

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

Town of Fairhaven

Permit No. MA0100765

**PETITION FOR REVIEW OF
TOWN OF FAIRHAVEN
NPDES PERMIT ISSUED BY REGION 1**

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1. Town of Fairhaven's Comments on Draft NPDES Permit, Dated October 4, 2010
2. Correspondence from Andy Thuman at HDR re MEP Report, Dated October 26, 2017

I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Town of Fairhaven (“Fairhaven” or “Town”) submits this Petition for Review (“Petition”) regarding its National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA0100765 (“the Permit”), which was issued on September 27, 2017, by Region 1 of the United States Environmental Protection Agency (“EPA”) and the Massachusetts Department of Environmental Protection (“MassDEP”). The Permit authorizes the Town to discharge treated effluent from the Fairhaven Wastewater Treatment Plant (“WWTP”) to the Acushnet River (“receiving water”).

Fairhaven contends that key findings of fact or conclusions of law are clearly erroneous, lack rational evidentiary support, and/or involve an abuse of discretion or implicate important policy considerations that warrant EAB review. 40 C.F.R. § 124.19(a)(4)(A) & (B). Additionally, EPA’s responses to comments fail to meaningfully acknowledge or address important issues raised by the Town related to disputed conditions, as required by 40 C.F.R. § 124.17(a)(2). Thus, the Town respectfully requests that the Environmental Appeals Board (“EAB”) grant review of this Petition.

Specifically, the Town contests and challenges the following permit limitations and conditions.

1. The monthly average total nitrogen (“TN”) limit of 125 lbs/day effective between May 1 and October 31; and
2. The requirements contained in Footnotes 11 and 12 on page 5 of 13 of the Permit, which contain the following language:

Footnote 11 – The nitrogen limit is a rolling seasonal average limit, which is effective from May 1 – October 31 of each year. The first value for the seasonal average will be reported after an entire May – October period has elapsed following the effective date of the permit (results do not have to be from the same year). For example, if the

permit becomes effective on December 1, 2017, the permittee will calculate the first seasonal average from samples collected during the months of May through October 2018, and report this average on the October 2018 DMR. For each subsequent month that the seasonal limit is in effect, the seasonal average shall be calculated using samples from that month and the previous five months that the limit was in effect.

Footnote 12 – The permittee shall operate the treatment facility to reduce the discharge of total nitrogen during the months of November through April to the maximum extent possible. All available treatment equipment in place at the facility shall be operated unless equal or better performance can be achieved in a reduced operational mode. The addition of a carbon source that may be necessary in order to meet the total nitrogen limit during the months of May through October is not required during the months of November through April. The permittee shall submit an annual report to EPA and the MassDEP by June 15 each year that summarizes activities related to optimizing nitrogen removal efficiencies during the preceding November through April period.

II. STATUTORY AND FACTUAL BACKGROUND

The Town submits the following relevant statutory, regulatory, and factual background to assist the EAB's review:

A. Clean Water Act Overview

Under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*, water quality-based effluent limitations may be imposed as necessary to attain applicable water quality standards ("WQS"). *See* 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d). WQS include the designated uses of a waterbody and the numeric or narrative criteria adopted to protect the uses. *See* 40 C.F.R. § 130.3; 33 U.S.C. § 1313(c)(2)(A); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 227-228 (D.D.C. 2011).

The Massachusetts Surface Water Quality Standards do not contain numeric criteria for TN. The narrative criterion for nutrients is found at 314 CMR § 4.05(5)(c), which states that "[u]nless naturally occurring, all surface waters shall be free from nutrients in concentrations that would cause or contribute to impairment of existing or designated uses and shall not exceed the site specific criteria developed in a TMDL or as otherwise established by the Department

pursuant to 314 CMR § 4.00.” No TMDL has been developed or approved for the receiving water.

The permitting authorities are therefore required to develop effluent limits using narrative criteria in the absence of numeric criteria. 40 C.F.R. § 122.44(d)(1)(V)(A).

B. Factual Background

In June of 2010, EPA issued the Town a draft permit that contained new, more stringent proposed nitrogen limitations, including a 125 lbs/day monthly average limit, which would be in effect year round. EPA concluded that the 125 lbs/day limit represented “the limit of technology.” Fact Sheet at 10. The Town submitted timely comments on the proposed permit and specifically on the new nitrogen limits. Because the explicit basis for the 2010 nitrogen limits was the proposed limit of technology, the Town did not request a compliance schedule or otherwise raise all water quality-related issues that might have been raised if the nitrogen limits were water quality-based. For example, the Town would have requested information on the extent and type of dilution factor used, the nature of TN attenuation or raised the possibility of nutrient trading.

Seven years after the Town submitted its comments, EPA issued a final permit without opportunity for further comment and now asserts that the nitrogen limits are water quality-based even though the Fact Sheet clearly indicates that EPA was “reducing the Fairhaven treatment plant loading to the limit of technology (3.0 mg/l total nitrogen).” Fact Sheet at page 10.

EPA also significantly changed the nitrogen limit and added new conditions relating to the nitrogen limit. See Footnotes 11 and 12 on page 5 of 13 of the Permit.

III. THRESHOLD PROCEDURAL REQUIREMENTS

Fairhaven satisfies the threshold requirements for filing a petition for review under 40 C.F.R. § 124 as follows:

1. The Town has standing to petition for review because it participated in the public comment period on the Permit. 40 C.F.R. § 124.19(a)(2). *See* Attachment 1 – Fairhaven’s Comments on Draft NPDES Permit, dated October 4, 2010.
2. All reasonably ascertainable issues raised by Fairhaven in this Petition were raised during the public comment period and are therefore preserved for review, including comments referenced in the Comments on Draft NPDES Permit. 40 C.F.R. § 124.13.
3. The Town’s Petition is timely filed. 40 C.F.R. § 124.19(a)(3) (30-day appeal deadline after notice of issuance).

IV. ARGUMENT

A. Standard of Review

The EAB is required to grant a review when a petitioner establishes that the NPDES permit conditions in question are: 1) based on a clearly erroneous finding of fact or conclusion of law, or 2) involve an exercise of discretion on important policy considerations that the EAB determines warrant review. 40 C.F.R. § 124.19(a).

B. **EPA’s Imposition of a TN Seasonal Effluent Limit of 125 lbs/day is Clearly Erroneous, Unsupported by Evidence in the Record, and Involves an Exercise of Discretion That Warrants Review**

The Town challenges EPA’s imposition of a monthly average TN effluent discharge limit of 125 lbs/day on a seasonal basis from May 1 through October 31. As noted, Massachusetts does not have numeric criteria for nitrogen, and instead uses a narrative criterion requiring that nutrients contained in an effluent shall not impair a waterbody’s designated uses. 314 CMR

§ 4.05(5)(c). However, nowhere in the Permit or Fact Sheet does EPA explicitly state that the nitrogen limits were developed to meet a specific narrative criterion or were, in fact, a water quality-based effluent limit. Rather, EPA explicitly stated that the nitrogen limit represented the “limit of technology” and that it was reducing the “treatment plant loading to the limit of technology....” Fact Sheet at page 10. As stated in Fairhaven’s October 4, 2010 comments, there is no explanation of the rationale for a technology-based TN limit. The technology-based TN limit was, and continues to be, entirely unsupported by anything in the record.

EPA now notes in its Response to Comments that the TN limit is water quality-based and was explained “by describing and referencing numerous studies” referenced in Section IV.B.2a of the Fact Sheet. Response to Comments at page 4. A review of the studies and analysis in Section IV.B.2a of the Fact Sheet does not support the conclusion that the 3.0 mg/l limit (from which the 125 lbs/day limit is derived) is a water quality-based limit. The loading calculations to meet target concentrations referenced in this section do not in any way relate to a water quality-based limit. There is no link made between the Town’s effluent loads and the impact on a nitrogen threshold for the receiving water. The Fact Sheet included a general discussion of the impacts nitrogen can cause to infauna and described the total watershed load necessary to achieve the target concentration at the sentinel location, but nowhere in the Fact Sheet does the Permit calculate a specific water quality-based effluent limit for the Town. There are no dilution factors established for the Town’s discharge, and no discussion of whether near field or far field dilution should be used, the amount of attenuation that may occur or other factors that form the basis of a water quality-derived permit limit.

If the proposed TN limits were water quality-based, why did not the permitting agencies offer a compliance schedule, as authorized by Massachusetts regulation. *See* 314 CMR

§ 4.03(1)(b) (providing that agencies “may include a schedule of compliance in a permit at the time of permit reissuance or modification where the permittee either cannot comply with such permit requirements or limitations, or there is insufficient information available to determine whether the permittee can comply with such permit requirements or limitations”).

EPA in its Fact Sheet acknowledged that the Town could not comply with the new TN limits. EPA analyzed in great detail the current TN concentrations in the treatment plant effluent and determined that effluent TN concentrations averaged 15.3 mg/l. Thus, it was clear that a 3.0 mg/l TN effluent limitation was not achievable at the time of permit issuance. Despite these facts, a compliance schedule was never mentioned in the Fact Sheet or discussed with the permittee. This is further evidence that the 3.0 mg/l TN limitation was a technology-based parameter rather than a water quality-based parameter.

The only reference to a 3.0 mg/l limit is in the context of a limit of technology. While a 3.0 mg/l limit at the facility design flow may be necessary to attain water quality standards as stated by EPA in its Response to Comments, EPA did not derive the 3.0 mg/l limit based on water quality considerations. EPA utilized a limit of technology basis to establish the 3.0 mg/l limit.

What was the regulatory standard that was applied in establishing this limit of technology effluent limitation – best available practicable treatment, best professional judgement, best available technology? EPA does not say anywhere in the Permit or the Fact Sheet. EPA’s analysis of the TN permit limit was conclusory. EPA simply stated that 3 mg/l was the limit of technology. No further explanation was given. At a minimum, the lack of analysis or an articulated basis for the TN limit denied Fairhaven a reasonable opportunity to comment on the draft permit. *See In Re Dominion Energy Brayton Point LLC*, 12 E.A.D. 490, 2006 WL 3361084

at 54 (E.A.B. 2006) (remanding permit where EPA provided only a conclusory basis for a limitation, stating that “[w]ithout an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality”).

Therefore, the Town requests that the EAB order EPA to provide additional information that will allow the Town to understand the derivation of the proposed TN effluent limitation upon which significant legal, technical, and financial consequences may rest. Once the additional information is provided, an opportunity for comment on the new information must be provided.

C. EPA’s Seven Year Delay in Issuing a Final Permit Without Providing a New Opportunity for Comment is Arbitrary and Unreasonable and Raises Important Policy Considerations that the EAB Should Review

Fairhaven reserved its right to challenge the TN limit in the event that EPA or the State later determined that the limit was water quality-based. Fairhaven Comments, Footnote 1 at page 3. Seven years later, EPA now seeks to redefine the TN limit as a water quality-based limit based on a 2015 Massachusetts Estuary Project (“MEP”) report. EPA acknowledges in the Response to Comments (page 20) that there were flaws in the 2008 MEP report upon which it purportedly based the nitrogen limits in the proposed permit. EPA notes that additional analysis and more recent information in a draft updated final report, dated June of 2013, and the updated final report of June 2015, addressed some of the flaws that were previously identified. Unfortunately, because EPA has chosen not to reopen the comment period, the Town cannot fully address the MEP report changes made subsequent to its October 2010 comments on the proposed draft.

EPA has had the luxury of developing a rationale for the proposed nitrogen limits over a seven-year period. Fairhaven has had 30 days to review and respond to new permit conditions

and to all the significant changes to the MEP report cited by EPA in its Response to Comments and which now apparently forms the basis for the TN limit. Despite the restricted review period, the Town has already identified several significant issues of concern related to the final MEP report. *See* Attachment 2. The Town should be granted additional time to elaborate on these and other concerns which relate directly to the need for, and extent of, the treatment required to meet an appropriate TN effluent limitation.

By any measure, there has been an extraordinary amount of time between the proposed and final draft. This hiatus, coupled with the lack of clarity and information regarding the basis for the TN limit in the proposed draft; the changes made in the interim to the underlying water quality reports which EPA is now utilizing as a basis for developing the nitrogen limits; and the failure to allow additional public comment, present a unique set of facts, constitute an important public policy issue, and represent a clear example of the type of issue that should be reviewed by the EAB.

D. EPA's Changes to the Final Permit Require that the Permit Proceeding Be Reopened and a New Opportunity for Public Comment Be Provided

In the final permit, EPA added Footnotes 11 and 12, which explain how the new nitrogen limit is to be monitored and calculated, as well as a new requirement that the permittee operate the treatment facility to reduce the discharge of TN to the maximum extent possible during the months of November through April. Footnote 12 also includes specific performance-based standards and requires annual reporting of nitrogen optimization and removal efficiencies. These changes are more than a clarification of permit conditions. Further, these changes were not a "logical outgrowth" of the previous proposal. (*See In Re District of Columbia Water and Sewer Authority*, 13 E.A.D. 714 (March 19, 2008), which held that removal of a general provision in a final NPDES permit required the reopening of the comment period.) These substantive new

provisions in the final permit represent a material change in EPA's underlying interpretation of the nitrogen limit and, therefore, require that the public comment period be reopened so that the permittee has adequate opportunity to address these new limitations and conditions. As an example, the Town has had no opportunity to express its position on the extent of the season in which the limits are in effect or to further elucidate what the term "maximum extent possible" means in the context of treatment facility operations. EPA's failure to reopen the permit and allow comments on Footnotes 11 and 12 is therefore arbitrary, unreasonable, and an abuse of discretion.

E. The Failure of the Permitting Agencies to Adopt a TMDL for the Receiving Water is Arbitrary and Capricious, Unfairly Prejudices the Permittee and Raises Important Public Policy Issues that Should be Addressed by the EAB

Even though the receiving water into which the Town's facility discharges has been listed as nonattainment for at least 20 years, the permitting agencies have failed to develop a TMDL that would take into consideration point source and nonpoint source loadings of nutrients to the receiving water. The Town requested that this permitting action be deferred until a TMDL was approved during the public comment period. EPA responded that it has "encouraged MassDEP to complete a TMDL for the New Bedford Inner Harbor," but that the absence of a TMDL does not bar EPA from proceeding to set a TN limit. EPA further noted that there is "no telling when a TMDL will be completed if at all and, in EPA's view, it makes little sense to forestall necessary nitrogen reductions on the mere possibility that a TMDL will someday soon be completed." Response to Comment on page 27.

While it may be true that an approved TMDL is not a necessary precondition to the issuance of a NPDES permit, the failure to complete a TMDL for New Bedford Inner Harbor is, in this case, a significant public policy issue that should be reviewed by the EAB. Section 303(d) of the Clean Water Act requires that states establish TMDLs for waters identified as not

attaining classification. The states are **required** to submit, for EPA approval, waters identified and loads established under a TMDL. 33 U.S.C. § 1313(d)(1)(D)(2).

The fact that a TMDL has not been established is extremely prejudicial to the Town. The Town will spend significant moneys to meet a 3.0 mg/l TN limit and significant additional moneys will be spent unnecessarily if a different effluent limitation for TN is derived from a TMDL. The failure to develop and approve a TMDL for New Bedford Inner Harbor over an extended a period of time and two years after completion of the MEP model is, in and of itself, grounds for suspending this permitting action. At least one court has concluded that where a state and EPA have failed to develop TMDLs for water quality limited segments, EPA acted arbitrarily and capriciously in failing to disapprove the State's inadequate submission of TMDLs. *See Friends of the Wild Swan v. U.S. EPA*, 130 F. Supp. 2d at 1199, 1206 (D. Mont. 2000). The *Wild Swan* court prohibited EPA from issuing any new permits until all necessary TMDLs were established.

EPA itself acknowledged the risk associated with developing permit limits prior to having a completed TMDL. In its Response to Comments on page 39, EPA stated that “[w]hen a TMDL is ultimately completed and approved, the effluent limitation in any subsequently issued NPDES permit must be consistent with the assumptions and recommendations of the of the wasteload allocations in the TMDL.”

In its 2007 comments on this permit, the Coalition for Buzzards Bay stated that “[e]stablishing a TMDL for this water segment must be a top priority for EPA and given the fact that the MEP report for the Acushnet River and Inner New Bedford Harbor was originally due in 2004, and is now 6 years overdue, it is time for EPA to act” (emphasis in original comments). Response to Comments on page 41. A TMDL was six years overdue in 2007. It is now thirteen

years overdue and EPA is “encouraging” MassDEP to develop a TMDL and concluding that a TMDL for these water quality limited segments is a “mere possibility.”

The inaction of the permitting agencies to develop a TMDL is significantly prejudicial to the Town. This thirteen-year failure to act is, by any definition, arbitrary and capricious, and must be addressed as an important public policy by the Board.

V. STAY OF CONTESTED AND NON-SEVERABLE CONDITIONS

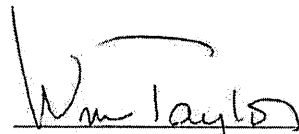
Pursuant to EPA regulations, the limits and conditions contested herein must be stayed, along with any uncontested conditions that are not severable from those contested. *See* 40 C.F.R. §§ 124.16(a) and 124.60(b). Until such time as the EAB reviews and resolves the contested provisions or remands the Permit to EPA for subsequent modification, the Town should be directed to comply with the terms and conditions of Fairhaven’s former NPDES permit, *i.e.* those terms/conditions in effect prior to the September 27, 2017 permit issuance.

VI. CONCLUSION AND RELIEF SOUGHT

For the aforementioned reasons, the Town respectfully seeks EAB review of the terms and conditions of the Town’s final NPDES Permit identified herein. After such review, the Town requests:

- A. The opportunity to present oral argument in this proceeding and a briefing schedule for this appeal to assist the EPA in resolving the issues in dispute;
- B. A remand of the Permit to EPA Region 1 with an order to reopen the public comment period and issue an amended NPDES Permit that conforms to the EAB’s findings on the terms and provisions appealed by the Town; and
- C. All other relief that the EAB deems appropriate under the circumstances.

Dated: October 27, 2017



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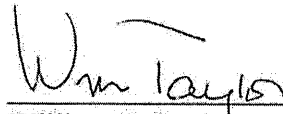
Counsel for Town of Fairhaven

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review in the matter of Town of Fairhaven, NPDES Permit No. MA0100765, was served via electronic mail and by United States First Class Mail on the following persons, this 27th day of October, 2017:

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