



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON SUMMARY

DECISION CROSS-MOTIONS

OAL DKT. NO. EER 13242-19

AGENCY DKT. NO. NJ0053350-46965

**SUSSEX COUNTY MUA UPPER
WALLKILL FACILITY,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Respondent.

CONSOLIDATED

**EWING LAWRENCE SEWERAGE
AUTHORITY,**

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Respondent.

OAL DKT. NO. EER 02687-21

AGENCY DKT. NO. NJ0024759-46314

Thomas H. Prol, Esq., for petitioner Sussex County Municipal Utilities Authority
(Sills Cummis & Gross, attorneys)

George J. Tyler, Esq., and **Matthew J. Krantz**, Esq., for petitioner Ewing
Lawrence Sewerage Authority (Law Office of George J. Tyler, attorneys)

Amy E. Stevens, Stephanie R. Carney, and David A. Tuason, Deputy Attorneys General, for respondent New Jersey Department of Environmental Protection (Matthew J. Platkin, Acting Attorney General of New Jersey, attorneys)

Record Closed: April 28, 2022

Decided: May 31, 2022

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Sussex County Municipal Utilities Authority (SCMUA), challenges the permit conditions for New Jersey Pollutant Elimination Discharge Elimination System (NJPDDES) Permit No. NJ0053350 issued in final form by the New Jersey Department of Environmental Protection (“NJDEP”) on August 30, 2018. Petitioner Ewing Lawrence Sewerage Authority (ELSA) challenges the permit conditions for New Jersey Pollutant Elimination Discharge Elimination System (NJPDDES) Permit No. NJ0024759 issued by NJDEP on August 27, 2018. In both cases, the contaminant of concern is Nitrate-Nitrogen, Total (“nitrate”) and the challenges are, specifically, to the water quality based effluent limitation (“WQBEL”) for nitrate. As set forth below, these matters have been consolidated for purposes of the motions for summary decision.

PROCEDURAL HISTORY

On May 22, 2018, NJDEP issued to SCMUA a draft NJPDDES permit; SCMUA responded during the public comment period; and, on August 30, 2018, NJDEP issued SCMUA’s final NJPDDES permit. On September 20, 2018, SCMUA requested a hearing on the final permit. On June 29, 2018, NJDEP issued to ELSA a draft NJPDDES permit; ELSA responded during the public comment period; and, on August 27, 2018, NJDEP issued ELSA’s final NJPDDES permit. On September 18, 2018, ELSA requested a hearing on its final permit.

The matters were transmitted to the Office of Administrative Law (OAL) by the NJDEP on September 20, 2019¹, and March 16, 2021², respectively, for determination as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I was assigned the SCMUA, while the ELSA matter was assigned to the Honorable Carl Buck, III, A.L.J.

I convened a case management conference telephonically on September 30, 2019, and periodically thereafter, as there was some consideration being given to a request for a stay. In May 2021, the NJDEP requested leave to file a dispositive motion. Accordingly, a briefing schedule was agreed upon, with due consideration and grant of adjournment requests. NJDEP submitted a Notice of Motion for Summary Decision and brief with supporting certification under cover of August 27, 2021. The agency filed almost identical motion papers for summary judgment against ELSA before Judge Buck on the same date.

Accordingly, mid-way in the briefing schedule on the NJDEP's Motion for Summary Decision, petitioners filed on October 28, 2021, a Motion for Consolidation of the two matters before me. NJDEP opposed the consolidation under cover of November 8, 2021. By Letter-Order entered on November 23, 2021, I granted consolidation of these cases at least through my determination of the within motions, with the possibility of separate plenary hearings should such seem appropriate.

Petitioners filed Cross-Motions for Summary Decision and in Opposition to respondent's motion under cover of January 14 and 20, 2022. I permitted a brief reply by the NJDEP under cover of February 11, 2022. Oral argument was requested and granted and was held on April 28, 2022. Accordingly, the cross-motions are now ripe for determination.

¹ While the NJDEP approved the request for a hearing by SCMUA on December 10, 2018, it did not transmit the matter to the OAL until nine months later.

² There has been no explanation given to this forum for the more than two-year delay in transmitting the ELSA hearing request to the OAL.

MOTION UNDER CONSIDERATION

NJDEP moves for summary disposition on the basis that the nitrate limitation in the permits must be upheld as a matter of uniform application of statute and regulations. The agency disagrees with the arguments of the petitioners that the burdensome costs of the improvements necessitated by enforcement of the nitrate surface water quality standard of 10 mg/L (“nitrate limit”) or the fact that the waterbody it discharges into is not actually used as a drinking water supply are material.

Petitioners argue that the conditions of its renewal permit are unduly burdensome, unnecessary, onerous, scientifically indefensible, or otherwise unreasonable. Thus, petitioners maintain that NJDEP’s action is arbitrary and capricious and urges this tribunal to strike the rule reinterpretation, and to eliminate the contested terms from their permit as a matter of law and the undisputed facts. On that basis, they filed a cross-motion for summary decision. Petitioners also assert that prior inaction by and/or stays issued by the NJDEP preclude enforcement now as a matter of either law or equity.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Based on a review of the relevant documents and motion papers, I **FIND** as **FACT**:

1. The SCMUA operates the Upper Wallkill Facility sewage treatment facility located in Hardyston Township, Sussex County, New Jersey. [Certification of Susan Rosenwinkel (“Rosenwinkel SCMUA Cert.”) Exhibit B at 5.]

2. The SCMUA NJPDES Permit No. NJ0053350 authorizes the discharge of treated, disinfected, domestic wastewater with no industrial contributions into the Wallkill River, which is classified as a freshwater 2, non-trout (FW2-NT) river. [Rosenwinkel SCMUA Cert., Exhibit K at 8.]

3. The SCMUA facility is located in Hardyston Township, Sussex County, upstream of the National Wildlife Refuge (NWR), and the discharge reaches the waters flowing through the NWR. Thereafter, the Wallkill River crosses into New York State flowing south to north where it joins the Rondout and becomes a tributary to the Hudson River just below Kingston, New York. New York State Department of Environmental Conservation [Certification of Thomas Varro (“Varro Cert.”) ¶ 9.]

4. New York State Department of Environmental Conservation confirmed to the NJDEP in 2011 that the Wallkill in New York is classified for public bathing and that it did not flow into any potable water intakes. [Varro Cert. ¶ 19 & Exhibit D.]

5. SCMUA is permitted to discharge up to 3.0 million gallons per day (mgd) of treated effluent into the Wallkill. Currently, SCMUA discharges approximately 2.5 mgd of treated effluent into the Wallkill.

6. The current SCMUA permit, from which this appeal was taken, was issued on August 30, 2018, made effective October 1, 2018, and will expire on September 30, 2023. [Rosenwinkel SCMUA Cert., Exhibit K at 13.]

7. The ELSA wastewater treatment facility is located in Lawrenceville, New Jersey. The receiving stream for ELSA’s discharge is Assunpink Creek, classified as a FW2-NT stream. [Rosenwinkel ELSA Cert., Exhibit C at 9; Certification of Raymond A. Ferrara (“Ferrara Cert.”) ¶ 3.]

8. The ELSA Permit authorizes the discharge of treated, disinfected, domestic wastewater with industrial contribution into the Assunpink Creek. Assunpink Creek is not suitable for a potable water intake, largely due to its minimal size; however, it drains into the Delaware River, which is a source for drinking water. [Rosenwinkel ELSA Cert. ¶ 18; Ferrara Cert. ¶ 4.] The only potable water intake is twenty (20) miles downstream of the confluence of the Assunpink and the Delaware, near Delran, NJ. [Rosenwinkel ELSA Cert. ¶ 20; Ferrara Cert.”) ¶ 8.]

9. On January 28, 2016, the NJDEP and ELSA entered into a Partial Stipulation of Settlement and Withdrawal of Hearing Request With Prejudice on its OAL

administrative hearing of its September 30, 2009, permit renewal (OAL Dkt. EER 8934-12). This Stipulation did not resolve the nitrate parameter but continued the stay pending adjudication and constituted an agreement to put that OAL matter on the inactive list for six months. [Rosenwinkel ELSA Cert., Exhibit H.] Thereafter, the 2009 ELSA Permit matter was periodically continued on the Inactive List through August 2018. The OAL adjudication was closed on October 30, 2018, when ELSA withdrew its hearing request.

10. The current ELSA permit, from which this appeal was taken, was issued on August 28, 2018, made effective October 1, 2018, and will expire on September 30, 2023. [Rosenwinkel ELSA Cert., Exhibit C at 13.]

11. A surface water quality standard (“SWQS”) for nitrate was developed based on its impacts to human health. Nitrate in drinking water can cause methemoglobinemia, also known as blue baby syndrome. Infants are most often affected and 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 high levels of nitrates in drinking water.³

12. After analysis of several years of data, and applying the applicable steady state mass balance equation, NJDEP developed for the SCMUA Walkill facility, a waste load allocation (“WLA”) utilizing the SWQS for nitrate of 10 mg/l, the design flow values of at 2.5 mgd, and 3.0 mgd, and the design low flow value of 3.1 cfs. The result was that SCMUA was found to have exceeded the instream WLA of 18.0 mg/L because the maximum reported daily value was 53.3 mg/L. [Rosenwinkel SCMUA Cert. ¶ 31.]

13. NJDEP then calculated a WQBEL for nitrate for SCMUA’s discharge. The draft and final NJPDES permit No. NJ0053350 for the SCMUA imposed concentration limitations of a monthly average of 18.0 mg/L and a daily maximum loading of 170 kg/day for the flow of 2.5 mgd, with daily maximum loading of 189.4 kg/day for the flow of 3.0 mgd. [Rosenwinkel SCMUA Cert. ¶¶ 33-34 and Exhibit B at 16-18.]

³ Toxicity and Exposure Assessment for Children’s Health: Nitrates and Nitrites, U.S. Env’tl. Prot. Agency, https://archive.epa.gov/region5/teach/web/pdf/nitrates_summary.pdf.

14. Similarly, the calculation results found that ELSA exceeded the instream WLA of 11.62 mg/L because the maximum reported daily value was 39.6 mg/L. [Rosenwinkel ELSA Cert. ¶ 42.]

15. The ELSA NJPDES permit No. NJ0024759 renewal specifies concentration limitations of a monthly average of 11.6 mg/L and a daily maximum of 17.8 mg/L; and loading limitations of a monthly average of 704 kg/day and a daily maximum of 1080 kg/day. [Rosenwinkel ELSA Cert. ¶ 45 and Exhibit B at 15.]

16. On November 6, 2019, the NJDEP granted the request by the SCMUA for a stay of the effluent limitations for nitrate. The stay remains in effect “while the adjudicatory hearing proceedings transpire.” [Rosenwinkel SCMUA Cert., Exhibit G; Varro Cert., Exhibit J.]

17. In its Stay decision, the NJDEP noted that the Wallkill facility of the SCMUA was designed to meet a stringent NJPDES permit limitation for ammonia-nitrogen. That high level of nitrification treatment for ammonia-nitrogen causes the facility to become non-compliant with the new total nitrate limits because it converts that contaminant ultimately to nitrate. [Varro Cert., Exhibit J.]

18. In its SCMUA Stay decision, the NJDEP acknowledged and responded that –

[T]he Department agrees that treatment upgrades to provide denitrification would be significant in scope from both a time and cost perspective. This would likely require an appropriation of public funds and the scope of the construction and permitting process could transpire over several years. The Department also acknowledges that the receiving waterbody, which extends into New York State, is not currently impaired for nitrate and not included on EPA’s Clean Water Act Section 303(d) list in either New Jersey or New York for that parameter. Further, the effluent nitrate levels are steady state and therefore not expected to increase based on current treatment provided.

[Id.]

19. On May 18, 2021, the NJDEP granted the request by ELSA for a stay of the effluent limitations for nitrate to become effective October 1, 2021, which was the effective date of the final phase of the permit. [Rosenwinkel ELSA Cert., Exhibit D.]

20. In its ELSA Stay decision, the NJDEP stated that the stay would remain in effect until resolution of the adjudicatory hearing “or the effective date of a future permit action which addresses nitrate, where the current permit expires on September 30, 2023.” This was subject to its reservation of discretion to withdraw the stay or alter its conditions pursuant to N.J.A.C. 7:14A-17.6(f). [Id.]

21. In its ELSA Stay grant, the NJDEP acknowledged and responded that –

[T]he Department does acknowledge that that the receiving waterbody is not impaired for nitrate under current loading conditions, and therefore, the designated use is not threatened at this time through ELSA’s contributions. This is in part due to the moderate nitrate loading being discharged from ELSA where the long term nitrate effluent average during the last 18 months was 13.9 mg/L. The Department also agrees that there are no short term or low cost alternatives to reduce further nitrate beyond existing effluent levels.

[Id.]

FINDINGS OF FACT

Based on the above undisputed facts, I **FIND** that –

1. The discharge from SCMUA Wallkill Facility has no current potential of being consumed as drinking water either here or in New York.

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 that the nitrate quantity it releases is not a health issue.

3. Neither SCMUA or ELSA can comply with the nitrate WQBEL easily or without substantial capital costs and ratepayer impacts.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a full evidentiary hearing should be avoided “when the evidence is so one-sided that one party must prevail as a matter of law.” DEP and petitioners have filed cross-motions for summary decision. In an administrative proceeding, the judge must consider whether the motion papers are sufficient to allow a rational fact finder to conclude that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Zaza v. Marquess and Nell, Inc., 144 N.J. 34, 54 (1996). It is the movant’s burden to exclude any reasonable doubt as to the existence of a genuine issue of material fact. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). The substantive law governing the underlying merits analysis is what determines which facts are material. Only disputes regarding “those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 685 (D.N.J. 1996) (internal citations omitted). Where there are no material facts in dispute and the only issue before the court is a matter of law, summary decision may properly be entered. Ibid.

On these cross-motions for summary decision, I concur that the matter can be resolved as a matter of law on the undisputed facts. For the reasons set forth below, I **CONCLUDE** that the motions of the NJDEP must be granted and the cross-motions of the SCMUA and ELSA must be denied.

The New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 to -60, grants NJDEP authority to promulgate rules and regulations and to make permitting decisions, as required by the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 to 1376. Summary decision is appropriate in cases involving challenges to permit conditions derived from duly adopted regulations. In re NJPDES Permit No. NJ0025241, 185 N.J.

474, 478 (2006); New Jersey Builders Ass'n v. Fenske, 249 N.J. Super. 60, 64 (App. Div. 1991). In NJPDES Permit No. NJ0025241, the Court held that for there to be adjudicative facts warranting a hearing, the challenge must be “rooted in factual error or deficiency based on an identified legal standard that would compel alteration of the Permit determination.” 185 N.J. at 489. For example, a challenge to NJDEP’s calculation of a numeric effluent limitation for enterococci (a bacterial pollutant) presented no material facts at issue. Rather, challenging NJDEP’s calculation method constituted a challenge to a NJDEP policy decision, which was within NJDEP’s discretion. Ibid.

On these motions, it is important to note that N.J.A.C.7:9B-1.5(c)(3) provides: “In order to provide adequate, clean supplies of potable water, it is the policy of the State that all fresh waters⁴ be protected as potential sources of public water supply.” (emphasis added). Thus, the SWQS applies regardless of whether there is an existing or proposed potable water supply intake.

While the petitioners argue that they have satisfied the rigorous regulatory test for a stay of the nitrate limitation, N.J.A.C. 7:14A-17.6, it is consistent with that regulation and the Administrative Procedure Act that the stay expire upon issuance of a final agency decision which will decide the contested permit issue. Thus, a final decision, a stipulation, or a withdrawal all would supersede a stay pending adjudication. N.J.A.C. 7:14A-17.6(f), (g)(3); N.J.A.C. 1:1-18.6(f). Accordingly, I **CONCLUDE** that prior stays granted to either of the parties, as well as the 2016 Partial Stipulation followed by the 2018 withdrawal, do not bind the NJDEP now on the 2018 renewal NJPDES permits. While both authorities have received a new stay on these current permits, my determination herein is not constrained by such from reaching the merits of the appeals and the motions. Once the Commissioner enters a final determination, which might differ than my own decision herein, petitioners shall have a right to

⁴ In 1981, after reclassifying several waterbodies as FW2, and thus designating them for public potable water supply use, NJDEP expressed valid concerns “about the impacts this reclassification would have on point source dischargers,” such as SCMUA. 30 N.J.R. 1778(a). To address these concerns, NJDEP “added a provision at N.J.A.C. 7:9-5.9 allowing it [NJDEP] to issue effluent limitations which were not designed to protect public potable water supply use, in waters which were not currently, and were not planned, within the next 20 years, to be used as public potable water supplies.” 30 N.J.R. 1778(a); 13 N.J.R. 194(b). In 1985, NJDEP removed this exception. 30 N.J.R. 1778(a); 17 N.J.R. 1270(a).

challenge the NJDEP in the Appellate Division, at which stage they can also seek a stay. N.J. Court Rules R. 2:2-3, 2:9-7.

In sum, I **CONCLUDE** that respondent has clearly demonstrated as a matter of law that the Permits properly included a nitrate limitation not presently being met by the SCMUA or ELSA. While I might find persuasive – very persuasive -- petitioners’ arguments laying out the genuine economic hardship to its ratepayers and the *de minimus* safe drinking water impacts, unless and until the Upper Wallkill River and Assunpink Creek are re-designated as other than FW2-NT freshwaters available potentially⁵ for public water supply through regulatory⁶ or statutory changes, or the NJDEP approves a “tiered drinking water uses” or similar proposal, the statewide nitrate SWQS criteria applies to their permitted operations.

This forum cannot revise regulations, refuse to enforce them, or comment on past exercises of administrative enforcement discretion even if common sense would inform any reasonable person that these two dischargers are not contributing to an environmental drinking water “blue baby” concern because of an exceedance of nitrate into waters highly diluted by the enormous volume of the Delaware River (ELSA) or flowing untouched through the Wallkill River National Wildlife Refuge and into New York. The same is still true even if I were to concur that this nitrate requirement is a “solution in search of a problem” at a tremendous public cost to a relatively small set of ratepayers. The fact that the NJDEP considered, but ultimately did not adopt, an “alternative application of the nitrate SWQS for discharges that do not impact water supply intakes” (Rosenwinkel ELSA Cert., Exhibit C at 9), does not provide this forum with the legal basis to mandate that the NJDEP do so now.

Any other argument raised by petitioners to the effect that they are entitled to discovery and a plenary hearing on the thought processes of NJDEP personnel because

⁵ “‘Designated use’ means those surface water or ground water uses, both existing and potential, that have been established by the Department for waters of the State.” N.J.A.C. 7:9B-1.4.

⁶ “The Department will entertain petitions, for reclassification of specific segments to less restrictive uses, or may decide to initiate reclassification proceedings on its own, at any time.” N.J.A.C. 7:9B-1.10(a). I note, however, that the arguments that might form the basis for reclassification petitions by the SCMUA and ELSA do not appear to conform to the specified requirements.

certain regulations were deleted years ago, N.J.A.C. 7:9-5.9, or certain alternative regulations were not proposed, as set forth above, are plainly without merit and require no further discussion. Nor is the NJDEP precluded from seeking summary rather than plenary decision just because it granted the parties' hearing requests and transmitted the contested cases to the OAL, as is plainly set forth in every grant of a hearing request by the agency.⁷

ORDER

For the reasons set forth above, it is **ORDERED** that the motions for summary disposition filed by the respondent New Jersey Department of Environmental Protection are hereby **GRANTED**. It is further **ORDERED** that the cross-motions of petitioners Sussex County Municipal Utilities Authority and Ewing Lawrence Sewerage Authority are hereby **DENIED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

⁷ "The transmittal of this matter to the Office of Administrative Law does not constitute a waiver of the Department's right to limit the introduction or consideration in the hearing at the Office of Administrative law of any defense or issues which are inappropriately raised." I disagree, however, with respondent's characterization of its own summary decision motion as invoking "subject matter jurisdiction."

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



May 31, 2022

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

5/31/22

Mailed to Parties:

5/31/22

id

MATERIALS SUBMITTED ON CROSS-MOTIONS

For Petitioners:

Brief in Support of Ewing-Lawrence Sewerage Authority's Cross-Motion for Summary Decision and in Opposition to NJDEP Motion for Summary Decision, dated January 14, 2022

Certification of Raymond A. Ferrara, Ph.D., dated January 14, 2022

Brief in Support of Sussex County MUA's Cross-Motion for Summary Decision and in Opposition to NJDEP Motion for Summary Decision, dated January 20, 2022

Certification of SCMUA Executive Director Thomas Varro, P.E., dated January 20, 2022

For Respondent:

Brief in Support of Motion for Summary Decision against Sussex County MUA, dated August 27, 2021

Certification of Susan Rosenwinkel in Support of Motion for Summary Decision against Sussex County MUA, dated August 27, 2021

Brief in Support of Motion for Summary Decision against Ewing Lawrence Sewerage Authority, dated August 27, 2021

Certification of Susan Rosenwinkel in Support of Motion for Summary Decision against Ewing Lawrence Sewerage Authority, dated August 27, 2021

Letter-Brief in Reply to Petitioners' Opposition to NJDEP Motion for Summary Decision, dated February 11, 2022