7). The District's argument ignores the fact that it is an application that triggers SEQRA review not the review of a speculative proposal to determine whether the proposal is feasible in the first instance. Section 617.3(c) of 6 NYCRR states that "[a]n application" for agency approval of a Type 1 or Unlisted action will not be complete until either a negative declaration or draft environmental impact statement has been accepted by the lead agency. The District did not submit an application related to the outfall diffuser. The District's proposal provided information "on the development of the model information to determine the permittability of a new effluent diffuser" (IC Exhibit OO at 1). The District stated that the proposal will require a number of federal and State approvals, and "the project would likely receive a Positive Declaration and require preparation of an EIS. The SEQRA process can take up to a year and require scoping, public hearings, preparation of DEIS, comments, FEIS, and findings." (IC Exhibits OO at 6-7, TT at 2-4.) The District's own submissions recognize that the SEQRA review will occur if the District decides to move forward with the proposal after the Department has provided comment on the conceptual proposal.

It also clear that it is the construction of the diffuser that will likely result in a positive declaration and preparation of a DEIS, not the modification of the SPDES permit by itself. The District's submissions associate the SEQRA review with the other relevant State permits and do not list modification of the SPDES permit as one of those permit applications (*see* IC Exhibits OO at 6-7, TT at 2-4). The final SPDES permit's compliance schedule states, in part:

> "The permittee shall submit an approvable Basis of Design Engineering Report, prepared by a Professional Engineer licensed to practice engineering in New York State, identifying a selected

> design to meet final effluent limitations for ammonia and TRC, as set forth in the Permit Limits, Levels, and Monitoring table of this permit or as may be modified through a permittee-initiated modification request. The Basis of Design Report shall contain a schedule for submission of approvable Engineering Plans and Specifications. The Basis of Design Engineering Report shall, by this reference, be made part of this permit once approved by the Department.
>
> "Should the selected design [e.g. diffuser] identified in the Basis of Design Engineering Report necessitate changes to the SPDES permit, including effluent limitations, the permittee shall submit a SPDES permit modification request (NY-2A) with all of the necessary supporting information for the Department to consider and process that request. The supporting information shall include any applications for related permits and a completed SEQR analysis." (IC Exhibit A at 17 [emphasis added].)

It is only if the selected design necessitates changes to the SPDES permit, that the permittee must submit a permit modification request. If the selected design does not require changes to the permit, a modification request is not required and the SPDES permit is not part of or reliant upon SEQRA review required by other permit applications. As it stands, SEQRA review of the modified outfall will occur when the District applies for the permits needed to construct the diffuser. After that the District may submit the SPDES modification request and applications for related federal and State permits together with the completed SEQRA analysis, as provided in the final SPDES permit's schedule of compliance, assuming changes to the SPDES permit are needed. Until that time, the District's proposal remains speculative. Therefore, the District's rights under the UPA and SEQRA have not been prejudiced as argued by the District.

I conclude that Department staff demonstrated a rational basis for staff's exercise of discretion and application of the law and regulations. Nothing in the record before me supports a conclusion that Department staff acted arbitrary and capricious when staff offered to publicly notice a revised permit after the District submitted a permittee-initiated modification request — a condition precedent that has not occurred. Department staff did not abuse its discretion in issuing a final permit that included a compliance schedule providing a procedural path forward consistent with the law and regulations, notwithstanding the fact that issuance of the permit was not to the liking of the District. Moreover, I conclude there are no issues of fact regarding these proposed issues that would require adjudication.

Ruling: The provisions of the ECL, SAPA and SEQRA did not preclude Department staff from declining to rescind the notice of complete application or issuing a final SPDES permit. I conclude that staff's issuance of the final SPDES permit to the District is supported on this record, staff's application of law was not in error and staff did not abuse its discretion. Because Department staff included a schedule of compliance consistent with the District's proposed timeframes, I conclude there was a rational basis for issuing a final permit when, as

here, the District failed to submit a modification request for more than a year after the October 31, 2019 deadline had passed. As stated above, the District's procedural argument is not a dispute over a substantive term or condition in the final permit.

Department staff's decision to issue the final SPDES permit is supported by the law and regulations, and the District has not identified any error of law or abuse of discretion in the Department's determination to do so. Accordingly, the District's objections and arguments regarding statutory and regulatory procedure, the application of the UPA, SAPA, SEQRA, and 6 NYCRR 624.4(c)(7), and any alleged dispute of facts are rejected as a matter of law and will not advance to adjudication.

2. Ammonia (NH_3)

The District claims it is entitled to an adjudicatory hearing as a matter of right because it disputes the necessity for and the process used by the Department to develop the WQBEL for ammonia (District Brief at 1, 7-9). The District argues that the WQBEL for ammonia as N applied by Department staff and included in the draft and final permit was in error because staff failed to conduct site-based testing and failed to conduct a reasonable potential analysis to determine that ammonia discharged in excess of the limit prescribed in the final permit would cause harm to the protected interest in the class of waters at the discharge point. In addition, the District argues that the Department failed to establish, as a factual and scientific matter, that ammonia limits more than those prescribed in the final permit have the reasonable potential to cause harm. (District Brief at 8-10.)

The District claims that there is a "clear factual dispute as to what ammonia effluent limits are necessary to protect the class SB waters and what facility or infrastructure improvements are necessary to ensure the compliance level of the ammonia effluent at the outfall." (District Brief at 5.) In addition, the District argues that it is Department staff's burden of production on the new ammonia effluent limits (citing *Matter of Entergy Nuclear Indian Point 2, LLC*, Interim Decision of the Assistant Commissioner, August 13, 2008, at 51). The District argues that staff failed to meet its burden of establishing the factual and legal basis for more stringent ammonia standards. (District Brief at 7.) According to the District, it disputes the numerical values in the 1993 mixing zone analysis used by Department staff because staff: (1) failed to use a site-specific evaluation of the discharge and its effect on the receiving waters; (2) failed to properly apply a reasonable potential analysis; and (3) failed to conduct a cost assessment. The District further argues there is no statutory or regulatory requirement that the District provide alternative data to establish a factual dispute. (Id. at 7-8.) In its reply brief, the District argues that, "[c]learly there is a factual dispute as to whether the limits set in the June 2018 [Draft] and the February 2021 [Final] permits are necessary, if lower limits are permitted in the event the diffuser is constructed" (District Reply Brief at 2).

Department staff argues that staff demonstrated the factual basis for the ammonia limits in the SPDES permit and that those limits are necessary to ensure compliance with the Clean Water Act and the SPDES permit program. Staff avers that there are no disputed issues of fact relative to the ammonia effluent limits and that those limits should be upheld as a matter of law. Staff's brief explains that a SPDES permit will contain the more stringent of either the

technology based effluent limits or water quality based effluent limits, and in this instance, there is no technology based effluent limit for ammonia. Therefore, the WQBEL for ammonia must be included in the permit. (Staff Brief at 7-8.)

Site-Based Testing

The District argues that without a site-specific evaluation that the numerical values used in the reasonable potential analysis do not reflect the reality at the outfall. In addition, it is the District's position that the Department must demonstrate ammonia limits above those in the final permit caused harm or had the potential to cause harm to organisms in the vicinity of the outfall. (District Brief at 8.) The District disputes whether ammonia limits above those in the final permit have the reasonable potential to cause harm (*id., citing Matter of Entergy Nuclear Indian Point 2, LLC*, Ruling on Proposed Issues for Adjudication and Petitions for Party Status, February 3, 2006, at 17.)

In opposition to the District's argument, staff explains that when a WQBEL is required for a pollutant to protect water quality, staff calculates the WQBEL following the process outlined in TOGS 1.3.1 E and accounting for the mixing zone conditions at the District's outfall. Staff argues that the District's statement that "the values derived from the 1993 mixing zone data used by the Department in its reasonable potential analysis are arbitrary and lacking a firm basis" is in error on several fronts (Staff Brief at 11, citing District Brief at 8). First, staff argues that the dilution ratios derived from the District's mixing zone data are not used or factored into staff's reasonable potential analysis. Instead, the dilution ratios are used when the WQBEL is calculated. Secondly, staff argues that the 1993 mixing zone data is the District's own data, therefore it is unclear why the District is arguing that the data is arbitrary or lacking a firm basis as argued by the District. Moreover, staff argues the District agreed, during a May 14, 2019, meeting, "that the dilution ratio used to calculate the water quality based effluent limitations for Ammonia and TRC in the draft permit appropriately reflected the current outfall configuration" and the District has not offered anything to contradict that agreement as documented in the administrative record. (Staff Brief at 11; IC Exhibit JJ.)

Staff argues that it was appropriate to consider site-specific data provided by the District. Staff also argues that staff is not required to independently collect site-specific data, and the District has not identified any requirement for the Department to verify "the physical or statistical ambient conditions at the point of discharge of the outfall, such as depth of outfall submergence, pH, river velocity and water temperature" (Staff Brief at 12, citing District Brief at 7). Staff argues it was reasonable for staff to consider the site-specific data provided by the District, including the stream velocity and outfall depth included in the District's mixing zone analysis and effluent data from the District's discharge monitoring reports. Staff also argues that it is reasonable for staff to rely on the District's information as well as the New York City Department of Environmental Protection's annual water quality surveys, which provide the pH, temperature, and salinity of the river. (*Id*. at 11-12.)

Department staff also argues that the District misapplies TOGS 1.1.3 in its arguments because TOGS 1.1.3 provides guidance for derivating from site-specific standards and guidance values. The District has not demonstrated why the area of the Hudson River where the District

discharges should be entitled to a different water quality standard than the standard found in 6 NYCRR 703.5, which was effective on February 16, 2008. Staff argues that TOGS 1.1.3 is not relevant to the setting of the WQBELS or this hearing. The District has not made any showing that the data used by Department staff is inaccurate. (Staff Brief at 12.)

Regarding the District's argument that Department staff has not demonstrated that ammonia limits above those in the permit will cause harm, Department staff argues that there is no law, regulation or policy requiring the Department to evaluate and establish the specific toxicity of ammonia in the District's effluent before a WQBEL for ammonia can be added to the SPDES permit. Staff explains that the toxicity of a pollutant is evaluated when the WQS for that pollutant is being established pursuant to 6 NYCRR 706.1. After the WQS for a pollutant is adopted, Department staff is not required to reexamine whether the pollutant is toxic at each and every SPDES permitted facility. In addition, Department staff does not need to wait until a water quality standard has been violated before a WQBEL can be imposed. (Staff Brief at 12-13, *citing Matter of Orange County Dept. of Public Works*, Decision of the Commissioner, January 29, 2020.)

Reasonable Potential Analysis

The District claims that the "values derived from the 1993 mixing zone data used by the Department in its reasonable potential analysis are arbitrary and lacking a firm basis" (District Brief at 8). The District also claims that the Department failed to show that the limitations included with the proposed diffuser would not meet the applicable water quality standard, and therefore the District disputes the need for and calculation of the stricter ammonia limits. The District argues that the permit will require the District to re-engineer and re-design the treatment plant to meet the new effluent limit. (District Brief at 8-9.) The District references its January 22, 2019, letter to the Department (IC Exhibit Z) as providing clear disputes about the facts, data and methods used by the Department. (District Brief at 7.) The District argues that the staff's reasonable potential analysis does not demonstrate that harm will occur above the permit's effluent limit for ammonia. (District Brief at 8.)

Staff argues that there are no disputed issues of fact regarding the reasonable potential analysis conducted by staff. Pursuant to 40 CFR § 122.44, Department staff, in developing effluent limits, must assess whether a pollutant is or may be "discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality" (40 CFR § 122.44[d][1][i]). Staff explained at the issues conference and in its brief the requirements for conducting a reasonable potential analysis and how that analysis was conducted in this matter. Staff used the effluent data from the District's facility to identify pollutants in the discharge. Staff then determined the maximum amount of a pollutant that could be discharged by the facility (projected instream concentration or PIC) using the District's monitoring data. The PIC is then compared against the WQS for each pollutant in the receiving water body to determine whether the pollutant will be discharged at a level which will cause, have a reasonable potential to cause, or contribute to an excursion above the WQS for that pollutant. If the PIC is higher than the WQS, there is a reasonable potential to cause or contribute to an excursion above the WQS for that pollutant and a WQBEL for that pollutant must be included in the permit to protect water

quality. Department staff's reasonable potential analysis concluded that the District's SPDES permit required a WQBEL for several pollutants including ammonia. (Staff Brief at 7-11; 6 NYCRR 750-2.1[B]; 40 CFR § 122.44[d][1][i]; IC Transcript at 93-95.) In this instance, staff also had to convert ammonia (NH3) to ammonia as N (Staff Brief at 10-11; see also IC Transcript at 104, IC Exhibit B at 17).

Cost Assessment

The District argues that the Clean Water Act and EPA guidance require the Department to consider the economic impact of meeting existing or proposed water quality standards. The District posits that it is not well settled that WQBELS are set without regard to cost. The District argues that because the EPA "logically requires states to consider the economic and social impacts when setting water quality standards, and in the absence of a prohibition on the consideration of cost, the Department should logically do the same when setting WQBELs." (District Brief at 9.) The District alleges that the new effluent limits for ammonia require the District to re-engineer and re-design the treatment plant at a cost of $125 million. Therefore, the District argues it should be allowed to build the outfall diffuser at a significant cost savings to the District. "To require the District to construct, re-engineer and re-design the Treatment Plant at such high costs is unequitable and unfair." (*Id*.)

The District further argues that a cost benefit analysis is required by Department precedent (citing *Matter of Entergy Nuclear Indian Point 2, LLC*, Ruling on Proposed Issues for Adjudication and Petitions for Party Status, February 3, 2006, at 28-29) and that the issue should be joined for adjudication. According to the District, the "denial of the diffuser in light of the economic and environmental factors is arbitrary and capricious." (District Brief at 10.)

Department staff argues that it properly did not consider costs when setting the WQBELs for ammonia. Department staff argues that it is well settled that WQBELs are set without regard to cost (Staff Brief at 13, *citing Natural Resources Defense Council, Inc. v United States Envtl. Protection Agency*, 859 F2d 156, 208 [DC Cir 1988]*; Matter of Orange County Dept. of Public Works*, Decision of the Commissioner, January 29, 2020). Staff argues that the District is conflating the legal framework for adopting water quality standards with the laws governing WQBELs because the District cites federal regulations and guidance documents that address the process for adopting water quality standards, which in the case of ammonia, was adopted in 2008. Furthermore, staff argues that costs are not part of the reasonable potential analysis to determine whether an excursion will occur and a WQBEL is needed. Staff argues that the *Entergy* matters relied upon by the District are inapposite because those matters involved a technology-based permit condition regarding the best technology available (BTA) where costs may be relevant. Staff argues that there is no legal authority to consider costs in developing a WQBEL. (Staff Brief at 13-14.)

Burden of Production

As noted above, the District argues that it is staff's burden of production on permit conditions that differ from the previous permit. The District further argues that the Department "failed to meet its burden of establishing the factual and legal basis for more stringent ammonia

limits, particularly in light of the alternative provided by the District, which was accepted by the Department. (Exhibit SS). The District maintains that the Department is required to provide, but has failed to, sufficient evidence that more stringent ammonia limits are necessary." (District Brief at 7.)

The District also argues that the District spent a great amount of time discussing the potential outfall redesign rather than presenting facts to the Department that would demonstrate the ammonia effluent limitations were in error. The District claims it cannot now be expected to present facts in support of the alleged error because it was focused on discussing a solution to the problem since May 2019. The District claims that it would be prejudiced if the District could not engage in discovery in preparation for an adjudicatory hearing. (*See* District Brief at 6; IC Transcript at 88-89.)

Staff argues that the SPDES permit issued on February 5, 2021 "is appropriately designed to protect the water quality of the Hudson River," and staff has demonstrated "the factual basis for the Ammonia limits in the SPDES permit" and "that the effluent limits for Ammonia are 'necessary' pursuant to the Department's legal responsibilities under the Clean Water Act and the SPDES permit program." (Staff Brief at 7.) Staff further argues that ECL 17-0811(5) mandates that all SPDES permits issued by the Department include provisions that ensure compliance with any limitations necessary to ensure compliance with water quality standards adopted pursuant to State law. (Id.)

Discussion

Burden of production

The District argues that the burden of production falls solely on Department staff in this matter and that the District is not required to present any countervailing facts or expert opinions to advance the disagreement over permit conditions to an adjudicatory hearing. Such an analysis oversimplifies the parties' burdens at the issue conference stage of permit proceedings pursuant to 6 NYCRR part 624. First, the burden of production referenced in the *Entergy* matter cited by the District refers to staff's burden to produce evidence at the adjudicatory hearing in support of staff's position on an issue that has been joined for adjudication. Second, at the issues conference stage, the general rule that an issue is adjudicable "if it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit" (6 NYCRR 624.4[c][1][i] does not mean that the applicant can simply state that the applicant disputes the necessity for the condition or disagrees with staff's calculations or conclusions. The general rule is tempered by the standards applied in a summary judgment proceeding as discussed above.

The Commissioner has previously held that an applicant's bare assertions are insufficient to raise an adjudicable issue (*Matter of the Orange County Department of Public Works*, Decision of the Commissioner, January 29, 2020, at 5). The Commissioner determined that Department staff made a prima facie showing that staff's effluent limitation calculations were consistent with Department guidance, the limitations proposed were appropriate water quality standards for the receiving waters, and the methods that Department staff utilized in its analysis

were authorized and appropriate (*id.*). Accordingly, when staff has made a prima facie showing in support of the imposed permit condition, the applicant must provide an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or whether the challenged condition is required by law and supported by the record. As a result, an applicant is not entitled to an adjudicatory hearing as a "matter of right" simply because it claims there is a dispute over the necessity of a permit condition.

As noted by Department staff, the water quality standard for ammonia discharged to SB waters has been in effect since February 16, 2008 (*see* 6 NYCRR 703.5[f]). As discussed above, Department staff explained how the water quality standard was applied in this matter, explained the data used to conduct a reasonable potential analysis and a mixing zone analysis and calculate the WQBEL for ammonia. In addition, staff explained how staff's analysis was conducted pursuant to federal and State guidance and regulations. (*See* Staff's Brief at 7-13; IC Transcript at 104-106.) Based on the record before me, I conclude staff made a prima facie showing that staff's calculation of the effluent limitation for ammonia is consistent with State and federal law, regulations, and guidance and appropriate for the receiving water body. Staff also demonstrated that the methods and data used by staff in its analysis were supported and appropriate. Staff's analysis and calculations were provided in the draft permit, fact sheet and various correspondence with the District (*see e.g.* IC Exhibits A, B, J, R).

Accordingly, the District must provide an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or, as in this instance, sufficient doubt that the challenged effluent condition is required by law and supported by the record such that a reasonable person would inquire further.

Site based testing

The District does not provide any statutory, regulatory, or legal authority in support of its argument that Department must conduct site-based testing. As Department staff points out, staff used the District's effluent monitoring results and other relevant data provided by the District to determine whether the facility has the reasonable potential to cause an excursion in excess of the WQS for ammonia. Department staff explains that staff used the mixing zone data prepared by the District in 1993, as confirmed by the District in 2019. (*See* Staff Brief at 9-10; IC Exhibits GG, HH; IC Transcript at 102.) Therefore, staff applied a chronic dilution ratio based on the District's site-specific data.

Also revealing is the fact that the District continues to argue that the WQBEL for ammonia that was calculated for the proposed outfall diffuser design should be applied to the final permit rather than the more stringent effluent limit applied to the current outfall. Both calculations are based on the same underlying facts and data sources, and the same reasonable potential analysis, the only difference being the dilution ratio applied to determine the WQBEL for the proposed outfall diffuser. (*See* District Brief at 4, 8; District reply brief at 1-2; IC Exhibit SS.) It is also notable that the District relies on river information that is not site-specific in the District's Outfall Mixing Zone Analysis and Permittability memorandum related to the proposed outfall reconfiguration (*see* IC Exhibit OO).

At a minimum, the District needed to identify who would testify regarding this stated issue, explain what facts or data parameters the witness would testify regarding, and state whether the witness would reach a different conclusion than that of Department staff. The District did not provide any of this information. Instead, the District argues that site-based testing is required. Such a conclusory statement is not enough to join the issue for adjudication.

Ruling: The District failed to raise an adjudicable issue regarding the need for site-based testing. Furthermore, the District offered no authority for the need for site-based testing on determinations by Department staff concerning the reasonable potential analysis or water quality based effluent limitations. Accordingly, site-based testing, beyond the District's own data and outfall information used in this matter, is not required as a matter of law and will not advance to adjudication.

Reasonable potential analysis

As discussed above, a reasonable potential analysis is performed to consider whether a discharge may cause or contribute to an exceedance of a water quality standard. The District did not provide a reasonable potential analysis of its own or provide different numbers or assumptions than those provided by Department staff. The District argues that it should not be required to hire costly experts to refute the Department's data.

As noted above, the Department advised the District in advance that a new ammonia effluent limit would be included in the draft permit consistent with other SPDES permits issued by the Department. The Department explained that the ammonia water quality standard for Class SB waterbodies found in 6 NYCRR 703.5 would be used in the permit by converting ammonia to ammonia as N using EPA *Ambient Water Quality Criteria for Ammonia (Saltwater)-1989* (440/5-88-004), assuming a background concentration of 0 mg/L and applying a dilution ratio using a mixing zone analysis through CORMIX. (*See* IC Exhibit J.) The mixing zone analysis is conducted in accordance with EPA documents and DEC TOGS 1.3.1 "Total Maximum Daily Loads and Water Quality-Based Effluent Limitations" (July 1996) (*see e.g.* IC Exhibit B at 10, 25).

Pursuant to 40 CFR § 122.44, Department staff, in developing effluent limits, assesses whether a pollutant is or may be "discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality" (40 CFR § 122.44[d][1][i]). The analysis, therefore, is whether there is a reasonable potential to cause an exceedance of any State water quality standard, not whether the discharge will cause harm as the District argues. (*See City of Taunton, Mass. v United States Envtl. Protection Agency*, 895 F3d 120, 136 [1st Cir. 2018] [Holding that the EPA did not need to show causation, "EPA needed only to conclude that the further discharge of [the pollutant] had the 'reasonable potential to cause, or contribute to an excursion above any State water standard.' 40 C.F.R. § 122.44(d)(1)(i)" (emphasis in original)"].)

As stated above, Department staff applied the WQS for ammonia in a Class SB water pursuant to 6 NYCRR 703.5 and used the District's effluent monitoring to determine the amount of ammonia the District was discharging to the Hudson River. During the issues conference Department staff explained the reasonable potential analyses that was used and included in the

permit and fact sheet. As found in 6 NYCRR 703.5 (Table 1), the aquatic chronic water quality standard (WQS) for un-ionized ammonia (NH_3) in a Class SB water is 35 micrograms per liter (ug/L) and the aquatic acute WQS is 230 ug/L. Staff converted those water quality standards from NH_3 to ammonia as N by using the pH, temperature and salinity of the Hudson River and multiplying the results by 0.8224 (based on the atomic mass of nitrogen and hydrogen atoms). The resulting WQS, as explained by staff and expressed in the fact sheet, are 0.36 milligrams per liter (mg/L) for summer and 0.72 mg/L for winter. Department staff determined, based on the District's monitoring reports, that the existing effluent quality for ammonia as N was 23 mg/L for summer and 27 mg/L for winter and the projected instream concentration would be 2.6 mg/L for summer and 2.8 mg/L for winter. Accordingly, staff determined there was a reasonable potential for the District's facility to cause or contribute to an exceedance of the WQS for ammonia as N and determined that a WQBEL for ammonia was required. (IC Transcript at 104-106; IC Exhibit B at 17.)

To arrive at the appropriate WQBEL, the WQS is multiplied by the dilution ratio. In this matter, the dilution ratio at the existing outfall was determined to be 16.4 to 1. This results in a WQBEL for ammonia as N of 5.9 mg/L (0.36 mg/L x 16.4) for summer and 12 mg/L (0.72 mg/L x 16.4) for winter. (IC Transcript at 104-107; IC Exhibit B at 17.) During the issues conference, Department staff stated that 5.9 mg/L was included in the final permit rather than the 5.8 mg/L in the draft permit. Department staff also referenced the fact sheet that shows the calculated WQBEL for ammonia as N is 5.9 mg/L for summer. The final permit, however, provided a WQBEL for ammonia as N of 5.8 mg/L for summer. As presented in the fact sheet and at the issues conference, the math is clear, 0.36 times 16.4 equals 5.904. There is nothing in the record explaining why the final permit contains an effluent limit of 5.8 mg/L rather than 5.9 mg/L. In civil matters and 6 NYCRR part 622 enforcement matters, CPLR 2001 authorizes the court to disregard or "correct, sua sponte, any defect, provided any substantial right of the party is not prejudiced." (*See Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 499, 500 [1st Dept 1986].) As noted above, Department staff indicated during the issues conference that 5.9 mg/L was included in the final permit, but as the record shows, it was not. Accordingly, consistent with CPLR 2001, I am sua sponte correcting the effluent limit for ammonia as N in the final permit to 5.9 mg/L for summer. I also conclude there is no prejudice to the District in making the correction because the District was on notice of the calculation included in the fact sheet and allowing a slightly higher effluent limit is to the District's benefit.

The District has not presented facts that are in dispute. Instead, the District makes bald claims and assertions that Department staff did not properly apply the law or regulations in determining the WQBEL for ammonia and that there is no factual or scientific basis for the imposition of an ammonia effluent limit in the District's SPDES permit. The District wrote several emails and letters opposing the ammonia WQS being applied to its facility, beginning with the District's FOIL request submitted in May 2018, request for the Department's CORMIX modeling in August 2018, and the District's challenges to the ammonia effluent limits in January and April of 2019 (*see* IC Exhibits K, P, R, Z, AA, BB, DD, EE). The parties also convened meetings to discuss Department staff's ammonia analysis (*see e.g.* IC Exhibits CC, DD, EE, FF, HH).

Although Environmental Design & Research, Landscape Architecture, Engineering & Environmental Services, D.P.C. (EDR) is copied on correspondence as early as January 2019 and assisted the District in assessing the "permittability of a new effluent diffuser," the District did not identify any witness or describe the nature of the witness's testimony regarding any asserted factual dispute. The District did not object to the proposed ammonia effluent limitations associated with the proposed outfall reconfiguration even though those effluent limitations used the same reasonable potential analysis and data as those included for the current outfall with the exception of the proposed change to the mixing zone analysis and resulting dilution ratio (53:1 dilution ratio for the proposed diffuser rather than 16.4:1 for the current outfall). On February 2, 2021, three days before the issuance of the final SPDES permit, the District wrote,

> "Finally, the District strongly reiterates that it is of the opinion that the Final Limits for ammonia to be contained in the Final Permit should be as described, approved and conditionally accepted in the Department's September 30, 2019 correspondence. That letter provided in relevant part:
>
> "*The Department accepts the District's conceptual design with the corrected chronic dilution. Construction of the proposed outfall would result in final ammonia as N limits of:*
>
> "• *Summer (June 1-Oct 31)-19 mg/L and 4,600 lb/d*
>
> "• *Winter (Nov 1- May 31)- 38 mg/L and 9,200 lb/d*" *(IC Exhibit CCC)*

The District continues to argue that the ammonia effluent limitations for the proposed outfall should have been included in the final SPDES permit (*see e.g.* District Brief at 8; District Reply Brief at 2).

Department staff has made a prima facie showing that the reasonable potential analysis and resulting WQBEL for ammonia as N included in the District's final SPDES permit, as corrected above, is supported by the law, regulations, guidance, and administrative record. The WQBEL for ammonia as N contained in the final SPDES permit is derived from and complies with the WQS for ammonia (NH_3) as required by 40 CFR § 122.44(d)(1)(vii)(A). Similar to a motion for summary judgment, the District must raise a triable issue of fact to have its proposed issue joined for adjudication. In this matter, the District needed to provide more than a shadowy semblance of a factual issue. As stated above, the District needed to identify who would testify regarding this stated issue, explain what facts or data parameters the witness would testify regarding, and state whether the witness would reach a different conclusion than that of Department staff. The District did not do so. I have reviewed the District's claims that Department staff did not properly perform a reasonable potential analysis as required by law or regulations. I have reviewed the detailed arguments made by the District as presented in IC Exhibits Z, ZZ and AAA, at the issues conference and in briefs that purport to raise factual issues in dispute, as well as the District's promises that it will provide proof at an adjudicatory hearing. I conclude that those arguments and promises are not enough.

The District's attempt to fashion a factual dispute because the ammonia effluent limits for the current outfall are stricter than the estimated ammonia effluent limits for the proposed diffuser is specious at best. As discussed above, the final SPDES permit contains ammonia effluent limitations based on the current outfall. If the diffuser is constructed, it is anticipated

that the dilution ratio will change significantly and necessitate a recalculation of the ammonia effluent limitations. No other information in the calculation changes. The fact that the effluent limitation may change in the future does not create a factual dispute that can be advanced to adjudication. At best, it turns into debate over whether a hypothetical effluent limitation for a yet to be chosen alternative should be included in a SPDES permit. I conclude such an outcome is contrary to the law and regulations for the reasons discussed above.

Ruling: The District failed to raise an adjudicable issue regarding Department staff's reasonable potential analysis, and resulting WQBEL, applied to ammonia in the District's effluent. Department staff's reasonable potential analysis and WQBEL calculation are consistent with the law, regulations, and administrative record. Accordingly, this proposed issue will not advance to adjudication. In addition to correcting the effluent limitation for ammonia as N to 5.9 mg/L for summer herein, I am directing Department staff to make the correction in the final SPDES permit and fact sheet.

Cost Assessment

As noted above, the District argues that it is not well settled that WQBELs are set without regard to cost. According to the District, economic impacts are considered when developing water quality standards, and absent a prohibition, that logically the same should occur when establishing WQBELs. In its reply brief, the District further argues that this position is supported by *Entergy Corp. v Riverkeeper*, 556 U.S. 208, 223 (2009), in which the Supreme Court determined that the Clean Water Act does not prohibit the EPA from considering costs related to the best technology available.

The District also argues that it should be allowed to build the outfall diffuser because of the considerable cost savings in pursuing that option. During the issues conference, the District argued that unlike other lower-Hudson River facilities burdened with stricter ammonia limits, no cost benefit analysis was conducted for the Rockland County facilities that use Outfall 001. Because the Department did not demonstrate a reasonable potential to cause harm in establishing the ammonia effluent limit, the District alleges that the Department's failure to provide the District and its ratepayers with the same cost/benefit analysis process, before imposing significant capital costs on the District, is an arbitrary and capricious act.

Department staff pointed out at the issues conference that the cost-benefit analysis referenced by the District was, as staff believes, actually conducted when the WQS for ammonia was being promulgated as part of the rulemaking process in 2008. Staff argues that WQBELs are set without regard to cost (IC Transcript at 146; Staff Brief at 13-14). Staff also argues that there is no legal support for the District's argument that cost considerations should be applied to WQBELs simply because costs are considered in developing a WQS or developing technology-based controls (Staff Brief at 14).

The District's reliance on *Entergy Corp. v Riverkeeper*, is misplaced. That case is narrow in its scope as the Court was reviewing CWA § 316(b) related to thermal discharges and cooling water intake structures used by large electrical generating facilities. Specifically, the

Act requires "that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact (33 USC § 1326[b])." By regulation, the EPA had set national performance standards for new generating facilities (Phase I) and existing facilities (Phase II). The regulation for Phase II facilities also provided for site-specific cost-benefit variances. The Second Circuit determined that the cost-benefit analysis was impermissible under CWA § 1326(b). The Supreme Court limited the issue to: "Whether [§ 1326(b)] ... authorizes the [EPA] to compare costs with benefits in determining 'the best technology available for minimizing adverse environmental impact' at cooling water intake structures" (*Entergy Corp. v Riverkeeper*, at 217). The Supreme Court concluded that "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden" (*id.* at 223) and "that the EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations" (*id.* at 226).

Contrary to the District's position, I conclude that it is settled in the Second Circuit that WQBELs are set without regard to cost or technology availability (*see Natural Resources Defense Council, Inc. v United States Envtl. Protection Agency*, 808 F3d 556, 565 [2d Cir 2015]; *Natural Resources Defense Council, Inc. v United States Envtl. Protection Agency*, 859 F2d 156, 208 (DC Cir 1988); *see also Matter of Orange County Dept. of Public Works (Orange County)*, Decision of the Commissioner, January 29, 2020, at 3-4). The District's reliance on the lack of any prohibition on considering costs is limited in scope by the courts that have applied that analysis. *Entergy Corp. v Riverkeeper* involved an EPA regulation that allowed for a cost-benefits analysis in a very limited situation – new national standards for cooling water intake structures at existing facilities. In this matter, there is no law or regulation that provides for cost-benefit considerations when establishing WQBELs.

Accordingly, I conclude the District's cost argument is without merit as a matter of law. As noted above, Department staff does not direct permittees to pursue any specific technology to meet effluent limitations. Permittees are allowed the flexibility to choose their own preferred treatment technologies or alternatives to meet permit limits. In this matter, the District is being allowed to build its proposed diffuser if the District choses to pursue that alternative. The final permit contemplates this and provides a reasonable compliance schedule for the District to apply for modification of the SPDES permit, obtain other required permits and engage in SEQRA review for the proposed diffuser project. If further flexibility is needed, the District may pursue a variance to provide more time for compliance with the new effluent limits (*see* 6 NYCRR 702.17).

Ruling: The District offered no authority for imposing cost considerations on determinations by the Department concerning water quality based effluent limitations. Accordingly, cost is not a consideration for adjudication.

3. Correspondence of June 11 and September 30, 2019

Connected to the first issue discussed above, the District argues that the Department acted in an arbitrary and capricious manner in reneging on its commitments contained in correspondence dated June 11, 2019, and September 30, 2019, to issue a revised draft permit upon receipt of the constructability analysis for the outfall reconfiguration from the District because precedent exists for such practice. The District argues that nothing in the UPA or SEQR statutes or regulations prevented the Department from issuing a revised draft permit as it committed to doing in the September 30, 2019 letter. In its reply brief, the District states that the Department approved the District's constructability analysis and agreed to lower ammonia limits (District Reply Brief at 1-2).

Department staff argues that the path forward discussed in the June 11 and September 30, 2019, correspondence was contingent upon two conditions precedent that did not occur. First, the June 11 letter expressly states, "Assuming the above deadlines are met and NYSDEC approves the constructability analysis, NYSDEC will proceed to publicly notice a revised draft permit that contains conditions consistent with the constructability analysis, including water quality based effluent limitations for Ammonia and TRC (IC Exhibit JJ)." Department staff states that it did not approve the constructability analysis (IC Transcript at 111). Secondly, as previously mentioned, the September 30, 2019 letter required the District to submit a permittee initiated SPDES permit modification application (IC Exhibit SS). To date, the District has not done so (IC Transcript at 111-112).

The constructability analysis was submitted on or about October 16, 2019. Nothing in the administrative record indicates that the Department approved the constructability analysis. As noted above, Department staff stated at the issues conference that it had not been approved. In staff's response to the District's October 2020 comments on the draft SPDES permit and fact sheet, staff indicated that "DEC did not approve the constructability analysis" (*see* IC Exhibit AAA, Fact Sheet at 5). Moreover, Department staff did not agree to lower ammonia limits. Staff determined that the ammonia limits would change if the proposed diffuser were constructed, and the diffuser resulted in an increased dilution of effluent as calculated based on the District's submissions. As noted above, in Department staff's September 30, 2019, letter, staff stated that upon receipt of a permittee-initiated modification request with final versions of all supporting documentation, staff would modify the draft permit to include revised ammonia effluent limitations based on the proposed outfall diffuser's increased dilution and noted that if changes were made to the conceptual design of the diffuser that the dilution may be modified (*see* IC Exhibit SS).

Again, the District's arguments do not constitute an issue of fact regarding a substantive condition of the permit. It is a continuing objection to the process and procedures involved in the issuance of the final SPDES permit. I find nothing arbitrary and capricious in the Department deciding to issue a final SPDES permit that allows the District several years to submit the agreed upon documentation and modification application when the conditions of the Department's letters were not met. The record supports the reasonableness of Department staff's decision to issue the final SPDES permit and there is no proof that the Department

abused its discretion in doing so.

Ruling: Applicant failed to raise an adjudicable issue regarding a dispute over a substantive term or condition of the final permit. The provisions of the June 11 and September 30, 2019, letters did not preclude the Department from issuing a final permit. I conclude that the Department's issuance of the final SPDES permit to the District is supported on this record. The Department's application of law was not in error nor did the Department abuse its discretion. Because the Department included a schedule of compliance consistent with the District's proposed timeframes, I conclude there was a rational basis for issuing a final permit when more than a year had passed after the October 31, 2019 deadline for the District to submit a modification application.

4. Other permit terms

Lastly, the District alleges that the Department, without explanation, failed to address or adjust numerous other concerns raised in the District's comments on the draft and final permits, including but not limited to:

- The 12-month rolling average for total flow was changed despite being in place prior to the administrative consent order regarding the District's inflow and infiltration (which consent order has been resolved favorably to the District).
- In footnote 5 of the permit, without explanation or justification, the Department added "Action Levels" and additional monitoring requirements not contained in the prior permit.
- In footnote 6 of the permit, the Department added "Acute" to WET testing when the prior permit contained only Chronic WET. (*See* IC Transcript, 148-150, 163-167; IC Exhibit GGG at 5.)

The District did not brief these proposed issues. During the issues conference, Department staff addressed each of these items, providing regulatory support for each of the required conditions (*see* IC Transcript at 150-162). Department staff also briefed these proposed issues, again describing the regulatory requirements and necessity for the conditions in the final permit (*see* Staff Brief at 23-25). In short, Department staff made a prima facie showing that the conditions are supported by the law, regulations, and administrative record.

As noted above, the District must provide an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or, as in this instance, sufficient doubt that the challenged conditions are required by law and supported by the record such that a reasonable person would inquire further. The District needed to identify who would testify regarding these stated issues, explain what facts or data parameters the witness would testify regarding, and state whether the witness would reach a different conclusion than that of Department staff. The District has not done so, but rather takes issue with the fact that these conditions are different from prior permits.

Ruling: The District failed to raise an adjudicable issue regarding total flow, action levels or WET testing. The permit conditions are consistent with the law and regulations. Accordingly, these proposed issues will not advance to adjudication.

Conclusion

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

ORDER OF DISPOSITION

In accordance with 6 NYCRR 624.4(c)(5), further hearings in this proceeding are canceled and the record is closed. Because a final permit was issued, it is normally unnecessary to remand the matter to Department staff. Here, however, consistent with the discussion above, I am directing Department staff to correct the effluent limitation for "Nitrogen, Ammonia (as N, June 1-Oct 31)" to 5.9 mg/L on page 5 of the final SPDES permit (IC Exhibit A) and page 3 of the Fact Sheet (IC Exhibit B).

APPEALS

A ruling to include or exclude any issue for adjudication, or on the merits of any legal issue that is made as part of an issues ruling, may be appealed to the Commissioner on an expedited basis (6 NYCRR 624.8[d][2][i], [ii]). Any appeals from this ruling are to be filed with the Commissioner in writing on or before December 10, 2021, and replies are to be filed on or before December 22, 2021 (*see* 6 NYCRR 624.6[g]; 624.8[b][1][xv]). Appeals and replies should include citations to the issues conference transcript and to documents submitted by the parties during the issues conference and in the parties' post-issues conference briefs and replies.

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

/s/
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
November 17, 2021

To: Service List

Matter of Rockland County Sewer District #1
DEC Application No. 3-3924-00052/00005
SPDES No. NY0031895

ISSUES CONFERENCE EXHIBITS

Exhibit	Description
A	State Pollutant Discharge Elimination System (SPDES) Permit No. NY0031895, issued February 5, 2021
B	SPDES Permit Fact Sheet, Rockland County Sewer District #1, Rockland County Sewer District #1 Wastewater Treatment Plant, NY0031895, dated February 4, 2021
C	SPDES Permit Modification effective October 2012
D	Letter from DEC to RCSD dated January 10, 2013
E	Municipal Application Form NY-2A dated May 22, 2013
F	Letter from DEC to RCSD dated March 11, 2016 with enclosure
G	Email from DEC to RCSD dated April 12, 2018
H	Four (4) Emails from RCSD to DEC dated April 18, 2018
I	Six (6) Emails from RCSD to DEC dated April 18, 2018
J	Email from DEC to RCSD dated May 14, 2018
K	Letter from RCSD to DEC dated May 23, 2018
L	Short Environmental Assessment Form and Negative Declaration dated June 5, 2018
M	Notice of Complete Application dated June 7, 2018
N	Draft permit and fact sheet dated June 7, 2018
O	Affidavit of Publication dated June 27, 2018
P	Letter from RCSD to DEC dated August 6, 2018
Q	Letter from DEC to RCSD dated September 5, 2018
R	Correspondence from DEC to Rockland County dated July 3, 2018 to September 17, 2018

S	Email from DEC to RCSD dated November 9, 2018
T	Email from RCSD to DEC dated November 20, 2018
U	Email from DEC to RCSD dated November 28, 2018
V	Email from RCSD to DEC dated December 7, 2018
W	Email correspondence between RCSD to DEC dated December 14, 2018 to December 28, 2018
X	Email from West Group Law PLLC to DEC dated December 21, 2018
Y	Letter from DEC to West Group Law PLLC dated January 2, 2019
Z	Letter from RCSD to DEC dated January 22, 2019 with enclosure
AA	Letter from Rockland County and Town of Orangetown to DEC dated January 22, 2019 with enclosure
BB	Letter from Rockland County to DEC dated February 27, 2019
CC	Meeting Roster – April 8, 2019
DD	Email correspondence between Rockland County and DEC dated April 8, 2019 to April 10, 2019
EE	Email correspondence between Rockland County and DEC dated April 8, 2019 to April 18, 2019
FF	Letter from DEC to RCSD dated April 22, 2019 with enclosures
GG	Letter from RCSD to DEC dated May 6, 2019 with enclosures
HH	Meeting agenda and roster – May 14, 2019
II	Email correspondence between RCSD and DEC dated May 14, 2019 to May 24, 2019 with attachment
JJ	Email from DEC to RCSD dated June 11, 2019 with attachments
KK	Email correspondence between Environmental Design & Research (EDR) and DEC dated June 17, 2019 to July 2, 2019 with attachments
LL	Meeting invitation – July 2, 2019
MM	Letter from DEC to EDR dated July 8, 2019

NN	Meeting agenda – July 24, 2019
OO	Memorandum from EDR to DEC dated August 2, 2019
PP	Email correspondence between RCSD and DEC dated August 2, 2019 to August 26, 2019
QQ	Meeting agenda – August 27, 2019
RR	Meeting invitation – September 18, 2019
SS	Letter from DEC to RCSD dated September 30, 2019
TT	Constructability Analysis dated October 16, 2019
UU	Meeting Roster – February 7, 2020
VV	Email from DEC to RCSD dated February 12, 2020 with attachment
WW	Letter from RCSD to DEC dated May 22, 2020 with enclosures
XX	Draft permit and fact sheet dated July 10, 2020
YY	Meeting roster – August 25, 2020
ZZ	Letter from RCSD to DEC dated October 7, 2020
AAA	Annotated draft permit and fact sheet dated November 10, 2020
BBB	Letter from DEC to RCSD dated January 28, 2021
CCC	Email from West Group Law PLLC to DEC dated February 2, 2021
DDD	Letter from West Group Law PLLC to DEC dated March 2, 2021
EEE	Notice published in the April 14, 2021, edition of the *Environmental Notice Bulletin*
FFF	Cover letter from West Group Law PLLC, dated April 27, 2021 with Affidavit of Publication in the April 14, 2021, edition of *The Journal News* attached
GGG	Rockland County Sewer District #1 – Statement of Issues