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Nitrogen/Clean Water Act: U.S. Environmental Protection Agency Environmental Appeals Board Addresses Massachusetts Municipalities Challenged NPDES Permit

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The United States Environmental Protection Agency (“EPA”) Environmental Appeals Board (“EAB”) issued a May 3rd decision addressing the City of Taunton, Massachusetts (“City”) challenge to a Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permit.

EPA had issued an NPDES permit to the City to discharge wastewater from an advanced secondary wastewater treatment facility into the Taunton River in Massachusetts.

The NPDES permit was issued on April 10, 2015 and superseded the prior permit that authorized the City’s discharges.

The City’s petition challenged a nitrogen limit that EPA placed in the NPDES permit (both the need and the actual effluent imposed).

The prior permit did not contain a nitrogen limit.

The additional challenges included:

- A requirement to reduce nitrogen year-round
- The compliance schedule for achieving the nitrogen limit
- The interim limit for nitrogen

The City also challenged:

- The NPDES permit’s copper limits
- EPA’s decision not to separate wet weather limits
- EPA’s authority to limit flow
- The City’s ability to “blend” peak wet weather flows
- The City’s potential liability for the activities of co-permittees

EAB rejected each of the challenges.

Besides rejecting various procedural challenges, EAB held that EPA did not clearly err or abuse its discretion when EPA decided to include a nitrogen limit in the NPDES permit.

It held that:

- EPA reasonably determined that the City's discharge of nitrogen to the waterway has the "reasonable potential" to cause or contribute to exceedances of applicable water quality standards, including nitrogen overenrichment
- The Clean Water Act Section 303(d) listing process is distinct from the NPDES permitting process, and the Massachusetts 303(d) list of impaired waters does not represent either a Massachusetts or EPA determination of whether the waterbody is nitrogen-impaired
- NPDES regulations do not require EPA to use any particular methodology or conduct any specific modeling to determine whether the "reasonable potential" standard is met, and EPA is not required to demonstrate that nitrogen is causing impairment before setting a nitrogen limit
- EPA considered potential improvements and conditions in the waterways and based its decision on all the relevant data

EAB also determined in regard to the specific nitrogen limit:

- EPA reasonably determined and provided support for a threshold nitrogen concentration for the receiving waters that was consistent with unimpaired conditions in the waterways as determined by the available data
- EPA reasonably determined a nitrogen limit for the City's wastewater treatment plant, taking into account the overall flow of the waterway, the reduction needed to achieve the threshold nitrogen concentration in the receiving waters, the size of the discharge, and the limits of available technology
- The City failed to demonstrate that EPA erred in relying on the monitoring station referred to as "MHB 16" as a reference location from which to derive the threshold nitrogen concentration, and EPA's reliance on MHB 16 as a reference location for unimpaired conditions is supported by Massachusetts and EPA guidance
- The City failed to satisfy the threshold requirement for review under 40 C.F.R. § 124.19(a)(4) because it failed to properly preserve its challenge to the requirement to reduce nitrogen year-round. It did not address EPA's explanation for its determination to impose a 10-year compliance schedule for the nitrogen limit.
- The City failed to demonstrate that EPA clearly erred or abused its discretion in determining the NPDES permit's interim limit for nitrogen or in determining the copper limits for the permit.
- The City failed to satisfy the threshold requirements for review under 40 C.F.R. § 124.19(a)(4) because the City did not address EPA's response to comments on the issue of setting separate wet weather limits for the NPDES permit and failed to properly preserve its challenge to EPA's authority to set a flow limit of the wastewater treatment plant.
- The City failed to satisfy the threshold requirements for review under 40 C.F.R. § 124.19(a)(4) because the City did not identify, in its petition, any NPDES permit condition relating to blending or any permit provision that would render it potentially liable for the actions of its co-permittees

A link to the EAB decision can be found here

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision~Date/OA045314B61E682785257FA80054E600/\\$File/Denying%20Review....pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision~Date/OA045314B61E682785257FA80054E600/$File/Denying%20Review....pdf).