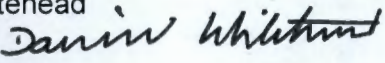
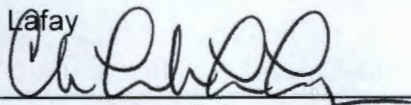


# DOW/DEP 1.2.5 / Interpretation and Implementation of 6 NYCRR 750-1.6(f)

New York State Department of Environmental Conservation

## DEC Program Policy

<b>Issuing Authority:</b> Daniel Whitehead Signature: 	<b>Title:</b> Director, Division of Environmental Permits
Carol Lamb Lafay Signature: 	Director, Division of Water
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### I. Summary

Section 750-1.6(f) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the state of New York (6 NYCRR) allows a State Pollutant Discharge Elimination System (SPDES) permit for a sewage disposal system, or approval of a sewer extension, serving or intended to serve more than one separately owned property, to be issued only to a governmental agency, municipality, or sewage disposal corporation (SDC).<sup>1</sup> Section 750-1.6(f) allows for a variance from the regulatory permitting/approval requirements, *"in a particular case, subject to appropriate conditions, . . . where such variance is in harmony with the general purposes and intent of this Chapter."* With the use of "only" and "shall," the regulation includes a clear mandate to issue a SPDES permit, or sewer extension approval, to a governmental agency, municipality, or SDC, absent a variance.

Consequently, DEC prefers issuance of a SPDES permit, or approval of a sewer extension, to a governmental agency or municipality. DEC acknowledges that there are circumstances where ownership or operation of the facility by a governmental agency or municipality is not a viable option. Where the facts support such a conclusion, DEC prefers that a SPDES permit be issued, or sewer extension approval be granted, to a duly formed SDC. Additionally, while the regulations allow the Commissioner to grant a variance from the requirements of 6 NYCRR 750-1.6(f) upon written application, the granting of such a variance should be supported by specific facts showing why ownership or operation of the facility by a governmental agency, municipality, or duly formed SDC is not viable. This allows the variance to be consistent with the protections afforded by the SPDES program, with supportive and appropriate conditions recommended in this Policy. This Policy also outlines considerations for existing sewer extension approvals and existing sewage disposal systems with an issued SPDES permit.

<sup>1</sup> The terms *Sewage Disposal Corporation* (referenced in 750-1.6(f)) and *Sewage Works Corporation* (referenced in Article 10 of the Transportation Corporations Law) are considered equivalent in meaning. The term Sewage Disposal Corporation (SDC) is used in this document.

## **II. Policy**

This Policy is not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation. DEC reserves the right to deviate from this Policy when, in its judgement, doing so would result in a net benefit to the people of New York State.

### **A. 6 NYCRR 750-1.6(f) applicability**

#### **1. Existing Sewer Extensions:**

Sewer extension approvals are granted one time (i.e., not renewed like SPDES permits) and, therefore, DEC has no opportunity to correct approvals that were not issued in compliance with 6 NYCRR 750-1.6(f). Should water quality issues arise with sewer extensions subject to prior approvals, the DEC will coordinate with the facility collecting or receiving the sewage to evaluate the situation and develop appropriate mitigation.

#### **2. Existing Sewage Disposal Systems:**

There have been instances where SPDES permits were issued for sewage disposal systems serving more than one separately owned property not in compliance with 6 NYCRR 750-1.6(f). For existing non-conforming permittees, DEC will require the permittee to apply for a variance at the time of the next permit renewal if they cannot form an SDC or connect to municipal sewers in a relatively short time. DEC should consider the information supporting the variance application, along with the current condition and management structure of the existing sewage disposal system. The modification would include appropriate conditions in a schedule to achieve compliance with 6 NYCRR 750-1.6(f) within the next five-year permit term<sup>2</sup>. This allows the sewage disposal system to continue to operate in accordance with its SPDES permit, while correcting the issue of noncompliance with 6 NYCRR 750-1.6(f). Additionally, the full permit term represents the shortest reasonable time sufficient for the permittee of the sewage disposal system to determine the most appropriate path to compliance with 6 NYCRR 750-1.6(f) and to complete all necessary actions. In accordance with 6 NYCRR 750-1.6(f), DEC may grant a variance if the application proves that the variance will not result in harm to the environment and will not have a negative impact on the local government's management of sewage. Therefore, as discussed above, a variance allowing a schedule for the formation of a SDC during the term of the renewed permit would typically be appropriate for existing systems that are operating properly but were permitted to a non-SDC entity.

#### **3. New sewer extension requests/ sewage disposal systems**

Through implementation of this policy DEC is taking affirmative steps to increase awareness of the obligations of 6 NYCRR 750-1.6(f) prior to the issuance of a new sewer extension approval or a SPDES permit for a new sewage disposal system. Implementation of this policy is consistent with the statutory and regulatory requirements of ECL section 17-0701(1)(b) and 6 NYCRR 750-2.10(b), ensuring that the construction of a new sewer extension or sewage disposal system (collectively, "facility" or "facilities") does not proceed until compliance with 6 NYCRR 750-1.6(f) is achieved. A SPDES permit or sewer extension approval cannot be issued unless the applicant meets 6 NYCRR 750-1.6(f).

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<sup>2</sup> Although SPDES permits for discharges to groundwaters may be issued for up to a 10-year term, it may be prudent to limit permit terms for such systems to 5 years to ensure consistency in compliance schedules to address the SDC requirement.

With respect to any new facility, DEC prefers to encourage municipal ownership or operation of the facility. Where ownership or operation of the new facility by a governmental agency or municipality is not a viable option, a SPDES permit can be issued, or sewer extension approval be granted, to a duly formed SDC. In the rare circumstance, where the facts and circumstances support that a viable option does not exist for ownership or operation of the new facility by a governmental agency or municipality, or by a duly formed SDC, a variance may be issued to be consistent with the protections afforded by the SPDES program with supportive and appropriate conditions recommended in this policy.

#### **4. Facilities in Suffolk County**

Because of concerns with groundwater pollution from disposal of sewage, Suffolk County ("County") established the Suffolk County Sewer Agency ("Sewer Agency") in 1965 to oversee all matters relating to sewage collection, conveyance, treatment, and disposal within the county. One of the main responsibilities of the Sewer Agency is to approve and execute agreements ("Agreement") with private developers on the construction, operation and maintenance of their private wastewater treatment plants, collection systems, disposal areas ("System"), and sites upon which the Systems are situated. This includes systems that involve surface or subsurface discharges.<sup>3</sup> Among the various articles of that Agreement, Article 18 requires a private developer, upon completion of construction, to dedicate the entire System, along with all easements and/or rights of way required for access, to the County free of charge. In essence, the County owns the System, and should the developer fail to operate and maintain the System, the County can step in and provide maintenance, repairs, or any other services as necessary. Suffolk County, via agreement executed by the Sewer Agency, acts as a back-up owner or operator of the System and thereby satisfies 6 NYCRR 750-1.6(f). Therefore, all SPDES-permitted facilities under the purview of Suffolk County Sewer Agency meet the substantive requirements of 6 NYCRR 750-1.6(f). As a result, SPDES permits in Suffolk County issued to non-SDC entities satisfy the variance requirements, provided that such entities have properly dedicated the systems as described above, or, in cases of new construction, have agreed in writing to dedicate the system upon construction completion. For the renewal of existing SPDES permits or the issuance of new SPDES permits to non-SDC entities, staff should verify with Suffolk County that the entity seeking the SPDES permit has dedicated the system.

#### ***B. Variance criteria/conditions***

Under 6 NYCRR 750-1.6(f), and after any necessary public notice in accordance with 6 NYCRR Part 621, the DEC may grant a variance if the application demonstrates that the variance will not result in harm to the environment and will not have a negative impact on the local government's management of sewage. For all variance applications, DEC should consider if the entity has exhausted all reasonable alternatives before considering the variance request.

The applicant should provide detailed information and documentation about the options considered and efforts made to comply with 6 NYCRR 750-1.6(f). To support the request, the variance application should include the following types of information:

- a. summaries of any meetings/calls with the relevant municipality or governmental agency(s);
- b. responses of the municipality or governmental agency(s) and rationale for any determinations made by those entities;
- c. documentation of attempts made by the applicant/permittee to satisfy the requirements of the

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<sup>3</sup> Suffolk County also has SPDES permitting authority for subsurface disposal systems. However, SPDES permitting authority for disposal systems with a surface discharge remains with DEC.

- municipality or governmental agency(s);
- d. if ownership by a municipality or governmental agency is not a viable option, then an explanation as to why it is not a viable option and details of the steps taken to form an SDC; and
  - e. justification for why a variance is necessary.

Under 6 NYCRR 750-1.6(f), in granting or denying the variance application, DEC should determine if "the variance is in harmony with the general purposes and intent of this Chapter." To that end, the applicant for a variance must demonstrate that the variance will not result in harm to the environment and will not have a negative impact on the local government's management of sewage. In evaluating the variance application, DEC should consider whether the entity:

1. is permanent and formed with the intent of being responsible for the operation and maintenance of the sewage disposal system or sewer extension;
2. possesses a certificate of incorporation bearing a stamp showing the New York State Department of State accepted the filing;
3. has a requirement for mandatory membership for initial and subsequent users of the sewage disposal system or sewer extension;
4. has authority to access, as required, individual lots and common areas to make repairs and undertake construction related to the sewage disposal system;
5. has authority to sell or dedicate the facilities in the future if there is an expansion of the public sewage system by the local governing body which may allow for assumption of the private sewage disposal system;
6. has authority to set fees, dues, and assessments for maintenance and replacement of facilities and improvements, and to enforce its rights to collect the fees. Has provisions to ensure that service charges, rates for services, or increases will be reasonable and adequate, consistent with those of the local governing body, and renewable every five years; and
7. has authority and a mechanism to amass reserve funds, or an ability to borrow funds, to make capital improvements and repairs.

Additionally, DEC should consider whether, for a new facility, the entity applying for the variance demonstrates that it:

8. conforms to local design and engineering specifications so that the system/extension would be compatible and meet local and state law;
9. has obtained, as appropriate, consent of the local governing body or the local Department of Health for the construction and operation of the sewage disposal system or sewer extension in accordance with the approved plans and specifications;
10. has a licensed professional engineer, hired by the entity or one employed by the local governing body, retained to a) monitor the plans and construction of the sewage disposal system or sewer extension, b) perform inspections at reasonable intervals during and after construction, and c) report to the local governing body;
11. has a licensed professional engineer certify that construction of the sewage disposal system or sewer extension was completed in accordance with the approved plans and specifications;
12. has a written warranty by the builder to guarantee performance of the sewage disposal system or sewer extension for not less than 5 years;
13. has a bond for the construction of the sewage disposal system or sewer extension, as well as for the operation and maintenance of the sewage disposal system or sewer extension for an appropriate period of time, but not less than 5 years. In the event additional hookups are approved, additional bonding should be required. Pursuant to 6 NYCRR 750-1.6(f) bonding

- may be appropriate for new sewage disposal systems or sewer extensions in order to ensure proper construction and completion in order to protect the users; and
14. as an alternative to 11 and 12 above, has a contingency plan in the event that it fails to complete construction and/or operate and maintain the sewage disposal system or sewer extension in accordance with all applicable laws, rules and regulations or is otherwise in default or abandons the system or extension.

### III. Purpose and Background

Article 10 of the New York State Transportation Corporations Law (TCL) was enacted to authorize a means of providing sewer services to multiple property owners in areas of the state not served by a publicly owned treatment works. The law allows land development that generates sewage to proceed in a manner that protects human health and the environment, protects users who rely on the system, and preserves the local government's fiscal resources and ability to oversee development. These protections include local government oversight and cost recovery during the design and construction phase of the project through the operation and maintenance of the completed system. Other protections include performance guaranty bonding and the right of local governments to take over operation and maintenance of the system should it be abandoned. 6 NYCRR 750-1.6(f) addresses those same concerns and implements these same considerations.

*6 NYCRR 750-1.6(f) - A permit for a sewage disposal system or approval of a sewer extension serving or intended to serve more than one separately owned property shall be issued only to either a governmental agency, municipality, or sewage disposal corporation formed and regulated pursuant to article 10 of the Transportation Corporations Law. The commissioner may, on written application, grant a variance from this provision in a particular case, subject to appropriate conditions, including bonding requirements, where such variance is in harmony with the general purposes and intent of this Chapter. (Emphasis added)*

As explained above in the Policy section, DEC prefers issuance of a SPDES permit, or approval of a sewer extension, to a governmental agency or municipality. They are typically long-standing, established entities with taxing authority, with an inherent organizational structure and experience serving constituents, that well positions them to be able to properly maintain and operate a system or sewer extension long-term. However, DEC acknowledges that there are situations when it is necessary for a properly organized and operated SDC to be issued the SPDES permit or receive approval for a sewer extension. A SDC provides a structure that is intended to avoid disputes or poor coordination between separate property owners or by organizations or interests that can be transient, and which, if not checked, may lead to improper sewage treatment or failure of the sewage disposal system. Finally, in the rare circumstance, where the facts and circumstances support that a viable option does not exist for ownership or operation of the new facility by a governmental agency or municipality, or by a duly formed SDC, a variance may be issued by DEC to be consistent with the protections afforded by the SPDES program with supportive and appropriate conditions recommended in this policy

### IV. RESPONSIBILITY

This policy was drafted by Central Office staff in the Division of Water (DOW) and the Office of General Counsel (OGC), in consultation with staff from the Division of Environmental Permits (DEP) and the

nine regions. Central Office DOW and DEP staff will be responsible for administering and updating this policy.

Primary responsibility for interpretation and implementation will rest with DOW and DEP staff processing applications for SPDES permits and DOW staff involved in the review of sewer extensions. Consultation with staff from OGC may also be necessary on a case-by-case basis.

## **VI. RELATED REFERENCES**

Environmental Conservation Law, Articles 8, 17, and 70

Transportation Corporations Law, Articles 1 and 10

6 NYCRR Part 750

6 NYCRR Part 617

6 NYCRR Part 621