

Natural Resources Defense Council • NY/NJ Baykeeper  
Pace Environmental Litigation Clinic • Riverkeeper • Soundkeeper

Sept. 27, 2011

Commissioner Joe Martens  
NYS Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-1011

Commissioner Carter H. Strickland  
NYC Department of Environmental Protection  
59-17 Junction Blvd.  
Flushing, NY 11373

**Re: Ongoing negotiations between NYSDEC and NYCDEP concerning modifications to the 2004 Combined Sewer Overflow Administrative Consent Order (DEC Case # CO2-20000107-8)**

Dear Commissioner Martens and Commissioner Strickland:

On behalf of the undersigned organizations and our more than 40,000 members, including over 15,000 in New York City, we write to call your attention to the final decision in *NRDC, et al. v. Grannis, et al.*, No. 110898/10 (N.Y. Sup. Ct.) and its implications for ongoing negotiations between the New York State Department of Environmental Conservation (“NYSDEC”) and New York City Department of Environmental Conservation (“NYCDEP”) concerning New York City’s combined sewer overflow (CSO) abatement obligations.<sup>1</sup> Our organizations participated for seven years (from 2003-2010) in the most recent NYSDEC administrative proceeding concerning the city’s CSO abatement obligations. It remains a priority for all of our groups to ensure that the city develops and implements CSO Long Term Control Plans that protect our waterways and satisfy all requirements of the federal Clean Water Act and state Environmental Conservation Law.<sup>2</sup>

As explained below, as a result of the court’s ruling in *NRDC v. Grannis*, it is now clear that **NYSDEC and NYCDEP cannot change the city’s CSO abatement obligations through bi-lateral negotiations, without providing a full opportunity for public participation, including an adjudicatory hearing on any substantive and significant issues.**

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<sup>1</sup> We enclose a copy of the court’s Decision, Order and Judgment, entered on August 4, 2011. We note that no party to the proceeding has filed a notice of appeal or sought any other post-judgment relief within the applicable deadlines for doing so.

<sup>2</sup> Among other things, two of the undersigned organizations, NRDC and Riverkeeper, are represented on NYCDEP’s Green Infrastructure Steering Committee. *See* [http://www.nyc.gov/html/dep/html/stormwater/nyc\\_green\\_infrastructure\\_outreach.shtml](http://www.nyc.gov/html/dep/html/stormwater/nyc_green_infrastructure_outreach.shtml). Most or all of the undersigned organizations are also active members of the Storm Water Infrastructure Matters (SWIM) Coalition, which has long been engaged with both NYCDEP and NYSDEC on issues relating to CSOs and green infrastructure. *See* [www.swimmablenyc.info](http://www.swimmablenyc.info).

It is now widely known that NYSDEC and NYCDEP are negotiating changes to the city's existing CSO obligations, including changes that would expand the role of "green infrastructure" in the city's CSO abatement program. Our groups strongly support the idea of improving the city's existing CSO administrative consent order ("Consent Order") to ensure the "green infrastructure" is fully integrated into the city's CSO program.<sup>3</sup> While we have not been privy to the ongoing negotiations, we are encouraged that this appears to be one of the main objectives of the negotiation. That is not to say, however, that *any* agreement between the city and state that incorporates substantial green infrastructure investments is necessarily one we could support, nor one that we would believe satisfies the requirements of state and federal law.<sup>4</sup>

**Accordingly, as your agencies continue their ongoing negotiations, we call on you to ensure that the general public has a meaningful role in the decisionmaking process, as required by law.** We would welcome the opportunity to participate directly in negotiations with the city and state, with the aim of reaching a settlement that all parties could agree to codify in the city's Clean Water Act permits. At a minimum, however, any proposed bi-lateral agreement between NYSDEC and NYCDEP must be fully vetted with the public; the state and city must provide meaningful opportunities for public input before purporting to modify any of the city's existing CSO-related obligations.

Presently, the city's specific CSO abatement obligations are defined by 13 State Pollutant Discharge Elimination System ("SPDES") permits, including the Consent Order attached thereto, which NYSDEC has issued pursuant to the federal Clean Water ("CWA") and state Environmental Conservation Law ("ECL"). In *NRDC v. Grannis*, the court ruled that "the terms of the Consent Order . . . are clearly incorporated as enforceable terms under the [SPDES] permits." Decision, Order and Judgment at 14.<sup>5</sup>

The court's ruling makes clear that the terms of the Consent Order are enforceable by citizen suit under Section 505 of the CWA, 33 U.S.C. § 1365. We emphasize that we currently have no intention of bringing such a citizen suit. However, the fact that the Consent Order's requirements are subject to citizen suit enforcement as SPDES permit terms has critically important implications for any future modifications to the Consent Order that NYSDEC and NYCDEP may negotiate.

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<sup>3</sup> See, e.g., Letter of 11/12/2010 from SWIM Coalition to NYSDEC Asst. Cmr. J. Tierney, Re: "NYC Green Infrastructure Plan" (available at: [http://swimmablenyc.info/wp-content/uploads/2010/11/SWIMSC\\_GIplan\\_DEC.pdf](http://swimmablenyc.info/wp-content/uploads/2010/11/SWIMSC_GIplan_DEC.pdf)).

<sup>4</sup> See *id.*

<sup>5</sup> This is clearly a holding, not dictum, as the court relied on this reading of the permits to conclude that they "satisfied the requirement [of 6 NYCRR § 750-1.14(b)] that a Compliance Schedule 'shall be specified in the permit.'" *Id.* We further note that this result is consistent with, among other things, EPA's instruction to NYSDEC in 2004 that "[t]he long-term planning and implementation obligations in the [CSO ACO] should, by mutual consent, be contemporaneously incorporated into the [SPDES] permits governing discharges from the City's fourteen wastewater treatment plants." See Letter from W. Andrews (EPA Region 2), to J. DiMura (DEC) of 10/6/04.

Specifically, DEC cannot render the terms of the existing Consent Order inoperative with respect to any potential citizen suit, except by *lawfully modifying the SPDES permits*, pursuant to all applicable procedural requirements. While a modification to the Consent Order or a new administrative order that supersedes it can alter (or abrogate) NYSDEC's rights to enforce NYCDEP's obligations under the existing Consent Order, any such new or modified consent order would not affect the enforceability of the terms of the existing Consent Order by potential citizen suit plaintiffs, *unless* DEC processes the terms of the new or modified order as a modification to the SPDES permits. *See, e.g., Riverkeeper, Inc. v Mirant Lovett, LLC*, 675 F. Supp. 2d 337, 345-46 (S.D.N.Y. 2009) (NYSDEC administrative consent order cannot modify a SPDES permit absent compliance with "the public notice and participation requirements necessary to modify a SPDES permit").<sup>6</sup>

The applicable procedural requirements for a SPDES permit modification include public notice, an opportunity for public comment, and, if such comments raise any "substantive significant issues," an adjudicatory hearing before an administrative law judge. *See* 6 NYCRR §§ 621.8(b), (g); 621.11(i); 621.13(f); 624.4(c)(1)(iii).

We note that NYSDEC Staff refused, throughout the permit proceeding, to clearly state that the agency would treat any public comments on a proposed modification to the Consent Order the same as comments on a draft SPDES permit -- *e.g.*, to state that the agency would refer the matter to an administrative law judge for a hearing under 6 NYCRR § 624 if the comments raise substantive and significant issues. Following the decision in *NRDC v. Grannis*, there should no longer be any dispute that, if NYSDEC fails to provide an adjudicatory hearing on any substantive and significant issues identified in public comments on a modification to the Consent Order, such modification would *not* alter NYCDEP's obligations under its SPDES permits.

We also note that the NYSDEC Commissioner's June 10, 2010 final decision on the city's current SPDES permits (at p. 16) held that the 2005 Consent Order was not a "modification" to the 1992 administrative consent order, which previously governed the city's CSO obligations, but rather a "replace[ment]" for the 1992 order. While we fundamentally disagree with that analysis, it appears that, under the logic of the Commissioner's ruling, NYSDEC and NYCDEP could, at their sole discretion, choose to embody any future changes to the city's CSO compliance obligations in either a "modification" to the 2005 Consent Order, or in a new order that "replaces" the existing one. We have no doubt that, for the purposes of NYCDEP's obligations under its SPDES permits, this choice represents a distinction without a difference. In light of the decision in *NRDC v. Grannis*, regardless of the labels attached to any

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<sup>6</sup> *See also Ohio Valley Env'tl. Coalition, Inc. v. Apogee Coal Co., LLC*, 531 F.Supp.2d 747, 755 (S.D.W.Va.2008) (allowing CWA claims against defendant to proceed where permit authority attempted to modify permit through administrative order but "there was no public notice and [p]laintiffs' ability to challenge the modification through state administrative channels was effectively eliminated"); *Citizens for a Better Environment-Cal. v. Union Oil Co. of Cal. (UNOCAL)*, 83 F.3d 1111, 1120 (9th Cir.1996) (state enforcement agency's attempted modification of permit with consent order ineffective when agency failed to comply with "federal and state regulations govern[ing] the modification of NPDES permits," which "ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant regulatory authorities"); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1012 (3d Cir.1988) (stipulation with EPA staying enforcement of violations on certain permit conditions void because there was "no opportunity for public participation" and the applicable regulations did not "permit dispensing with public notice when an amendment effects a substantial change in the terms of a permit").

future changes to the city's obligations under the existing Consent Order, the terms of that Consent Order will remain enforceable as terms of NYCDEP's SPDES permits, unless NYSDEC follows all legally required procedures for modifying those permits.

In conclusion, we look forward to working constructively with NYSDEC and NYCDEP to seek consensus on improvements to the city's CSO compliance program. Notably, NYCDEP has committed, in its 2010 Green Infrastructure Plan, to seek such consensus.<sup>7</sup> Therefore, we are hopeful that the ongoing discussions concerning modifications to the Consent Order can yield agreements that would allow for the uncontested modification of the CSO provisions of the city's SPDES permits, while avoiding the need for any party to seek further judicial relief.

Sincerely,



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**encl.**

cc: Judith Enck, Regional Administrator, USEPA Region 2  
*[list continued on next page]*

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<sup>7</sup> See *NYC Green Infrastructure Plan* (2010), pp. 11, 129 (available at: [http://www.nyc.gov/html/dep/html/stormwater/nyc\\_green\\_infrastructure\\_plan.shtml](http://www.nyc.gov/html/dep/html/stormwater/nyc_green_infrastructure_plan.shtml)).

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

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In the Matter of

NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
RIVERKEEPER, INC., SOUNDKEEPER, INC.,  
HUDSON-RARITAN BAYKEEPER, INC.,  
(d/b/a NY/NJ BAYKEEPER),

Petitioners,

**DECISION, ORDER  
and JUDGMENT**

Index No. 110898/10

For Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

ALEXANDER B. GRANNIS, in his official  
capacity as Commissioner of the NEW YORK  
STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION, and DEPARTMENT OF  
ENVIRONMENTAL PROTECTION OF THE CITY  
OF NEW YORK,

Respondents.  
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**Jane Solomon, J.:**

This is an article 78 proceeding by petitioners Natural Resources Defense Council, Inc., Riverkeeper, Inc., Soundkeeper, Inc. and Hudson-Raritan Baykeeper, Inc., challenging two decisions of the Commissioner of the Department of Environmental Conservation (Commissioner), which resulted in the issuance of certain State Pollution Discharge Elimination System Permits to the Department of Environmental Protection of the City of New York in connection with the operation of 14 water pollution control plants in New York City. For the reasons stated below, the First Amended Verified Petition (Petition) is dismissed.

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NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

## 1. Parties

Petitioner Natural Resources Defense Council, Inc. is a not-for-profit organization which was founded in 1970 and has its headquarters in New York City. Petition, ¶ 8. Its goal is to protect public health and the environment through litigation, lobbying, and public education. Id.

Petitioner Riverkeeper, Inc. is a not-for-profit environmental organization which is headquartered in Tarrytown, New York. Its 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." Petition, ¶ 9.

Petitioner Soundkeeper, Inc. is a not-for-profit organization, founded in 1987, which works "to protect and enhance the biological, physical, and chemical integrity of Long Island Sound through education, projects, and advocacy." Petition, ¶ 10.

Petitioner Raritan Baykeeper, Inc. is a not-for-profit public interest corporation. It works "to protect, preserve, and restore the ecological integrity and productivity of the Hudson-Raritan Estuary through enforcement, field work and community action." Petition, ¶ 11.

Respondent Department of Environmental Protection of the City of New York (NYCDEP) is the agency of the City of New York which, among other things, operates the 14 water pollution

control plants (the Plants) which treat most of the sewage generated in New York City. It also operates the City's combined sewage system.

Respondent New York State Department of Environmental Conservation (DEC) is the state agency which issued the State Pollution Discharge Elimination System (SPDES) permits at issue here.

Respondent Alexander B. Grannis (Grannis) is the former Commissioner of the DEC. Grannis issued the June 10, 2010 decision which is the subject of the instant petition.

## **2. Background**

Approximately two-thirds of New York City's sewer system is a combined one, meaning that the sewer pipes convey both sanitary sewage wastewater and storm water runoff, i.e. rainfall and snow melt. See Affidavit of Vincent Sapienza, Deputy Commissioner for the Bureau of Wastewater Treatment of the NYCDEP at ¶ 4. In dry weather, almost all of the City's sewage is treated at one of the Plants, before the sewage is released into a receiving body of water. Id. However, when storm water runoff increases, e.g. during a heavy rainfall, the additional water volume may cause sewage backups into homes; in addition, excess water flow through the Plants can wash out organisms that break down and treat waste. Id.

To prevent backups, the City's sewer system is equipped with relief structures known as combined sewer outfalls. Id.

During events in which the volume of water exceeds the system's capacity to convey and treat the water, discharges of untreated sewage and storm water are conveyed through such outfalls directly into various bodies of water in and around New York City. Such discharges are referred to as combined sewer outflows, or CSOs.

According to NYCDEP, the Plants process an average of 1.3 billion gallons of wastewater every day, approximately 475 billion gallons each year, and 27 billion gallons of combined sewer overflows. Id., ¶ 19 and 38. Respondents do not dispute this, but state that the total consists of approximately 12 percent sanitary sewage and 88 percent storm water runoff. Sapienza Affidavit, ¶ 19.

While there are 422 outfalls which are licensed to discharge water, NYCDEP states that the majority of them never have discharges. Sapienza Affidavit, ¶ 20.

### **3. Statutory Framework**

The discharge of sewage into bodies of water is regulated on the federal and state levels. In 1972, Congress passed the Federal Water Pollution Control Act, 33 USC § 1251, et seq., which is commonly referred to as the Clean Water Act (CWA). Relevant here, the CWA created a national pollutant discharge elimination system (NPDES), which is a mandatory permitting program that governs point sources of effluent discharged into bodies of water in the United States, and regulates the amount of

pollutants that such discharged water may contain. See 33 USC §§ 1341, 1342. The Plants are considered point sources and are subject to the CWA.

The CWA permits individual States to develop and administer their own permitting programs in lieu of the federal NPDES program, provided that the State program, at a minimum, ensures compliance with the federal standard. See 33 USC § 1342(b), (c). New York's program was approved in 1975 and is codified at Environmental Conservation Law (ECL) §§ 17-0801, et seq.; see *Catskill Mountains Chapter of Trout Unlimited, Inc. v Sheehan*, 71 AD3d 235, 240-41 (3d Dept 2010).

Under New York's program, the DEC administers the issuance of the SPDES permits, which regulate the discharge of pollutants into New York's waters. See 6 NYCRR 750, et seq. Except in certain limited circumstances, the discharge of pollutants is prohibited unless a SPDES permit has been obtained. The discharge must occur in the manner prescribed in the permit.

The DEC also administers the revocation and modification of permits. For example, the DEC may modify an existing SPDES permit if the permittee fails to comply with any of the terms or conditions of the permit. See 6 NYCRR 621.13 (2).

The regulations provide that a SPDES permit may contain compliance schedules, which operate to "achieve compliance by the permittee with applicable effluent limitations, water quality standards, and other requirements...." 6 NYCRR 750-1.14 (a).

Where necessary, the DEC must establish "specific steps" in the compliance schedule "designed to attain compliance within the shortest reasonable time." 6 NYCRR 750-1.14 (a). Further, "[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." 6 NYCRR 750-1.14 (b).

The permit application and administration process is set forth in ECL §§ 70-0101 et seq. and NYCRR Part 621 et seq. Once a SPDES application is complete, the DEC must publish, among other things, a notice of complete application, make a copy of the draft permit available for review, and provide for a public comment period of at least thirty days. ECL § 17-0805(1)(a), (b). Such comments may result in the holding of a public hearing. ECL § 70-0119(1); 6 NYCRR 621.9. The regulations provide, in relevant part, 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 an adjudicatory public hearing on the application.

6 NYCRR 621.8 (b); see ECL § 70-0119(1).

A substantive issue is one which 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). If the DEC determines that no substantive or significant issues have been raised then no public hearing is held.

In certain cases, including the case at hand, a permittee may object to proposed modifications of a SPDES permit. In that event, the permittee may request an adjudicatory hearing and a notice of hearing must be published. 6 NYCRR 624 et seq. A threshold hearing is conducted by an Administrative Law Judge (ALJ), in order to determine which petitioners are entitled to party status and which issues require an adjudicatory hearing. See 6 NYCRR 623, 624.

#### **4. Administrative Proceedings**

In September of 1988, the DEC issued SPDES permits to each of the Plants. In June of 2002, the DEC provided NYCDEP with a Notice of Intent to Modify the permits. Because NYCDEP had objections to the proposed modifications, it requested a permit hearing. See 6 NYCRR 624.1 (a) (5). DEC published a hearing notice and the proceeding was assigned to an ALJ.

Thereafter, the DEC, NYCDEP and the City of New York executed an administrative consent order (Consent Order), effective January of 2005, designed to bring NYCDEP into

compliance with federal and state laws regulating water discharge quality. The Consent Order set forth specific actions that NYCDEP was required to take and a schedule (Compliance Schedule) according to which such actions would be completed.

In February of 2005, the DEC issued revised draft SPDES permits which reflected the new terms set forth in the Consent Order. The DEC also issued a public notice of the proposed revised permits. Eventually, petitioners here were granted party status with respect to Combined Sewer Outflow (CSO) issues and the matter proceeded before the ALJ.

**A. ALJ Decision**

In a decision dated November 9, 2005, the ALJ found that an adjudicable issue existed as to whether the draft permits had to specifically incorporate into the permits the Compliance Schedule set forth in the Consent Order. ALJ November 9, 2005 Decision at 9. However, the ALJ further found that adjudication of the issue could be avoided if the DEC specifically incorporated the Compliance Schedule into the permits, or if it stated in each permit that the Compliance Schedules represented the "shortest reasonable time" in which to meet the applicable water quality requirement. *Id.*

The DEC chose the latter of the two options and, in April of 2006, issued draft SPDES permits that stated: "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."

Thereafter, in a decision dated March 16, 2007, the ALJ found that the City had to be included in the draft permits as a named permittee, because it is "the entity with the legal and financial authority to implement all the terms of the proposed SPDES Permits." ALJ March 16, 2007 Decision at 22.

#### **B. Commissioner's Decision**

In a decision dated June 10, 2010, the Commissioner, among other things, upheld the ALJ's ruling that the draft permits complied with the regulations because they referenced the Compliance Schedule set forth in the Consent Order. The Commissioner found that "[b]oth the explicit reference in each draft permit to the 2005 [Consent Order] 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." Commissioner's Decision at 10.

However, the Commissioner reversed the ALJ's ruling that the City had to be a named permittee in the draft permits. The Commissioner found that, pursuant to 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." Commissioner's Decision at 19. The Commissioner also noted that the New York City Charter sets forth that NYCDEP is responsible for "all those functions and operations" of the City relating to sewage disposal and the

prevention of water pollution, including the operation of the City's sewage disposal plants. Id., n 14.

#### **5. Article 78 Proceeding**

Petitioners commenced this proceeding in August of 2010, asserting three causes of action, challenging the June 10, 2010 decision. In a decision dated September 2, 2010, the Commissioner denied petitioner's motion for clarification and reconsideration. On October 18, 2010, the DEC issued final SPDES permits to NYCDEP. In November of 2010, the parties stipulated to hold the third cause of action in abeyance and petitioners served a First Amended Verified Petition, challenging the June 10, 2010 decision, the September 2, 2010 decision and the issuance of the final SPDES permits. Earlier this month, the parties stipulated to withdraw and discontinue the third cause of action.

Petitioners' first cause of action alleges that the Commissioner erred in directing that the draft permits be issued. Petitioners assert that the permits failed to include enforceable Compliance Schedules to reduce CSO discharges and ensure compliance with water quality standards. Petition, ¶ 52. The second cause of action alleges that the Commissioner erred in failing to direct that the City of New York be added to the permits as a named permittee. Petition, ¶ 61.

#### **6. Standard of Review**

In an Article 78 proceeding reviewing an agency's

action, the court must examine whether such action has a rational basis. *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009). In order to overturn the agency's decision, the court must find that it is arbitrary and capricious. See *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974).

"An agency has broad power to construe and interpret its own rules, and its interpretation must be upheld where...it is rational." *Shih v Waterfront Commn. of New York*, 83 AD3d 564, 565 (1st Dept 2011). Indeed, "the fact that the agency's interpretation might not be the most natural reading of [its] regulation, or that the regulation could be interpreted in another way, does not make the interpretation irrational." *Matter of Sisters of Charity Hosp. v Daines*, 84 AD3d 1757, 1758 (4th Dept 2011), quoting *Matter of Padulo v Reed*, 63 AD3d 1687, 1688 (4th Dept 2009).

## 7. SPDES PERMITS

In their first cause of action, petitioners allege that the Commissioner's decision is arbitrary and capricious in that it held that attachment of the Consent Order to the draft SPDES permits satisfies the requirement that a compliance schedule "shall be specified" in each SPDES permit.

### A. Compliance Schedule

The DEC, NYCDEP and the City of New York executed a Consent Order, effective January of 2005, designed to bring

NYCDEP into compliance with federal and state laws regulating water discharge quality. The Consent Order set forth specific actions that NYCDEP was required to take and a Compliance Schedule according to which such actions would be completed.

The schedule set forth in the Consent Order for achieving compliance exceeded nine months. When this occurs, "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), emphasis added.

The SPDES permits at issue here do not explicitly repeat the details of the Compliance Schedule in the body of the permits. Instead, the Consent Order, including the Compliance Schedule, is attached to the permits, and the permits state that:

DEC and the permittee have entered into an Administrative Order on consent...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...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 publicly noticed for review and comment in accordance with Uniform Procedure Regulations, 6 NYCRR Part 621.

Petitioners contend that this language, and the physical attachment of the Consent Order are insufficient to satisfy the requirement that the Compliance Schedule "shall be specified in the permit." In contrast, the Commissioner found that reference

to the Compliance Schedule and attachment of the Consent Order satisfied the regulations.

The central issue, then, is the construction of the words "shall be specified in the permit". As a threshold matter, it is undisputed that the regulations do not define the term "specified in the permit" or set forth a particular manner in which the Compliance Schedule must be included in the permit in order to comply with the term "specified." Given that the term is not entirely clear on its face, the court must look to other factors to determine whether the Commissioner's actions had a rational basis.

The applicable regulations are designed to ensure that, when a SPDES permit is issued or modified, certain conditions must be satisfied in cases where compliance with water quality standards is expected to exceed nine months. Those conditions are satisfied here.

First, there must be a Compliance Schedule which sets forth both the steps that will be take to achieve compliance with water quality standards and the time in which those steps will be accomplished. Here, the Consent Order sets forth both the steps to be taken to meet water quality standards and a Compliance Schedule for reaching those goals.

Second, the permits themselves specifically state that the Compliance Schedule represents the "shortest reasonable time within which to achieve water quality standards for the receiving

waters" as required by 6 NYCRR 750-1.14 (a).

Each permit also explicitly states that the Consent Order, including the Compliance Schedule, is attached to the permit and that the Consent Order "governs the Permittee's obligations with regard to its CSO abatement program." Thus, although the terms of the Consent Order are not repeated in the body of the permits, they are clearly incorporated as enforceable terms under the permits.

In light of these facts, the Commissioner had a rational basis for determining that attachment of the Consent Order to the permits and reference in the permits to the terms of the Consent Order satisfied the requirement that a Compliance Schedule "shall be specified in the permit."

The fact that the term "shall be specified in the permit" may be capable of more than one interpretation does not change the outcome here. It is not the court's function to second-guess the Commissioner's construction of the term. *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 (2007)

#### **B. Public Participation**

Petitioners contend that attachment of the Consent Order has the potential to undermine public participation in the permitting process because, in theory, the parties could choose to modify the Consent Order without providing public notice of the modifications. The Consent Order has, in fact, been modified

twice in 2008 and 2009.

Petitioners' argument is unpersuasive. First, the SPDES permits specifically state that "[m]odifications to the CSO Order on Consent will be publicly noticed for review and comment in accordance with Uniform Procedure Regulations, 6 NYCRR Part 621." Further, the Consent Order states that "[i]n the event of a substantive and significant modification to the construction compliance schedule provided for in this Order, the State shall provide public notice...." Moreover, the original Consent Order was noticed for public review, a public meeting was held, and comments were received--including comments from the petitioners. Affirmation of Carin E. Spreitzer, Esq., Senior DEC Attorney, ¶ 6. The 2008 modification was noticed for public comment, though no comments were received. Id., ¶ 8.

Based on these factors, petitioners have not demonstrated that the Commissioner's decision to permit attachment of the Consent Order to the SPDES permits is sufficiently likely to undermine public participation such that it should be overturned.

#### **C. Attachment of Consent Order**

Petitioners argue that physical attachment of the Consent Order to the SPDES permits is unworkable in practice. Specifically, they contend that it is not clear whether the modified Consent Orders are also deemed "attached" to the SPDES permits. However, given the language in the permits that the

Consent Order "governs the Permittee's obligations with regard to its CSO abatement program," there is nothing to indicate that this would not also encompass the subsequent modifications.

Petitioners assert that, when they received emailed versions of each SPDES permit, the electronic file containing each permit did not also contain a copy of the Consent Order and modifications. Thus, they contend that the Consent Order was not "attached" to each permit.

DEC states that it sent an electronic copy of each permit to petitioners, and sent one separate file containing the Consent Order and modifications. Spreitzer Affirmation, ¶¶ 10-17. They assert that, since the one copy of the Consent Order and modifications was applicable to all of the permits, one copy would be sufficient and petitioners still retained the ability to reprint it for each permit if they so chose. Id.

Based on these facts, petitioners have not demonstrated that the Consent Order was not adequately attached to the SPDES permits.

In light of the foregoing, the first cause of action in the petition is dismissed.

#### **8. City of New York As Permittee**

Petitioners allege that the Commissioner erred in failing to direct that the City of New York be added to the permits as a named permittee. Petition, ¶ 61. Petitioners have not demonstrated that the Commissioner's decision lacks a

rational basis.

First, the regulations provide that the operator of a facility or activity that requires a SPDES permit is the party responsible for obtaining such permit. 6 NYCRR 750-1.6 (a). Here, the City is indisputably the owner of the wastewater treatment facilities and the sewer system in general. However, the City "has granted NYCDEP broad powers and authorities in all matters relating to the City's sewer system." Commissioner's Decision at 19. Moreover, NY City Charter § 1403 specifically provides that NYCDEP is responsible for all "functions and operations" of the City relating the disposal of sewage and the prevention of water pollution. Id., n 14. Further, NYCDEP is in charge of constructing and maintaining all sewers and sewage disposal plants. NY City Charter, § 1403(b). In light of these facts, respondents have adequately demonstrated that NYCDEP is the operator of the Plants, and, as such, is the party responsible for obtaining the SPDES permit. 6 NYCRR 750-1.4, 750-1.6 (a).

Next, Petitioners contend that the City must be added to the permits because NYCDEP lacks the authority to comply with the provisions in the permits relating to CSO discharges. Specifically, petitioners describe measures which can be taken to either detain or retain storm water runoff before it reaches the sewer system, including the use of street trees and tree boxes, porous pavement, rain barrels, and the disconnection of roof

leaders from the sewer system. Petitioners argue that City agencies other than NYCDEP have authority to implement these measures.

Petitioners' are unpersuasive. The methods described above may be utilized to prevent water from reaching the sewer system. While these methods may be under the authority of other agencies, none of the methods are set forth as a condition in the SPDES permits. Instead, these are methods designed to prevent water from reaching the sewer system, where it would then become NYCDEP's responsibility.

Petitioners also point out that the City utilizes street cleaning to reduce the amount of solids in CSO discharges, which is controlled by the Department of Sanitation rather than NYCDEP. However, street cleaning is not a condition of the permits. Instead, the permits set forth NYCDEP's responsibilities in connection with such solids, which include measures to prevent street litter and other items from entering the sewer system in the first place. These measures include things like retrofitting or replacing catch basins, curb cuts and street gratings. Petitioners do not contend that these measures are beyond NYCDEP's authority to implement.

Petitioners further argue that NYCDEP lacks the authority to implement the Flow Management Plan set forth in each permit. Because the permits specifically require NYCDEP to state that it has the authority to implement the plan's provisions, or

to set forth a proposed schedule under which it will obtain such authority, this argument fails.

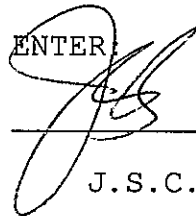
**CONCLUSION**

Petitioners have not set forth sufficient evidence to demonstrate that NYCDEP is unable to fulfill its obligations under the SPDES permits, such as would require the Commissioner's decision to be overturned.

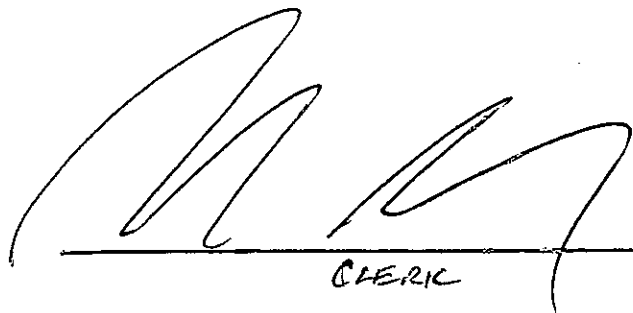
Accordingly, it is

ORDERED and ADJUDGED that the Petition is denied, and the proceeding is dismissed, without costs and disbursements.

DATED: *August 2, 2011*

ENTER  
  
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J.S.C.

**JANE S. SOLOMON**

  
\_\_\_\_\_  
CLERK

**FILED**

AUG - 4 2011

NEW YORK  
COUNTY CLERK'S OFFICE