

3. The Permit violates New York's Environmental Conservation Law and the federal Clean Water Act by authorizing hundreds of industrial facilities to discharge extremely high levels of "oxygen-demanding" pollutants – pollutants that lower oxygen levels in water – into numerous waterbodies throughout the State that, according to DEC, already fail to meet state standards for oxygen. These oxygen-impaired waters extend throughout the watersheds protected by Petitioners Riverkeeper and Waterkeeper Alliance. For example, DEC recognizes that portions of the Mohawk River and all of Patroon Creek, near Albany, and many of the heavily industrialized tributaries of the New York Harbor and Long Island Sound, are impaired by low dissolved oxygen.

4. Both the Environmental Conservation Law and the Clean Water Act require DEC to ensure that the Permit will assure compliance with water quality standards, including the state's standards for dissolved oxygen. Both laws prohibit DEC from authorizing any discharge that causes or contributes to such water quality violations.

5. Discharges containing the extremely high levels of oxygen-demanding pollutants authorized under the Permit – discharges of up to 120 milligrams per Liter ("mg/L") of Chemical Oxygen Demand ("COD") and up to 220 mg/L of Biochemical Oxygen Demand (BOD) – contain so much oxygen demand that they necessarily have a negative effect on oxygen levels in almost any receiving water. When discharged into an impaired water, such high concentrations of oxygen-demanding pollutants will almost always cause or contribute to the low oxygen conditions that violate water quality standards and render these waters inimical to fish and other aquatic life. These discharges assure that water quality standards will be *violated*, not complied with.

6. The Permit also violates the ECL and its implementing regulations for an additional, separate reason: through the Permit, DEC has authorized industrial facilities to discharge polluted stormwater into the state's most pristine waterbodies – those classified by DEC as "AA-Special" waters. Under state law, these waters are to be categorically off-limits to any type of pollution, including industrial stormwater pollution.

7. For these reasons, DEC's determination to issue the Permit was affected by an error of law, and was also arbitrary, capricious, and an abuse of the discretion left to DEC under the Environmental Conservation Law and the Clean Water Act.

8. The Permit should be remanded to DEC for the agency to set more protective limits on the discharge of oxygen-demanding pollutants into oxygen-impaired waters and to prohibit discharges into AA-Special waters.

9. Petitioners request that the Court declare portions of the Permit to be inconsistent with the legal requirements described herein and to remand it to the agency (without vacatur), with instructions to modify it consistent with all applicable legal requirements.

PARTIES

10. Petitioner Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the State of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper was originally founded by the Hudson River Fisherman's Association, a group of fishermen concerned about the ecological state of the Hudson River, and the effect of its polluted and degraded condition on fish. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 7,500 members, many of whom use and enjoy waterways that are polluted by industrial stormwater runoff authorized under this General Permit, including many of the oxygen-impaired waterbodies at issue in this case. Many Riverkeeper members live near, use, enjoy and seek to protect oxygen-impaired waterbodies ranging from the Mohawk River and Patroon Creek in Albany. Hundreds more Riverkeeper members live near, use, enjoy and seek to protect the numerous oxygen-impaired waterbodies found in the greater New York City area that receive pollution from industrial sites operating under this General Permit. These oxygen-impaired waters include the Bronx River, Westchester

Creek, Hutchinson River, Flushing Bay, Flushing Creek, Newtown Creek, Gowanus Canal, Arthur Kill, Harlem River, East River, and others.

11. Petitioner Waterkeeper Alliance, Inc. is a non-profit corporation organized under the laws of the State of New York. The mission of Waterkeeper Alliance is to support and connect Waterkeeper programs and to provide a voice for waterways and their communities worldwide. In furtherance of this mission Waterkeeper Alliance conducts advocacy and litigation on issues common to Waterkeeper programs. Waterkeeper Alliance is composed of at least 12,000 individual supporting members. Waterkeeper Alliance is also composed of approximately 340 Basinkeepers, Baykeepers, Bayoukeepers, Canalkeepers, Channelkeepers, Coastkeepers, Creekeepers, Deltakeepers, Gulfkeepers, Inletkeepers, Lakekeepers, Riverkeepers, Shorekeepers, Soundkeepers, Streamkeepers, and Waterkeepers chartered and licensed by Waterkeeper Alliance. Waterkeeper's individual members and the members of Waterkeeper's member programs reside in communities across the country (and abroad), many of them in New York. Many of these members use and enjoy New York waterways, including Lake George and Lake Placid, which are AA-Special waterbodies. Many of these members also live near, use, enjoy and and seek to protect many of the oxygen-impaired waterbodies at issue in this case that are polluted by industrial stormwater discharged from facilities that are covered by the General Permit.

12. Members of each of the Petitioners use and enjoy their respective water bodies referenced above for, among other things, commercial, recreational, aesthetic, and scientific purposes, such as swimming, fishing, boating, and viewing wildlife. As stormwater runoff from industrial facilities regulated under the General Permit pollutes these waterbodies, it contributes to low levels of dissolved oxygen, an accumulation of toxic and carcinogenic pollutants in the water column and benthos, and other environmental problems that have diminished water quality and thereby impaired these members' use and enjoyment of these resources. These injuries to Petitioners' members are continuing and would be redressed, at least in part, through improvements to the General Permit.

13. Respondent DEC is an agency of the State of New York, established by chapter 140 of the Laws of 1970, which administers the SPDES permit program pursuant to article 17, title 8 of the New York Environmental Conservation Law. The principal office of DEC is located in Albany County.

14. Respondent Basil Seggos is the Commissioner of DEC. His principal office is located in Albany County.

JURISDICTION AND VENUE

15. This Court has jurisdiction pursuant to the New York Civil Practice Law and Rules (“CPLR”) sections 7801 and 7803(3).

16. Venue lies in the Supreme Court, Albany County, pursuant to CPLR §§ 506(b) and 7804(b), because the principal office of Respondent DEC is located there, CPLR § 505(a), and it is where Respondent DEC made the determinations challenged in this proceeding, CPLR § 506(b).

STATUTORY AND REGULATORY FRAMEWORK

The Federal Clean Water Act, 33 U.S.C. §§ 1251, et seq.

17. Congress enacted the Federal Water Pollution Control Act, more commonly called the Clean Water Act (“CWA”), 33 U.S.C. § 1251, *et seq.*, in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA Section 101(a), 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA provides a comprehensive approach for the regulation of pollution discharged into the waters of the United States.

Protection of Water Quality Under the Clean Water Act

18. The Clean Water Act requires each State to adopt water quality standards for all waters within its boundaries and submit them to EPA for approval. 33 U.S.C. §§ 1311(b),

1313(d)(1); *see also Niagara Mohawk Power Corp. v. State Dep't of Env'tl. Conservation*, 82 N.Y.2d 191, 194 (1993).

19. The Act also requires New York State to regularly publish a list of waters that fail to comply with water quality standards because of excessive levels of pollution. *See* 33 U.S.C. §1313(d). Such waters are typically referred to as “impaired” waters. In designating a waterbody as impaired, EPA’s implementing regulations require the state to “identify the pollutants causing or expected to cause violations of applicable water quality standards.” 40 C.F.R. § 130.7 (b)(4).

20. As the agency implementing the Clean Water Act on behalf of New York State, DEC has established water quality standards for the level of dissolved oxygen in water. *See* 6 NYCRR § 703.3.

21. As of 2016, DEC has recognized that at least 69 waterbodies across the state, including many of the state’s most industrialized waters, are impaired because they fail to meet the State’s dissolved oxygen water quality standards. Hundreds more waterbodies have related impairments, such as impairments for nutrients or hazardous algal blooms, that are likely to trigger low dissolved oxygen conditions.

22. In addition, New York State has designated some waterbodies, including Lake George and Lake Placid, as Class AA-Special waterbodies and set special water quality standards for these waterbodies, including a categorical requirement that “there shall be no discharge or disposal of sewage, industrial wastes or other wastes in these waters.” *See* 6 NYCRR § 701.3(c).

23. “Of course, the water quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits.” *American Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993).

The NPDES and SPDES Program

24. The Clean Water Act created the National Pollutant Discharge Elimination System (“NPDES”), a mandatory permitting program for point-source discharges of water pollution to surface waters. *See* 33 U.S.C. § 1342. The Act prohibits discharges of pollutants from point sources to waters of the United States, except in accordance with a NPDES permit. 33 U.S.C. §§ 1311(a), 1342.

25. NPDES permits limit the level of pollution a source can lawfully discharge and impose operational, monitoring, recordkeeping, reporting, and other requirements. *See* 33 U.S.C. § 1342; *see also* 40 C.F.R. §§ 122.41, 122.44. NPDES permits “may be individual (issued to a specific entity to discharge pollutants at a specific place) or general (issued to an entire class of dischargers in a geographic location).” *NRDC v. EPA*, 804 F.3d 149, 156 (2d Cir. 2015).

26. The NPDES program is

a means of achieving and enforcing . . . effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger. . . .

EPA v. California State Water Res. Control Bd., 426 U.S. 200, 205 (1976) (internal footnotes omitted).

27. The Clean Water Act specifically provides that NPDES permits for industrial stormwater – referred to in the Act as “discharges of stormwater associated with industrial activity” – are subject to all of the permitting requirements of the Clean Water Act. *See* 33 U.S.C. § 1342(p)(3)(A) (“Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.”).

28. Although the federal government plays the dominant role in water pollution control under the CWA, states may continue their own pollution control regulations as long as

they are at least as stringent as federal law. *NRDC v. DEC*, 25 N.Y.3d 373, 381 (2015) (citing 33 U.S.C. § 1370).

29. New York's version of the NPDES program is called the State Pollutant Discharge Elimination System ("SPDES"). DEC "operates the SPDES program as EPA's NPDES delegee and is bound to follow EPA's interpretation of the Clean Water Act." *NRDC v. DEC*, 25 N.Y.3d at 395 n.16.

30. Each NPDES permit must control the discharge of all pollutants that have a "reasonable potential to cause or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. 122.44(d)(1)(i).

31. "Since 1973, EPA regulations have provided that an NPDES permit shall not be issued when the imposition of conditions cannot ensure compliance with the applicable water quality requirements." *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) (internal quotation and citations omitted). In other words, NPDES permits "must establish limits on discharges that will lead to compliance with water quality standards." *NRDC v. EPA*, 804 F.3d at 156; *see also Waterkeeper Alliance v. EPA*, 399 F.3d 486, 499 (2d Cir. 2005); 33 U.S.C. § 1342(b)(1)(A) (state-issued permits must "apply, and insure compliance with, any applicable requirements" of the Clean Water Act).

32. Under New York law, DEC is required to issues SPDES permits that fully implement both the CWA and the State's water quality protections, and thus must include limits that ensure compliance with water quality standards. *See* ECL §§ 17-0701(3), (5); 17-0801 (SPDES permits must "meet all applicable requirements" of the federal Clean Water Act "and rules, regulations, guidelines, criteria, standards and limitations adopted thereto."); 17-0807 (prohibiting "any discharge not permitted by...the [CWA]"); 17-0809 ("SPDES permits...shall contain applicable effluent limitations as required by the Act"); and 17-0811(5) ("SPDES permits...shall include provision requiring compliance with the following, where applicable...any further limitations necessary to insure compliance with water quality standards adopted pursuant to state law"). DEC regulations provide that "no SPDES or other permit shall

be issued...[w]hen the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA.” 6 NYCRR § 750-1.3. New York law specifically incorporates the federal requirements applicable to permits for stormwater discharges. ECL § 17-0808; 6 NYCRR §§ 750-1.4(b), 750-1.11(a).

33. Under the ECL, DEC cannot issue a permit that allows “any person, directly or indirectly, to...discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by [DEC].” ECL § 17-0501.

FACTS

Industrial Stormwater

34. DEC consistently identifies stormwater as a leading cause of water quality impairment in rivers, streams, lakes, and coastal waters throughout the state. DEC has identified hundreds of waterways that, due in whole or in part to stormwater pollution, do not meet water quality standards established to protect fishing, swimming, shellfish harvesting, and other commercial, recreational, and ecological uses.

35. Industrial stormwater discharges are a significant part of the larger stormwater runoff problem in New York. From the mines and power plants that produce raw materials and energy to fuel our economy, to the dumps, hazardous waste treatment facilities, and junkyards that handle New York’s wastes and recyclables, industrial facilities store millions of tons of materials and waste outdoors, exposed to rainfall. As stormwater flows over industrial yards and parking lots, open mines and quarries, factory roofs, and exposed piles of material, it accumulates debris, chemicals, sediment or other pollutants that adversely affect water quality when it is discharged, untreated, into lakes, rivers, streams and other waters.

36. Industrial stormwater frequently carries a wide range of pollutants into New York state’s waters, including: oil and gasoline; heavy metals such as arsenic, mercury, copper, and lead; toxic organic chemicals; nutrients, such as nitrogen and phosphorus; sediments and organic material that decomposes in receiving waters; acidic or alkaline wastes; and a variety of

dissolved and suspended sediments. These discharges can and must be controlled to the fullest extent required by law in order to allow New York's water bodies a fighting chance to regain their health.

37. Of the thousands of industrial sites in New York, DEC has recognized hundreds as significant sources of oxygen-demanding pollutants - in particular, airports, railyards, vehicle fleet depots, scrap yards, lumber mills, paper plants, and a range of factories engaged in activities that expose pollutants to stormwater. As rainfall flows across these sites, it comes into contact with oxygen-demanding pollutants and conveys them to nearby surface waters.

38. As a result of industrial stormwater pollution and other sources of pollution, some of those receiving waters fail to meet New York's water quality standards for dissolved oxygen. New York's most oxygen-impaired waters include heavily industrialized portions of the Arthur Kill, Bronx River, Hutchinson River, Mohawk River, Patroon Creek, Flushing Bay, Flushing Creek, Newtown Creek, the Gowanus Canal, Westchester Creek, and many other waterbodies.

Dissolved Oxygen and Oxygen-Demanding Pollutants

39. Dissolved oxygen is vital to life – it is what fish and all other aquatic organisms breathe underwater. Waters low in dissolved oxygen become at first stressful, and ultimately lethal, to aquatic life. The “dead zones” that appear every year in New York's coastal waters are vast low dissolved oxygen stretches of water from which most living creatures must flee or die.

40. The dissolved oxygen level in a waterbody is measured in milligrams per liter (mg/L). The level of dissolved oxygen in a waterbody varies based upon conditions such as water temperature, salinity, and pressure.

41. A healthy range of dissolved oxygen concentration in fresh and saline waters is generally considered to be above 5 mg/L, although New York's water quality standards allow some waters to dip as low as 3 mg/L. The maximum concentration of dissolved oxygen possible in fresh water is about 14 mg/L and in salt water is about 11 mg/L.

42. Significantly for this petition, many of the pollutants found in industrial stormwater are “oxygen demanding” – i.e., they undergo chemical or biochemical reactions that take up dissolved oxygen from the water. The dissolved oxygen demanded (consumed) by these pollutants would otherwise be available to fish, shellfish, and other organisms.

43. This pollution impact is referred to as the chemical oxygen demand (“COD”) or biochemical oxygen demand (“BOD”) upon the receiving water. Like dissolved oxygen, BOD and COD levels are measured in mg/L. But rather than measuring how much oxygen is present in the waterbody, BOD and COD measure how much oxygen the incoming pollutants will deplete from the existing reserve of dissolved oxygen in the waterbody.

The Permit

44. DEC published the Permit on February 21, 2018. It became effective on March 1, 2018.

45. The Permit is a “multi-sector general permit” – it covers thousands of industrial facilities in 28 industrial sectors that span the diversity of New York’s economy, from raw materials extraction (mining, energy production, and timber) to manufacturing (dozen of sectors from pulp and paper mills to baked goods to leather tanning) to services (boat repair, airports, warehouses, and vehicle maintenance depots) to waste disposal (waste carting, scrap yards, landfills, and hazardous waste treatment and disposal facilities).

46. Permittees gain coverage by submitting a form called a Notice of Intent to DEC. Any permittee is automatically covered by the uniform terms of the Permit 30 days later so long as it meets the Permit’s other eligibility requirements.

47. There is no prohibition in the Permit on the discharge of stormwater associated with industrial activity to Class AA-Special waters.

48. Discharges to impaired waterbodies are generally eligible for coverage under the Permit.

49. The Permit is designed around a series of “benchmarks” set by DEC for each industrial sector. The benchmarks are not hard limits, they are goals for the level of pollution that will be found in a discharge. Polluters can exceed the benchmarks without violating the Permit. A benchmark exceedance indicates that the permittee should take “corrective action” – i.e., should take steps to try and further reduce the pollution coming from their facility. See Permit Part IV.F.3.c.1.

50. In the case of BOD and COD – the pollutants that reduce dissolved oxygen – the benchmarks contemplate discharges of up to 120 mg/L of COD and up to 220 mg/L of BOD.

51. Of the Permit’s 28 sectors, only 10 are subject to BOD or COD benchmarks. Permittees in other sectors face no specific conditions related to BOD or COD.

52. The Permit is designed to allow permittees in these 10 sectors to discharge up to the benchmark levels of BOD and COD freely. When discharges exceed these benchmark levels, the Permit requires permittees to engage in corrective action to reduce the amount of BOD and COD in their discharges to these levels. The Permit is not designed to, nor does it, reduce BOD and COD discharges below these levels or compel permittees to comply with any more stringent limit on BOD or COD discharges. The Permit plainly authorizes discharges into *any* water body, including dissolved oxygen-impaired waterbodies, up to these levels.

The Effects of Oxygen-Demanding Pollutants Discharged Under the Permit

53. The Permit’s benchmarks for COD and BOD (120 mg/L of COD or 220 mg/L of BOD) represent extremely high levels of oxygen demand with the potential to cause significant and rapid oxygen depletion. The addition, even in small quantities, of stormwater with oxygen demand approaching the levels identified in the General Permit would be expected to further deplete oxygen in the receiving waterway.

54. Stormwater, like most water, typically contains some dissolved oxygen. At saturation, stormwater dissolved oxygen levels could be about 14 mg/L and at warmer temperatures substantially less (e.g. about 9 mg/L at 20°C or 68°F). Due to the oxygen demand

they carry, urban stormwater flows will often have much lower dissolved oxygen upon release into a receiving waterway; they likely will not have dissolved oxygen concentrations near their saturation value.

55. If incoming stormwater contains far more oxygen demand (for example, oxygen demand of 100 mg/L or more) than dissolved oxygen, the net effect of adding the stormwater to a receiving waterbody will be negative.

56. A stormwater discharge with high oxygen demand of 100 mg/L or more will always contain far more oxygen demand than dissolved oxygen. It will almost always have a net negative effect on the dissolved oxygen concentration of a receiving waterbody.

57. If the receiving waterbody already contains less dissolved oxygen than the desired or required level, introduction of the new oxygen demand will subtract dissolved oxygen from the already low concentration in the waterbody.

58. The negative impact of stormwater carrying high levels of oxygen demanding pollutant on a receiving water is clear and indisputable. The conclusion is derived from basic science and math.

59. In sum, when industrial stormwater with the high levels of oxygen demand authorized under the Permit is discharged into an oxygen-impaired waterbody, it almost always causes or contributes to that water body's failure to meet State-mandated levels of dissolved oxygen. The BOD or COD pollution in the stormwater will either further depress the dissolved oxygen level below standards, keep the dissolved oxygen level below standards for longer, or both.

60. Thus, instead of ensuring compliance with water quality standards, DEC has written a permit that explicitly contemplates they will be violated.

AS AND FOR THE FIRST CAUSE OF ACTION

**DEC Failed to Ensure that Authorized Discharges Will Not
Cause or Contribute to Violations of Water Quality Standards
For Dissolved Oxygen**

61. Petitioner repeats and re-alleges the allegations contained in the foregoing paragraphs.

62. Any decision by DEC to issue a SPDES permit must be supported by a record providing a rational basis for the agency to find that the terms and conditions of the permit satisfy all legal requirements. *See, e.g., Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974); *Flacke v. Onandaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363-64 (1987). DEC can only issue a SPDES permit following, among other things, “a determination . . . on the basis of a submitted application, plans, or other available information, that compliance with the specified permit provisions will . . . assure compliance with applicable water quality standards.” 6 NYCRR § 750-2.1(b). And DEC cannot issue a permit that allows “any person, directly or indirectly, to . . . discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by [DEC].” ECL § 17-0501.

63. The Permit does not assure compliance with applicable water quality standards for dissolved oxygen. To the contrary, the Permit authorizes discharges so high in BOD and COD that they necessarily cause or contribute to conditions in contravention of the dissolved oxygen standards adopted by DEC, and approved by EPA, in dozens of oxygen-impaired waters throughout the state.

64. DEC’s issuance of the Permit was in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious and an abuse of discretion in that the Permit fails to ensure compliance with applicable water quality standards and, in fact, authorizes discharges of pollutants to impaired waterbodies at concentrations that cause or contribute to violations of water quality standards.

AS AND FOR A SECOND CAUSE OF ACTION

**DEC Failed to Ensure that Permittees Will Not
Cause or Contribute to Violations of
Water Quality Standards for AA-Special Waters**

65. Petitioner repeats and re-alleges the allegations contained in the foregoing paragraphs.

66. DEC violated New York’s protections for AA-Special waters in issuing the Permit.

67. The water quality standards for AA-Special waters categorically prohibit the direct discharge or disposal of “industrial wastes or other wastes in these waters.” 6 NYCRR § 701.3 (c).

68. The Permit authorizes discharges of polluted stormwater from industrial facilities into these waterbodies.

69. Polluted industrial stormwaters are “industrial wastes or other wastes.”

70. DEC’s issuance of the General Permit was in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious and an abuse of discretion in that the General Permit does not comply with New York’s protections for AA-Special Waters because it allows the discharge of “industrial or other wastes” into these waters.

DEMAND FOR RELIEF

WHEREFORE, Petitioners demand judgment:

a. Declaring that Respondent DEC has abused its discretion, has acted arbitrarily, capriciously, and contrary to the law and in violation of lawful procedure by issuing a SPDES general permit for stormwater discharges associated with industrial activity that fails to conform to the requirements of state and federal law in the manner described herein;

- b. Remanding the permit to DEC and directing DEC to revise the General Permit consistent with the Court's decision, consistent with federal and state law, and pursuant to the procedural requirements of 6 NYCRR Part 621, within a reasonable period of time determined by the Court;¹
- c. Awarding Petitioners their reasonable costs and attorneys' fees pursuant to CPLR Article 86 or other applicable authority; and
- d. Granting such other and further relief as the Court deems just and proper.

Dated: April 20, 2018
New York, New York

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¹ Although DEC's permit is flawed, there is a practical need for an industrial stormwater permit to regulate the discharge of pollution in the state. Therefore, Petitioners seek only a remand of the permit and respectfully request that this Court not vacate the permit while DEC makes necessary improvements.