



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

U.S. EPA Environmental Appeals Board: Fairhaven, Massachusetts Petition Challenging NPDES Permit Nitrogen Limit

11/17/2017

The Town of Fairhaven, Massachusetts ("Fairhaven") filed an October 27th Petition for Review before the United States Environmental Protection Agency ("EPA") Environmental Appeals Board ("EAB").

Fairhaven is challenging certain conditions related to nitrogen in a Clean Water Act National Pollution Discharge Elimination System ("NPDES") Permit issued by EPA.

The Petition states that Fairhaven operates a wastewater treatment plant ("Plant") that discharges into the Acushnet River.

EPA Region 1 is stated to have issued Fairhaven a draft permit for the Plant in 2010 that contained "new, more stringent proposed nitrogen limitations, including a 125 lbs/day monthly average limit, which would be in effect year round." A final permit was issued seven years after the town submitted its comments on the draft permit.

The final permit limitations and conditions being challenged include:

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.

Fairhaven raises four arguments in support of its Petition challenging these conditions. They include:

1. 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
2. PA'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
3. EPA's Changes to the Final Permit Require that the Permit Proceeding Be Reopened and a New Opportunity for Public Comment Be Provided
4. 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

The relief sought by Fairhaven includes:

- 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.

[A copy of the Petition can be downloaded here.](#)