



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NOs. EER 05228-21 and
ELU-10600-15

AGENCY DKT. NOs. 0024490-47050
and 0024490-47050

VERONA TOWNSHIP WTP

Petitioner

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

Respondent.

Diane Alexander, Esq., for petitioner Township of Verona (Maraziti Falcon, LLC)

Amy E. Stevens, Deputy Attorney General, for respondent New Jersey
Department of Environmental Protection (Matthew J. Platkin, Attorney
General of New Jersey, attorney)

Record Closed: October 16, 2023

Decided: November 20, 2023

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

On or about July 13, 2015, the New Jersey Department of Environmental Protection, Office of Legal Affairs (DEP), transmitted ELU-10600-2015, Verona Township WTP, to the Office of Administrative Law for hearing as a contested. N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The matter was placed on the inactive list as agreed by the parties by Barry E. Moscovitz, ALJ, on December 3, 2015. The second matter, EER-05228-21 was transmitted to the OAL and filed on June 15, 2021. The issue in these matters is whether respondent, New Jersey Department of Environmental Protection, properly set the nitrate limit for petitioner Verona Township Wastewater Treatment Plant's (Verona) 2019 New Jersey Pollutant Discharge. Counsel for respondent filed the motion for summary decision on April 28, 2023, finding that the agency complied with the Surface Water Quality Standards, N.J.A.C. 7:9B-1.1 to -1.16, and the rules governing the NJPDES permit program, N.J.A.C. 7:14A-1.1 to -25.10, in determining the nitrate limit, and that the grounds upon which Verona disputes the nitrate limit are immaterial, irrelevant, or deemed waived.

Opposition was filed on July 28, 2023. Verona disagrees and challenges the nitrate limit in its 2019 New Jersey Pollutant Discharge Elimination System (NJPDES) permit issued by the New Jersey Department of Environmental Protection (DEP). On October 16, 2023, respondent submitted its reply. This matter was transferred to the undersigned on November 16, 2023. For the reasons set forth below, respondent's motion for summary decision is granted.

The parties have jointly stipulated the following facts. Verona is located at 10 Commerce Court, Verona Township, Essex County, New Jersey. Exhibit M, p. 7. Verona discharges treated wastewater into the Peckman River. Id. at p. 1. Verona has long held a NJPDES permit issued by the DEP. For many years, Verona's NJPDES permit has included a nitrate limit. And for many years, Verona has contested the nitrate limit.

The nitrate limit first appeared in Verona's December 28, 2007, final permit, NJPDES permit number NJ0024490. Exhibit A, pp. 6-7, 29. Verona commented on the

nitrate limit, to which the DEP responded in the final permit. Exhibit A, pp. 6-7. The permit set a Water Quality Based Effluent Limitation (WQBEL) for nitrate of 15.20 mg/L as a monthly average and 21.1 mg/L as a daily maximum concentration. Id. at p. 29. The permit contains nitrate loading limitations of a monthly average of 172 kg/day and a daily maximum of 239 kg/day. Ibid. Verona requested an adjudicatory hearing and stay of contested conditions on December 28, 2007, and final permit on January 18, 2008. Exhibit B, pp. 1, 9, 14-16. The DEP granted Verona's request for an adjudicatory hearing on June 17, 2009. Exhibit D, p. 1. On June 9, 2011, the DEP granted a stay of the nitrate limitation. Exhibit C, pp. 1-2.

On February 12, 2013, Verona and the DEP executed a Stipulation of Settlement, resolving all adjudicatory issues except for nitrate. Exhibit F, p. 2. The settlement states that "the pending adjudication [shall] remain open, and pursuant to N.J.A.C. 1:1-9.7, [be] placed on the inactive list for a period of six months from the date of execution of this Stipulation." Ibid. The Stipulation also states that "the effluent limitation for Nitrate Nitrogen in Part III-A, Table 111-A-1, will remain stayed during the pendency of this adjudication." Ibid. On June 27, 2014, the DEP issued a draft renewal NJPDES permit, again containing a nitrate limit. Exhibit G, pp. 1-2, 15-16. Verona commented on this draft permit, including commenting on the nitrate limit. Exhibit H, pp. 6-7.

On August 11, 2014, the DEP issued a final renewal NJPDES permit, with a nitrate WQBEL of a monthly average of 12.6 mg/L and a daily maximum of 14.5 mg/L. Exhibit H, p. 20. The permit contains nitrate loading limitations of a monthly average of 142.9 kg/day and a daily maximum of 165.0kg/day. Ibid. The 2014 final permit action superseded the 2007 permit.

On September 17, 2014, Verona requested an adjudicatory hearing and stay of contested permit conditions, including nitrate. Exhibit I, p. 1. The DEP granted the request for an adjudicatory hearing on October 17, 2014. Ex. J, p. 1. On March 27, 2015, the DEP granted the stay request for nitrate. Exhibit K, pp. 1-2. The DEP then

issued Verona a draft renewal NJPDES [permit] on July 10, 2019. Exhibit L, p. 1. The draft renewal permit again contained a limit for nitrate. Id. at pp. 12-13.

On September 6, 2019, the DEP issued the final NJPDES permit (the Permit) to Verona authorizing Verona to discharge 3.0 million gallons per day (MGD) of treated and disinfected sanitary water into the Peckman River. Exhibit M, p. 1. This final permit action supersedes the 2014 permit such that the 2014 permit has no further force and effect and the 2019 permit is the governing permit for the facility. The final 2019 renewal permit specifies a nitrate WQBEL with concentration limitations of a monthly average of 12.80 mg/L and a daily maximum of 18.23 mg/L. Exhibit M, p. 17. The permit contains nitrate loading limitations of a monthly average of 145.35 kg/day and a daily maximum of 207.11 kg/day. Ibid.

On October 3, 2019, Verona requested an adjudicatory hearing and stay of contested conditions for the nitrate limit in its NJPDES permit. Exhibit N, p. 1. The nitrate limit is the sole issue in this adjudication. Id. at p. 4. The DEP granted the Adjudicatory Hearing Request on October 15, 2020. Exhibit O, p. 1. On June 22, 2021, the DEP subsequently transmitted Verona's appeal to the Office of Administrative Law (OAL) for a contested case hearing.

The DEP granted the Stay Request on September 2, 2021, which becomes effective December 1, 2024, stating that "the stay shall remain in effect until the resolution of the Adjudicatory Hearing Request or the effective date of a future permit action which addresses nitrate." Exhibit P, pp. 1-2.

In the 2019 draft permit, the Department determined that Verona's effluent data showed cause to violate the SWQS [Surface Water Quality Standard] for nitrate in the Peckman River, Exhibit L, pp. 12-13. The DEP calculated the nitrate WQBEL in Verona's 2019 permit using the nitrate [SWQS] of 10 mg/L, Exhibit L, pp. 12-13. Verona's hearing request asserts that the nitrate limit should not apply because there is

no downstream potable water intake and the cost to treat nitrate is substantial. Exhibit N, p. 4.

In addition to the foregoing stipulated facts, the parties further stipulated that the DEP and the Passaic Basin dischargers (24 wastewater dischargers) developed a nutrient Total Maximum Daily Load (TMDL) Report, applicable to nutrients in the Passaic River Basin, including the development of a basin-wide simulation modeling framework to determine the final TMDLs necessary to address water use impairments and to evaluate management alternatives to achieve water quality goals. Exhibit 1. However, the DEP denies that this is a material fact in this case.

The DEP has moved for summary decision finding that there are no genuine issues of material fact and that, as a matter of law, the agency properly set the nitrate limit in Verona's 2019 permit. In addition to the jointly stipulated facts, the DEP relies on briefs, exhibits, and certifications in support of its motion.

Initially, the agency points out that the parties jointly stipulated that "[t]he nitrate limit is the sole issue in this adjudication." The DEP asserts that there are no genuine issues of material fact with respect to whether the agency followed the procedures in N.J.A.C. 7:9B and N.J.A.C. 7A:14 in setting the nitrate limit for Verona's 2019 permit. In this regard, the agency notes:

When using the undisputed data in the formulas, the Department first determined there was 'cause' that Verona's discharge could contribute to an excursion of the SWQS. N.J.A.C. 7:14A-13.6; Exhibit L, pp. 12-13; Rosenwinkel Cert., ¶¶ 10-18. The Department then used the applicable data to determine a WQBEL using the appropriate formula, finding concentration limitations of a monthly average of 12.80 mg/L and a daily maximum of 18.23 mg/L and nitrate loading limitations of a monthly average of 145.35 kg/day and a daily maximum of 207.11 kg/day. Exhibit M, p. 17; Rosenwinkel Cert., ¶¶ 19-21.

Second, the DEP maintains that the bases on which Verona challenges the nitrate limit in the 2019 permit are immaterial or irrelevant. According to the DEP, Verona cannot as part of this contested case challenge the designation of the Peckman River as a potable water supply source because “[d]uly promulgated rules designated the Peckman River as a potable water supply as it is designated as an FW2 water. N.J.A.C. 7:9B-1.12; N.J.A.C. 7:9B-1.15(f).” The nitrate SWQS criteria of 10 mg/L that applies to the Peckman River is also set by regulation, N.J.A.C. 7:9B-1.14(f)(7). Thus, “[i]t is improper to challenge either the designated use of the Peckman River or the nitrate SWQS in an OAL proceeding since they are both established by regulation.” Any such challenges to the validity of these regulations must be raised instead in the Appellate Division under R. 2:2-3.

The DEP further avers that Verona cannot challenge the nitrate limit based on financial costs because “[t]he calculation of a WQBEL does not allow the Department to consider cost. See N.J.A.C. 7:14A-13.5 to -13.6.” Next, the agency contends that the TMDL Report for the Passaic River Basin, of which the Peckman River is a part, “is not material” because the DEP “did not apply any aspect of the TMDL to calculate Verona’s nitrate limit” and the DEP did not have to apply the TDML because it “relates to phosphorous, not nitrate.” Moreover, Verona cannot raise the TMDL issue here because “NJPDDES permittees are obligated to raise issues and provide information during the public comment period. N.J.A.C. 7:14A-15.13.” Verona did not do this, or raise the issue in its hearing request, and thus “any contentions relating to the TMDL are ‘deemed to have been waived.’”

Finally, the DEP argues that it is entitled to summary decision because the 2019 permit “supersedes all existing permitting actions, rendering both the adjudications on the 2007 and 2014 final permits moot, regardless of whether the adjudicatory hearing requests were formally withdrawn.” According to the department, “the 2007 and 2014 permits are no longer the active permit[s] in dispute, N.J.A.C. 7:14A-2.8(a),” because “[w]hen the Department issued the September 6, 2019 final permit, that permit became the governing permit [under] N.J.A.C. 7:14A-2.8(a).” Thus, “once the Department

issues a new final permitting action, any previous adjudications on previous permit actions become moot” and the prior permits are “not properly before this tribunal as this forum is unable to provide the requested relief on superseded permits.”

In opposition, Verona submits that there are genuine issues of material fact that prevent summary decision and that must be determined in a hearing, including:

- 1) There is no evidence to suggest that NJDEP utilized a use attainability analysis as defined in 40 CFR, Chapter 1, Subchapter D, Part 131, Subpart A, § 131.3(g), when it designated the Peckman River as a potable water source.
- 2) Verona cannot currently remove nitrates at a level of 10 mg/L without significant expenditures.
- 3) In implementing a nitrate limit within Verona’s NJPDES permit, sewer rate payers will be adversely affected.
- 4) NJDEP and the Passaic Basin dischargers (24 wastewater dischargers) developed a nutrient Total Maximum Daily Load (“TMDL”) Report, applicable to nutrients in the Passaic River Basin, including the development of a basin-wide dynamic simulation modeling framework. See Stipulation of Fact #22.
- 5) The TMDL was used to establish point source effluent limits necessary to address water use impairments and to evaluate management alternatives to achieve water quality goals. See Stipulation of Fact #22.

In this regard, Verona raises several legal arguments. First, “the designated use of the Peckman River, which has been classified as a potential potable water source, is required to undergo a use attainability analysis pursuant to the federal Clean Water Act, and the Water Pollution Control Act prior to such designation.” Second, “[i]t is also essential that economic factors, specifically any cost incurred in the implementation of said nitrate limit must also be factored into the decision-making as well as other factors established in federal and state regulations.” Third, “NJDEP’s improper determination to employ a steady state model to establish effluent limitations, where a multimillion-

dollar dynamic model of the Passaic River Basin (a Total Maximum Daily Load Study or “TMDL Study”) exists, is arbitrary, capricious and unreasonable” and “NJDEP has already reviewed and approved of the Study for nutrients, including nitrates discharged into the Peckman River.” Finally, “this matter represents a continuing challenge to a continuing action taken by NJDEP that has not yet been resolved” and “[t]he issue of any nitrate limit within Verona’s NJPDES permit has not yet been fully resolved, and despite NJDEP’s argument otherwise, Verona’s prior permits are not moot, even if they are expired.”

In its reply, the DEP states that Verona has failed to raise any genuine issues of material fact related to the nitrate limit in the 2019 permit, which was “established based on the application of regulations as well as an undisputed formula and undisputed data.” The DEP reiterates its arguments that, in essence, Verona improperly seeks to challenge the validity of several regulations, and that such challenges belong instead in the Appellate Division.

The DEP again asserts that Verona waived any argument “that the Department should have used the dynamic model from the Passaic TMDL (TMDL model) to calculate its limit instead of the steady state mass balance equation.” First, “Verona did not request in its renewal application that the Department calculate its nitrate limit using the TMDL model, Exhibit BB,” and “N.J.A.C. 7:14A-4.3(27) provides that with its application, the permittee can provide ‘any other optional information that the permittee wishes to have considered.’” Second, “Verona did not raise using a dynamic model in its comments on the July 10, 2019, draft permit or in its the hearing request on the September 6, 2019, final permit. See Exhibit M, pp. 5–6; Exhibit N, p. 4.” As such, the TMDL issue is deemed waived under N.J.A.C. 7:14A-15.13, which provides that “[i]f an applicant or permittee or any person fails to raise any reasonably ascertainable issues within the public comment period, the right to raise or contest any such issues in any subsequent adjudicatory hearing or appeal shall be deemed to have been waived.” According to the DEP, “if Verona would like to have its nitrate limit calculated through a dynamic limit, Verona can either (1) request a major modification, see N.J.A.C. 7:14A-

16.3, of its permit on this basis and engage with the Department over what studies need to be done pursuant to N.J.A.C. 7:14A-2.12, or (2) request a dynamic model be used in its renewal application for its next NJPDES permit.”

In addressing the mootness of prior permit disputes, the DEP maintains that “Verona agreed that the 2014 permit action superseded the 2007 permit, ¶ 9, and the 2019 final permit superseded the 2014 permit “such that the 2014 permit has no further force and effect,” ¶ 14. If the 2014 permit has no force and effect, the related adjudication is also moot.” However, the Department allows that “to the extent that prior permit limits were properly challenged in prior adjudicatory hearings and those matters were not resolved prior to the next permit’s issuance, that if those limits were again challenged in the new permit, that limit has never been ‘final’ for purposes of anti-backsliding. Accordingly, any prior permit adjudications or issues raised in the hearing requests of those adjudications are moot and not properly before this court as this forum is unable to provide the requested relief on superseded permits.”

LEGAL DISCUSSION

I. Standards for Summary Decision

The Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, allow a party to “move for summary decision upon all or any of the substantive issues in a contested case.” N.J.A.C. 1:1-12.5(a). Such a motion “shall be served with briefs and with or without supporting affidavits.” N.J.A.C. 1:1-12.5(b). A judge may grant a motion for summary decision “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Ibid. If a motion is “made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid.

II. The Laws Governing Surface Waters in New Jersey

Through the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 to -73, the Legislature has declared that because “pollution of the ground and surface waters of this State continues to endanger public health” and aquatic life, “[i]t is the policy of this State to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water.” N.J.S.A. 58:10A-2. And because the Federal Clean Water Act, 33 U.S.C. 1251, et seq., “establishes a permit system to regulate discharges of pollutants and provides that permits for this purpose will be issued by the Federal Government or by states with adequate authority and programs to implement the regulatory provisions of that act,” our Legislature has further declared that “[i]t is in the interest of the people of this State to minimize direct regulation by the Federal Government of wastewater dischargers by enacting legislation which will continue and extend the powers and responsibilities of the Department of Environmental Protection for administering the State’s water pollution control program, so that the State may be enabled to implement the permit system required by the Federal Act.” Ibid.

The Legislature has tasked the DEP Commissioner with promulgating “reasonable codes, rules and regulations to prevent, control or abate water pollution and to carry out the intent of [the WPCA].” N.J.S.A. 58:10-4. To protect New Jersey’s surface waters, the Commissioner has adopted the Surface Water Quality Standards (SWQS), N.J.A.C. 7:9B-1.1 to -1.16, which “set forth designated uses, use classifications, and water quality criteria for the State’s waters based upon such uses, and the Department’s policies concerning these uses, classifications and criteria.” N.J.A.C. 7:9B-1.4.

Under the SWQS, “designated use” includes surface water uses “both existing and potential, that have been established by the Department for waters of the State;” “criteria” are SWQS elements, “expressed as constituent concentrations, levels, or

narrative statements, representing a quality of water that supports a particular use” and “[w]hen the criteria are met, water quality will generally protect the designated use,” and “water quality-based effluent limitations,” WQBELs, are “effluent limitations established so that the quality of the waters receiving a discharge will meet the surface water quality criteria and policies of this chapter after the introduction of the effluent.” Ibid.

Relevant to this matter, the entire length of the Peckman River has been classified as “FW2-NT.” N.J.A.C. 7:9B-1.15(f). “FW2” means “fresh waters that are not designated as FW1 or Pinelands Waters.”¹ N.J.A.C. 7:9B-1.4. “NT” means “nontrout waters,” or waters that are “generally not suitable for trout.” Ibid. The designated uses in FW2 waters like the Peckman River are “[m]aintenance, migration and propagation of the natural and established biota;” “[p]rimary contact recreation;” “[i]ndustrial and agricultural water supply;” “[p]ublic potable water supply after conventional filtration treatment (a series of processes including filtration, flocculation, coagulation, and sedimentation, resulting in substantial particulate removal but no consistent removal of chemical constituents) and disinfection;” and “[a]ny other reasonable uses.” N.J.A.C. 7:9B-1.12(c).

The DEP recognizes that “[t]he 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” and has announced that “[i]n order to provide adequate, clean supplies of potable water, it is the policy of the State that all fresh waters be protected as potential sources of public water supply, such that “point and nonpoint sources of pollutants shall be regulated to attain compliance with the [SWQS] human health criteria outside of regulatory mixing zones.” N.J.A.C. 7:9B-1.5(a)(3). The Department has long maintained that “New Jersey classifies all freshwaters for use as public potable water supply after such treatment as required by law or regulation.” 30 N.J.R. 1778(a) (May 18, 1998).

¹ “FW1” are “those fresh waters . . . that are to be maintained in their natural state of quality (set aside for posterity) and not subjected to any man-made wastewater discharges[.]” N.J.A.C. 7:9B-1.4.

As required by the WPCA and federal law, the DEP has established a permit system for the discharge of pollutants in New Jersey's surface waters. N.J.A.C. 7:14A. It is "unlawful for any person to discharge any pollutant except in conformity with a valid NJPDES permit issued by the Department, unless specifically exempted[.]" N.J.A.C. 7:14A-2.1.

The procedures for determining effluent limitations for discharge to surface water permits are set forth in N.J.A.C. 7:14A-13. WQBELs "shall control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants, including whole effluent toxicity) which are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above the [SWQS]." N.J.A.C. 7:14A-13.5(a). If the DEP determines that "a discharge causes, has the reasonable potential to cause, or contributes to an excursion above a [SWQS], a water quality based effluent limitation for each pollutant or pollutant parameter including WET [whole effluent toxicity], shall be determined in accordance with the USEPA TSD [technical support document], as amended and/or supplemented, unless the permittee demonstrates that none of the methods in the TSD are applicable and that an alternative method will result in a water quality based effluent limitation that ensures compliance with the [SWQS]." N.J.A.C. 7:14A-13.6.

Nitrate is classified as a toxic substance under the SWQS. N.J.A.C. 7:9B-1.14(f)(7). According to the National Primary Drinking Water Regulations, "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" because "[h]igh nitrate levels in drinking water can cause blue baby syndrome." 40 C.F.R. § 141.62(c)(1). As such, for FW2 waters in New Jersey, like the Peckman River, the criteria for nitrate levels is 10 mg/L. N.J.A.C. 7:9B-1.14(f)(7).

The NJPDES permit procedures "include conducting a permit preapplication conference when requested, receiving a permit application, performing an administrative and technical review of the application, preparing a draft permit, issuing a

public notice, inviting public comment, holding a public hearing on a draft permit as applicable, issuing a final permit decision, responding to comments and establishing an administrative record for the permit action.” N.J.A.C. 7:14A-15.1.

There are also specific procedures and requirements for challenging a final permit decision by the DEP. N.J.A.C. 7:14A-17.1 to -17.6. First, while a permittee who is dissatisfied with a final permit decision may request an adjudicatory hearing to challenge a permit decision, the scope of such a hearing may be limited. In this regard, any “contested legal and/or factual issues” must have been “raised during the public comment period” for a draft permit. N.J.A.C. 7:14A-17.4(b). Indeed, “[i]f an applicant or permittee or any person fails to raise any reasonably ascertainable issues within the public comment period, the right to raise or contest any such issues in any subsequent adjudicatory hearing or appeal shall be deemed to have been waived.” N.J.A.C. 7:14A-15.13. A permittee must seek to challenge “the Department’s application of the regulations” and not “duly promulgated regulations” as part of an adjudicatory hearing. N.J.A.C. 7:14A-17.4(b).

Finally, “[t]he issues presented in the adjudicatory hearing shall be limited to those permit conditions contested in a request for an adjudicatory hearing or those specifically identified by the Department[.]” N.J.A.C. 7:14A-17.4(c).

If the DEP grants a request for an adjudicatory hearing, the DEP may transmit the matter to the OAL to conduct the hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. The DEP may also grant a stay of any contested permit conditions pending the hearing before the OAL. N.J.A.C. 7:14A-17.6.

The entire length of the Peckman River has been classified as “FW2-NT;” as such, the river is considered fresh water. N.J.A.C. 7:9B-1.15(f). The DEP, the agency charged with protecting New Jersey’s freshwaters, has confirmed that “it is the policy of the State that all fresh waters be protected as potential sources of public water supply,” such that “point and nonpoint sources of pollutants shall be regulated to attain

compliance with the [SWQS] human health criteria[.]” N.J.A.C. 7:9B-1.5(a)(3). As such, the DEP “classifies all freshwaters for use as public potable water supply after such treatment as required by law or regulation.” 30 N.J.R. 1778(a) (May 18, 1998).

Nitrate is classified as a toxic substance under the SWQS, N.J.A.C. 7:9B-1.14(f)(7), because “[n]itrate in drinking water at levels above 10 ppm [parts per million] . . . can cause blue baby syndrome.” 40 C.F.R. § 141.62(c)(1). As such, for FW2 waters in New Jersey, like the Peckman River, the criteria for nitrate levels is 10 mg/L. N.J.A.C. 7:9B-1.14(f)(7).

The DEP determined the nitrate limit for Verona’s NJPDES permit in light of these classifications and considerations, and in accordance with the SWQS and the rules governing effluent limitations for discharge to surface water permits under N.J.A.C. 7:14A-13. As the DEP confirms in its moving papers:

When using the undisputed data in the formulas, the Department first determined there was ‘cause’ that Verona’s discharge could contribute to an excursion of the SWQS. N.J.A.C. 7:14A-13.6; Exhibit L, pp. 12-13; Rosenwinkel Cert., ¶¶ 10-18. The Department then used the applicable data to determine a WQBEL using the appropriate formula, finding concentration limitations of a monthly average of 12.80 mg/L and a daily maximum of 18.23 mg/L and nitrate loading limitations of a monthly average of 145.35 kg/day and a daily maximum of 207.11 kg/day. Exhibit M, p. 17; Rosenwinkel Cert., ¶¶ 19-21.

Thus, the DEP followed the law by conducting a cause analysis under N.J.A.C. 7:14A-13.5 and, after determining that Verona’s discharge could contribute to an excursion of the SWQS, calculated the appropriate nitrate limit for Verona’s permit under N.J.A.C. 7:14A-13.6. As the parties jointly stipulated, the DEP “calculated the nitrate WQBEL in Verona’s 2019 permit using the nitrate [SWQS] of 10 mg/L, Exhibit L, pages 12-13.” As such, there is no genuine issue of material fact with respect to whether the DEP complied with the law in setting the nitrate limit.

The DEP's rules for requesting an adjudicatory hearing to challenge NJPDES permit conditions are clear: "contested legal and/or factual issues" must have been "raised during the public comment period" for a draft permit and "[i]f an applicant or permittee or any person fails to raise any reasonably ascertainable issues within the public comment period, the right to raise or contest any such issues in any subsequent adjudicatory hearing or appeal shall be deemed to have been waived." N.J.A.C. 7:14A-17.4(b). N.J.A.C. 7:14A-15.13. Moreover, a permittee cannot challenge "duly promulgated regulations" as part of an adjudicatory hearing, only "the Department's application of the regulations." N.J.A.C. 7:14A-17.4(b). And "[t]he issues presented in the adjudicatory hearing shall be limited to those permit conditions contested in a request for an adjudicatory hearing or those specifically identified by the Department[.]" N.J.A.C. 7:14A-17.4(c). In this matter, Verona either did not raise certain legal or factual issues during the public comment period, Verona seeks to challenge "duly promulgated regulations," or Verona raises issues that were not specified in its hearing request.

The DEP argues that Verona cannot as part of this contested case challenge the designation of the Peckman River as a potable water supply source because "[d]uly promulgated rules designated the Peckman River as a potable water supply as it is designated as an FW2 water. N.J.A.C. 7:9B-1.12; N.J.A.C. 7:9B-1.15(f)." The nitrate SWQS criteria of 10 mg/L that applies to the Peckman River is also set by regulation, N.J.A.C. 7:9B-1.14(f)(7). Thus, "[i]t is improper to challenge either the designated use of the Peckman River or the nitrate SWQS in an OAL proceeding since they are both established by regulation," and any challenges to the validity of these regulations must be raised instead in the Appellate Division under R. 2:2-3. I agree.

To the extent that Verona maintains that "[t]here is no evidence to suggest that NJDEP utilized a use attainability analysis as defined in 40 CFR, Chapter 1, Subchapter D, Part 131, Subpart A, § 131.3(g), when it designated the Peckman River as a potable water source," this is a challenge to the regulation designating the Peckman River as "FW2-NT" and not appropriately part of this administrative case.

Verona also improperly argues that it “cannot currently remove nitrates at a level of 10 mg/L without significant expenditures” and “[i]n implementing a nitrate limit within Verona’s NJPDES permit, sewer rate payers will be adversely affected.” The DEP correctly counters that Verona cannot challenge the nitrate limit based on financial costs because “[t]he calculation of a WQBEL does not allow the Department to consider cost. See N.J.A.C. 7:14A-13.5 to -13.6.” The DEP also argues that Verona’s rules challenge and cost argument were similarly raised and rejected recently by the DEP Commissioner in Ewing Lawrence Sewerage Auth. v. New Jersey Dep’t of Env’t Prot., EER 02687-21 & EER 13242-19, available at njlaw.rutgers.edu/collections/oal. In that case, which also involved nitrate limits in NJPDES permits for public utility authorities, the DEP Commissioner noted 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,” but instead “challenge the regulations underlying these determinations.” However, the DEP Commissioner made clear that the “OAL is not the appropriate forum to address such a challenge to the underlying regulations.”

The DEP Commissioner also held that, “[w]hile 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,” but rather “it is the province of the Department’s underlying rulemaking process pursuant to the Administrative Procedure Act” and “[s]uch 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.” He continued, “[t]he NJPDES permitting process . . . is chiefly concerned with whether a permit holder’s discharge causes an excursion of the SWQS” and “[a]lleged capital costs are simply not relevant to the regulatory compliance analysis.”

Thus, it is clear from the DEP Commissioner’s recent holdings in Ewing Lawrence Sewerage Auth. that Verona’s challenges to duly promulgated regulations and Verona’s financial cost arguments are improperly raised in this OAL proceeding.

The DEP also correctly argues that Verona's "contentions relating to the TMDL are 'deemed to have been waived'" because "NJPDES permittees are obligated to raise issues and provide information during the public comment period," and "Verona did not do this, or raise the issue in its hearing request[.]" As the DEP notes, it "properly defaulted to steady state modeling when [Verona] did not ask for a dynamic model to be applied when calculating the [nitrate] limit," and advises that "if Verona would like to have its nitrate limit calculated through a dynamic limit, Verona can either (1) request a major modification, see N.J.A.C. 7:14A-16.3, of its permit on this basis and engage with the Department over what studies need to be done pursuant to N.J.A.C. 7:14A-2.12, or (2) request a dynamic model be used in its renewal application for its next NJPDES permit."

The DEP maintains that the 2019 permit "supersedes all existing permitting actions, rendering both the adjudications on the 2007 and 2014 final permits moot, regardless of whether the adjudicatory hearing requests were formally withdrawn." According to the department, "the 2007 and 2014 permits are no longer the active permit[s] in dispute, N.J.A.C. 7:14A-2.8(a)," because "[w]hen the Department issued the September 6, 2019 final permit, that permit became the governing permit [under] N.J.A.C. 7:14A-2.8(a)." Thus, "once the Department issues a new final permitting action, any previous adjudications on previous permit actions become moot" and the prior permits are "not properly before this [tribunal] as this forum is unable to provide the requested relief on superseded permits."

Verona argues that the DEP is "incorrect with regard to the lack of impact of prior permits – their final and effective provisions are carried forward even once any permit expires. Anti-backsliding requirements, namely statutory and regulatory provisions that prohibit the renewal, reissuance, or modification of an existing NJPDES permit that contains effluent limitations, permit conditions, or standards less stringent than those established in the previous permit, are only authorized under certain circumstances. See CWA Section 402(o)." In this regard, the DEP concedes that "to the extent that prior permit limits were properly challenged in prior adjudicatory hearings and those

matters were not resolved prior to the next permit's issuance, that if those limits were again challenged in the new permit, that limit has never been 'final' for purposes of anti-backsliding."

Based on these arguments, the DEP correctly asserts that "any prior permit adjudications or issues raised in the hearing requests of those adjudications are moot and not properly before the OAL as this forum is unable to provide the requested relief on superseded permits."

Having considered the arguments of the parties, including the joint stipulation of facts, exhibits, and certifications and briefs, I **CONCLUDE** there are no genuine issues of material fact necessitating a hearing and that the DEP is entitled to prevail as a matter of law in setting the nitrate limit for Verona's 2019 permit to discharge treated wastewater into the Peckman River. I further **CONCLUDE** that the previous matter, ELU-10600-2015, is moot and must be **DISMISSED**. I **CONCLUDE** that the DEP's motion for summary decision is **GRANTED** and Verona's appeal in both matters **DISMISSED**.

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 a final decision in this matter. 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 shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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.

November 20, 2023



DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

November 20, 2023

Date Mailed to Parties:

November 20, 2023