

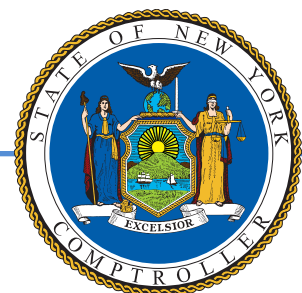
Department of Environmental Conservation

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 | October 2020

OFFICE OF THE NEW YORK STATE COMPTROLLER
Thomas P. DiNapoli, State Comptroller

Division of State Government Accountability



Audit Highlights

Objectives

To determine if the Department of Environmental Conservation (Department) is ensuring applicable entities are complying with the 2013 Sewage Pollution Right to Know Act (Act), and is adequately monitoring and enforcing requirements of the State Pollutant Discharge Elimination System (SPDES) to ensure safe discharge into public waters. The audit covered the period April 1, 2017 to February 27, 2020.

About the Program

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 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. 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 Act and Article 17 of the State Environmental Conservation Law, which created 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 its NY-Alert electronic notification system to report overflow events and any subsequent updates.

The SPDES was created as a means to maintain reasonable standards of water purity by controlling permitted discharges into State waterways. Under the program, the Department issues both individual and general discharge permits. Individual permits are issued to a single facility, in one location, possessing unique discharge characteristics such as POTWs. General permits cover a category of dischargers with similar operations or pollutants such as those related to stormwater discharge from construction activities. SPDES permit holders have certain reporting responsibilities, depending on the permit type. For example, many are required to submit periodic discharge monitoring reports (DMRs), which are self-monitoring reports that detail facility discharge data. The Department monitors compliance by analyzing DMRs, conducting periodic facility inspections, responding to citizen complaints, and issuing formal and informal enforcements.

The Department's Division of Water is responsible for ensuring POTWs' and POSSs' compliance with the Act and overseeing the SPDES program.

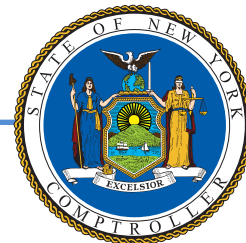
Key Findings

- The Department has established procedures to help ensure that POTWs and POSSs comply with the Act; however, at the time of our testing, 83 (22 percent) of the 371 identified POSSs were not registered for NY-Alert and were not reporting overflow events.
- The Department has established procedures to ensure that SPDES permit requirements are met;

however, some SPDES permit holders are not responding timely to actionable follow-ups resulting from inspections, and 11 percent of DMRs that identified exceedances did not include a report of non-compliance as required.

Key Recommendations

- Initiate prompt enforcement action to register POSSs with the Department and NY-Alert.
- Monitor and take timely enforcement action for facilities that don't submit required reports or plans.



**Office of the New York State Comptroller
Division of State Government Accountability**

October 19, 2020

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

Dear Commissioner Seggos:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for the tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit *Compliance With the Sewage Pollution Right to Know Act and Monitoring and Enforcement of State Pollutant Discharge Elimination System Permit Requirements*. This audit was performed pursuant to the State Comptroller's authority in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Division of State Government Accountability

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Glossary of Terms

Term	Description	Identifier
Act	Sewage Pollution Right to Know Act	<i>Law</i>
Department	Department of Environmental Conservation	<i>Auditee</i>
DMR	Discharge monitoring report	<i>Key Term</i>
EPA	U.S. Environmental Protection Agency	<i>Federal Agency</i>
ITS	Office of Information Technology Services	<i>State Agency</i>
MMP	Mercury Minimization Program	<i>Key Term</i>
MMR	Mercury Minimization Report	<i>Key Term</i>
NY-Alert	Electronic notification system	<i>System</i>
Overflow event	Discharge of untreated or partially treated sewage into surface water	<i>Key Term</i>
POSS	Publicly owned sewer system	<i>Key Term</i>
POTW	Publicly owned treatment works	<i>Key Term</i>
SPDES	State Pollutant Discharge Elimination System	<i>Program</i>

Background

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.

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

Discharge Reporting Under the Sewage Pollution Right to Know Act

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.

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 its NY-Alert electronic notification system to report overflow events and any subsequent updates, excluding combined sewer overflow events.¹

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. (See Exhibit for details of this process.)

¹ Combined sewer systems are designed to collect stormwater runoff, domestic sewage, and industrial wastewater in the same pipe, and convey it to the wastewater treatment facility. These systems are designed to overflow during wet weather. During rain events, when stormwater enters the sewers, the capacity of the sewer system may be exceeded and the excess water will overflow directly to a body of water. Combined sewer systems are excluded from certain reporting requirements.

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. Department officials may waive the written report requirement on a case-by-case basis if the initial electronic report is received within the required time frame.

State Pollutant Discharge Elimination System Program

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.

Under the SPDES program, the Department issues both individual and general discharge permits. Individual permits are issued to a single facility, in one location, possessing unique discharge characteristics such as POTWs. General permits cover a category of dischargers with similar operations or pollutants such as stormwater discharges from construction activities. For each general permit issued, the dischargers must have similar effluent limits and operating conditions and the same or similar monitoring practices. There are about 15 permit discharge classes between individual and general SPDES permits. As of February 12, 2020, there were 19,027 authorized SPDES permits.

The Division of Water'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. For example, 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 (DMR), 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.

Audit Findings and Recommendations

The Department has established procedures to help ensure that applicable entities comply with the Act; however, we identified many POSSs that were not registered for NY-Alert or reporting overflow events. In addition, the Department has not followed up with non-compliant facilities or verified whether events are reported timely, and we found inaccuracies in its historical overflow reporting.

Similarly, the Department has established procedures to help ensure that permit holders meet SPDES permit requirements. However, some permit holders are not responding timely to actionable follow-ups resulting from inspections and/or not submitting reports of non-compliance as required. We also found 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.

Sewage Pollution Right to Know Act

Unregistered POSSs

While the Department has successfully registered all identified POTWs, 83 (22 percent) of 371 identified POSSs were not registered at the time of our testing, and therefore were not reporting overflows to the Department, health officials, affected and adjoining municipalities, and the public through NY-Alert, as required. According to the Department, there are 933 facilities (645 POTWs and 288 POSSs) with over 1,200 representatives registered to use NY-Alert. NY-Alert is the primary method for reporting overflows to the public, and failures to report prevent interested parties from taking steps to protect themselves from exposure to pollutants.

Department officials took steps prior to the November 9, 2016 effective date of the POSS registration requirement to identify and register approximately 200 POSSs. They also sent Notices of Violation to 71 unregistered POSSs in August 2017, with follow-up later that same year. However, since then, there has been little effort to pursue enforcement against the remaining unregistered POSSs, as required by the Department's procedures. Officials stated their lack of enforcement was partially due to a replacement of the NY-Alert system, which took nearly two years between 2016 and 2018, and drew staff resources away from enforcement activities.

Timeliness and Accuracy of NY-Alert Reporting

Timely reporting of events to the public is crucial so they can avoid bodies of water that have recently received an overflow of untreated or partially treated sewage. However, the Department has not established a process to verify, even on a sample basis, that POTWs and POSSs are reporting overflows within the Act's time frames. While the Department's regional inspectors may contact designated representatives, on a case-by-case basis, to confirm that overflows reported in NY-Alert actually occurred, they do not determine if these events were reported timely.

We tested a sample of 113 events reported in NY-Alert to determine if POSSs and POTWs were complying with the two- and four-hour reporting requirements.

Documentation supporting when overflows occurred varied by facility but included automated emails, phone calls, and/or text messages from the facilities' monitoring systems or time-stamped screenshots of the monitoring system dashboard, and logbook entries. Some facilities were unable to provide time-stamped documentation for events reported in NY-Alert. Due to these limitations, we could not verify the timeliness of 42 (37 percent) of the events. Of the other 71 events, 13 (18 percent) were not reported within two hours and 7 (10 percent) were not reported within four hours, as required by the Act. Monitoring and compliance could be improved if the Department, on a sample basis or in conjunction with other functions (e.g., during inspections), verified that facilities are meeting the Act's notification requirements.

We also identified discrepancies in the information posted on the Department's website of past overflow events. Of the 113 events we reviewed, 109 (96 percent) had inaccurate times for the start of the overflow event. The Office of Information and Technology Services (ITS) extracts this data monthly from the NY-Alert system to the electronic spreadsheet, which then becomes the official record of overflow events. Department officials could not confirm the reason the ITS spreadsheet did not match the NY-Alert information but speculated that it could have occurred from errors in the extraction or time zone coding.

Additionally, we found not all facilities are submitting written incident reports to the Department within five days of a dry weather overflow describing the event and steps taken or planned to reduce, eliminate, and prevent the incident and its recurrence. The Department has not consistently verified if a report was submitted or followed up with the facilities that have not submitted written reports to determine if the event was actually a dry weather overflow. For the period April 1, 2017 through September 30, 2019, we identified 91 dry weather overflows that required a five-day report. For 28 (31 percent) of the 91 events, either facilities did not submit a written report or the report could not be located. Department officials indicated there may have been circumstances in which the reporting requirement should have been waived, but the Department had not formally waived this requirement for any of the incidents. The five-day written incident report contains more detail than the initial NY-Alert notification. It is important that the Department have the most accurate information on record and a thorough understanding of the facility's plan to prevent future dry weather overflows.

SPDES Monitoring and Enforcement

MMP Issues

While the policies developed by the Division of Water provide guidance and procedures for monitoring and enforcement of SPDES requirements, we found the Department isn't always taking adequate steps to enforce MMP and reporting requirements. This resulted in significant gaps between when the Department permitted these facilities to discharge certain wastewater and when their MMP was finalized.

Municipal facilities are POTWs discharging wastewater composed of residential sewage that might also be combined with industrial wastewater. We reviewed ten individual SPDES permits issued to municipal facilities. Five of the ten 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 neither developed a MMP nor submitted a MMR timely.

Once the facilities' permits became effective in 2016, a MMR should have been submitted to the Department in 2017, which would have required a MMP be submitted to the Department beforehand. However, neither facility developed or submitted a final plan until 2020. Because the MMP was developed and submitted late, neither facility has submitted the annual MMR to the Department. The Department didn't take immediate enforcement action in either case, although Department personnel stated that they made several attempts to get one of the facilities to comply with the requirements. In January 2020, the Department issued a Notice of Violation, more than three years after the permit's effective date. Without these documents, facilities cannot properly monitor and track the reduction of mercury discharged.

Inspection and Follow-Up Weaknesses

While we found that the Department is conducting inspections for individual SPDES permit holders and issuing Notices of Violation, some facilities are not taking follow-up action or submitting required reports of non-compliance in a timely manner. For example, the Department conducted an inspection of a facility in July 2018 and reported on five items the facility was required to address by September 2018, including correcting a quarterly DMR. However, the facility did not submit the DMR correction until January 2020 after we requested it from the Department. We also reviewed the DMRs for 10 facilities and identified 72 exceedances that required them to submit a report of non-compliance along with the DMR. We found 8 of the 72 (11 percent) DMRs did not have a report of non-compliance attached. These reports are necessary to document the actions the facility plans to undertake to prevent future exceedances and for the Department to be able to track whether it is a recurring issue that the facility needs to address further.

Recommendations

1. Initiate prompt enforcement action to register POSSs with the Department and NY-Alert.
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.
- 3.** Monitor and take timely enforcement action for facilities that don't submit required reports or plans.

Audit Scope, Objectives, and Methodology

The objectives of our audit were to determine if the Department is ensuring applicable entities are complying with the Act, and is adequately monitoring and enforcing the requirements of the SPDES to ensure safe discharge into public waters. The audit covered the period April 1, 2017 to February 27, 2020.

To achieve our audit objectives, we reviewed relevant laws and regulations, Department policies and procedures, NY-Alert overflow data and emails, POTW and POSS overflow event documentation, SPDES permits and the required reports submitted to the Department, inspections, and relevant formal and informal enforcement actions taken by the Department. We interviewed officials from the Department and from POTWs and POSSs regarding compliance with the Act, the NY-Alert system, and monitoring and enforcement of SPDES permit requirements. We became familiar with and assessed the adequacy of the Department's internal controls as they related to our audit objectives.

We assessed the reliability of data in the electronic spreadsheet that the Department considers to be the official record of overflow events and determined that, while individual fields were inaccurate, incomplete, or both, the data was sufficiently reliable to identify the existence of an event. We also assessed the reliability of the Department's electronic spreadsheets containing information about all SPDES permit holders and the POTW and POSS listing, and determined that they were sufficiently reliable.

To determine if the Department is ensuring applicable entities are complying with the Act, we used both random and judgmental sampling methodologies, resulting in our testing of 113 overflow events at 12 facilities (10 POTWs and 2 POSSs) across four regions: New Paltz, Capital Region, Syracuse, and Buffalo. We selected the four regions judgmentally, based on the number of POTWs and POSSs in each region and the location, to ensure we tested facilities throughout the State. For each of the regions, we judgmentally selected three POTWs or POSSs with the highest number of reported overflow events, with the exception of Buffalo, where we selected the top two facilities and the fourth highest so there was a mix of facilities in different counties within the region. We randomly selected 10 overflow events for each of 11 facilities, totaling 110 events, plus 3 overflow events for the 12th facility, which did not maintain enough time-stamped documentation for us to select 10 events – for a total of 113 events. We only selected events reported in the current NY-Alert system between June 13, 2018 and September 30, 2019.

To assess whether the Department is adequately monitoring and enforcing requirements of the SPDES to ensure safe discharge into public waters, we selected 25 SPDES permit holders. Our sample included the 10 POTWs described above plus 5 individual and 10 general SPDES permit holders that we selected randomly, for a total of 25. The results from neither our random sampling nor our judgmental sampling can be used to project our conclusions across the population as a whole.

Statutory Requirements

Authority

The audit was performed 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 conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating threats to organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Reporting Requirements

A draft copy of the report was provided to Department officials for their review and comment. Their comments were considered in preparing this final report and are attached in their entirety to the end of it, along with our own State Comptroller's Comments addressing certain Department statements. In general, Department officials agreed with our recommendations and indicated actions they would take to implement them.

Within 180 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Environmental Conservation shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.



NY-Alert Notification Process

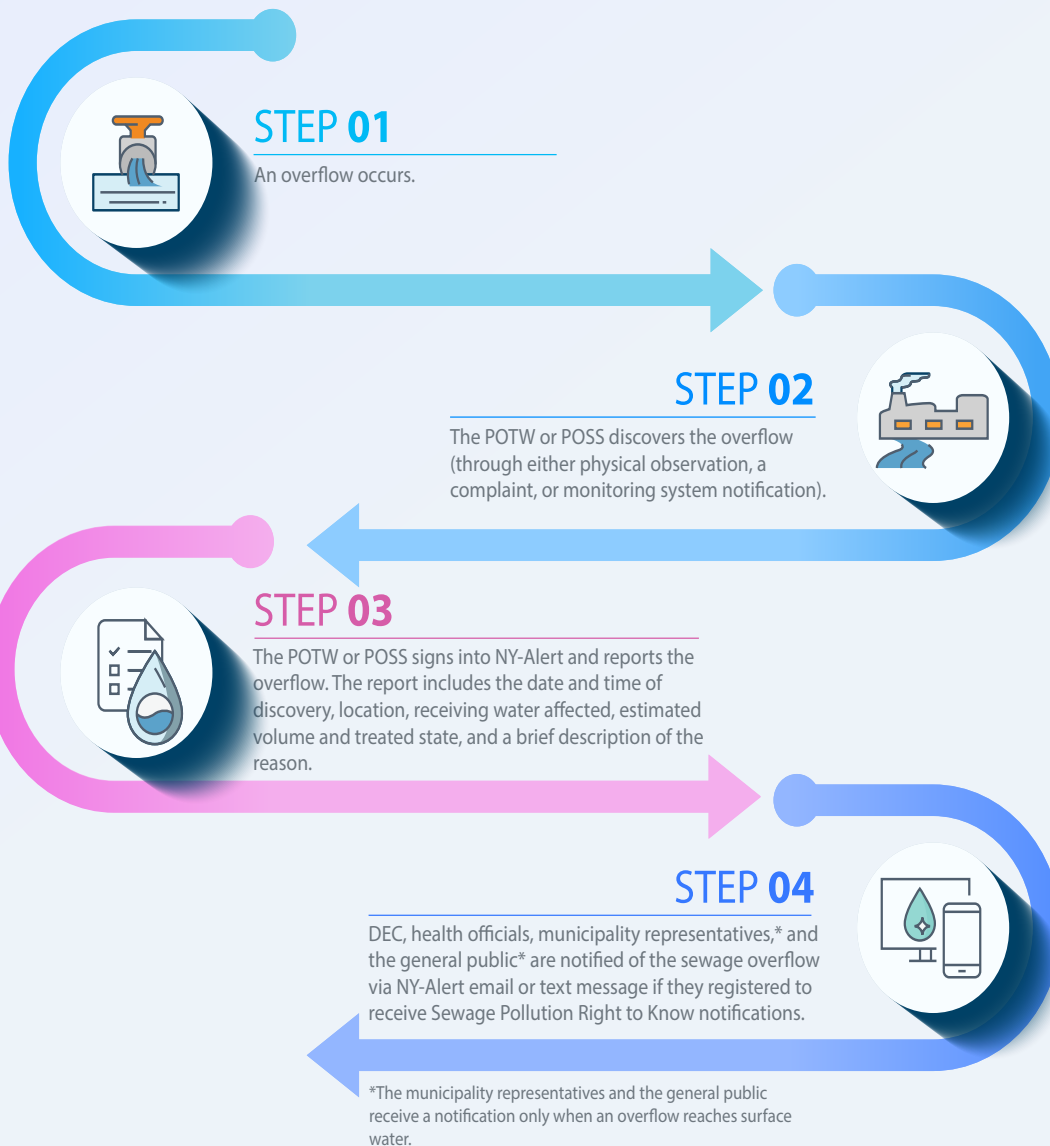


Photo Source: iStock.com/akuzone/RonFullHD/Nadiinko

Agency Comments and State Comptroller's Comments

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OCT -1 2020

Mr. Mark Ren
Office of the State Comptroller
Division of State Government Accountability
110 State Street – 11th Floor
Albany, New York 12236-0001

Dear Mr. Ren:

The Department of Environmental Conservation (DEC) has reviewed the Office of the State Comptroller's Draft Audit Report entitled *Compliance With the Sewage Pollution Right to Know Act and Monitoring and Enforcement of State Pollutant Elimination System Permit Requirements*. DEC's comments with respect to this report are contained in the enclosed document. Please contact Andrew Fischler, Director of Internal Audit, at (518) 402-9761 if you have any questions.

Sincerely,


for Basil Seggos
Commissioner



Department of Environmental Conservation
Compliance with the Sewage Pollution Right to Know Act and Monitoring and Enforcement of State
Pollutant Discharge Elimination System Permit Requirements
2019-S-54
Response to OSC Draft Report

The Department of Environmental Conservation (Department) has reviewed the Office of the State Comptroller's August 18, 2020 draft report in connection with compliance of the Sewage Pollution Right to Know Act (SPRTK) and monitoring and enforcement of State Pollutant Discharge Elimination System (SPDES) permit requirements. The Department's Division of Water (DOW) has taken steps to ensure publicly owned treatment works (POTWs) and sewer systems (POSSs) are registered for and use NY-Alert to report overflow events. During the 2016-18 transition to the new NY-Alert system, staff were in continuous communication with authorized notifiers and users to register POSSs, provide system training, and improve reporting. In addition, unregistered POSSs that could not report were registered voluntarily or as a result of Department action. Furthermore, the Department has controls in place that address monitoring compliance with enforcement actions related to the SPDES program. These controls are identified primarily in DOW's Technical and Operational Guidance Series 1.4.1, *Water Integrated Compliance Strategy System*; and 1.4.2, *Compliance and Enforcement of State Pollutant Discharge Elimination System Permits*. Guidance contained within these documents prioritize violations and the Department's assessment and response to these violations, and provide for a consistent statewide understanding and implementation of the SPDES compliance and enforcement program in order to protect public health and the intended best use of the waters of the state.

The following is the Department's response to the report's findings and recommendations.

Findings

- **Unregistered POSSs, page 9:** A listing of POSSs was nonexistent prior to the implementation of SPRTK. As a result, the Department developed a list of *likely or suspected* POSSs, which required extensive evaluation prior to confirmation. The identification of POSSs is an ongoing effort, but not all end up being validated. Confirmation of POSS status is now a part of the SPDES permit process for POTWs. This improves our ability to identify potential POSSs and ensure they are registered if confirmed.
- **Timeliness and Accuracy of NY-Alert Reporting, page 10, first paragraph:** Regarding references to overflow events not being reported within the required two and four hours, it is important to note the reporting timeframe begins with a facility's *discovery* of an overflow and may reflect a significant delay from the actual or estimated start time of the discharge. Sewage discharges often occur in an unmonitored location, so reporting entities may not know exactly when the discharge began, therefore the accuracy of the reported discovery time of the event can be ambiguous and lead to a lag from the estimated time the discharge started when compared to the reporting of an event in NY-Alert. The reported start time of a discharge and discovery time, which triggers the reporting process, are usually different.

State Comptroller Comment – We understand the requirement; we used the discovery time as documented at the facility for our audit findings.

- **Timeliness and Accuracy of NY-Alert Reporting, page 10, third paragraph:** This paragraph states that the Department had not *formally* waived the requirement for submission of a five-day report for any

of the dry weather overflows identified by the auditors; however, regulatory language states the Department may waive the requirement, but does not stipulate that it must be *formal*.

State Comptroller Comment – The Department does not have a standard mechanism to document whether or not a waiver was granted (formally or informally). For those instances noted in the report, there was no evidence that a waiver was granted and officials themselves were unsure if one was or was not granted. For this reason, officials stated there could be value in documenting waivers.

- **SPDES Monitoring and Enforcement – MMP Issues, page 10, fourth paragraph; and page 11, first paragraph:** The report references failure to enforce Mercury Minimization Program (MMP) requirements as resulting “in significant gaps between when the Department permitted these facilities to discharge certain wastewater and when their MMP was finalized.” The premise of this finding is facilities were discharging “certain” wastewater without prior approval to do so; however, the facilities for which this finding is based were already permitted to discharge and the MMP requirement was added to evaluate actions taken to reduce mercury levels. Additionally, POTW difficulty in meeting water quality standards for mercury is often attributable to emissions produced from power plants in the Midwest. As a result, New York State has a statewide variance for alternate limits for POTW mercury discharge. The variance requires POTWs prepare a MMP and annual Mercury Minimization Report even though they may be in compliance with permit limits and taking appropriate actions to address mercury. While failure to submit the required report constitutes noncompliance, it does not signify noncompliance with effluent limits. The Department is currently working to renew the variance and identify alternative mercury monitoring provisions that provide more effective use of resources for monitoring and addressing mercury at POTWs.

State Comptroller Comment – We did not state in the report that facilities discharged water they were not permitted to discharge. However, when the MMP is not submitted, the Department does not know the efforts the facility is taking to reduce mercury levels or if the actions they are taking are appropriate for that facility.

- **SPDES Monitoring and Enforcement – Inspection and Follow-Up Weaknesses, page 11, third paragraph:** The report states that reports of non-compliance are necessary for the Department to track whether an exceedance is a recurring issue that a facility needs to address further. The Department reviews DMR data and EPA’s compliance database to determine whether an exceedance is recurring and meets the threshold for enforcement action.

State Comptroller Comment – The report of non-compliance explains the cause of the exceedance and the preventive corrective action that can help the Department identify recurring violations caused by similar reasons, as well as instances not adequately addressed by the facility’s preventive corrective actions. The report provides the suspected underlying reason for a permit violation, which is crucial for addressing the root cause of the issue.

Recommendations

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

DEC Response: The Department requests identification of POSSs on SPDES applications and includes this information within SPDES permit fact sheets to allow for further actions to register POSSs. In addition, the Department will continue its training and outreach efforts to encourage municipalities to voluntarily register POSSs. To the extent that training and outreach is unsuccessful, the Department agrees that enforcement action would be appropriate and will initiate informal enforcement action

requiring timely registration of facilities that have been identified as potential unregistered POSSs.

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.

DEC Response: The Department is working with the New York State Office of Information Technology Services to identify the source of discrepancies with recorded times of discharge on historical reports posted on the Department’s website and develop an improved system for the public to access these reports. We generally agree with the recommendation and in this regard the Department is also planning for the implementation of an electronic reporting system for five-day reports that will aid in the tracking, accessibility, and provision of five-day reporting. Due to unknowns associated with the initiation of a discharge event and a reporting entity’s time of discovery, the Department will provide additional training and training materials to reinforce the importance of accurate and timely reporting, and Department staff will receive training on taking appropriate action for untimely reporting.

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

DEC Response: Department staff utilize Department and EPA policies and guidance on monitoring and enforcement action, and staff will receive additional training on existing enforcement guidance, prioritizing non-compliance, and initiating/documenting follow-up actions.

Contributors to Report

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