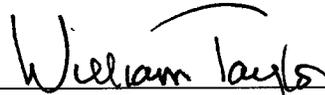


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BEFORE THE ENVIRONMENTAL APPEALS BOARD 2015 AUG 13 PM 3:15
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. ENVIR. APPEALS BOARD

In re:)
Town of Salisbury)
)
Permit No. MA0102873)
_____)

PETITION FOR REVIEW OF
TOWN OF SALISBURY SEWER COMMISSION
NPDES PERMIT ISSUED BY REGION 1



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August 11, 2015

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Town of Salisbury Sewer Commission (“Petitioner” or the “Town”) submits this Petition for Review (“Petition”) regarding its National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA 0102873 (the “Permit”) issued on July 9, 2015 by Region 1 of the United States Environmental Protection Agency (“EPA”) and the Massachusetts Department of the Environment (“MassDEP”). The permit authorizes Petitioner to discharge treated effluent from the Salisbury Wastewater Treatment Plant to an unnamed tidal creek that drains to the Merrimack River (“Receiving Water”). The applicable Receiving Water segment (Segment MA84A-06) has been listed as impaired for enterococcus, fecal coliform and PCB in fish tissue. This Receiving Water has not been designated as impaired as a result of nutrients or other pollutants including metals such as Total Copper or Nickel.¹

Salisbury contends that the key findings of fact and conclusions of law are clearly erroneous, lack rational evidentiary support, 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 failed to acknowledge or address important issues raised by Salisbury related to disputed conditions, as required by 40 C.F.R. § 124(17)(a)(2). Thus, Salisbury respectfully requests that the Environmental Appeals Board (“EAB”) grant review of this petition.

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

1. The monthly average and maximum daily permit limits for Total Copper of 3.7 mg/l and 5.8 mg/l;
2. The monthly average Total Nickel permit limitation of 8.3 mg/l; and
3. The monthly average, weekly average and daily maximum permit limits for Total Ammonia-Nitrogen of 5.0 mg/l, 7.0 mg/l and 10.0 mg/l between May 1 and October 31.

¹ Final Massachusetts Year 2012 Integrated List of Waters.

II. STATUTORY AND FACTUAL BACKGROUND

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

A. Clean Water Act Overview

Under the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§ 1251 *et seq.*, water quality-based effluent limitations may be imposed as necessary to ensure attainment of 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. 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 regulates toxic pollutants in toxic amounts. For pollutants not specifically listed such as Total Copper, Total Nickel and Total Ammonia-Nitrogen, Massachusetts utilizes the criteria recommended by EPA in its 2002 publication; EPA 822-R-02-047, November 2002. 314 CMR 4.05(5)(e). EPA, as the permitting authority, is required to apply these criteria when developing permit limits. 40 CFR § 122.44(d). EPA is also required to consider the sensitivity of potentially impacted species and the dilution of the effluent in the receiving water. 40 CFR § 122.44(d)(1)(i). Massachusetts regulations further provide for the use of compliance schedules to afford a permittee adequate time to comply with one or more new or newly revised water quality-based permit limitations. 314 CMR 4.03(1)(b).

B. Factual Background

The Town of Salisbury Sewer Commission operates a wastewater treatment facility located at 125 Elm Street, Salisbury, Massachusetts. The treatment facility is a 1.3 million gallons per day ("mgd") advanced wastewater treatment facility with seasonal nitrification that serves approximately 5,000 people. Wastewater entering the facility flows to 5 and 7 million gallon geotextile-lined lagoons

operated in series with retention times of 5 and 10 days. Effluent from the final lagoon flows to 8 geotextile-lined rapid infiltration sand beds. The treatment plant was originally designed to operate in a tidal discharge mode, including the instrumentation and controls designed for such a discharge. This mode of operation has never been utilized nor is it clear that all original tidal discharge controls remain operable at present. A tidal operating mode allows the discharge to be limited to periods immediately prior to and after high tide when there is water in the tidal creek in order to ensure greater dilution.

The existing permit became effective on January 1, 2008 and expired on December 31, 2012. The permit was administratively continued in accordance with 40 CFR §122.6. On July 13, 2011, the Town entered into an Administrative Order with EPA and MassDEP. See Administrative Order Document No. 11-012 (“AO”) – **Attachment 1**. The AO established interim permit limits for Total Copper and Total Ammonia-Nitrogen. Actions required under the AO included the preparation of an Ammonia-Nitrogen Removal Engineering Report (see **Attachment 2** – February 2012 Report prepared by Weston & Sampson); and a Copper Optimization Engineering Report (see **Attachment 3** – January 4, 2013 Report prepared by Weston & Sampson). The Town has also provided quarterly progress since 2011 apprising EPA and MassDEP of work done to optimize treatment of Copper and Ammonia-Nitrogen and to study the feasibility of a tidal discharge. See, e.g., **Attachment 4** – January 2015 Quarterly Progress Report. After reviewing the two major reports described above, EPA concurred with the Town’s recommendation to evaluate the use of a tidal discharge system to obtain additional dilution.

Pursuant to its enforcement authority, EPA ordered the Town to submit “for review and approval a detailed scope of work (“SOW”) for a tidal discharge system by August 1, 2014.” The EPA order listed specific issues to be covered in the SOW. See **Attachment 5** – May 2, 2014 letter from D. Dart to N. Harrington, Salisbury Town Manager. In accordance with the Order, the Town timely submitted a detailed Tidal Discharge Study SOW to EPA and MassDEP. See **Attachment 6** – Scope of Work with July 31, 2014 cover letter to G. Harding, EPA, and K. Brander, MassDEP. The SOW details the modifications

at the treatment plant necessary to operate in a tidal discharge mode. EPA and MassDEP have reviewed the July 31, 2014 SOW and have approved key sections of the study plan. See **Attachment 7** – April 14, 2015 letter from D. Dart to N. Harrington.

III. THRESHOLD PROCEDURAL REQUIREMENTS

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

1. The Petitioner 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 8** – Comments of Christopher M. Perkins, PE, Weston & Sampson, on behalf of the Town.
2. The issues raised by Petitioner in this petition were raised during the public comment period and are therefore preserved for review.
3. The Town’s petition is timely filed. 40 C.F.R. § 124.19(a)(3) (30 day appeal deadline after notice of issuance) and 40 C.F.R. § 124.20(d) (adding 3 days onto mailing date).

IV. ARGUMENT

A. Standard of Review

The EAB is required to grant a review when the 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 Board determines warrant review. 40 C.F.R. § 124.19(a). An agency action is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (U.S. 1983).

B. EPA's Failure to Address Petitioner's Request for Additional Time in Which to Conduct a Tidal Study Was Arbitrary and Unreasonable

In the middle of the technical review being conducted by EPA and MassDEP on a tidal discharge option, EPA chose to issue a draft permit which may supersede the existing AO and the interim permit limits contained in the AO. While the permit makes mention of the AO and the potential tidal discharge option currently under review by its technical staff, EPA permit writers ignored the lengthy correspondence, the Town's costly optimization and engineering reports and the detailed SOW for a tidal discharge for which the Town wastewater treatment facility was originally designed. EPA had recently approved the SOW in large part allowing the Town to proceed with specific work on a tidal discharge. See **Attachment 7**. Rather, EPA states in the Fact Sheet that it would "continue to work with the Town during this permit cycle to achieve compliance with the permit." See page 8 of 21 of the Fact Sheet. It is not clear what "continue to work with the Town during this permit cycle" actually means. It is clear that EPA has imposed permit limits for Total Copper, Ammonia-Nitrogen and Copper that have been violated since the original permit was issued in 2008.

In its Response to Comments, EPA states that it "must include limitations in the permit to control pollutants which EPA determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard." See Response to Comments, page 3. What EPA doesn't say in its Response to Comments or in the Fact Sheet of the permit, is why it is necessary to issue a revised permit at this time. As the Response to Comments indicates, EPA may be willing to extend the interim limits for Copper and Ammonia-Nitrogen in the AO as well as to develop an interim limit for Nickel while the tidal discharge study and subsequent construction is completed. However, there is no need to issue a new NPDES permit pending implementation of the tidal discharge study and subsequent construction. EPA has given no rational basis for not administratively extending the current NPDES permit, extending the current AO and

modifying the current AO to add an interim limit for Nickel. The addition of a reopener provision in the reissued permit does not change the fact that there is no underlying need to immediately reissue the permit, particularly since it is not clear whether the new permit may supersede the current AO and place the Town in immediate non-compliance with Total Copper, Ammonia-Nitrogen and Total Nickel limitations. The Town's whole effluent toxicity testing data clearly indicates no immediate need to reissue the permit due to water quality concerns. The AO provides the necessary regulatory flexibility to accomplish the goals of both the Town and the agencies. The reissued permit unnecessarily limits regulatory options. For these reasons, the issuance of the permit at this time is arbitrary, an abuse of discretion and implicates important policy considerations.

C. EPA's Failure to Address Petitioner's Request for Additional Time in Which to Conduct a Water Effect Ratio Analysis Was Arbitrary and Unreasonable

The Town challenges EPA's imposition of a monthly average and daily maximum of total copper effluent discharge limits of 3.7 mg/l and 5.8 mg/l, including EPA's decision not to provide sufficient time for the Petitioner to conduct a site specific study (water effect ratio) to establish a total copper criteria which takes into account receiving water characteristics and conditions.

Massachusetts regulations allow for the establishment of site specific criteria where EPA recommended criteria are "invalid due to site specific, physical, chemical or biological considerations." 314 CMR 4.05(5)(e)(1.). MassDEP and EPA have established many site specific criteria throughout the state. However, despite a specific request in writing in the Town's Response to Comments letter (see **Attachment 8**) to allow time to conduct a water effects ratio, EPA failed to address this specific request in its Response to Comments and in the final permit. Therefore, EPA's imposition of Total Copper limits is arbitrary and unreasonable.

D. EPA's Failure to Address Petitioner's Request for Additional Time in Which to Comply with New, More Stringent Water Quality-Based Permit Limit for Total Nickel was Arbitrary and Unreasonable

Massachusetts regulations allow for establishment of compliance schedules for new, more stringent water quality-based limits. 314 CMR 4.03(1)(b). In the prior Town permit, EPA established compliance schedules for Total Copper and Total Ammonia-Nitrogen. However, despite a request for additional time to meet the new, more stringent Total Nickel monthly average limitation of 8.3 ug/l, no compliance schedule was provided. In the comments provided by C. Perkins of Weston & Sampson (**Attachment 4**) on behalf of the Petitioner, it was requested that Total Nickel effluent limitations be removed from the permit until EPA and MassDEP had reviewed the Scope of Work for a tidal discharge and a plant modification could be made to institute a tidal discharge. Absent removal of the Total Nickel limit, Petitioner requested that an interim limit, similar to interim limits contained in the Order for Total Copper and Total Ammonia-Nitrogen, be established. A suggested interim limit for 40 ug/l was proposed. EPA's failure to address these specific requests in the response to comment and in the final permit is arbitrary and unreasonable.

E. EPA May Have Misinterpreted the Massachusetts Water Quality Classification Laws In Asserting that the Unnamed Tidal Creek Into Which the Salisbury Wastewater Treatment Plant discharges is Classified as a Class SA Segment

On page 5 of the Fact Sheet EPA asserts that the Receiving Water is not classified or listed in 314 CMR 4.05. As a result, according to EPA, this unnamed tidal creek is classified SA by default under 314 CMR 4.06(4). The Town does not necessarily agree with EPA that the unnamed tidal creek, into which its wastewater treatment facility discharges, is Class SA. The Town believes EPA should consider the unnamed tidal creek as part of the Merrimack River watershed which is classified as SB. The reason for the Town's position is that it is illogical for EPA to designate the unnamed tidal creek as SA when it was

known to have a significant discharge to it since the beginning of the classification program. Additionally, there is no evidence that there is any flow through this unnamed tidal creek that is not related to tidal influence or drainage as a result of tidal factors. In fact, EPA assumes, for purposes of establishing Total Ammonia-Nitrogen limits, that the pH and salinity of the unnamed tidal creek is typical of marine water. See page 13 of the Fact Sheet. In short, there is not sufficient evidence to indicate that this is an independent, fresh water tributary to the Merrimack River. The unnamed tidal creek appears to be dominated by salt water during high tide and salt water drainage during low tide.

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). Moreover, in light of the fact that Petitioner has challenged numerous major aspects of the Permit and given the interdependent relationship of these provisions to all remaining non-contested provisions, the proper result is to stay the Permit in its entirety. See *Friends of Pinto Creek v. United States EPA*, 504 F.3d 1007, 1010 (9th Cir. 2007). In which case, and until such time as the Board reviews and resolves the contested provisions or remands the Permit to the Region for subsequent modification, the Petitioner should be directed to comply with the terms and conditions of Petitioner's former NPDES permit, *i.e.* those terms/conditions in effect prior to the June 9, 2015 permit issuance.

VI. CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,



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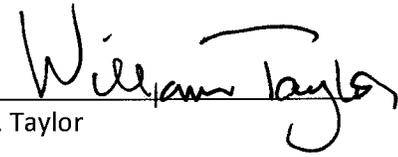
TABLE OF ATTACHMENTS

1. July 13, 2011 Administrative Order Document No. 11-012
2. February 2012 Ammonia-nitrogen removal engineering report, prepared by Weston & Sampson
3. January 2013 Copper optimization engineering report, prepared by Weston & Sampson
4. January 2015 Quarterly Progress Report
5. May 2, 2014 letter from D. Dart to N. Harrington, Salisbury Town Manager
6. July 31, 2014 Scope of work with cover letter to G. Harding, EPA , and K. Brander, MassDEP
7. April 14, 2015 Letter from D. Dart to N. Harrington
8. February 10, 2015 Comments of Christopher M. Perkins, PE, Weston & Sampson, on behalf of the Town

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Petition for review, including all relevant portions, contains fewer than 14,000 words.





William E. Taylor

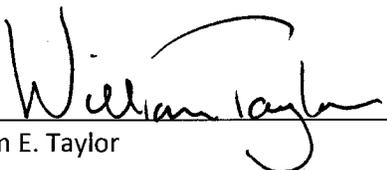
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review in the matter of The Town of Salisbury Sewer Commission, NPDES Permit No. MA0102873, was served by United States First Class Mail on the following persons, this 11th day of August, 2015:

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