



**Department of
Environmental
Conservation**

Responsiveness Summary

For

Public Comments Received

On the

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

SPDES MULTI-SECTOR GENERAL PERMIT
FOR STORMWATER DISCHARGES
ASSOCIATED WITH

INDUSTRIAL ACTIVITY

Permit No. GP-0-17-004
Modification

Issued Pursuant to Article 17, Titles 7, 8 and Article 70
of the Environmental Conservation Law

March 2020

Introduction

In April 2018, Riverkeeper, Inc. and Waterkeeper Alliance, Inc. (collectively, Petitioners), filed a challenge, under Article 78 of the New York State Civil Practice Laws and Rules, against the New York State Department of Environmental Conservation (Department) and Basil Seggos, in his capacity as the Department's Commissioner. Petitioners challenged the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-17-004). GP-0-17-004 was issued on February 16, 2018 and became effective on March 1, 2018. GP-0-17-004 regulates stormwater discharges from over 1,700 industrial facilities throughout New York State.

The Petition had two causes of action. The first cause of action alleged that GP-0-17-004 authorizes discharges, to impaired waters in New York State, so high in biological oxygen demand (BOD) and chemical oxygen demand (COD) that the discharges necessarily cause or contribute to violations of the dissolved oxygen water quality standard. The Petition's second cause of action alleged that GP-0-17-004 authorizes discharges of polluted stormwater (i.e. with industrial waste or other waste) from industrial facilities into Class AA-Special waterbodies, in violation of the applicable water quality standard at 6 NYCRR 701.3(c). In addition to costs and fees, the Petition asked that the court direct the Department to make changes to GP-0-17-004 within a reasonable amount of time

There are 12 waters in New York State classified as AA-Special. There are 5 facilities with coverage under GP-0-17-004 that discharge to Lake George (affected facilities). Department staff have not identified any facilities with coverage under GP-0-17-004 discharging to any other waters classified as AA-Special.

On July 17, 2018, Department staff visited several of the potentially affected facilities to inform them of the lawsuit and to get a sense of how a negative outcome in the second cause of action would affect them. One of the facilities visited, the Lake George Steamboat Company (LGSC), told Department staff that it planned to file an Amicus brief on behalf of the Department in defense of GP-0-17-004. The Albany County Supreme Court (Court) granted LGSC until October 1, 2018 to file its motion to intervene. By letter, dated September 28, 2018 from attorneys of the LGSC to the Court, Department staff were notified that LGSC had changed its mind and would not be filing an Amicus brief in support of the Department. That letter stated "...upon closer examination and discussion with Petitioners' Counsel, it appears that LGSC is likely exempt from these permit requirements and will not ultimately have any interest in the outcome of this matter." On October 3, 2018, the Department sent a letter to LGSC reminding the owner that the facility was covered by GP-0-17-004 and would be so until a complete Notice of Termination form was received and compliance with all conditions for termination were met. To date, none of the 4 facilities, including LGSC, has filed a Notice of Termination under GP-0-17-004.

On January 23, 2019, the Court rendered a decision finding in favor of the Department on the first cause of action and against the Department on the second cause of action. The Court held that the Department was not arbitrary or capricious in determining that the conditions of GP-0-17-004 are sufficient to protect water quality, in waterbodies in general, as well as in impaired waterbodies. Specifically, the Department acted reasonably in including the same benchmarks for COD and BOD in GP-0-17-004 as established by the United States Environmental Protection Agency (USEPA). The Court also held that the Department acted reasonably in concluding that exceedances of benchmarks are not violations of water quality standards. In support, the Court noted that the corrective actions included in GP-0-17-004, to address any exceedances of benchmarks, go beyond those developed by USEPA.

However, the Court held that the Department is prohibited by its own regulations from allowing discharges of stormwater associated with an industrial activity into Class AA-Special waterbodies. 6 NYCRR 701.3(c) says: “There shall be no discharge or disposal of sewage, industrial waste or other wastes into these waters.” Utilizing the definitions of “industrial waste” and “other waste” (6 NYCRR 700.1(a)(26) and (40)), as well as the conditions of GP-0-17-004, the Court held that the Department recognizes that industrial stormwater runoff is directly related to industrial activities, adding pollutants to the waters of the state. GP-0-17-004 does not provide exceptions or any special protections to ensure that industrial stormwater runoff does not enter Class AA-Special waterbodies.

The Court directed the Department to make changes and issue a final modified GP-0-17-004 within 6 months. In order for the Department to develop a draft modified GP-0-17-004, comply with administrative procedures to issue the final modified GP-0-17-004, and for regulated facilities to implement necessary changes, the Court granted the Department’s request for an extension. Pursuant to the Court’s amended order, dated March 27, 2019, the Department must issue a final modified GP-0-17-004 by July 23, 2020. The current version of GP-0-17-004 is still in effect until the effective date of the final modified GP-0-17-004, which is July 23, 2020. The Department’s request for the additional 12 months was noted in the Court’s October 17, 2019 decision, on a separate action, awarding fees to Petitioners for the underlying Article 78 challenge to GP-0-17-004.

The modifications to GP-0-17-004 are limited to the specific issue in litigation and subject to the Court’s remand. The draft was publicly noticed in the Department’s Environmental Notice Bulletin on September 25, 2019, and in newspapers on October 1, 2019. At the request of affected facilities, the comment period was extended from November 4, 2019 to November 18, 2019. This extension was publicly noticed in the ENB on October 30, 2019. That notice states “[t]he court remanded GP-0-17-004 and directed [the Department] to issue a final modified GP-0-17-004 by July 23, 2020. The extension of this comment period does not change that deadline.” It should be noted that there were numerous requests to extend the comment period through January 31, 2020. Those requests were all denied in order to give the affected facilities as much time as possible to comply with the amendments ordered by the Court.

Pursuant to the modifications to GP-0-17-004, coverage under GP-0-17-004 will terminate on July 23, 2020 for facilities discharging to AA-Special waters. These modifications are necessary to comply with the Court's amended order. Should a facility discharging to AA-Special waters decide to certify to No Exposure, it must do so by June 23, 2020. The Department is issuing the modifications to GP-0-17-004 now in order to provide affected facilities with time to come into compliance with the permit conditions in the final modified GP-0-17-004.

The Department prepared this responsiveness summary to address all comments that were timely received on the draft modifications to GP-0-17-004. Pursuant to 6 NYCRR 750-1.18(d), only the aspects of GP-0-17-004 proposed to be modified are subject to public review. Comments received on areas of GP-0-17-004 that were not part of the draft modifications may be considered in the drafting of the renewal of GP-0-17-004. Frequently raised issues are summarized and presented as one set of comments. A list of commenters is included at the end of the summary with commenter(s) referenced at the end of each comment. Additionally, many commenters interpreted and referred to the permit modifications as regulatory changes. No regulation is being changed or introduced.

Response to Comments

Comment 1: Draft Modification does not comply with 6 NYCRR 701.3

DEC's Draft Modified Permit provides language in Part I.C., entitled "Activities which are Ineligible for Coverage under this General Permit", that is not consistent with the Supreme Court's Order because it does not include discharges of "other wastes". Without a specific prohibition on discharging "other wastes", or a general prohibition on discharging stormwater associated with industrial activity, to Class AA-Special waters, the Draft Modified Permit, as written, could be mistakenly read to authorize discharges that contain "other wastes" into Class AA-Special waters in violation of 6 NYCRR § 701.3 and the Supreme Court's Order. (Super Law Group)

Response:

In response to this comment, changes were made to the language in Part I.C of the final modified GP-0-17-004 to reflect the Court's amended order. The ineligibility criteria now reads (underlined text has been added):

"Discharges of industrial waste and other wastes to Surface Waters of the State that are classified as AA-Special fresh surface waters as defined in 6 NYCRR Part 800 to 941."

Comment 2: Additional Time is needed to Comply:

Several comments were received asserting that more time is needed to comply and requesting that DEC continue to work with impacted facilities and other stakeholders to provide fair and reasonable time frames related to

implementation and enforcement. (F.R. Smith & Sons, Meyer, Fuller & Stockwell, Lake George Regional Chamber of Commerce, Queen Boat Co., Senator Betty Little, Adirondack Chamber of Commerce, Performance Marine Service Inc., Town of Bolton, YMCA Glens Falls)

Response:

As noted in the introduction, these changes are being made in response to a court order. The Department does not have discretion to provide more time beyond that which was granted in the Court's amended order. Pursuant to the Court's amended order, the Department must issue a final modified GP-0-17-004 by July 23, 2020, consistent with the Court's holding regarding the application of 6 NYCRR 701.3(c).

There were 9 facilities on Lake George that had coverage under GP-0-17-004 when the draft modification was publicly noticed. Since that time, some of those facilities have taken the steps such that they no longer have coverage. It is important to note that some of these facilities have certified "No Exposure", demonstrating that it is possible to comply with the draft modification.

Comment 3: No Prior Notice

Several comments were received suggesting that no prior notice was given by the Department to stakeholders of the litigation and/or changes to the MSGP (F.R. Smith & Sons)

Response:

Although the Department is not required to provide affected facilities with notification of the litigation, it did make affected facilities aware of the situation after commencement of the litigation, as well as after the Court's amended order as noted below:

- On July 17, 2018 Department staff visited several of the potentially affected facilities to inform them of the lawsuit and to get a sense of how a negative outcome in the second cause of action would affect them.
- On March 22, 2019, a letter was sent to the affected facilities notifying them of the Court's January 23rd, 2019 decision. No response was received.
- On September 25, 2019, pursuant to New York State Environmental Conservation Law Section 17-0805(1)(b) and 6 NYCRR 621.7(a), (b), and (c), the draft modifications to GP-0-17-004 were made available for public comment in the ENB. On that same date, the Department sent a letter to affected facilities notifying them of the draft modifications and the date of an information session to be held by the Department.

- On October 9, 2019, the Department conducted an outreach meeting for affected facilities on Lake George.

At the request of the affected facilities, the Department extended the comment period to November 18, 2019. This made the comment period 53 days in total, which is beyond the legally required public notice period.

Comment 4: Guidance Needed on How to Comply

Comments were received asserting that the vagueness of the standard creates a situation of uncertainty relative to compliance regardless of monies spent or effort and recommending that DEC issue guidance on how to achieve a condition of no exposure and not require case-by-case analysis for every possible marina. (Meyer, Fuller & Stockwell, Town of Bolton)

Response:

On October 9, 2019, the Department conducted an outreach meeting with affected facilities (those covered under GP-0-17-004 at the time of the meeting) on Lake George. The Department provided written guidance from USEPA on “No Exposure” to the facilities to assist them in complying with the requirement in the draft modifications to GP-0-17-004 that “[t]here shall be no discharge or disposal of sewage, industrial wastes or other wastes into these waters.” For the marinas, No Exposure will generally mean keeping outdoor storage of industrial materials and activities, such as boat maintenance, painting, or cleaning, from exposure to stormwater. One of the initially affected marinas attended the October 9, 2019 meeting, and provided information as to how they were able to achieve no exposure and file a “No Exposure” certification with the Department.

Please also note that marinas are not the only industrial facilities covered and affected by the final modified GP-0-17-004. Any facilities that would require coverage for stormwater discharges, as detailed in 40 CFR 122.26(b)(14)(i-ix) and (xi), are affected. As each industrial facility has unique characteristics, each facility must be evaluated individually. The Department will continue to respond to individual inquiries regarding the requirements of GP-0-17-004.

Comment 5: Clarification of impacted facilities

Some commenters suggested that marinas are being ‘singled out’ while others suggested that NYSDEC work with the LGPC in a cooperative effort to identify all facilities on Lake George which currently provide or offer marina type services and which should be subject to the existing LGPC permit requirements for operating a marina facility. (F.R. Smith & Sons) (Performance Marine Service Inc.)

Response:

6 NYCRR 701.3(c), and the modifications to GP-0-17-004, affect all facilities discharging industrial waste or other waste to AA-Special waterbodies, whether

or not they are currently covered by GP-0-17-004. Facilities discharging to AA-Special waterbodies cannot gain coverage under the final modified GP-0-17-004. Marinas are not the only industrial facilities covered and affected by the final modified GP-0-17-004. Any facilities that would require coverage for stormwater discharges, as detailed in 40 CFR 122.26(b)(14)(i-ix) and (xi), are affected.

Comment 6: Financial Assistance Needed

A financing mechanism in terms of low interest loans and grants should be made available to provide the necessary financial assistance for the costs associated with complying with the permit modification. (F.R. Smith & Sons, Meyer, Fuller & Stockwell)

Response:

Grants or loans for commercial entities are not available through New York State funding sources.

Comment 7: Exceptions for Historic Sites

Please include in the permit the following language of exclusion concerning important Historical sites.

National Historical Sites: Facilities that have been declared National Historical Sites prior to December 31, 2019 may qualify for no exposure designation when the Agency makes a determination, after review of the unique Historical Site and the activities conducted thereon, that the implementation of detailed structural and procedural safeguards will eliminate contamination and also retain the Historical character of the facility and its activities. (H. Wayne Judge)

Response:

6 NYCRR 701.3(c) does not provide exceptions for historical sites. The suggested language is in contravention of that regulation.

Commenters

1. Edan Rotenberg (Super Law Group)
2. Senator Betty Little
3. Wayne Judge Esq. (H. Wayne Judge Attorney At Law)
4. Ronald F. Conover (Town of Bolton Supervisor)
5. Gina Mintzer (Executive Director Lake George Chamber of Commerce)
6. Matt F. Fuller Esq. (Meyer, Fuller & Stockwell)
7. Frederick W. Killeen Attorney At Law
8. Scott P. Andersen, (F.R.Smith & Sons)
9. Matt O'Hara (Queen Boat Co.)
10. Jason Saris (Performance Marine Service INC.)
11. Michael T. Bittel (Adirondack Chamber of Commerce)
12. Edward Bartholomew (EDC Warren County)
13. Lisa Camp (YMCA Glens Falls)