SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of	:	
NATURAL RESOURCES DEFENSE COUNCIL, INC.; RIVERKEEPER, INC; SOUNDKEEPER, INC.; HUDSON-RARITAN BAYKEEPER, INC. (d/b/a NY/NJ BAYKEEPER),	:	ORAL ARGUMENT REQUESTED
Petitioners,	:	VERIFIED PETITION
For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	:	Index No. 110898-10
- against -	:	
ALEXANDER B. GRANNIS, in his official capacity as Commissioner of the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK,	:	NEW YORK COUNTY CLERK'S OFFICE AUG 16 2010 NOT COMPARED WITH COPY FILE
Respondents.	:	

Petitioners, by their attorneys Pace Environmental Litigation Clinic, for their verified petition allege as follows:

NATURE OF THE PROCEEDING

1. This is an Article 78 proceeding challenging a Decision of the Commissioner of the Department of Environmental Conservation, dated June 10, 2010 ("Decision" or "Decision of the Commissioner"), which directed the issuance of fourteen State Pollution Discharge Elimination System ("SPDES") permits (the "Draft Permits") to the Department of Environmental Protection of the City of New York ("DEP").

2. In New York City (the "City"), nearly every time it rains, raw sewage is dumped into rivers, bays, creeks, and other waterways. In a typical year, billions of gallons of this untreated waste is released from a municipal "combined sewer system," which handles both sanitary sewage (*i.e.*, from indoor plumbing) and polluted storm runoff (*i.e.*, from roads and other paved surfaces) through a single set of pipes, because the system lacks the capacity to capture and treat it all when as little as one-tenth of an inch of rain falls in the City. These untreated discharges, known as Combined Sewer Overflows ("CSOs"), are the primary source of disease-causing bacteria and other pathogens that often make it unsafe for City residents to come into contact with their local waterways.

3. The City also discharges treated sewage effluent containing excessive amounts of nutrient pollution into one of the region's most ecologically important water bodies, Jamaica Bay. The bay, located in southeast Brooklyn and Queens, is a vital natural resource for the City and the State of New York, as well as the entire East Coast of the United States. As one of the largest coastal wetland ecosystems in New York State, and home to a federal wildlife refuge, it is a critically important habitat for wildlife and provides unparalleled outdoor recreation opportunities for New York City residents. Jamaica Bay has suffered many years of severe water quality impairment, largely attributable to the City's discharges of high levels of nutrients from four sewage treatment plants located around the bay. These pollutants cause low dissolved oxygen levels in the bay, which sometimes create uninhabitable conditions for marine life.

4. In this Article 78 proceeding, Petitioners challenge the Decision of the Commissioner because it directed issuance of the Draft Permits without including the necessary permit terms to ensure the City will reduce its CSO discharges sufficiently to comply with state water quality standards. Petitioners also challenge a ruling, included in the Decision of the

Commissioner, that Petitioners are not entitled to an adjudicatory public hearing to address "substantive and significant" issues concerning the adequacy of the Draft Permits' limits on nutrient discharges into Jamaica Bay from the City's sewage treatment plants. (A copy of the Decision of the Commissioner is attached as Exhibit 1 to this Petition.)

5. Petitioners request that the Court declare portions of the Decision to be inconsistent with the legal requirements described herein; vacate such portions of the Decision; and remand the Decision to the Commissioner with instructions to modify the SPDES permits consistent with applicable legal requirements concerning CSOs, and with instructions to hold an adjudicatory public hearing on the nutrient pollution issues concerning the sewage treatment plants that discharge to Jamaica Bay.

PARTIES

6. Petitioner Natural Resources Defense Council, Inc. ("NRDC") is a not-for-profit organization existing under the laws of the state of New York, with its headquarters in New York City. Founded in 1970, NRDC has more than 440,000 members nationwide, including over 39,000 members who live in New York State and over 15,000 in New York City. NRDC, with a staff of scientists, lawyers, and environmental specialists, is dedicated to protecting public health and the environment through litigation, lobbying, and public education. NRDC has members in New York State who use and enjoy water bodies in New York City, such as Long Island Sound the Hudson River, and Jamaica Bay, which are polluted by untreated sewage and storm water discharged from the City's CSO outfalls and, in the case of Jamaica Bay, by high levels of nitrogen and biological oxygen demand ("BOD") discharged by the four DEP sewage treatment plants (or Water Pollution Control Plants ("WPCPs")) that discharge to Jamaica Bay (collectively, the "Jamaica Bay WPCPs").

7. Petitioner Riverkeeper, Inc. is not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Tarrytown, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper was originally founded by the Hudson River Fisherman's Association, a group of fishermen concerned about the ecological state of the Hudson River, and the effect of its polluted and degraded condition on fish. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 7,500 members, many of whom use and enjoy waterways, such as the Hudson River, which are polluted by untreated sewage and storm water discharged from the City's CSO outfalls.

8. Petitioner Soundkeeper, Inc. is a not-for-profit organization, founded in 1987, whose mission is to protect and enhance the biological, physical, and chemical integrity of Long Island Sound through education, projects, and advocacy. Soundkeeper's members include a broad cross-section of the public, including commercial fishermen, boaters, swimmers, recreational fishers, marine industry members, shellfish harvesters, birders, and other interested members of the public. Many of these members use and enjoy Long Island Sound, which is polluted by untreated sewage and storm water discharged from the City's CSO outfalls.

9. Petitioner Raritan Baykeeper, Inc. (d/b/a "NY/NJ Baykeeper"), is a non-profit public interest 501(c)(3) corporation, whose mission is to protect, preserve, and restore the ecological integrity and productivity of the Hudson-Raritan Estuary through enforcement, field work and community action. Baykeeper has approximately 350 members in the New York and New Jersey region, many of whom use and enjoy Jamaica Bay and New York Harbor, which are

polluted by untreated sewage and storm water discharged from the City's CSO outfalls and, in the case of Jamaica Bay, by nitrogen and BOD discharged by the four Jamaica Bay WPCPs.

10. Members of each of the Petitioners use and enjoy their respective water bodies referenced above for, among other things, commercial, recreational, aesthetic, and scientific purposes, such as swimming, fishing, boating, and viewing wildlife. The City discharges untreated sewage mixed with untreated storm water runoff into these water bodies from CSO outfalls regulated under the Draft Permits. The City also discharges high levels of nitrogen and BOD from outfalls at the four Jamaica Bay WPCPs that are regulated under the Draft Permits. Such discharges have polluted these water bodies by contributing to high levels of disease-causing bacteria, large amounts of floating debris, low levels of dissolved oxygen, and other water quality problems that have resulted in violations of state water quality standards and otherwise diminished the quality of the environment in and around these water bodies. Such degraded water quality and environmental conditions impair the use and enjoyment of these resources by Petitioners' members.

11. All of the Petitioners filed petitions with the state Department of Environmental Conservation ("DEC") in 2003 seeking full party status and an adjudicatory hearing in a DEC proceeding concerning the Draft Permits, in response to a notice published by DEC inviting such petitions from any interested parties. Petitioners participated as prospective intervenors in the ensuing proceedings before a DEC Administrative Law Judge ("ALJ") and before the DEC Commissioner. Those administrative proceedings culminated in the Decision that Petitioners challenge in this case.

12. In their petitions to DEC, including supplemental petitions filed in 2005 and 2006, Petitioners asserted that the Draft Permits' provisions applicable to CSO discharges throughout

the City, and to nitrogen and BOD discharges from the Jamaica Bay WPCPs, were defective in several ways. Among other things, Petitioners asserted that the Draft Permits failed to include, as enforceable permit requirements, a compliance schedule mandating specific steps to reduce CSO discharges to attain the compliance with state water quality standards within the shortest reasonable time. Petitioners also asserted that the Draft Permits improperly omitted "The City of New York" as a named permittee (*i.e.*, in addition to DEP, which was already the named permittee) because actions by New York City agencies other than DEP are necessary to fully comply with the permit's requirements to reduce CSO discharges. Petitioners also asserted that the Draft Permits for the four Jamaica Bay WPCPs did not include all provisions necessary to ensure compliance with water quality standards, because discharges that comply with the Draft Permits' numeric effluent limitations for nitrogen and BOD have been shown to cause or contribute to violations of water quality standards in Jamaica Bay.

13. The Decision injures Petitioners' members because it orders the issuance of the Draft Permits without modifying them to include, as enforceable permit requirements, a compliance schedule mandating specific steps to reduce CSO discharges to achieve compliance with state water quality standards within the shortest reasonable time.

14. The Decision injures Petitioners' members because it orders the issuance of the Draft Permits without modifying them to include "The City of New York" as a permittee, which diminishes the efficacy of the Draft Permits with respect to ensuring that City agencies other than DEP take actions necessary to reduce CSO pollution.

15. The Decision injures NRDC's and Baykeeper's members because it orders the issuance of the Draft Permits for the four Jamaica Bay WPCPs, without modification to include stricter terms to ensure reductions of nitrogen and BOD discharges sufficient to achieve

compliance with water quality standards, and because it denied Petitioners the opportunity to participate, on behalf of their members, in a formal hearing that would serve to establish such stricter permit terms.

16. The injuries to Petitioners' members described above are continuing and would be redressed, at least in part, through the relief sought in this Petition.

17. Respondent Alexander B. Grannis is the Commissioner of DEC and issued the Decision that is the subject of this petition. DEC is an agency of the State of New York, established by chapter 140 of the Laws of 1970, which administers the SPDES permit program pursuant to article 17, title 8 of the New York Environmental Conservation Law.

18. Respondent Department of Environmental Protection of the City of New York ("DEP") is an agency of the City of New York. DEP owns and operates, on behalf of the City of New York, the fourteen WPCPs and their associated combined sewer outfalls, and is the named permittee in the Draft Permits that are the subject of this petition.

VENUE

19. Venue lies in the Supreme Court, New York County, pursuant to §§ 506(b) and 7804(b) of the New York Civil Practice Law and Rules, because the City's CSO discharges that are the subject of the Draft Permits and of the Decision challenged in this case take place, and have taken place, in New York County and Bronx County, among other locations.

STATUTORY AND REGULATORY FRAMEWORK

The Federal Clean Water Act and the NPDES Program, 33 U.S.C. §§ 1251, *et seq.*

20. The Federal Water Pollution Control Act, more commonly called the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, creates, *inter alia*, the national pollutant discharge elimination system ("NPDES"), a mandatory permitting program for point-source discharges of

water pollution to surface waters. *See* 33 U.S.C. § 1342 (2000 & Supp. 2005). The NPDES program is

> a means of achieving and enforcing . . . effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality —into the obligations (including a timetable for compliance) of the individual discharger. . . .

U.S. Envt'l Prot. Agency v. California State Water Res. Control Bd., 426 U.S. 200, 205 (1976) (internal footnotes omitted.)

21. Any "publicly owned treatment works" ("POTW") that discharges to a water body under the jurisdiction of the CWA is subject to the CWA's NPDES permitting requirements. For purposes of the NPDES program, a POTW includes "a treatment works as defined by section 212 of the [Clean Water] Act" and "the municipality as defined in section 502(4) of the Act, which has jurisdiction over the Indirect Discharges to and the Discharges from such a treatment works" 40 C.F.R. § 122.2; 40 C.F.R. § 403.3. A "treatment works" under section 212 of the CWA includes, in addition to sewer systems and wastewater treatment plants, "any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems." 33 U.S.C. § 1292(2)(B).

22. NPDES permits control water pollution through two overlapping approaches. First, the permits set effluent limitations (*i.e.*, controls on the discharge of pollutants) based on specified standards of pollution control technology. 33 U.S.C. §§ 1311(b), 1342(a). Second, where these technology-based standards are not sufficient to ensure compliance with applicable water quality standards, the CWA requires NPDES permits to impose more stringent "water quality based effluent limitations." 33 U.S.C. §§ 1312(a), 1342(a).

23. The CWA authorizes states to establish water quality standards for waters within their boundaries. Water quality standards comprise the designated uses of the water body, *e.g.*, water contact recreation or propagation of fish and shellfish, and the water quality criteria or standards that must be met to maintain the designated use. 33 U.S.C. § 1313(c)(2)(A); 40 CFR § 131.3(i).

24. The CWA requires states to regularly publish a list of waters that fail to comply with state water quality standards because of excessive levels of pollution. *See* 33 U.S.C. § 1343(d). Each state's list is commonly referred to as a "303(d) List."

New York's SPDES Program, N.Y. ECL Art. 17, Title 8

25. Federal law allows states to assume NPDES permitting responsibilities, provided that the state permitting program ensures compliance with the procedural and substantive requirements of the CWA. 33 U.S.C. § 1342(b)(1); 40 CFR §§ 123.25(a).

26. New York has assumed NPDES permitting responsibilities through its SPDES program. *See* ECL §§ 17-0801, *et seq.* Under state law, SPDES permitting is administered by DEC, through a program that must "meet all applicable requirements" of the federal Clean Water Act "and rules, regulations, guidelines, criteria, standards and limitations adopted thereto." *Id.* § 17-0801; *see also id.* §§ 17-0805(1) (providing for public notice and participation in accordance with requirements of the CWA); 17-0807(4) (prohibiting all discharges not permitted by, *inter alia*, the CWA); 17-0809(1) (providing that SPDES permits shall include all "applicable effluent limitations as required by the [federal Clean Water] Act"); 17-0815(7)-(8) (providing that SPDES permits shall include any other requirements applicable under the CWA).

27. Pursuant to DEC regulations, "no SPDES or other permit shall be issued . . . [w]hen the conditions of the permit do not provide for compliance with the applicable

requirements of the CWA, or regulations promulgated under the CWA . . . ." 6 NYCRR § 750-1.3.

28. DEC has established water quality standards for waters across New York. ECL § 17-0301; 6 NYCRR Parts 700-703; 800-941. State law mandates that all SPDES permits "shall include provisions requiring compliance with . . . any further limitations necessary to insure compliance with water quality standards adopted pursuant to state laws." ECL § 17-0811; *see also* 6 NYCRR § 750-1.11(a)(5)(i).

29. Upon issuance of a renewal permit to an existing permittee (or, in limited cases, issuance of the first SPDES permit to a new source or new discharger), if the permittee cannot immediately achieve compliance with state water quality standards, state law requires that the permit include a compliance schedule with "specific steps . . . designed to attain compliance within the shortest reasonable time." 6 NYCRR § 750-1.14(a), (h); ECL § 17-0813(2). "Where the time for compliance . . . exceeds nine months, a schedule of compliance shall be specified in the permit, which will set forth interim requirements and the dates for their achievement." 6 NYCRR § 750-1.14(b).

30. Any decision by DEC to issue a SPDES permit must be supported by a record providing a rational basis for the agency to find that the terms and conditions of the permit satisfy all legal requirements. *See, e.g.*, *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974); *Flacke v. Onandaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363-64 (1987). DEC can only issue a SPDES permit following, among other things, "a determination . . . on the basis of a submitted application, plans, or other available information, that compliance with the specified permit provisions will . . . assure compliance with applicable water quality standards." 6 NYCRR 750-2.1(b).

31. The "operator" of a "facility or activity" that requires a SPDES permit is responsible for obtaining such permit. 6 NYCRR §§ 750-1.4, 750-1.6(a).

32. For DEC to lawfully approve a proposed permit, "there must be a clear and direct method for the Department to enforce all permit conditions." *In the Matter of the Application of SES Brooklyn Company, L.P. for Permits to Construct and Operate the Proposed Brooklyn Navy Yard Resource Recovery Facility in Brooklyn, New York*, Third Interim Decision,1988 WL 158355, *5 (NYSDEC 1988).

Public Hearing Requirements

33. The Uniform Procedures Act, which governs, *inter alia*, DEC's review of proposed SPDES permits, provides that:

> where any comments received from members of the public or otherwise raise substantive and significant issues relating to the application and resolution of any such issue may result in denial of the permit or the imposition of significant conditions thereon, the department shall hold a public hearing on the application.

ECL § 70-0119(1).

34. DEC regulations provide that a hearing pursuant to ECL § 70-0119(1) must be an "adjudicatory public hearing." 6 NYCRR § 621.7(b).

35. A "substantive" issue is one that raises "sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." 6 NYCRR § 624.4(c)(2). A "significant" issue is one that "has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit." 6 NYCRR § 624.4(c)(3).

FACTS

Combined Sewer Overflows in New York City

36. In a typical year, New York City discharges approximately 27 billion gallons of combined sewer overflow from approximately 450 outfalls. CSOs are the New York/New Jersey Harbor's most significant source of disease-causing pathogens and, together with treated sewage effluent, of excess nutrient loadings that cause reduced dissolved oxygen levels in receiving water bodies. CSOs cause beach closures, restrict consumption of fish and shellfish, and damage waterways' aesthetic qualities and ability to support aquatic and marine life. CSOs are also significant sources of both organic pollutants and metals to New York City's waters.

37. The City has highlighted its CSO discharges as a significant water pollution problem and specifically as the cause of water quality standard violations. DEC, on its most recent 303(d) List, identified over twenty water bodies in New York City where a violation of water quality standards is due, in whole or in part, to pollution from CSOs; as indicated on that list, most of these water bodies have been so listed for many years. *See* DEC, 2010 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy, available at http://www.dec.ny.gov/docs/water_pdf/303dlistfinal10.pdf.

38. According to the United States Environmental Protection Agency, the National Association of Clean Water Agencies, the Association of State and Interstate Water Pollution Control Administrators, New York City Mayor Michael Bloomberg, and many others, measures to reduce the amount of storm water runoff entering a combined sewer system play an important role in reducing the volume of CSO discharges.

39. As demonstrated by Petitioners' submissions in the administrative record before DEC, agencies of the City of New York, other than DEP, operate methods or systems for

preventing and reducing storm water runoff in the City's combined storm water and sanitary sewer system. Such agencies include, but are not limited to, the City's Department of Parks and Recreation and Department of Transportation.

40. As demonstrated by Petitioners' submissions in the administrative record before DEC, agencies of the City of New York, other than DEP, also have regulatory jurisdiction over activities that affect the volume of storm water discharges into the City's combined sewer system. Such agencies include, but are not limited to, the Department of City Planning and the Department of Buildings.

41. All of the City's CSO discharges are subject to the requirements of the SPDES permits for the City's WPCPs. All of the discharges authorized by the Draft Permits are discharges to water bodies under the jurisdiction of the CWA.

Water Quality in Jamaica Bay

42. Jamaica Bay is the ecological "jewel" of the City's water bodies. DEP has described it as "one of the largest coastal wetland ecosystems in New York State" and "an important and complex network of open water, salt marsh, grasslands, coastal woodlands, maritime shrublands, [and] brackish and freshwater wetlands," supporting many hundreds of species of fish, birds, reptiles, amphibians, and small mammals. It is a critical stopover on the Eastern Flyway migration route for migratory birds and home to hundreds of species designated as threatened, endangered, or otherwise "of special concern." Jamaica Bay is also a unit of the National Parks System, a state-designated "critical environmental area" and "significant coastal fish and wildlife habitat," and a City-designated wildlife refuge.

43. The four Jamaica Bay WPCPs discharge treated effluent to Jamaica Bay or its tributaries. DEC has included Jamaica Bay on its 303(d) List since 1998 for violations of water

quality standards relating to pathogens, nitrogen, and oxygen demand. The list identifies the Jamaica Bay WPCPs and CSO discharges as the primary causes of the impairment. Despite DEP's compliance for many years with the Draft Permits' numeric effluent limitations for discharges of nitrogen and BOD from the Jamaica Bay WPCPs, these water quality violations have persisted.

DEC's Administrative Proceeding to Modify the SPDES Permits for New York City's Fourteen WPCPs

44. As summarized in paragraphs 11-12 above, in 2003, in response to a public notice issued by DEC, Petitioners submitted petitions to DEC seeking full party status in a permit modification proceeding concerning the SPDES permits for the City's fourteen WPCPs. The petitions sought rulings as a matter of law that certain provisions of the Draft Permits must be revised, and sought an adjudicatory public hearing to address certain "substantive and significant issues" Petitioners had identified concerning the adequacy of the Draft Permits.

45. After Petitioners filed their initial petitions with DEC, DEC and the City negotiated an administrative consent order addressing certain CSO issues (the "CSO ACO"), which they executed in January 2005. The stated purposes of the CSO ACO include bringing the City into compliance state law prohibiting discharges that cause or contribute to violations of water quality standards. Following execution of the CSO ACO, DEC's permit-writing staff revised the Draft Permits to reference the existence of the CSO ACO, but without incorporating the terms of the order as enforceable terms of the permits themselves.

46. After opportunities for Petitioners to submit supplemental petitions, a DEC ALJ issued a series of rulings concerning the Draft Permits. The ALJ ruled, *inter alia*, that Petitioners had identified a "substantive and significant" issue (*i.e.*, an "adjudicable" issue) concerning whether DEC must revise the Draft Permits to incorporate the compliance schedule from the

CSO ACO or, in the alternative, revise the Draft Permits to state that the compliance schedule in the CSO ACO "represents 'the shortest reasonable time' within which to achieve waster quality [standards]." The ALJ's ruling also stated that adjudication of that issue would be avoided if DEC's permit-writing staff were to make either of those two possible revisions to the Draft Permits. The agency's staff chose to make the latter of the two revisions suggested by the ALJ's ruling, and the ALJ determined that the issue was resolved.

47. The ALJ also ruled that the Draft Permits for the four Jamaica Bay WPCPs included terms sufficient to ensure compliance with water quality standards, based on language in the Draft Permits stating that, pursuant to a Consent Judgment entered in State Supreme Court in 2006, the City is required to complete and submit a "Comprehensive Jamaica Bay Report" presenting recommendations for "improving water quality" in Jamaica Bay, following which DEC intends to "re-open" the permits to propose further modifications implementing the report's recommendations.

48. The ALJ also ruled that the City of New York must be included in the Draft Permits as a named permittee. The ALJ concluded that "the City is "the entity with the legal and financial authority to implement all the terms of the proposed SPDES Permits" and that "[t]he omission of the City of New York as a permittee is at variance with the CWA."

49. Petitioners appealed the ALJ's rulings concerning the CSO compliance schedule and the Jamaica Bay nutrient discharge limits to the Commissioner, as well as other issues on which the ALJ had ruled against the Petitioners. DEC's permit-writing staff, along with DEP, appealed the ALJ's ruling concerning the designation of the City of New York as a permittee to the Commissioner.

50. On June 10, 2010, the Commissioner issued the Decision, which affirmed the ALJ's rulings on all issues except the one that DEP and DEC had appealed; on the latter issue, the Commissioner reversed the ALJ and held that DEC is not required to revise the Permits to add the City of New York as a co-permittee.

51. On June 15, 2010, counsel for the Petitioners received a copy of the Decision via email from DEC's Office of Hearings & Mediation Services. Within several days after that date, Petitioners' counsel received a copy of the decision from DEC via certified mail.

CAUSES OF ACTION

First Cause of Action: The Commissioner Unlawfully Directed Issuance of the Draft Permits Despite Their Failure to Include Enforceable Compliance Schedules to Reduce CSO Discharges to Ensure Compliance with Water Quality Standards.

52. Petitioner repeats and re-alleges the allegations contained in paragraphs 1-51 above.

53. Respondent DEC cannot lawfully issue a SPDES permit that fails to include limitations necessary to meet water quality standards. Where a permittee cannot immediately comply with water quality standards, DEC cannot lawfully issue a SPDES permit without including in it a compliance schedule with specific steps designed to attain the compliance with state water quality standards within the shortest reasonable time. Where compliance schedule exceeds nine months, the compliance schedule must set forth interim requirements and the dates for their achievement. Such a compliance schedule must be an enforceable term of the SPDES permit. ECL §§ 17-0811, 17-0813(2); 6 NYCRR §§ 750-1.11(a)(5)(i), 750-1.14(a), (h), 750-1.14(b).

54. Each of the Draft Permits states that a compliance schedule for the reduction of CSO discharges is contained in an administrative consent order, to which DEC, DEP, and the

City are parties. A copy of that administrative consent order is attached to each of the Draft Permits. The Draft Permits do not incorporate the requirements of the order's multi-year compliance schedule as enforceable terms of the permits.

55. The Decision of the Commisioner is arbitrary and capricious and contrary to law, insofar as it held that the Draft Permits satisfy the requirement that a compliance schedule "shall be specified in" each permit for discharges from the City's sewer system.

Second Cause of Action: The Commissioner Unlawfully Directed Issuance of the Draft Permits Without Requiring that the City of New York Be Added to the Draft Permits as a Named Permittee.

56. Petitioners repeat and re-allege the allegations contained in paragraphs 1-55 above.

57. DEC must ensure that the Draft Permits satisfy the requirements applicable to POTWs under the CWA's NPDES permitting program.

58. The CWA requires that the City of New York, and not only DEP, must be a permittee under the Draft Permits because the City of New York is the "municipality which has jurisdiction over the Indirect Discharges to and the Discharges from" the sewer systems and wastewater treatment plants that DEP operates, 40 C.F.R. § 122.2; 40 C.F.R. § 403.3, and because the City of New York operates "method[s] or system[s] for preventing, abating, reducing, storing, treating, separating, or disposing of . . . storm water runoff . . . in [the City's] combined storm water and sanitary sewer systems" that are not operated by DEP itself, 33 U.S.C. § 1292(2)(B).

59. DEC must ensure that all of the terms of a SPDES permit are enforceable. Under the terms of the Draft Permits, the permittee's ability to comply with the permits depends, in part, on the permittee's ability to reduce CSO discharges. Measures to reduce the amount of

storm water runoff entering the combined sewer system play an important role in reducing the volume of CSO discharges.

60. DEP does not have the ability to comply fully with the Draft Permits' CSO requirements because DEP lacks the authority or jurisdiction to implement all necessary and appropriate measures to reduce the amount of storm water runoff entering the combined sewer system. The City of New York as a whole, including other agencies of the City of New York, possesses such authority.

61. The Decision of the Commisioner is arbitrary and capricious and contrary to law, insofar as it held that DEC is not required to revise the Draft Permits to include the City of New York as a named permittee.

Third Cause of Action: The Commissioner Unlawfully Denied Petitioners' Request for an Adjudicatory Hearing on the Nitrogen and BOD Effluent Limitations Applicable to the Four Jamaica Bay WPCPs.

62. Petitioners repeat and re-allege the allegations contained in paragraphs 1-61 above.

63. DEC is required to hold an adjudicatory public hearing on a draft SPDES permit if public comments raise substantive and significant issues and the resolution of any such issue may result in the denial of the permit or the imposition of significant permit conditions in addition to those proposed in the draft permit. ECL § 70-0119(1); 6 NYCRR § 621.7(b).

64. In the administrative proceeding below, Petitioners identified "substantive and significant issues" concerning the adequacy of the effluent limitations for nitrogen in the four Jamaica Bay WPCP Permits, including by submitting documentation prepared by DEC and DEP showing that discharges in compliance with the Draft Permit's numeric effluent limitations are causing and contributing to violations of water quality standards.

65. The Decision of the Commisioner is arbitrary and capricious and contrary to law, insofar it held that Petitioners had not identified any substantive and significant issues concerning the effluent limitations for nitrogen and BOD in the four Draft Jamaica Bay WPCP Permits and that Petitioners are not entitled to an adjudicatory public hearing on such issues.

WHEREFORE, Petitioners demand judgment:

a. declaring that the Commissioner has acted arbitrarily, capriciously, and contrary to law by ruling that the Draft Permits satisfy the requirement that a compliance schedule "shall be specified in" each permit for CSO discharges from the City's sewer system, notwithstanding that the Draft Permits do not incorporate the compliance schedule from the CSO ACO as enforceable terms of the permits;

b. declaring that the Commissioner has acted arbitrarily, capriciously, and contrary to law by ruling that DEC is not required to revise the Draft Permits to include the City of New York as a named permittee;

c. declaring that the Commissioner acted arbitrarily, capriciously, and contrary to law by ruling that Petitioners had not identified any substantive and significant issues concerning the effluent limitations for nitrogen and BOD in the Draft Permits for the four Jamaica Bay WPCPs and that Petitioners are not entitled to an adjudicatory public hearing on such issues;

d. vacating those portions of the Decision of the Commissioner that are inconsistent with this Court's declaratory ruling;

e. directing the Commissioner to modify, forthwith, the SPDES permits for the City's WPCPs to: (1) incorporate, as enforceable terms of the permits, the compliance schedules set forth in the CSO ACO, and (2) add the City of New York as a named permittee;

f. directing the Commissioner to hold an adjudicatory public hearing on the substantive and significant issues Petitioners have raised concerning the effluent limitations for nitrogen and BOD in the SPDES permits for the four Jamaica Bay WPCPs;

g. granting Petitioners their reasonable costs and attorneys' fees; and

h. granting such other and further relief as the Court deems just and proper.

Dated: August 16, 2010

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

By: 

Karl Coplan
78 North Broadway
White Plains, New York 10603
(914) 422-4343

Counsel for Petitioners

VERIFICATION

Judith A. Keefer, being duly sworn, deposes and says she is an officer of Petitioner Natural Resources Defense Council, Inc. ("NRDC"); that she has read the foregoing petition and that the facts stated therein are true to her knowledge on information and belief; and that the basis of her information and belief consists of conversations with NRDC staff with personal knowledge.

Judith A. Keefer
Director of Finance and Operations

Sworn to before me this
16th day of August, 2010

KATHERINE ANNE SINDING
Notary Public, State of New York
No. [illegible]
Qualified in New York County
Commission Expires Jan. 29, 2011

Notary Public

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

In the Matter

- of -

the Department-Initiated Modification of State Pollutant Discharge Elimination System (SPDES) Permits Issued Pursuant to Environmental Conservation Law Article 17 and 6 NYCRR Parts 621, 624, and 750 for Fourteen Publicly Owned Sewage Treatment Plants Operated

- by the -

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK,

Permittee.

DEC Permit ID Nos. 2-6007-00025, et al.

SPDES Permit Nos. NY-0026191, et al.

DECISION OF THE COMMISSIONER

June 10, 2010

DECISION OF THE COMMISSIONER

This proceeding addresses the modification of the State Pollutant Discharge Elimination System ("SPDES") permits for the fourteen water pollution control plants ("WPCPs") that the Department of Environmental Protection of the City of New York ("NYCDEP") operates for the City of New York ("City"). The WPCPs treat sewage generated within the City, as well as material from the City's combined and separate sanitary sewage collection facilities.

BACKGROUND

In June 2002, staff of the New York State Department of Environmental Conservation ("DEC" or "Department") provided NYCDEP with notice of intent to modify the SPDES permits for the WPCPs operated by NYCDEP. By letters dated September 27, 2002 and October 22, 2002, NYCDEP preserved the right to object to several of the proposed modifications, and negotiations between the Department and NYCDEP ensued. The SPDES permit modification process resulted in several iterations of draft permits and the resolution or withdrawal of various NYCDEP objections to the proposed modifications.

Several objections remained with respect to the proposed modifications, and NYCDEP requested a hearing. The matter was referred to the Department's Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto. The issues conference was held on September 18 and October 9, 2003, and was reconvened on May 4 and 5, 2005.

The ALJ issued four rulings over the course of this proceeding:

(i) an issues ruling dated January 28, 2004, among other things, granting adjournment of combined sewer overflow ("CSO") issues, pursuant to the motion of Department staff, because of ongoing negotiations between Department staff and NYCDEP regarding alleged CSO violations (see ALJ Ruling on Proposed Adjudicable Issues and Petitions for Party Status and Ruling on Motion for Stay, January 28, 2004, at 5-7). No appeals were taken from this ruling;

(ii) an issues ruling dated April 23, 2004, addressing issues relating to proposed nitrogen effluent reduction schedules. Department staff appealed from the April 23, 2004 ruling, and the appeal was subsequently determined to have been

rendered academic (see Matter of Department of Environmental Protection of the City of New York, Interim Decision of the Deputy Commissioner, June 26, 2006, at 3 [execution of January 2006 consent judgment[1] and issuance of revised draft SPDES permits rendering moot the factual basis for the appeal]);

(iii) an issues ruling dated November 9, 2005, addressing CSO issues ("CSO Issues Ruling"); and

(iv) an issues ruling dated March 16, 2007, addressing nitrogen issues ("Nitrogen Issues Ruling"). In this ruling, the ALJ noted that Department staff's motion to issue the SPDES permit for one of the 14 WPCPs (Oakwood Beach) had been granted (see Nitrogen Issues Ruling, at 1 fn 1; see also Issues Conference Transcript, May 4, 2005, at 9-11 [no objections raised to motion]).

As set forth in the Nitrogen Issues Ruling, the ALJ determined that no issues required adjudication in this proceeding. An appeals schedule was established in the Nitrogen Issues Ruling with respect to that ruling and the CSO Issues Ruling (see Nitrogen Issues Ruling, at 22).

Natural Resources Defense Council, Riverkeeper, Inc., Long Island Soundkeeper Fund, Inc., and New York/New Jersey Baykeeper ("Consolidated Petitioners") filed a joint appeal dated April 13, 2007 ("Consolidated Petitioners Appeal") from the CSO Issues Ruling and the Nitrogen Issues Ruling. NYCDEP and Department staff filed timely responses ("NYCDEP Reply" [dated May 10, 2007] and "Staff Reply" [dated May 4, 2007], respectively) in opposition to the appeal taken by Consolidated Petitioners. The Interstate Environmental Commission ("IEC") filed a reply dated April 27, 2007 ("IEC Reply") in support of certain arguments advanced by Consolidated Petitioners (see IEC Reply, at 9-10 [summarizing IEC position]).

Additionally, both NYCDEP and Department staff appeal ("NYCDEP Appeal" [dated April 13, 2007] and "Staff Appeal" [dated April 13, 2007], respectively) from that portion of the Nitrogen Issues Ruling in which the ALJ determined that the City of New York must be named as a co-permittee with NYCDEP on the SPDES permits (Nitrogen Issues Ruling, Ruling #5). Consolidated Petitioners and the Connecticut Fund for the Environment, Inc.

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[1] Matter of New York City Dept. of Envtl. Protection v State of New York (Sup Ct, New York County, Jan. 10, 2006, Feinman, J., Index No. 04-402174).

filed a reply dated May 10, 2007 ("Joint Reply") in opposition to those appeals. IEC stated that it took "no position" on whether naming the City as a permittee was a substantive and significant issue (see IEC Reply, at 3).

By ruling dated January 18, 2008 (the "2008 Ruling"), I addressed two motions, both dated August 14, 2007, and a filing, dated October 31, 2007, submitted by Consolidated Petitioners and/or Connecticut Fund for the Environment, Inc. ("CFE"). The 2008 Ruling (i) denied Consolidated Petitioners' motion for leave to file a surreply brief in further support of their appeal of the issues rulings; (ii) granted Consolidated Petitioners' and CFE's motion for leave to supplement their reply dated May 10, 2007; and (iii) accepted into the record excerpts from the Jamaica Bay Watershed Protection Plan dated October 1, 2007.

For the reasons discussed in this decision and subject to my comments below, I am:

(a) reversing the ALJ's ruling that would require the City to be named as a co-permittee on the permits;
(b) otherwise affirming the ALJ's remaining rulings;
(c) remanding this matter to Department staff for issuance of the permits to NYCDEP, consistent with the draft permits prepared by Department staff and this decision; and
(d) directing that the issues conference participants receive copies of the SPDES permits upon their issuance and notice of any proposed modification to the permits following their issuance.

DISCUSSION

In accordance with the Department's permit hearing regulations, at the issues conference stage a potential party must demonstrate that an issue it proposes for adjudication is both "substantive and significant" (6 NYCRR 624.4[c][1][iii]). An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). In determining whether an issue is substantive, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (id.). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the

imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4[c][3]).

Pursuant to 6 NYCRR 624.4(c)(4), where Department staff has determined that "a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant."

A potential party's burden of persuasion at an issues conference is met with an appropriate offer of proof supporting its proposed issues. Its assertions must have a factual or scientific foundation. Speculation, expressions of concern, or conclusory statements alone are insufficient to raise an adjudicable issue (see, e.g., Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 ["Crossroads Ventures"], at 7-8). Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions (see, e.g., Matter of Waste Management of New York, LLC, Decision of the Commissioner, October 20, 2006, at 4-5). With respect to legal and policy issues that are raised on appeal, as opposed to factual issues, the Commissioner's review is *de novo* (see Crossroads Ventures, at 10 [internal citations omitted]).

On its appeal, Consolidated Petitioners challenge various rulings of the ALJ (see Consolidated Petitioners Appeal, at 51-52 [summarizing the appeal]). Those challenges, together with the appeals of NYCDEP and Department staff, are addressed below.

1. CSO Issues Ruling, Ruling #2.

In January 2005, Department staff announced the execution of an administrative consent order with the City of New York and NYCDEP regarding CSO regulation for the WPCPs ("2005 ACO"). In this administrative proceeding, an issue was raised whether the 2005 ACO was the appropriate mechanism for CSO regulation, or whether the terms and conditions of the ACO compliance schedule must be explicitly set forth in the draft SPDES permits. Several petitioners further argued that if water quality standards could not be achieved immediately, State law and regulation required that the compliance schedule contain "specific steps designed to

attain compliance within the shortest reasonable time" (see CSO Issues Ruling, Ruling #2, at 9).[2]

The ALJ ruled that whether Department staff must incorporate the compliance schedule in the permits, or in the alternative, should include a statement in each permit that the compliance schedule represents the "shortest reasonable time" within which to achieve water quality standards for the WPCP's receiving waters, constituted an adjudicable issue (see CSO Issues Ruling, Ruling #2, at 9).

The ALJ stated that adjudication of this issue would be avoided if Department staff opted to either incorporate the 2005 ACO compliance schedule into each of the draft permits or include the "shortest reasonable time" statement in the permits. In accordance with the ALJ's direction, Department staff added to each of the draft permits the following statement: "The CSO Order on Consent contains compliance schedules, which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters." Accordingly, the ALJ determined that adjudication on this issue was avoided (see Nitrogen Issues Ruling, at 4). I note also that the draft permits state, under the heading "Long-Term Control Plan," that the 2005 ACO is attached to the permit.

Consolidated Petitioners object to this resolution as inadequate for the following reasons:

--Compliance with CWA § 402(q)(1)

Consolidated Petitioners argue that section 402(q)(1) of the federal Clean Water Act ("CWA") (33 USC § 1342[q][1]) mandates that the 2005 ACO compliance schedule be incorporated into the permits. This section of CWA states:

> "[e]ach permit, order, or decree issued pursuant to this Act after [December 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the

[2] The phrase "shortest reasonable time" appears both in the Environmental Conservation Law ("ECL") and the applicable regulations (see ECL 17-0813 ["compliance schedules shall require that the permittee within the shortest reasonable time consistent with the requirements of the (CWA) conform and meet" various standards, limitations and criteria]; see also 6 NYCRR 750-1.14 [a]).

Administrator on April 11, 1994" (parenthetical omitted).[3]

Consolidated Petitioners read this to mean that each and every CWA permit, order, and decree issued to a municipal CSO must contain "the requirement that permittees develop and implement a [long term control plan ("LTCP")] to eliminate or minimize CSO discharges" (Consolidated Petitioners Appeal, at 18). Consolidated Petitioners assert that the development and implementation of an LTCP is "[t]he core of the CSO Control Policy" (id.). Because the compliance schedule for the City's LTCP appears only in the 2005 ACO and not in the draft permits, Consolidated Petitioners argue that the draft permits violate section 402(q)(1).

In its reply brief, IEC states that it "agrees in principle with [Consolidated Petitioners] that the Clean Water Act and state law require incorporation of the [2005] ACO into the draft SPDES Permit, however, [IEC] differs with [Consolidated Petitioners] on how implementation should be carried out for practical purposes" (IEC Reply, at 4). Specifically, IEC maintains that the "wholesale incorporation of the [2005] ACO terms into the SPDES Permits does not serve a practical purpose" (id.). IEC endorses the incorporation into the draft SPDES permits of only milestone dates from the 2005 ACO that it concludes are significant and substantive (see id.).

NYCDEP acknowledges that the compliance schedules for both the water body specific facility plans and long term control plans, and the citywide LTCP are now contained only in the 2005 ACO (NYCDEP Reply, at 2). NYCDEP, however, contends that adding the compliance schedules to the permits is redundant and unnecessary. NYCDEP reads CWA § 402(q)(1) to require LTCP compliance schedules to be contained in the applicable permit, order or decree, but that no requirement exists that the schedules must be duplicated in each of those documents. NYCDEP emphasizes that the statutory language reads "[e]ach permit, order, or decree" and not "[e]ach permit, order, and decree" as the argument of Consolidated Petitioners would suggest (see NYCDEP Reply, at 2-3).

Department staff generally agrees with NYCDEP's read of CWA § 402(q)(1). Staff maintains that the use of the word "or" in

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[3] The Combined Sewer Overflow Control Policy ("CSO Control Policy") was published in its final form on April 19, 1994, in the Federal Register (59 Fed Reg 18688-701).

the phrase "each permit, order or decree" in the federal statute provides regulatory authorities with discretion in how they choose to ensure that the objectives of the CSO Control Policy are met (Staff Reply, at 4-5). Staff also cites to various provisions of the CSO Control Policy that provide flexibility and discretion to the regulatory authority (id. at 5-9).

I conclude that the meaning ascribed to CWA § 402(q)(1) by NYCDEP and Department staff is in keeping with the plain language of the statute and the provisions of the CSO Control Policy. The federal statute uses the word "or," and its meaning and intent are not to be read out of the statute as Consolidated Petitioners suggest. Accordingly, the inclusion of the compliance schedule in the 2005 ACO is sufficient to meet the legal requirements of the CWA, and the schedule does not have to be restated in each draft permit.

Each draft permit has a section entitled "Long-Term Control Plan." This section states that the Department and NYCDEP entered into the 2005 ACO, which implements the combined sewer overflow abatement plan. The section also states that the 2005 ACO is to be attached to each SPDES permit.[4]

Moreover, where the CSO Control Policy affords regulatory authorities flexibility in achieving the objectives of the policy, the exercise of that authority does not violate section 402(q)(1). As NYCDEP and staff point out, the CSO Control Policy provides for compliance schedules pertaining to LTCPs to be

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[4] As an example, the section entitled "Long-Term Control Plan" in the draft permit for the Hunts Point WPCP reads as follows:

"DEC and the Permittee have entered into an Administrative Order on Consent . . . effective January 14, 2005, concerning the Permittee's Combined Sewer Overflow ("CSO") abatement program. In addition to the Monitoring Requirements for CSO Regional Facilities in Item VIII and the CSO Best Management Practices set forth in Item IX, the CSO Order on Consent, which is attached hereto, governs the Permittee's obligations with regard to its CSO abatement program which includes, but is not limited to, design and construction of CSO abatement facilities and the submission of Waterbody/Watershed Facility Plan Reports (*i.e.* CSO Draft Long-Term Control Plans), Drainage Basin Specific CSO Long-Term Control Plans, and the City-Wide CSO Long-Term Control Plans. The CSO Order on Consent contains compliance schedules, which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters. Modifications to the CSO Order on Consent will be public noticed for review and comment in accordance with Uniform Procedures Regulations, 6 NYCRR Part 621".

included in an appropriate enforceable mechanism (see NYCDEP Reply, at 3; Staff Reply, at 4-5). Specifically, under the general heading "[Environmental Protection Agency ("EPA")] Objectives for Permittees," the CSO Control Policy states:

> "This policy identifies EPA's major objectives for the long-term CSO control plan. Permittees should develop and submit this long-term CSO control plan as soon as practicable, but generally within two years after the date of the NPDES permit provision, Section 308 information request, or enforcement action requiring the permittee to develop the plan. NPDES authorities [i.e., the EPA or appropriate state regulator] may establish a longer timetable for completion of the long-term CSO control plan on a case-by-case basis to account for site-specific factors which may influence the complexity of the planning process. Once agreed upon, these dates should be included in an appropriate enforceable mechanism" (CSO Control Policy, section II.C [59 Fed Reg 18691] [emphasis added]).

Furthermore, under the general heading "Expectations for Permitting Authorities," the CSO Control Policy states:

> "Once the permittee has completed development of the long-term CSO control plan and has coordinated with the permitting authority the selection of the controls necessary to meet the requirements of the CWA, the permitting authority should include in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan, including conditions for water quality monitoring and operation and maintenance" (CSO Control Policy, section IV.A [59 Fed Reg 18695] [emphasis added]).

The CSO Control Policy does not expressly define what an appropriate "enforceable mechanism" is, but does provide that:

> "[u]nder the CWA, EPA can use several enforcement options to address permittees with CSOs. Those options directly applicable to this Policy are [CWA] section 308 Information Requests, section 309(a) Administrative Orders, section 309(g) Administrative Penalty Orders, section 309(b) and (d) Civil Judicial Actions, and section 504

> Emergency Powers. NPDES States should use comparable means" (CSO Control Policy, section V.C [59 Fed Reg 18697]).

Additionally, the CSO Control Policy states that its provisions may be implemented through a "permit or other enforceable mechanism" (see CSO Control Policy, section I.C [59 Fed Reg 18690]; section I.D [id.]; and section II.B [id. at 18691]). Therefore, under the CSO Control Policy, the phrase "enforceable mechanism" includes an administrative consent order, among other enforcement mechanisms.

Nothing in this record suggests that either the plain language of CWA § 402(q)(1) or the exceptions, flexibility, and discretion established under the CSO Control Policy were to be replaced by a more prescriptive regimen. I do not read CWA § 402(q)(1) to eliminate that flexibility. As previously set forth, the CSO Control Policy authorizes the states to determine the appropriate enforceable mechanism through which to establish CSO compliance schedules. Here, Department staff has determined that the 2005 ACO is the appropriate mechanism under which to impose the compliance schedule, and nothing in the CSO Control Policy requires that each subsequent permit restate that same schedule.[5]

--Compliance with New York Law

Consolidated Petitioners next argue that New York State law provides an independent basis for the requirement that the City's CSO obligations be embodied in the SPDES permits (Consolidated Petitioners Appeal, at 25). Consolidated Petitioners cite ECL 17-0811(5) and assert that it requires "all SPDES permits issued by DEC [to] include such limitations as are 'necessary to insure compliance with water quality standards adopted pursuant to state law'" (id.). Additionally, Consolidated Petitioners argue that, under the circumstances presented here, ECL 17-0813(2) requires

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[5] Consolidated Petitioners' reliance on Friends of the Earth, Inc. v EPA, 446 F.3d 140 (D.C. Cir 2006) is misplaced. Consolidated Petitioners emphasize a phrase in the court's decision wherein the court states that "the CSO Policy requires municipalities with combined sewer systems to develop long-term control plans" (Consolidated Petitioners Appeal, at 24 [emphasis supplied by Consolidated Petitioners]). This does not conflict with my holding that the LTCP compliance schedule may be contained in the 2005 ACO rather than in the permit, as both are considered "enforceable mechanisms" under the CSO Control Policy.

SPDES permits to include compliance schedules and, as provided in 6 NYCRR 750-1.14(a), those schedules must contain "specific steps . . . designed to attain compliance within the shortest reasonable time" (id. at 26).

Department staff challenges Consolidated Petitioners' interpretation of the ECL. Among its arguments, Department staff further maintains that ECL 17-0813(2) provides only that SPDES permits "may contain compliance schedules" and that, if such schedules are included in the permits, they shall ensure "compliance with water quality standards within the shortest reasonable time" (id. at 11 [emphasis supplied by Department staff]).

In addition to the ECL provisions, Consolidated Petitioners argue that "DEC regulations are explicit that, '[w]here the time for compliance . . . exceeds nine months, a schedule of compliance shall be specified in the permit, which will set forth interim requirements and the dates for their achievement'" (Consolidated Petitioners, at 26 [quoting 6 NYCRR 750-1.14(b)] [emphasis supplied by Consolidated Petitioners]).

The time for compliance under the 2005 ACO compliance schedules is in excess of nine months, and neither NYCDEP nor Department staff dispute the applicability of 6 NYCRR 750-1.14(b) to the permits at issue here. Thus, the question is whether the draft permits meet the regulatory requirement that a schedule of compliance be "specified" in the permit.

The draft permits, in accordance with the ALJ's directive, contain the following provision: "[t]he CSO Order on Consent contains compliance schedules, which represent the shortest reasonable time within which to achieve water quality standards for the receiving waters" (see, e.g., the draft SPDES permit for the Jamaica Water Pollution Control Plant, Section IX, Long-Term Control Plan). Both the explicit reference in each draft permit to the 2005 ACO and its attachment to each permit satisfies the requirement of section 750-1.14(b) to "specify" in the permit a compliance schedule that exceeds nine months.

--Other Arguments

Consolidated Petitioners contend that the decision not to incorporate the 2005 ACO compliance schedules in the permits "cannot be reconciled with the ALJ's subsequent . . . holding that the 'interim effluent limits' for nitrogen discharges set

forth in the January 2006 consent judgment[6] . . . must be incorporated [in the permits]" (Consolidated Petitioners Appeal, at 29). They also argue that it may, in the event that the City violates the terms of the compliance schedules, adversely affect the viability of an action by EPA or a citizen suit seeking to enforce the compliance schedules (id. at 30). IEC agrees with Consolidated Petitioners' arguments concerning citizen suits and contends that "a consent order as a stand alone document provides no avenue for non-signatories to enforce the failure to meet any obligation on the part of the signatories" (IEC Reply, at 5).

With regard to whether the ALJ's decision to incorporate the nitrogen limits conflicts with his decision not to incorporate the compliance schedules, Department staff points to numerous distinctions between these two rulings of the ALJ, especially the fact that NYCDEP and staff agreed to the incorporation of the effluent limits for nitrogen (see Staff Reply, at 12-14). I concur with Department staff that the incorporation of the effluent limits for nitrogen, which reflected an agreement between NYCDEP and staff, does not otherwise mandate the incorporation of the 2005 ACO compliance schedules in the permits.

In summary, the inclusion of the compliance schedule in the 2005 ACO, which is an enforceable mechanism, satisfies the requirements of both federal and State law. Additionally, Department staff has, by the very language of the draft permits, provided that the 2005 ACO is to be attached to each SPDES permit (see, e.g., draft permit for Newtown Creek Water Pollution Control Plant, Section IX [stating that the 2005 ACO is "attached hereto"]).[7]

2. CSO Issues Ruling, Ruling #4.

CSO Issues Ruling, Ruling #4, addresses whether the draft permits failed to conform with the CSO Control Policy of the EPA

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[6] In January 2006, a consent judgment was entered in Matter of New York City Dept. of Envtl. Protection v State of New York, (Sup Ct, New York County, Jan. 10, 2006, Feinman, J., Index No. 04-402174). Among other things, the 2006 consent judgment sets forth interim effluent limits for nitrogen discharges from the WPCPs. Pursuant to the consent judgment, Department staff issued revised draft permits addressing nitrogen and other issues.

[7] Whether the 2005 ACO may be challenged in a citizen suit by non-signatories is not relevant to whether the Consolidated Petitioners raised an adjudicable issue. Here they have not.

because the draft permits did not include narrative water quality based effluent limitations. The ruling stated that the narrative water quality standards are applicable to all SPDES permits by operation of State law and, therefore, the issue whether the standards are expressly included in the permit terms is neither substantive nor significant (see CSO Issues Ruling, at 13).

Consolidated Petitioners argue that both federal and State law require SPDES permits to include narrative water quality effluent limitations and that, as currently proposed, the draft permits fail to do so (see Consolidated Petitioners Appeal, at 36). IEC supports the inclusion of limitations based on water quality standards in the SPDES permits, but only with respect to certain parameters – floatables, settleable solids, and oil and grease (see IEC Reply, at 7).

NYCDEP and Department staff argue that compliance with water quality standards is already mandated by the draft permits as written and, therefore, no revisions to the permits are necessary. Both NYCDEP and staff quote text from the first page of the draft permits which states that discharges must be "in accordance with effluent limitations; monitoring and reporting requirements; other provisions and conditions set forth in this permit, and 6 NYCRR Part 750-1.2(a) and 750-2" (see NYCDEP Reply, at 5; Staff Reply, at 19).

The assertion of Consolidated Petitioners and IEC that the draft permits do not require NYCDEP to comply with water quality standards is not correct. Not only are the Consolidated Petitioners and IEC incorrect as to what the draft permits state, a permittee cannot violate water quality standards by operation of federal and State law. Congress intended water quality standards to provide an important backstop to effluent limitations in a CWA (SPDES) permit (see CWA § 301[b][1][C]). In other words, water quality standards can drive the imposition of more stringent limitations.[8] The ECL and accompanying regulations further this federal mandate. For example, in New York State, water quality standards are established under ECL 17-0301. To ensure that the water quality standards are maintained, ECL 17-0501(1) expressly provides that it is "unlawful for any person . . . to discharge . . . matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301."

[8] See, e.g., Arkansas v Oklahoma, 503 US 91, 101(1992)(addressing how water quality standards supplement effluent limitations to prevent water quality from falling below acceptable levels).

The regulations further support the mandate that permittees are to comply with water quality standards. Section 750-2.1(b) of 6 NYCRR subpart 750-2, which is referenced in each of the draft permits, provides that "[s]atisfaction of permit provisions notwithstanding, if operation pursuant to the permit causes or contributes to a condition in contravention of State water quality standards or guidance values," the Department may modify the permit or take enforcement action against the permittee, including requiring abatement action or prohibiting operation. Therefore, by operation of federal and State statutes (the CWA and the ECL), and by express reference in the draft permits to 6 NYCRR subpart 750-2, NYCDEP is required to comply with water quality standards.[9] The additional language that Consolidated Petitioners and IEC seek to incorporate into the permits is neither required nor necessary.

3. CSO Issues Ruling, Ruling #7, & Nitrogen Issues Ruling, Ruling #4.

The CSO Issues Ruling, Ruling #7, addresses whether discharges of nitrogen and biological oxygen demand ("BOD") in treated effluent from the four Jamaica Bay WPCPs[10] act cumulatively with CSO discharges to impair water quality in Jamaica Bay, and, therefore, require that the permits for the four plants contain water quality-based effluent limitations for nitrogen and BOD to address the cumulative impacts. The ALJ ruled that "[n]o adjudicable issue exists regarding revision of the draft Jamaica Bay permits to recite a narrative water quality standard" (CSO Issues Ruling, at 17). The ALJ noted that the applicable regulations are referenced on the first page of each draft permit and those regulations contain the narrative water quality standards (see id.).

Nitrogen Issues Ruling, Ruling #4, is interrelated with CSO Issues Rulings numbered 4 and 7 above. With respect to Nitrogen Issues Ruling, Ruling #4, the ALJ denied adjudication of the issue whether the SPDES permits for the WPCPs that discharge into

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[9] This is not to suggest that NYCDEP would violate the legal obligation to comply with applicable water quality standards when it acts pursuant to a duly signed consent order, decree, or judgment. As the discussion elsewhere in this decision indicates, consent orders, decrees, or judgments constitute appropriate enforcement mechanisms to achieve compliance.

[10] The four plants are 26th Ward WPCP, Coney Island WPCP, Rockaway WPCP, and Jamaica WPCP (collectively, "Jamaica Bay plants")(see CSO Issues Ruling, at 16 fn 1).

Jamaica Bay must include additional provisions to ensure compliance with water quality standards pertaining to nitrogen.

Consolidated Petitioners argue that the draft permits for the Jamaica Bay plants sanction a pollutant discharge that does not meet applicable water quality standards. Consolidated Petitioners assert that NYCDEP has been in "compliance" with its existing effluent limits for nitrogen, that these limits are unchanged in the draft permits, and that, nevertheless, violations of water quality standards continue (see Consolidated Petitioners Appeal, at 40-43). Consolidated Petitioners argue, "even assuming the permits [for the Jamaica Bay plants] do include a narrative water quality-based effluent limitation for nitrogen," the numeric limits in the draft permits "can hardly be said to 'ensure' compliance with water quality standards in any real-world, practical sense" (id. at 43).

Additionally, Consolidated Petitioners argue that the ALJ's reliance on Department staff's stated intent to revise the permits in the future to improve Jamaica Bay water quality is in error. Consolidated Petitioners contend that this "intent" is insufficient to satisfy legal requirements that apply to the permits today (see Consolidated Petitioners Appeal, at 43-44). Consolidated Petitioners conclude that the Commissioner should reverse Ruling #4 of the Nitrogen Issues Ruling and Ruling #7 of the CSO Issues Ruling and rule that the nitrogen effluent limits for the four Jamaica Bay plants "are inadequate as a matter of law" (id. at 47).

Department staff notes that both the revised draft SPDES permits for the Jamaica Bay plants and the 2006 Consent Judgment provide that, following the approval of the Comprehensive Jamaica Bay Report,[11] the permits will be reopened for modification (see Staff Reply, at 25). Department staff argues that it would be inappropriate to require changes to the Jamaica Bay plant draft

[11] Under the terms of the 2006 consent judgment, NYCDEP is required to submit the Comprehensive Jamaica Bay Report to the Department for approval. The Comprehensive Jamaica Bay Report "shall summarize and integrate" information from sources specified in the 2006 consent judgment "and provide recommendations and an implementation schedule for improving water quality in Jamaica Bay" (2006 consent judgment, Appendix B ["26th Ward WPCP Upgrade Schedule & Jamaica Bay Milestones"]). NYCDEP submitted the report, which among other things, addressed a phased approach for adaptive management of environmental improvements and nitrogen reduction by advanced wastewater treatment, to the Department in October 2006 for staff review.

permits at this time, on the basis of the Comprehensive Jamaica Bay Report, prior to Department approval of that report (see id. at 24-25).

Consolidated Petitioners miscomprehend what is required by the language contained in the draft Jamaica Bay plant permits. Each of the draft permits expressly states that "[u]pon approval by the Department [of the Jamaica Bay Report], or as soon as possible thereafter, the Department will reopen the permit and propose a modification to the SPDES permits for the Jamaica Bay WPCPs . . . to require the implementation of the Comprehensive Jamaica Bay Report" (see draft SPDES permit for the Jamaica Water Pollution Control Plant, section VI, Jamaica Bay WPCPs [Jamaica, Rockaway, Coney Island, 26th Ward] No-Net Increase Effluent Limits and Monitoring for Nitrogen, at 10 fn 5 [emphasis supplied]). Accordingly, the draft permits for the Jamaica Bay plants expressly provide a mechanism by which the permits will be reopened once the Comprehensive Jamaica Bay Report is approved.

Therefore, I determine that the draft Jamaica Bay plant permits provide an appropriate mechanism to ensure compliance with water quality standards within the shortest reasonable time.

4. CSO Issues Ruling, Ruling #9

CSO Issues Ruling, Ruling #9, addresses whether the draft SPDES permits and the CSO ACO incorporated appropriate procedures for public review and participation. The ALJ determined that the proposed issue did not raise doubts about NYCDEP's ability to meet statutory or regulatory criteria nor did the issue have the potential to result in denial or major modification of the draft permits, or result in imposition of significant new permit conditions in the draft permits. Accordingly, the ALJ concluded that the issue was not adjudicable (see CSO Issues Ruling, Ruling #9, at 20).

On their appeal, Consolidated Petitioners argue that "in order to comply with a 1993 ruling of the DEC Commissioner concerning the City's SPDES Permits and the 1992 administrative consent order on CSOs ["1992 ACO"], the proposed SPDES Permits must be revised to state specifically that any future modifications to the [2005 ACO] will be subject to an opportunity for a full adjudicatory hearing under 6 NYCRR Part 624" (Consolidated Petitioners Appeal, at 48). Consolidated Petitioners rely, in part, on a 1993 ALJ ruling that recommended the 1992 ACO be revised "to require any proposed modification of the schedule of compliance to comply with the procedural requirements of 6 NYCRR Part 753, governing SPDES permit

applications" (Matter of New York City Department of Environmental Protection, Supplemental Rulings of Administrative Law Judge, January 27, 1993, at 8 ["1993 Ruling"]). The 1993 Ruling was affirmed by the Commissioner (see Matter of New York City Department of Environmental Protection, Third Interim Decision of the Commissioner, June 1, 1993, at 2 ["Third Interim Decision"]). Part 753 of 6 NYCRR set forth regulations governing notice, public participation, and hearings applicable to SPDES permit applications.

Consolidated Petitioners argue that the reference in the draft permits to 6 NYCRR part 621 is insufficient to ensure appropriate public participation. According to Consolidated Petitioners, this approach "fails to satisfy the requirement of the Third Interim Decision (affirming [the] 1993 ruling) that ACO modifications must afford full public participation rights, including the opportunity for an adjudicatory hearing, not merely the notice and comment procedures applicable under Part 621" (Consolidated Petitioners Appeal, at 49).

IEC "fully endorses" Consolidated Petitioners' argument that the draft permits are inconsistent with the 1993 Ruling (IEC Reply, at 8). IEC argues that the draft permits "must be revised to state specifically that any future modifications of the [2005] ACO will be subject to an opportunity for a full adjudicatory hearing under 6 NYCRR Part 624" (id. at 9).

The arguments of Consolidated Petitioners and IEC are misplaced. First, the 1993 Ruling and the Third Interim Decision are not applicable. The 1992 ACO, as modified in 1996, was rendered "null and void" by the 2005 ACO (see 2005 ACO, at paragraph I, at 6). The 2005 ACO did not simply modify the 1992 ACO, but rather, replaced the earlier ACO "in [its] entirety" (id.). Second, part 753 of 6 NYCRR, which as noted established notice, public participation, and hearings-related requirements for SPDES permit applications, was repealed in 2003. Consolidated Petitioners cite no similar provision enacted in its place.[12] In short, the 1993 Ruling concerned provisions of an order on consent that is now superseded and imposed procedural requirements from a regulation now repealed.

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[12] In the 1993 ruling, the ALJ sought to address, by citing part 753, issues relating to public notice requirements in the event that a modification to the compliance schedule in the 1992 ACO was proposed (see 1993 Ruling, at 8 [noting that under part 753, a proposed modification to the compliance schedule would require "public notice . . . along with a hearing if substantive issues are raised"][emphasis added]).

Consolidated Petitioners also confuse the application of Parts 621 and 624. Presently, Part 621 establishes specific requirements governing the general permitting process, including, among other things, modification of permits (see 6 NYCRR 621.13; see also 6 NYCRR 750-1.18[a][referencing modifications in the context of 6 NYCRR part 621]). It also establishes standards governing whether a public hearing will be conducted, and, in the event that substantive and significant issues are raised, authorizes referral for adjudication (see, e.g., 6 NYCRR 621.8). Once a matter is referred to the Office of Hearings and Mediation Services for adjudication, Part 624 sets forth the permit hearing procedures that govern.

The current draft permit language, as proposed by Department staff, provides an appropriate mechanism for public participation where the modification at issue is of sufficient consequence to warrant public notice and, potentially, an adjudicatory hearing. Specifically, Department staff's proposed language states that "[m]odifications to the CSO Order on Consent will be publicly noticed for review and comment in accordance with Uniform Procedures Regulations, 6 NYCRR Part 621" (see e.g. draft SPDES permit for the Jamaica Water Pollution Control Plant, Section IX, Long-Term Control Plan).

Furthermore, where either the Department's review or comments received from the public on those modifications raise substantive and significant issues that may result in denial of or substantial revision to a proposed modification, the Department would hold an adjudicatory public hearing in accordance with the provisions of 6 NYCRR part 624 (see 6 NYCRR 621.8[b] and [g]; see also 6 NYCRR 621.13[f][noting where modifications for SPDES and other delegated permits are to be treated as new applications][13]). Accordingly, if substantive and significant issues are raised, the matter will be referred to the Office of Hearings and Mediation Services for adjudication.

Thus, the current provisions of Part 621 provide Consolidated Petitioners and IEC with the procedural safeguards they seek. Accordingly, no revision to the language of the draft permits with respect to procedural requirements is legally

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[13] Section 621.11(h) of 6 NYCRR also establishes that, in various circumstances, the Department may determine that "any application for . . . modification will be treated as a new application for a permit." This includes, but is not limited to, where an application involves a material change in existing permit conditions or in the scope of the permitted actions, or where there is newly discovered material information (see 621.11[h]).

required. However, recognizing the interests of the issues conference participants in this matter and their involvement in this proceeding, it would be appropriate for issues conference participants to be notified of any proposed modification to the SPDES permits following their issuance and during their term. Accordingly, Department staff is directed to notify in writing Consolidated Petitioners, IEC, and the other organizations on the service list to this proceeding of any proposed modifications to the permits following their issuance.

5. Nitrogen Issues Ruling, Ruling #5

In Nitrogen Issues Ruling, Ruling #5, the ALJ held that the City of New York must be added as a named permittee to each of the proposed SPDES permits. NYCDEP and Department staff appeal from that ruling.

NYCDEP argues that the issue was not timely raised by Consolidated Petitioners and should not have been considered by the ALJ (see NYCDEP Appeal, at 2). Moreover, NYCDEP argues, pursuant to 6 NYCRR 750-1.6(a), it is NYCDEP, as the "operator" of the WPCPs, that "is responsible for obtaining a permit, and ensuring compliance with its requirements" (NYCDEP Appeal, at 5). NYCDEP also challenges the ruling's reliance on 6 NYCRR 750-1.7(a)(17) as the basis for requiring the City to be named as a co-permittee. According to NYCDEP, this section pertains only to the Department's ability to request additional information from an applicant and, "[i]n contrast, the [identity of the] proper applicant is set forth in the previous section, 750-1.6(a), and is the operator of the facility" (id. at 6).

Department staff makes similar arguments. Staff contends that 6 NYCRR 750-1.7(a)(17) provides the Department with "discretion to require the applicant to submit additional information that would assist in drafting the SPDES permit parameters" (Staff Appeal, at 3-4). Staff agrees with NYCDEP that "federal and state regulations express that it is the operator's duty to obtain a permit when a facility is owned by one person but operated by another person" (id., at 5 [citing 40 CFR 122.21(b) and 6 NYCRR 750-1.6(a)]).

Consolidated Petitioners and the Connecticut Fund for the Environment, Inc. ("CFE") question whether NYCDEP has the authority to implement all the provisions of the draft permits. As summarized in the Joint Reply, the primary concern of Consolidated Petitioners and CFE is that "only the City, via its myriad agencies (not just NYCDEP), has operational control over all aspects of the 14 [WPCPs] and possesses the authorities

needed to comply with many terms of the Proposed SPDES Permit relating to stormwater and CSOs" (Joint Reply, at 2).

Under the circumstances presented here, I am satisfied that NYCDEP, as the operator of the 14 WPCPs, is the appropriate permittee, and the City need not be added to the permits as a co-permittee. The legal arguments set forth by NYCDEP and Department staff are persuasive and compelling. NYCDEP is, indisputably, a department within the municipal government of the City of New York. As a duly established department under the charter of the City of New York, NYCDEP is an administrative division of the City acting within its sphere of authority.

I have reviewed relevant provisions of the New York City Charter and the New York City Rules and Regulations. The City has granted NYCDEP broad powers and authorities in all matters relating to the City's sewer system.[14] Accordingly, I am satisfied that, in applying for and being named the permittee on the SPDES permits, NYCDEP is acting within its authority pursuant to the powers granted to it by the City.

For the foregoing reasons, I reverse Ruling #5 of the Nitrogen Issues Ruling and hold that Department staff need name only NYCDEP as the permittee on the SPDES permits that are the subject of this proceeding.[15]

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[14] See, e.g., NY City Charter § 1403 (stating that the commissioner of NYCDEP "shall have charge and control of and be responsible for all those functions and operations of the city relating to . . . the disposal of sewage and the prevention of air, water and noise pollution," and further stating, at § 1403(b), that the commissioner "shall have charge and control over the location, construction, alteration, repair, maintenance and operation of all sewers . . . and sewage disposal plants, and of all matters in the several boroughs relating to public sewers and drainage"); Rules of City of NY Dept. of Envtl. Protection (15 RCNY) § 19-02 (governing the disposal of wastewater, stormwater and groundwater).

[15] NYCDEP and Department staff contend that this issue regarding the entity or entities to be named as permittee was not timely raised before the ALJ and should not be considered (see NYCDEP Appeal, at 2-4; Staff Appeal, at 9-10). Based upon the record before me, I conclude that the issue was timely raised.

CONCLUSION

Based upon my review of the record, Consolidated Petitioners in their appeal failed to raise any substantive and significant issues for adjudication. To the extent that Consolidated Petitioners raised other arguments on their appeal that are not specifically addressed in this decision, I have considered them and found them to be without merit. Accordingly, Consolidated Petitioners' appeal is dismissed.

Upon consideration of the appeal of NYCDEP and Department staff, I reverse Nitrogen Issues Ruling, Ruling #5, and hold that the City of New York need not be added to the draft permits as a co-permittee.

There being no issues for adjudication, I remand this matter to Department staff for issuance of the permits to NYCDEP, consistent with the draft permits prepared by Department staff and this decision. As noted, the 2005 ACO is to be attached to each permit.

Copies of the permits shall also be mailed to the service list in this proceeding at the same time that they are issued to NYCDEP.

Department staff is also directed to provide notice of any proposed modification to the SPDES permits following their issuance to the service list at the same time that the notice is provided to NYCDEP.

For the New York State Department
of Environmental Conservation

/s/

By: Alexander B. Grannis
Commissioner

Dated: June 10, 2010
Albany, New York