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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

May 26, 2022

Basil Seggos
Commissioner
Department of Environmental Conservation
625 Broadway
Albany, NY 12233

Re: Compliance With the Sewage
Pollution Right to Know Act and
Monitoring and Enforcement of State
Pollutant Discharge Elimination
System Permit Requirements
Report 2022-F-1

Dear Commissioner Seggos:

Pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law, we have followed up on the actions taken by officials of the Department of Environmental Conservation to implement the recommendations contained in our audit report, *Compliance With the Sewage Pollution Right to Know Act and Monitoring and Enforcement of State Pollutant Discharge Elimination System Permit Requirements* (Report [2019-S-54](#)).

Background, Scope, and Objective

New York State is rich in surface and ground water resources, with over 70,000 miles of rivers and streams and more than 7,600 freshwater lakes, ponds, and reservoirs that are used for drinking, bathing, and recreation. As the State's environmental regulatory agency, the Department of Environmental Conservation (Department) is responsible for improving and protecting this vast network of water resources, including preventing, abating, and controlling pollution. Wastewater has been identified as one of the top sources of pollutants, including bacteria and other pathogens, which impair or impact the quality of State waters and, in turn, pose health risks to those who use them.

Across New York State, over 600 wastewater treatment facilities process billions of gallons of wastewater per day to purify it for reuse. During sewage overflow events, which may result from heavy rainfall, snow melt, or "dry weather" events, such as blocked or broken sewer lines and power outages, untreated or undertreated sewage may be discharged into ground and surface waters, posing risks to the customers of public water systems that may draw from these waters. These events may also pose risks to people who use the waters to swim, boat, or fish. Timely reporting of overflow events to the public is therefore crucial so they can avoid exposure.

Two key pieces of legislation specifically related to wastewater were enacted to protect the State's natural resources and the health of its residents: the 2013 Sewage Pollution Right

to Know Act (Act) and Article 17 of the Environmental Conservation Law, which created the State Pollutant Discharge Elimination System (SPDES) program. The Department's Division of Water (Division) is responsible for ensuring compliance with the Act and overseeing the SPDES program.

Generally, the Act requires publicly owned (e.g., municipal) treatment works (POTWs) and publicly owned sewer systems (POSSs) to report untreated and partially treated sewage discharges to the Department and local health department within two hours of discovery and to notify the public and affected and adjoining municipalities within four hours of discovery. To ensure appropriate notification, the Department requires POTWs and POSSs to register for and use the NY-Alert electronic notification system to report overflow events and any subsequent updates. After an event is reported, NY-Alert notifies the Department, health officials, affected and adjoining municipalities, and consumer subscribers of an overflow of untreated or partially treated sewage.

The Department also established a registration program and developed reporting requirements for POSSs. Owners and operators must register with the Department (as well as NY-Alert) and comply with reporting and notification requirements, which include the initial report of the overflow event to NY-Alert and a written report to the Department within five days of an event resulting from a dry weather overflow. The written report should detail the event and the steps taken or planned to reduce, eliminate, and prevent its recurrence.

Article 17 of the Environmental Conservation Law created the SPDES program to maintain New York's waters with reasonable standards of purity by controlling permitted discharges into State waterways. The U.S. Environmental Protection Agency (EPA) approved the SPDES program for the control of surface wastewater and stormwater discharges in accordance with the Clean Water Act. However, the SPDES program is broader in scope than what is required by the Clean Water Act as it controls discharges to ground and surface waters.

The Division's Technical and Operational Guidance Series manuals outline the objectives, compliance responsibilities, and enforcement action options under the SPDES program. Requirements vary based on the permit issued. Some SPDES permit holders are required to develop, implement, and maintain a Mercury Minimization Program (MMP). Exposure to unsafe levels of mercury can be toxic to wildlife and cause health risks in humans, such as brain damage and behavioral and developmental problems. The purpose of the MMP is to get facilities to conform to the statewide water quality-based discharge limit for total mercury. As part of the MMP, SPDES permit holders may be required to submit annual Mercury Minimization Reports (MMRs) summarizing all MMP monitoring results, known or potential mercury sources, actions taken under the strategy, and plans going forward to reach established goals. Further, many SPDES permit holders are required to submit periodic discharge monitoring reports (DMRs), which are self-monitoring reports that detail facility discharge data.

The Department monitors SPDES permit holders' compliance by analyzing DMRs from permitted facilities, conducting periodic facility inspections in coordination with the EPA, responding to citizen complaints, and issuing formal and informal enforcement. Informal enforcements include issuing Notices of Violation, holding compliance conferences with permitted facility representatives, or requesting specific actions be taken to address the non-compliance. Formal enforcements include issuing Orders on Consent and tickets. An Order on Consent is a legally binding agreement negotiated between the Department and the SPDES permittee that addresses specific violations and includes provisions for a payable penalty.

Our initial audit report, covering the period April 1, 2017 through February 27, 2020, was issued on October 19, 2020. The audit objectives were to determine if the Department was ensuring applicable entities were complying with the 2013 Act, and was adequately monitoring and enforcing requirements of the SPDES to ensure safe discharge into public waters. We found that the Department had established procedures to help ensure that applicable entities comply with the Act; however, the audit identified many potential POSSs that were not registered for NY-Alert and were not reporting overflow events. In addition, the Department had not followed up with potentially non-compliant facilities or verified whether events were reported timely. Furthermore, the audit found inaccuracies in the Department's historical overflow reporting.

The audit also found that the Department had established procedures to help ensure that permit holders meet SPDES permit requirements. However, some permit holders were not responding timely to actionable follow-ups resulting from inspections and/or not submitting reports of non-compliance, as required. For example, the audit team reviewed 10 individual SPDES permits issued to municipal facilities. Five of the 10 facilities were required to develop, implement, and maintain a MMP and submit a MMR summarizing the MMP's monitoring results, known or potential mercury sources, actions taken under the strategy, and plans going forward to reach established goals. Two of the five facilities did not develop a MMP or submit a MMR timely.

The Department did not always act promptly when MMPs and MMRs were late or not submitted, resulting in significant gaps between when these facilities were permitted to discharge certain wastewater and when their MMP was finalized.

The objective of our follow-up was to assess the extent of implementation, as of March 2022, of the three recommendations included in our initial audit report.

Summary Conclusions and Status of Audit Recommendations

The Department made progress in addressing the problems we identified in the initial audit report. However, additional improvements are still needed. Of the initial report's three audit recommendations, one was implemented and two were partially implemented.

Follow-Up Observations

Recommendation 1

Initiate prompt enforcement action to register POSSs with the Department and NY-Alert.

Status – Partially Implemented

Agency Action – In November 2020, the Department conducted outreach to register suspected POSSs by sending Notices of Violation to 61 unregistered facilities – some that were identified in the original audit and others that officials stated were likely identified through the Department's outreach. However, of the 83 unregistered potential POSSs identified in the original audit, only 50 were sent a Notice of Violation and just 13 have since registered. The Department did not have a clear explanation for why only 13 of the 83 potential POSSs identified in the previous audit registered. Officials stated that the other potential POSSs either may have registered under a different POSS/POTW ID, did not meet the requirements of a POSS upon further investigation, or are still being followed up with – but they did not provide support to show the status of each

potential POSS that is not registered. Officials also stated that, in June 2021, they sent emails to 102 municipalities, identified through a list of sewer districts, requesting registration or an explanation as to why they did not need to register as a POSS. However, the Department could not provide information regarding the outcomes of those communications.

Recommendation 2

Improve reporting required by the Act, including but not limited to:

- *Developing a risk- or sample-based approach for verifying timeliness of reported overflows to NY-Alert;*
- *Reviewing and verifying the electronic spreadsheet used to record historical overflow data to ensure information maintained and reported to the public is accurate; and*
- *Identifying dry weather overflow events that require five-day written reports and obtaining the report when necessary or waiving the requirement when appropriate.*

Status – Partially Implemented

Agency Action – The Department has been working with the Office of Information Technology Services (ITS) to develop an application to provide the Department with access to NY-Alert data. The Department is in regular communication with ITS staff through weekly meetings and update emails regarding application development and system repairs. However, as of March 2022, this project is still ongoing, and the Department has not begun using the application. Department officials stated that when the project is completed, they will work to implement the rest of our recommendation. Specifically, Department officials will be able to identify dry weather overflow events that require five-day written reports. Officials stated they do currently review overflow data for accuracy prior to public reporting; however, this review is unstructured, and officials did not provide support to show the review is taking place and errors are being caught.

Recommendation 3

Monitor and take timely enforcement action for facilities that don't submit required reports or plans.

Status – Implemented

Agency Action – The Department received the missing MMP and MMR for one of the two facilities identified as non-compliant in the original audit. The second facility submitted only MMRs. Although the Department's policy and permit criteria require facilities to complete a MMP, officials stated it is their position that a MMR can be used to cover the MMP requirement; therefore, they accepted the MMRs in lieu of the MMP. In December 2020, the Department issued an update to its MMR Guidance Policy that now requires annual and semiannual MMRs be completed and maintained on site rather than submitted to the Department. Additionally, the Department issued a memo in February 2022 with instructions for resolving SPDES permit deliverables for less significant violations. The memo instructs regional staff to utilize an EPA application to research and resolve missing permit deliverables for facilities in their region. Officials believe utilization of this application will promote more timely resolution of outstanding issues – such as missing required reports or plans.

Major contributors to this report were Marisa Sutliff, Chelsey Fiorini, Kevin Lance, and Brian O'Connor.

We would appreciate your response to this report within 30 days, indicating any actions planned to address the unresolved issues discussed in this report. We thank the management and staff of the Department for the courtesies and cooperation extended to our auditors during this review.

Very truly yours,

Heather Pratt
Audit Manager

cc: Andrew Fischler, Director of Internal Audit