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ENVIR. APPEALS BOARD

James E. Hannon
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October 25, 2008

VIA EXPRESS MAIL

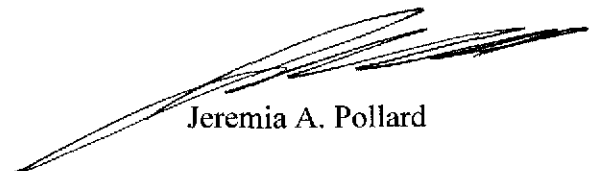
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

RE: NPDES Permit No. MA0100153
Town of Lee, MA
Lee Wastewater Treatment Facility
379 Pleasant Avenue
Lee, MA 01238

Dear Sir/Madam:

Enclosed for filing in the above matter are the original and five copies of the Petition for Relief and three sets of Exhibits. On October 24, 2008, the foregoing was forwarded without a case identifier on the envelope and thus is being resubmitted to assure that the Town's rights are preserved.

Very truly yours,



Jeremia A. Pollard

JAP:mgb
Enclosures

RECEIVED
U.S. E.P.A.

**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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ENVIR. APPEALS BOARD

In re:)
)
)

Town of Lee, Lee Wastewater Treatment)
Facility, 379 Pleasant Street, Lee, MA 0123)
NPDES Permit No. MA0100153)
)

PETITION FOR REVIEW

Jeremia A. Pollard
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October 25, 2008

**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In re:)
)
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Town of Lee, Lee Wastewater Treatment)
Facility, 379 Pleasant Street, Lee, MA 0123)
NPDES Permit No. MA0100153)
)

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Town of Lee ("Town") petitions for review of the conditions of the National Pollution Discharge Elimination System (NPDES) permit No. MA0100153, which was reissued to the Town on September 23, 2008, by the United States Environmental Protection Agency Region 1 ("EPA"), and received by the Town on September 29, 2008. The NPDES permit is attached as Exhibit A.

The Town appeals on the basis that certain permit conditions are based on a (1) a finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should in its discretion, review. 40 C.F.R. 24.19(a). Specifically, the Town appeals the following permit conditions and accompanying requirements:

- 1) Phosphorus limit of 0.2 mg/1 (April 1-October 31) and 1.0 mg/1 (November 1-March 31);
- 2) Effective dates for phosphorus limitations, effective November 1, 2009, where the state had indicated the requirements would be imposed in the future; and
- 3) The EPA's refusal to consider alternative schedules for compliance.

FACTUAL BACKGROUND AND PUBLIC COMMENTS

The following facts were raised by the Town with written submissions and public comments before the EPA and Massachusetts Department of Environmental Protection ("MADEP"), as indicated in the Response to Public Comments, attached as Exhibit B. See 40 C.F.R. § 124.19(a) (any person participating in public comment period on the permit may petition Environmental Appeals Board).¹ The Town of Lee's new wastewater treatment facility (WWTF) is essentially complete. The WWTF was erected after a lengthy planning, design and construction process that commenced with an Administrative Consent Order issued in August, 1998 and a Project Evaluation Report prepared in 2001. The current construction began after a failed design/build project delivery approach was rejected by Town voters in the fall of 2004. The Town then proceeded with a conventional design/bid/build project to accommodate the Town's needs. After retaining Metcalf & Eddy, Inc. ("M&E"), as a consultant, the Town completed design in January of 2006. Following advertisement and bidding, the construction Contract was awarded and notice to proceed was issued on June 27, 2006. Construction is completed with minimal change orders and no pending claims by the Contractor and the Town. The Town has expended substantial sums in completing the WWTF.

As part of M&E's scope of services for project development, a facilities plan update, Supplemental Project Evaluation Form (PEF), was prepared and issued by M&E. Through communications, including communications with the MADEP and EPA, M&E

¹ In connection with public commentary, the Town's consultant submitted a June 13, 2008, correspondence to the EPA, attached hereto as Exhibit C and incorporated herein by reference.

indicated that it was clear that all parties understood that the basis of design of the new WWTF would consider the following:

1. Upon renewal of the Permit, the Total Phosphorus ("TP") limit would be 0.8 mg/l (seasonal- May 1 through October 31);
2. MADEP advised the Town to plan for the possibility of a future TP limit of 0.2 mg/l- "future" understood to mean no earlier than the second or third Permit renewal cycle after construction of the new WWTF.

In its design, M&E sought to address future TP limit concerns at the WWTF, including allocating space in the Headworks building for a future polymer storage/blend/feed system and instituting an in-line static mixer (and associated additional polymer dosing point) located in the main process line between the post equalization tank and the effluent disk filters. Any other required provisions required review in the context of the operating WWTF, for example, considering operating history with the new SBR process. In its comments, M&E cited a number of concerns of the lower TP limits revealed in the draft permit, including impact on chemical consumption of Alum (perhaps 70% more required) and Polymer (new equipment required, added operating and management costs (polymer, power, maintenance); impact on sludge production (much higher Alum sludge production; perhaps 10% overall increase); and insufficient operating history with the new WWTF to properly optimize the design of the additional process equipment.

M&E therefore recommended that the EPA/MADEP relieve the Town of the strict limit of 0.2 mg/l in the near term and revert to the previous understanding that lower TP effluent limits be implemented over time in successive Permit renewal periods.

M&E attached a series of calculations in spreadsheet format that demonstrated two scenarios for consideration. See Response to Public Comments, Appendix A & B, Proposed Phosphorus Limit Calculations, pp. 31-33.

ARGUMENT

In order for the NPDES permit to impose the significant costs upon taxpayers and residents, there must be credible scientific evidence to support a conclusion that real environmental benefits will result from the conditions imposed on the Town. See In re City of Salisbury, 2000 WL 190658 (EPA 2000). In this regard, the scientific evidence requires “a preliminary assessment of whether the reasoning or methodology underlying the [evidence] is scientifically valid and of whether that reasoning or methodology can properly be applied to the facts in issue.” Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149-150 (1999) (“Daubert/Kumho”). The Town commented that the limits were motivated solely by the findings of the Housatonic River Watershed—2002 Water Quality Assessment Report (issued September 2007) (“Assessment Report”) and the findings that reduction in TP is “technology based.” Exhibit B at p. 4. The response to public comments evinced as much, in that the EPA relied heavily on the Assessment Report, and concluded that the prior limits of 1.0mg/l were ineffective, and that a 0.2 mg/l limit was warranted in the reissued permit notwithstanding the parties’ initial understanding that the limits would not be effective immediately.

A. Calculating 0.2 mg/l limit was clearly erroneous and was not based on reasonably acceptable scientific methods

In imposing a 0.2 mg/l phosphorus limit, the EPA addressed primarily the ineffectiveness of the 1.0mg/l phosphorus limit issued in 2000. The EPA's conclusion was based on analyses conducted on samples collected upstream from the WWTF's discharge, conducted by MADEP in 2002 and presented in the Assessment Report and based on the data, the EPA concluded that the prior limits of 2000 were "likely causing or contributing to excursions above water quality criteria in the receiving water."

In explaining the justification for the 0.2 mg/l limit in the permit, EPA discussed at length the water quality concerns evinced by the Assessment Report and other data. Sources listed as potentially contributing to the pollutants included agriculture, unspecified urban storm water, non-point sources, and municipal point source discharges. The EPA noted that the Housatonic River also receives discharges of treated effluent from the Pittsfield and Lenox WWTPs, both of which are located upstream from the Lee WWTF. The EPA noted that Pittsfield, which is the "largest municipal discharger on the river" with a design flow of 17 MGD, is now subject to a 0.1mg/l seasonal total phosphorus limit in its permit issued on August 8, 2008, which will "significantly decrease loadings of phosphorus from [the Pittsfield] facility." The EPA noted, however, "that it is not clear how long it will take before the effects of the decrease phosphorus loadings upstream will be observed downstream, particularly downstream from Woods Pond, an impoundment located upstream from the Lee WWTF in Lenox." In developing a limit for the Lee WWTF, it was assumed that the instream phosphorus concentration immediately upstream from the facility will approach 0.09 mg/l, ostensibly accounting for the reduced levels from Pittsfield. Using these assumptions, the EPA calculated that

the 0.2 mg/l is necessary “at this time” to ensure that water quality standards will be met in the downstream receiving water at all times.

The EPA, in focusing on the criteria above, committed an error in law in failing to properly “account for existing controls on point and nonpoint sources of pollution and where appropriate, the dilution of the effluent in the receiving water.” 40 C.F.R. § 122.44(d)(1)(ii). As an initial matter, there is no discussion of non-point sources of pollution, even though the EPA’s discussion of the water quality concerns and data acknowledges non-point sources of pollution in this regard with other contributors than the municipal output. Even by its own methodology, Region 1 has failed to establish that its conclusions are reasonable in that there is a scientifically accepted (1) general principle at issue and (2) application of the general principle to the specific facts at issue. Similarly, the EPA’s equation does not appear to accommodate for the “dilution of the effluent in the receiving water.” In this regard, although the EPA acknowledges that it is unknown to what extent the effluent reductions from Pittsfield will affect the phosphorus concentration, the EPA nonetheless proceeds with a calculation with an arbitrary 0.09 mg/l concentration immediately upstream of the Lee WWTF. See Washington Aqueduct Water Supply System, 11 E.A.D. 565, 583 (E.P.A. 2004) (although the region indicated that a study “supported its choice of data for the reasonable potential analysis, the evidence presented in that document instead raises questions about that choice).

In this regard, there was insufficient scientifically based water quality analysis other than outdated tests, and the EPA interposed assumptions that were not explained and were shown to be reasonable or reliable. Lastly, the EPA failed to justify why the “recommended Gold Book criterion of 0.1 mg/l”, as used in its calculation, was necessary

to achieve water quality standards by seasonal calculations. As has been raised in other appeals before the Board, there is insufficient basis to determine that Gold Book standards are not to be exceeded when applying 7Q10 conditions, as the EPA has in its calculations. In this regard, the decision lacks any explanation as to why these criteria are applied and why these increased strictures are justifiable at this time, as opposed to arbitrary requirements imposed on the Town. Accordingly, the EPA's findings of fact and conclusions of law are clearly erroneous with respect to its calculation of phosphorus limits and the Board should exercise to review this issue.

B. Phosphorus limits provided for WWTF's design

The Town raised that additional concern that the its plant, which exceeded \$19 million to build, was constructed on the available information provided by MADEP and EPA projecting a phosphorus limit of 0.2 mg/l phosphorus limit would not be included in the reissued NPDES permit for several years, and that at its outset the WWTF would need to achieve a phosphorus output of 0.8 mg/l. The EPA did not contend otherwise, but instead concluded that Section 301(b)(1)(C) of the CWA requires achievement of "any more stringent limitations than the technology-based requirements set forth in Section 301(b)(1)(A) and (B), including those necessary to meet water quality standards established pursuant to any State law or regulation." Relying on U.S. Steel Corp. v. Train, 556 F.2d 822, 838 (7th Cir. 1977), the EPA concluded that it was required to force technology "even at the cost of economic and social dislocation." However, the EPA erroneously applied this concept, at the very least because the Town was fully compliant at every level with the MADEP's projection for phosphorus limits in its design and

construction of the plant. In this regard, there was no dispute that the plant's design accounted for the state's minimum technology requirements at every relevant stage. The question is now whether the EPA, after the fact, can impose a stricter requirement, thereby increasing the Town's costs and requiring further upgrades to the WWTF in these circumstances. To require the Town to further reduce the phosphorus limits in these circumstances achieves the highest levels of arbitrary and capricious agency action, and also demonstrates an erroneous application of law warranting the Board's review and reversal.

C. Failure to consider compliance alternatives

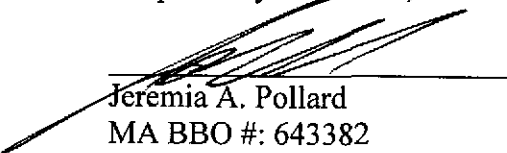
The Town requested alternative compliance schedules to allow for a graduated schedule to reduce phosphorus levels. EPA erroneously concluded that implementation schedule proposed by the Town was not reasonable in light of the circumstances. In this regard, the Massachusetts Regulations allow compliance schedules. See 314 C.M.R. 4.03(1)(b)(2). To the extent that the EPA relied on what it perceived to be Massachusetts standards, a compliance schedule was certainly appropriate in this case, especially where the state had indicated that the phosphorus limits would be imposed at a later date, as outlined above and in the public comments. In this regard, as a matter of basic municipal appropriation, there exists no funds earmarked to accommodate the increased expenses resulting from the unforeseen imposition of the more stringent phosphorus limit of 0.1mg/l. The added expenditures will require a town meeting to appropriate funds in excess of those already designated for the facility and the permit fails to account for this self-evident proposition at any level, other than to note that the Town may request a

compliance schedule for achieving the new limit from the EPA Region 1 Compliance Office. However, that the Town may request a compliance schedule begs the question as to why newly created limits applied retroactively should not have been graduated, especially where the state had indicated that the more stringent limitations would not take effect immediately. Also, the Town's consultant presented reasonable, tempered alternatives in this regard that warranted consideration.

CONCLUSION

The phosphorus limits in the permit should be reversed and/or remanded for further consideration by EPA Region 1 consistent with the arguments contained in this Petition.

Respectfully submitted,



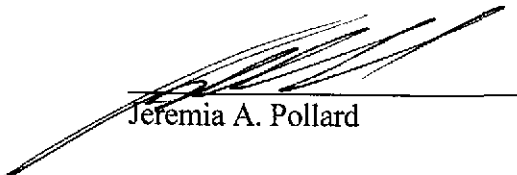
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October 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2008, true copies of the Petition and Exhibits were served upon the Massachusetts Department of Environmental Protection as follows:

Commonwealth of Massachusetts
Department of Environmental Protection
P.O. Box 4062
Boston, MA 02211



Jeremia A. Pollard