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February 17, 2015

VIA U.S. FIRST CLASS MAIL & E-MAIL

Ms. Susan Murphy
U.S. Environmental Protection Agency – Region I
5 Post Office Square, Suite 100 (OEP06-1)
Boston, MA 02109-3912

RE: Supplemental Comments Regarding Draft Permit #MA0100897, City of Taunton

Dear Ms. Murphy:

On Apr 18, 2013, EPA published Draft Permit #MA0100897 ("Draft Permit") for the City of Taunton, Massachusetts ("City" or "Taunton"). The City's prior comments addressed the interplay of the mass and flow restrictions, noting that the mass limits, as presently structured, would effectively cap the City's allowable growth to 8.4 MGD. The City objected to this result as unreasonable. The Draft Permit would impose explicit limitations on "flow" as an effluent parameter. The City disputes the legal rationale for imposition of flow requirements in the Draft Permit as provided in the Draft Permit and Fact Sheet. The regulation of flow as a pollutant parameter is beyond the scope of the Clean Water Act and is therefore prohibited. Accordingly, the City requests that the flow limitation in the permit be removed or be designated as a "report only" requirement.

In consideration of the question of whether water itself may be regulated as a pollutant under the CWA, the answer is a resounding "No." Several courts have held that water is not a pollutant under the CWA. *Orleans Audubon Society v. Lee*, 742 F.2d 901, 910 (5th Cir. La. 1984) ("Clear water is not within the definition of a pollutant under the CWA") *see also Bettis v. Ontario*, 800 F. Supp. 1113, 1118 (W.D.N.Y. 1992) ("Water itself, however, is not a pollutant"). Additionally, EPA itself has long recognized that flow is not a regulated parameter, because it is not a "pollutant" and, as such, should not be included with a limit in the permit. Specifically, EPA published a statement on July 13, 2000, in the Federal Register, which stated that "EPA does not consider flow to be a pollutant, and therefore the final rule does not require TMDLs for flow." F.R. 65,135 (July 13, 2000). A recent district court opinion, that was not appealed by EPA, concurred with EPA's historical interpretation and ruled, again, that EPA lacks authority to regulate flow. In *Va. DOT v. United States EPA*, the court stated:

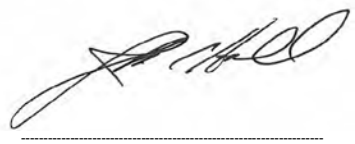
> "Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring stormwater within the ambit of EPA's TMDL authority. Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its clearly limited statutory authority."

2013 U.S. Dist. LEXIS 981, 15 (E.D. Va. 2013). As such, the uncontroverted rule is that water/flow, terms which are used interchangeably, is not a pollutant discharge regulated under the Clean Water Act. In essence, then, the draft permit is seeking to not only re-write the adopted NPDES rules, it is seeking to re-write the Clean Water Act to regulate flow, regardless of the pollutant levels present – something which federal courts have repeatedly confirmed is simply not permissible. *See, e.g., Iowa League of Cities v. EPA,* 711 F.3d 844 (8th Cir. 2013).

Consequently, the City requests that the flow limit in its permit be deleted, recognizing that EPA does not have the authority to regulate flow.

Thank you for your consideration of these comments. We look forward to the Region's response.

Sincerely,



John C. Hall

Attachments

cc: Mayor Thomas C. Hoye, Jr.
Joseph Federico, BETA
Dan Arsenault, EPA