



State of New Jersey

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EWING LAWRENCE SEWERAGE
AUTHORITY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

SUSSEX COUNTY MUNICIPAL
UTILITIES AUTHORITY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

ADMINISTRATIVE ACTION

FINAL DECISION

OAL DOCKET NO.: EER 02687-21

AGENCY DKT. NO. NJ0024759-46314

CONSOLIDATED

OAL DOCKET NO.: EER 13242-19

AGENCY DKT. NO. NJ0053350-46965

INTRODUCTION

This Order addresses the consolidated appeals by Ewing Lawrence Sewerage Authority (ELSA) and Sussex County Municipal Utilities Authority (SCMUA) (collectively, Petitioners) of conditions in their respective New Jersey Pollutant Discharge Elimination System (NJPDES) permits issued by the New Jersey Department of Environmental Protection (Department) in

August 2018, pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 to -73, and its implementing NJPDES rules, N.J.A.C. 7:14A, requiring that Petitioners' sewage treatment facilities adhere to a numeric Water Quality Based Effluent Limitation (WQBEL) for the pollutant Nitrate-Nitrogen, Total (nitrate), commonly known as a nitrate limit.¹

Petitioners ELSA and SCMUA submitted adjudicatory hearing requests on September 18 and September 20, 2018, respectively. In addition to requesting an adjudicatory hearing, ELSA submitted a request for a stay of the nitrate limit in its permit, dated September 18, 2018. The Department issued a stay on May 18, 2021, to remain in effect until the resolution of this contested case. SCMUA similarly requested a stay of the nitrate limits in its permit, which the Department issued on November 6, 2019. The Department transmitted ELSA's request to the Office of Administrative Law (OAL) on March 16, 2021, and SCMUA's request on September 20, 2019.

The parties in both matters filed cross-motions for summary decision before the OAL. Petitioners sought consolidation of the matters, and the motions for summary decision were heard together by Administrative Law Judge Gail M. Cookson (ALJ). On May 31, 2022, the ALJ issued an Initial Decision granting the Department's motions for summary decision and denying Petitioners' cross-motions. The ALJ concluded that Petitioners' respective permits properly included nitrate limits that were not presently being met. Petitioners and the Department each submitted timely exceptions to the Initial Decision.²

¹ ELSA requested an administrative hearing to challenge various other aspects of its permit in addition to the nitrate limit. The Department subsequently modified the permit, making moot ELSA's other challenges and leaving only its challenge to the WQBEL for nitrate.

² The Department takes exception to, *inter alia*, any implication in the Initial Decision that this matter contains an enforcement component. While I agree that these matters consist purely of challenges to individual permit conditions in Petitioners' respective NJPDES permits, I do not agree that the Initial Decision implied that these matters involve enforcement of the subject conditions. Therefore, I reject the Department's exception.



For the reasons set forth below, the Initial Decision granting summary decision in favor of Respondent and denying summary decision in favor of Petitioners is ADOPTED as MODIFIED below.

BACKGROUND

Surface Water Quality Standards

The federal Clean Water Act (CWA) establishes a comprehensive program intended to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA is administered by the U.S. Environmental Protection Agency (EPA), as well as by State agencies, through a system of cooperative federalism: the EPA develops regulations, and the CWA authorizes states to administer programs under EPA’s oversight. 33 U.S.C. § 1251(b); 40 C.F.R. § 123.25. Through its implementation of the State Water Pollution Control Act (WPCA) and cooperative agreements with the EPA, the Department has primary authority for administering the CWA in New Jersey.

Under the CWA, states are required to establish water quality standards sufficient to “protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA].” 33 U.S.C. § 1313(c)(2)(A). For the surface waters of New Jersey, those standards are set forth in the Surface Water Quality Standards (SWQS) rules at N.J.A.C. 7:9B. The SWQS establish the designated uses for individual waterbodies throughout the State, classify the waterbodies based on the designated uses, and specify the surface water quality criteria for specified substances, including nitrate, that must be met to support the designated uses. N.J.A.C. 7:9B-1.1. The surface water quality criteria are expressed either as numerical concentrations or levels, or as narrative statements, and represent “a quality of water that supports a particular



designated use.” N.J.A.C. 7:9B-1.4. “When the criteria are met, water quality will generally protect the designated use.” *Ibid.*; 40 C.F.R. § 131.3(b).

Designated uses for surface waters include both existing and potential uses that the Department has established for the waters of the State. These uses can include potable (drinking) water supply, propagation of the natural and established biota, maintenance of wildlife, recreation, agricultural and industrial water supplies, and navigation. N.J.A.C. 7:9B-1.12. The designated uses inform the establishment of surface water classifications for each waterbody. Freshwater waterbodies (FW), such as those pertinent to this matter, are classified as either FW1 waters³ (not subject to any wastewater discharges), FW2 waters⁴ (all other waters), or PL waters⁵ (waters of the Pinelands Area not otherwise classified as FW1). It is the policy of the State that all freshwaters—regardless of their classification or presently existing use—be protected as potential sources of potable water supply. To this end, the SWQS rules that govern this and all surface water discharge permit matters are clear:

The restoration, maintenance, and preservation of the quality of the waters of the State for the protection and preservation of public water supplies is a paramount interest of the citizens of New Jersey. In order to provide adequate, clean supplies of potable water, it is the policy of the State that all freshwaters be protected as potential sources of public water supply. Therefore, point and nonpoint sources of pollutants shall be regulated to attain compliance with the Surface Water Quality Standards human health criteria outside of regulatory mixing zones.

³ FW1 are fresh waters to be maintained in their natural state of quality and not subjected to any wastewater discharges or increases in runoff from anthropogenic (human-made) activities. These waters are set aside for posterity because of their clarity, color, scenic setting, other characteristic of aesthetic value, unique ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resource. N.J.A.C. 7:9B-1.4.

⁴ FW2 is the general surface water classification applicable to freshwaters not designated as FW1 or Pinelands Waters. N.J.A.C. 7:9B-1.4.

⁵ Pinelands waters are all waters within the boundaries of the Pinelands Area, unless otherwise classified as FW1, as established in the Pinelands Protection Act (N.J.S.A. 13:18A-1 et seq.) and shown on Plate 1 of the "Comprehensive Management Plan" adopted by the New Jersey Pinelands Commission in November 1980. N.J.A.C. 7:9B-1.4.



N.J.A.C. 7:9B-1.5(a)3.

As such, all freshwaters in New Jersey are designated for use as potable water supplies. See 30 N.J.R. 1778(a) (May 18, 1998) (All New Jersey freshwaters are designated “for use as potable water supply after such treatment as required by law or regulations.”). Accordingly, the SWQS are intended to protect that designated use to ensure the continued and future availability of potable water, which is critical to the State’s public and environmental health.

NJPDES Permits

To ensure that the SWQS for such waters are met and the designated uses are protected, an NJPDES permit must be obtained prior to discharging any pollutant into the surface waters of New Jersey. N.J.A.C. 7:14A-2.1(b). An NJPDES permit will often set a restriction, known as an effluent limit, on the quantities, quality, discharge rates, and concentration of chemical, physical, thermal, biological, radiological, and other constituents of pollutants. N.J.A.C. 7:14A-13.6(a). WQBELs are effluent limits established to ensure that waters receiving a discharge of a pollutant will continue to meet the SWQS even after the discharge. N.J.A.C. 7:14A-1.2. In order to ensure that water quality is adequately protected, when a determination is made that available evidence does not call for establishment of a WQBEL or insufficient data is available to make a determination, the Department may require that monitoring for specific pollutants or pollutant parameters occurs through the permit. N.J.A.C. 7:14A-13.5(k)3.

Requiring a facility to monitor a pollutant prior to establishing a WQBEL for that pollutant in a permit supports the necessary “cause analysis”. N.J.A.C. 7:14A-13. A cause analysis is conducted to determine whether a discharge of a pollutant causes, has the reasonable potential to cause, or contributes to an excursion above the SWQS. The determinations resulting from a cause analysis are based on a comparison of a pollutant’s maximum effluent concentration value—the



highest value of the pollutant measured in the effluent during a particular monitoring period—with the pollutant’s applicable site-specific wasteload allocation⁶ (WLA)—the amount of the pollutant allocated to the point source or sources of pollution—in accordance with procedures set forth by the EPA. N.J.A.C. 7:14A-13.5(d). The discharge is determined to have caused an excursion above the SWQS if the maximum reported effluent concentration value for the pollutant of interest is greater than the WLA or the site-specific allocation for that pollutant. N.J.A.C. 7:14A-13.5(e). In other words, if the amount of the pollutant measured in the effluent exceeds the amount of the pollutant allocated to that discharge source, then the discharge has caused an excursion of the SWQS. When the Department determines that a discharge causes, has the reasonable potential to cause, or contributes to an excursion above a surface water quality standard, a water quality based effluent limitation (WQBEL) is established for the discharging facility.

Nitrate

The pollutant of concern in this matter is nitrate. Nitrate is a naturally occurring but nonetheless toxic substance at certain levels. Nitrate is therefore listed as a toxic substance under the Department’s SWQS rules applicable here. See N.J.A.C. 7:9B-1.14(f)7. Nitrate can affect many designated uses of water, including drinking water. Nitrate in drinking water can cause methemoglobinemia, also known as blue baby syndrome. This disease most often affects infants, who may show signs of blueness of the skin, including around the mouth, hands, and feet. Some cases may be fatal. The most common cause of methemoglobinemia is elevated levels of nitrates in drinking water. Such elevated nitrate levels put bottle-fed infants most at risk—a risk further

⁶ Wasteload means “the amount of chemical, physical, radiological, or biological matter contained within a waste discharge.” N.J.A.C. 7:14A-1.2.



compounded by the increased susceptibility of infants' hemoglobin and the compounding effect of gastrointestinal infection.

The federal government has taken specific note of the health risks posed by nitrate, stating, “Nitrate in drinking water at levels above 10 ppm [parts per million] is a health risk for infants of less than six months of age. High nitrate levels in drinking water can cause blue baby syndrome.” 40 C.F.R. § 141.154(c)(1). The EPA specifies that the maximum amount of permissible nitrate in potable waters, expressed as a maximum contaminant level, is 10 mg/L. See 40 C.F.R. § 141.62(b)(7) (maximum contaminant level for nitrate). The Department developed a statewide surface water quality criteria for nitrate based on impacts on human health from ingestion, such as ingesting drinking water containing the contaminant. The nitrate surface water quality criteria for freshwater (FW2) is identical to the federal limit of 10 ppm for nitrate set forth at 40 C.F.R. § 141.62. See N.J.A.C. 7:9B-1.14(f)7.

Ewing Lawrence Sewerage Authority

ELSA operates a wastewater treatment facility located in Lawrenceville, Mercer County. ELSA's permit authorizes the discharge of up to 16 million gallons per day (MGD) of treated, disinfected, domestic wastewater with industrial contribution into Assunpink Creek, which drains into the Delaware River. Assunpink Creek is designated as an FW2-NT (C2) “Category Two” stream.⁷ N.J.A.C. 7:9B-1.15(d). Assunpink Creek's classification as a freshwater stream makes potable water supply a designated use under the Department's regulations. See N.J.A.C. 7:9B-

⁷ FW2-NT indicates that the waters are freshwaters that are not associated with trout production or maintenance. N.J.A.C. 7:9B-1.15(b)6. C2 indicates the waters are “Category Two,” meaning “those waters not designated as Outstanding National Resource Waters or Category One at N.J.A.C. 7:9B-1.15 for purposes of implementing the anti-degradation policies set forth at N.J.A.C. 7:9B-1.5(d).” N.J.A.C. 7:9B-1.4. These classifications help determine designated use. N.J.A.C. 7:9B-1.12.



1.5(a)3; N.J.A.C. 7:9B-1.15(d). Other designated uses based on Assunpink Creek's classification as FW2 waters include the maintenance, migration and propagation of natural and established biota and primary contact recreation, among other uses. N.J.A.C. 7:9B-1.12(c).

After analyzing ELSA facility data from 2015-2017, the Department concluded that nitrate was being discharged in quantifiable amounts in the effluent. As a result, a cause analysis was conducted as authorized pursuant to N.J.A.C. 7:14A-13.5. The cause analysis showed that the amount of nitrate in the effluent (39.9 mg/L) exceeded the applicable WLA (11.62 mg/L). Thus, the effluent was found to have caused an excursion of the SWQS. As such, the Department proceeded to calculate the appropriate nitrate limit pursuant to N.J.A.C. 7:14A-13.6(a).

The nitrate limit was incorporated into ELSA's most recent permit renewal, NJPDES Final Renewal Permit No. NJ0024759, the permit currently under appeal, which the Department issued on August 27, 2018, with an expiration date of September 30, 2023.

Sussex County Municipal Utilities Authority

SCMUA operates the Upper Wallkill Facility, a wastewater treatment facility located in Hardyston Township, Sussex County. SCMUA's permit authorizes the discharge of up to 3.0 MGD of treated, disinfected, domestic wastewater with no industrial contribution into the Wallkill River, which is classified as a FW2-NT (C1) "Category One" stream. Category One or "C1" means those waters designated as such for purposes of implementing the antidegradation policies set forth at N.J.A.C. 7:9B-1.5(d), for protection from measurable changes in water quality based on exceptional ecological significance, exceptional recreational significance, exceptional water supply significance or exceptional fisheries resources to protect their aesthetic value (color, clarity, scenic setting) and ecological integrity (habitat, water quality and biological functions). N.J.A.C. 7:9B-1.4. In accordance with the N.J.A.C. 7:9B-1.5(d)2iii, C1 waters "shall be protected from any



measurable changes (including calculable or predicted changes) to the existing water quality.” As FW2 waters, potable water supply is a designated use under the Department’s regulations. See N.J.A.C. 7:9B-1.5(a)3; N.J.A.C. 7:9B-1.15(i). Other designated uses based on the Wallkill River’s classification as FW2 waters include the maintenance, migration and propagation of natural and established biota and primary contact recreation, among other uses. N.J.A.C. 7:9B-1.12(c).

After analyzing SCMUA facility data from 2012-17, the Department concluded that nitrate was being discharged by SCMUA in quantifiable amounts in the effluent. As a result, a cause analysis was conducted in accordance with N.J.A.C. 7:14A-13.5. The cause analysis determined that the amount of nitrate in the effluent exceeded the applicable WLA: the relevant WLA was 18.0 mg/L, while the discharge of nitrate in the facility’s effluent was 53.3 mg/L. Thus, the effluent was found to have caused an excursion of the SWQS. As such, the Department proceeded to calculate the appropriate nitrate limit pursuant to N.J.A.C. 7:14A-13.6(a).

The nitrate limit was incorporated into SCMUA’s most recent permit renewal, NJPDES Final Renewal Permit No. NJ0053350, the permit currently under appeal, which the Department issued on August 30, 2018 with an expiration date of September 30, 2023.

DISCUSSION

Before addressing the ALJ’s ultimate conclusions, I note that Petitioners challenge neither the Department’s conclusion that the facilities exceeded the SWQS nor the Department’s calculation of the nitrate limit in Petitioners’ permits. Instead, Petitioners challenge the regulations underlying these determinations. The ALJ found—and I concur—that OAL is not the appropriate forum to address such a challenge to the underlying regulations. Petitioners point to Montclair v. Hughey, 222 N.J. Super. 441 (App. Div. 1987) to support their contrary assertion that OAL is the proper forum and that the ALJ erred in finding otherwise. In Montclair, Petitioners assert, the



Appellate Division of the New Jersey Superior Court recognized an alternative forum to the Appellate Division for review of an administrative action. Petitioners then argue that it was not only within the OAL's jurisdiction and the ALJ's power to address Petitioner's challenge to the underlying regulations, but that it was necessary that the ALJ do so. Petitioner's interpretation of Montclair is incorrect.

As Petitioners concede, Montclair stands for the premise that appellate review of an agency action is not ripe when it is not preceded by the creation of an agency record. Id. at 446. Here, the Department did in fact create a record when proposing, and later adopting, the underlying SWQS regulations. As required by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq, the Department provides notice and accepts public comment before adoption of its rules. See N.J.S.A. 52:14B-4. Review of agency rulemaking under such circumstances is exclusive to the Appellate Division. Montclair, 222 N.J. Super. at 446 (citing Pascucci v. Vagott, 71 N.J. 40, 51-52 (1976)); see also R 2:2-3(a)(2). While Montclair establishes an exception to that general rule when an agency record has is required but has not yet been created, that exception is inapplicable here. Thus, I concur with the ALJ that OAL is simply not the proper forum to adjudicate Petitioners' rulemaking challenges.⁸

There being no legitimate challenge to the underlying SWQS regulations here, the resolution of this matter turns on whether the Department properly applied the regulations when it mandated a nitrate limit in Petitioners' permits. The ALJ concluded that the regulations were

⁸ For the same reasons, Petitioners' argument that the Department waived its ability to assert that OAL was an improper forum to challenge agency rulemaking also fails. Such review is exclusive to the Appellate Division. Pascucci v. Vagott, 71 N.J. 40, 51-52 (1976); See also R 2:2-3(a)(2).



properly applied, granted summary decision in favor of the Department, and denied Petitioners' cross motions for the same.

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). To prevail, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue that can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply "sit on his or her hands," but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is "sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000) (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)). And even though the allegations of the pleadings may raise an issue of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment should be granted. Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 201 (App. Div. 1978) (citing Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954)).

I concur with the ALJ that summary decision was appropriate under the circumstances here. There is no dispute that the Department analyzed effluent data from SCMUA and ELSA's respective facilities and correctly determined in each case that nitrate was found in quantifiable amounts, necessitating a cause analysis in accordance with the Department's regulations. In each



case, the cause analysis showed an excursion of SWQS caused by nitrate in the respective facility's effluent.

With regard to ELSA, the Department analyzed data from January 2015 to December 2017. It is not disputed that nitrate was found in quantifiable amounts upon review of that data. Therefore, the Department conducted a cause analysis pursuant to N.J.A.C. 7:14A-13.5 to determine if the discharge of nitrate causes, has reasonable potential to cause, or contributes to an excursion above the applicable SWQS. Using procedures set forth by the EPA, the Department determined that the maximum daily reported value of nitrate in ELSA's discharge was 39.6 mg/L, which was greater than the calculated instream WLA of 11.62 mg/L. Thus, the Department found that nitrate in ELSA's discharge caused an excursion of the applicable SWQS leading to the imposition of a nitrate limit in ELSA's renewal permit currently under appeal.

With regard to SCMUA, the Department similarly analyzed data from August 2012 to July 2017. Again, it is not disputed that nitrate was found in quantifiable amounts upon review of that data. The Department thus conducted a cause analysis pursuant to N.J.A.C. 7:14A-13.5 to determine if the discharge of nitrate causes, has reasonable potential to cause, or contributes to an excursion above the applicable SWQS. Using the same procedures set forth by the EPA, the Department determined that the maximum daily reported value of nitrate in SCMUA's discharge was 53.3 mg/L, which was greater than the calculated instream WLA of 18.0 mg/L. Thus, the Department found that nitrate in SCMUA's discharge caused an excursion of the applicable SWQS leading to the imposition of a nitrate limit in SCMUA's renewal permit currently under appeal.



The ALJ concluded that the Department appropriately calculated a nitrate limit for each facility and properly incorporated it into each individual permit.⁹ Petitioners nonetheless argue that certain factual findings should have led to a different result. Specifically, the ALJ found that 1) the discharge from SCMUA's Wallkill Facility has no current potential of being consumed as drinking water; 2) the discharge from the ELSA treatment facility is so highly diluted by the time it travels into the Delaware and reaches the first potable water intake at Delran Township, Burlington County, that the nitrate quantity it releases is not a health issue; and 3) neither SCMUA or ELSA can comply with their nitrate limits easily or without substantial capital costs and impacts to its ratepayers.¹⁰ These factual findings, however, are not material to the ALJ's decision.

As discussed, the Department's determination to impose a WQBEL does not turn on whether an effluent is discharging into surface water that is presently supplying potable water. All freshwaters of the State are interconnected, and each is protected as a potential source of potable water supply through application of the SWQS. To this end, the Department's regulations are clear:

The restoration, maintenance, and preservation of the quality of the waters of the State for the protection and preservation of public water supplies is a paramount interest of the citizens of New Jersey. In order to provide adequate, clean supplies of potable water, it is the policy of the State that all freshwaters be protected as potential sources of public water supply. Therefore, point and nonpoint sources of pollutants shall be regulated to attain compliance with the Surface Water Quality Standards human health criteria outside of regulatory mixing zones.

N.J.A.C. 7:9B-1.5(a)3.

⁹ The Department takes exception to the absence of a clear statement in the ALJ's decision that the Department met its legal burden in establishing the challenged nitrate limit in Petitioners' permits. As explained below, the record clearly supports the Department's determination. The Initial Decision is so MODIFIED for clarity.

¹⁰ The Department also takes exception to these three findings of fact. However, none are relevant to the regulatory analysis at issue and are therefore not material to this Final Decision.



There is no exception to the application of the SWQS, and for good reason. The Department's charge under the WPCA is both restorative and preventative. In addition to improving degraded waters, the Department must preserve the quality of the State's waters and maintain both their existing and potential human uses, as well as their ecological, aesthetic, and recreational functions. In application, this means that just because the Assunpink Creek and the Wallkill River are not presently used for potable water supply, the Department cannot ignore Petitioners' discharge of nitrate at levels that would violate the WPCA. Irrespective of their present water supply use status, the Department must maintain water quality in the Assunpink Creek and Wallkill River for potential future water supply uses and preserve the many, and inherently valuable, natural resource functions of these waters. Similarly, even if discharge of nitrate into the Assunpink Creek or Wallkill River would eventually become so diluted to be below the SWQS upon reaching a distant drinking water intake, that fact would not somehow legalize facility discharges above the SWQS. Dilution is not actually the solution to pollution.

While Petitioners question whether the public health benefits of reducing nitrate in wastewater effluent is worth their cost of compliance with the subject permit conditions, that issue is not the province of the OAL upon appeal of a permit. Rather, and discussed above, it is the province of the Department's underlying rulemaking process pursuant to the Administrative Procedure Act. Such costs are properly considered through the rulemaking process of proposing, receiving public comment, and adopting the pertinent regulations in accordance with the Administrative Procedure Act. Once adopted, however, the Department must apply the regulations as promulgated. See SMB Assoc. v. N.J. Dept. of Env. Protection, 264 N.J. Super 38, 50 (App. Div. 1993); In Re CAFRA Permit No. 87-0959-5, 152 N.J. 287, 308 (1997).



The NJPDES permitting process, which the Department properly followed when issuing Petitioners' renewal permits, is chiefly concerned with whether a permit holder's discharge causes an excursion of the SWQS. Alleged capital costs are simply not relevant to the regulatory compliance analysis.¹¹ And while SCMUA is correct that compliance costs are a factor the Department considers when receiving a request for a stay of a permit condition under N.J.A.C. 7:14A-17.6, nothing in that regulation contemplates a stay that is permanent and unqualified, as further discussed below. Accordingly, I ADOPT the ALJ's conclusion that the Department properly included nitrate limits in Petitioners' permits.

I likewise ADOPT the ALJ's conclusion that the stays issued by the Department in this matter shall expire upon issuance of this Final Decision and that stays previously issued to Petitioners in previously issued permits, as well as the 2016 Partial Stipulation of Settlement between the Department and ELSA, do not bind the Department now with respect to the renewal permits that are the subject of this appeal. Contrary to Petitioners' exceptions,¹² the ALJ correctly found that it is consistent with N.J.A.C. 7:14A-17.6 and the Administrative Procedure Act that a stay pending adjudication of a contested permit condition should expire upon issuance of a final agency decision in which the contested permit issue is decided. A stay pending adjudication of a contested permit condition is clearly contemplated at N.J.A.C. 7:14A-17.6(g)3 (regarding "a stay pending an adjudicatory hearing."). Thus, a final decision, a stipulation, or a withdrawal would supersede such a stay. N.J.A.C. 7:14A-17.6(f) and (g)(3). At Petitioners' request, the Department

¹¹ While the capital cost of complying with SWQS is no reason to waive the duly promulgated standards, the Department routinely makes low-cost financing available to publicly owned treatment works like Petitioners for purposes of making capital improvements necessary to meet permit requirements. See <https://nj.gov/dep/wiip>

¹² Petitioners assert that the ALJ erred in concluding their respective stays expire upon a final agency decision in this matter, and SCMUA, in its exceptions, asserts that the ALJ erred in rejecting its claim that it qualified for an unconditional and unqualified stay. I reject these assertions.



evaluated the stay factors set forth at N.J.A.C. 7:14A-17.6 and, pursuant to N.J.A.C. 7:14A-17.6(e)1, granted ELSA's and SCMUA's stay requests until resolution of their adjudicatory hearing requests or until the effective date of any future permit action that might address nitrate. By their own terms, the stays will expire with the issuance of this Final Decision. And while each Petitioner did receive a stay of the nitrate limit in the past, those stays attached only to prior Department permitting cycles¹³ and do not bind the Department with respect to the permits currently under appeal.

Finally, Petitioners raise two additional exceptions that I find to be without merit but shall address briefly. First, Petitioners assert that the ALJ failed to consider their argument that the Department did not “‘turn square corners’ in adopting an effluent limitation for nitrate.” ELSA Exceptions, at 8; SCMUA Exceptions, at 12; See F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 427 (1985) (explaining government must “act solely in the public interest . . . [i]ts primary obligation is to comport itself with compunction and integrity”). While the ALJ's decision is clear that those arguments not specifically mentioned were plainly without merit, I must note that the record reflects that the Department did deal fairly with the parties in this matter. As discussed, the Department fully evaluated the permit renewal applications, correctly applied its regulations, and granted Petitioners' request for a stay of the contested permit conditions pending this adjudication. I reject Petitioners' assertions that the Department did not turn square corners.

Second, ELSA asserts that enforcement of the nitrate standard is inconsistent with New Jersey's Environmental Justice Law, N.J.S.A. 13:1D-157 et seq., because the steps it must take to bring itself into compliance with the nitrate limit will have economic impacts on its ratepayers.

¹³ In accordance with the Department's regulations, NJPDES permits must be renewed every five years. N.J.A.C. 7:14A-2.7.

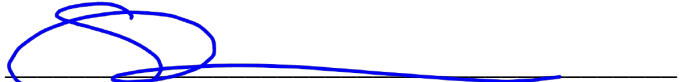


ELSA had not previously raised this issue, but it is unpersuasive nonetheless. The Environmental Justice Law requires the Department, when evaluating certain permits sought by a subset of pollution-generating facilities, to consider and make provision to avoid adverse cumulative environmental or public health stressors that may be imposed upon an overburdened community. It would upend the Legislature's intent to conclude that the Environmental Justice Law, which was specifically designed to reduce pollution outcomes in overburdened low-wealth communities and communities of color, actually requires the Department to reduce water quality standards in overburdened communities as would be the case were the nitrate SWQS lifted here. As that cannot be the result of the Environmental Justice Law, I reject ELSA's environmental justice assertion.

CONCLUSION

Having reviewed the record, for the foregoing reasons I ADOPT the ALJ's Initial Decision as MODIFIED as set forth above. IT IS SO ORDERED.

Dated: February 14, 2023


Shawn M. LaTourette, Commissioner
New Jersey Department of Environmental Protection



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