



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

(CONSOLIDATED)

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. ELU 05549-13

AGENCY REF. NO. NJDES

#NJ0027821-46474

MUSCONETCONG SEWERAGE AUTHORITY,

Petitioner,

v.

NEW JERSEY DEPARTEMENT OF

ENVIRONMENTAL PROTECTION,

Respondent.

MUSCONETCONG SEWERAGE AUTHORITY,

Petitioner,

v.

NEW JERSEY DEPARTEMENT OF

ENVIRONMENTAL PROTECTION,

Respondent.

OAL DKT. NO. EER 05944-21

AGENCY REF. NO. NJ0027821-
46474

Patrick J. Dwyer, Esq., for petitioner (Nussbaum, Stein, Goldstein, Bronstein &
Kron, attorneys)

Stephanie R. (Carney) Tuason, Deputy Attorney General, and **Elizabeth Delahunty**, Deputy Attorney General for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: December 13, 2023

Decided: December 13, 2023

BEFORE: **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Muscongecong Sewerage Authority (MSA), appeals the Final Permit Decision, dated October 14, 2011, NJPDES Permit # NJ0027821. The matter was transmitted to the Office of Administrative Law (OAL) as a contested matter, where it was filed on April 19, 2012 under Docket No. ELU 05549-13. The matter was initially assigned to the Honorable Caridad F. Rigo, ALJ.

The matter was settled except as to the effluent limitation for total nitrate. The matter remained a contested matter as to this issue pursuant to a Stipulation of Settlement signed by Petitioner on January 23, 2015, and by DEP on March 10, 2015. Judge Rigo placed the matter on the Inactive List by a series of Orders dated October 25, 2016, July 26, 2018 and April 25, 2019. The matter was thereafter assigned to the undersigned after the retirement of Judge Rigo. The undersigned continued the matter on the Inactive List by Order dated April 30, 2021.

Petitioner's permit was due to expire and an application for renewal was submitted. DEP issued its Final Surface Water Renewal Action on December 11, 2020. Petitioner requested an adjudicatory hearing as to this action.

The Department of Environmental Protection transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on July 13, 2021 under Docket No. EER 05944-21.

The undersigned consolidates the two above noted matters sua sponte for purposes of this decision.

Respondent filed a motion for summary decision, dated December 1, 2022. Thereafter, Petitioner was permitted to file a motion to compel discovery, which was filed on March 9, 2023. Respondent's motion for summary decision was held in abeyance pending a decision on Petitioner's motion to compel discovery.

Respondent filed their response to the motion to compel, dated April 5, 2023. Petitioner filed their reply thereto on April 27, 2023.

The undersigned determined that an in camera review of the documents sought in the discovery motion was necessary to render a decision on Petitioner's motion. Those documents are set forth as Exhibit E in Petitioner's Notice of Motion to Compel Discovery, and addressed by Susan Rosenberg, Bureau Chief of the Bureau of Surface Water and Pretreatment Permitting, in her Certification dated April 5, 2023. The undersigned entered an Order, dated May 31, 2023, requiring Respondent to provide the aforementioned documents.

After reviewing the documents in camera the undersigned denied the motion to compel discovery by Order dated June 27, 2023.

Petitioner filed its response to the motion for summary decision on July 28, 2023. Petitioner filed its reply thereto on September 14, 2023.

Oral argument on Respondent's motion for summary decision was held on December 13, 2023, whereupon the record closed.

ISSUE

Whether respondent New Jersey Department of Environmental Protection properly set the nitrate limit for petitioner MSA's permit for discharging wastewater.

FACTUAL DISCUSSION

MSA is a municipal sewage authority and operates a sewage treatment plant and discharges into the Musconetcong River. MSA received a final New Jersey Pollutant D Elimination System permit from DEP, dated October 14, 2011, NJPDES Permit No. NJ0027821. (DEP Ex. A)

MSA requested an adjudicatory hearing, and the matter was transferred to the OAL under Docket No. ELU 05549-13. (DEP Ex. B.)

Thereafter MSA filed a Stay Request with DEP on March 21, 2012. (DEP Ex. C) The Stay Request was granted on June 8, 2012. (DEP Ex. D)

That matter was settled between DEP and MSA via Stipulation of Settlement agreement on all issues, except for the Total Nitrate in Part III, Table III-A-2. (DEP Ex. F)

Thereafter DEP issued a final New Jersey Pollutant Elimination System permit from DEP, NJPDES Permit No. NJ0027821, dated April 15, 2015, superseding the previous iteration of said permit. (DEP Ex. G) That permit was modified on July 15, 2015. (DEP Ex. H)

MSA applied to renew its permit, which was filed with DEP on January 7, 2020. (DEP Ex. I)

DEP issued a final New Jersey Pollutant Elimination System permit from DEP, NJPDES Permit No. NJ0027821, dated December 14, 2021. (DEP Ex. K)

MSA submitted another Stay Request dated January 5, 2021. (DEP Ex. L) That Stay Request was granted by DEP on July 22, 2021. (DEP Ex. M)

On January 6, 2021, MSA requested an adjudicatory hearing relating to “effluent limitations for Nitrates, and potentially for TDS, contained in the final Permit Decision dated December 11, 2020.” (DEP Ex. N) The matter was then transferred to the OAL as a contested matter under Docket No. EER 05944-21. (DEP Ex. O)

The contested permit in the within matter is the one issued on December 11, 2021.

MSA discharges into the Muscongecong River, which drains into the Delaware River. (Rosenwinkel Cert. #25, DEP Ex. J)

NJPDES permits are designed to ensure New Jersey Surface Water Quality Standards (SWQS). (Rosenwinkel Cert. #29)

Water Quality Based Effluent Limitations (WQBELs) are required when DEP determines that the discharge of a pollutant causes, has the reasonable potential to cause or contribute to an excursion above a given SWQS. (Rosenwinkel Cert. #30)

DEP analyzed MSA’s effluent data and found nitrate to be discharged in quantifiable amounts in the effluent. A cause analysis was then conducted. (DEP Ex. J)

DEP utilized procedures set forth in U.S. EPA Technical Support Document for Water-Quality based Toxics Control (TSD). (DEP Ex. Q)

The cause analysis consists of a comparison between pollutant’s maximum effluent concentration value and the pollutant’s applicable site-specific waste load allocation (WLA). (DEP Ex. Q)

Waste load is defined in N.J.A.C. 7:14A-1.2 as “the amount of chemical, physical, radiological, or biological matter contained within a waste discharge.” (Rosenwinkel Cert. #33)

DEP properly calculated the WLA for MSA. (Rosenwinkel Cert. #35 and #36) Nitrate is a toxic pollutant pursuant to N.J.A.C. 7:9B-1.14(f)(7).

DEP properly calculated nitrate discharge. (Rosenwinkel Cert. #38, #39, #40 and #41)

The Permit Renewal properly specifies concentration limitations of a monthly average of 19.8 mg/L and a daily maximum loading of 27.1 mg/L for the flow of 4.31 MGD. (DEP Ex. J and Rosenwinkel Cert. #42)

MSA's current effluent data does not comply with the calculated effluent limits, which are scheduled to take effect on March 1, 2025. (DEP Ex. K) They are currently stayed. (DEP Ex. M)

LEGAL ANALYSIS

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must

grant summary decision if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” *Id.* at 536 (citation omitted).

In the instant matter, I find there are no material facts in dispute and that the matter is ripe for summary decision.

I. 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 Musconetcong River has been classified as “FW2-TM.” FW2-TM indicates that the waters are freshwaters that are associated with trout production or maintenance. N.J.A.C. 7:9B-1.15(b)(6). “The designated uses in FW2 waters like the Musconetcong 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).

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 Muscongecong River, the criteria for nitrate levels is 10 mg/L. N.J.A.C. 7:9B-1.14(f)(7).

The NJPES 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 Musconetcong River has been classified as “FW2-TM;” 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 Musconetcong 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.

Thus, the DEP followed the law by conducting a cause analysis under N.J.A.C. 7:14A-13.5 and, after determining that MSA’s discharge could contribute to an excursion of the SWQS, calculated the appropriate nitrate limit for MSA’s permit under N.J.A.C. 7:14A-13.6.

MSA does not contest the calculation, but rather argues that the regulation, as applied to MSA, are arbitrary, capricious and unreasonable. MSA bases this argument on its assertion that the Musconetcong River is not a source of potable water. It further argues that MSA’s discharge would not impact a potable water supply intake on the Delaware River some 81 miles from MSA’s discharge.

MSA further argues that DEP did not “turn square corners” in issuing the permit. In furtherance of this argument MSA asserts that DEP intentionally misled MSA from applying for a variance. This argument rests on a telephone conversation between one of MSA’s professionals and DEP. Nothing prevented MSA from applying for a permit, other than its own interpretation of that conversation.

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).

MSA never raised the “square corners” argument prior to this motion. It is precluded from doing so now.

MSA also argues that there is a substantial cost to upgrade its facility to meet discharge levels. MSA cannot challenge the nitrate limit based on financial costs. See N.J.A.C. 7:14A-13.5 to -13.6.”

For a similar cost and rule challenge argument, which were 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 MSA’s challenges to duly promulgated regulations and its financial cost arguments are improperly raised in this OAL proceeding.

Based upon the foregoing, 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 MSA’s permit to discharge treated wastewater into the Musconetcong River. I further **CONCLUDE** that the previous matter, ELU 05549-13, is moot and must be **DISMISSED**. I **CONCLUDE** that the DEP’s motion for summary decision is **GRANTED** and MSA’s appeals in both matters are **DISMISSED**.

ORDER

It is **ORDERED** that Respondent’s motion for summary decision is **GRANTED**; and it is further **ORDERED** that the two above captioned matters are **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.

December 13, 2023

DATE

A handwritten signature in black ink, reading "Thomas R. Betancourt", enclosed within a thin yellow rectangular border.

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

APPENDIX

List of Moving Papers

For Respondent:

Notice of Motion for Summary Decision

Brief in support of Motion for Summary Decision

Exhibits A through S

Certification of Susan Rosenwinkel, Bureau Chief

Reply Brief

Certification of Elizabeth Delahunty, DAG with Exhibit T

For Petitioner:

Brief in opposition to motion for summary decision

Certification of Howard Litwack with Exhibits A and B

Certification of James Wancho, P.E. with Exhibits A through E