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

In re:	)	
	)	NPDES Appeal No. 17-03
City of Ruidoso Downs and Village of Ruidoso WWTP	)	**REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW**
NPDES Permit No. NM 0029165	)	

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I. The EPA acted irrationally, arbitrarily, and capriciously when it determined that it could assure compliance with New Mexico's water quality standards for plant nutrients in the Rio Ruidoso by authorizing a 100% increase in the discharge of Total Nitrogen from the Ruidoso wastewater treatment plant into a stream segment known to be in non-attainment with plant nutrient standards

The Clean Water Act prohibits Respondent U.S. Environmental Protection Agency ("EPA") "from issuing NPDES permits that fail to ensure compliance with the water quality standards of all affected states." *In re Town of Concord Department of Public Works*, 16 E.A.D. 514, 518 (NPDES 2014) *citing* 33 U.S.C. §§ 1311(b)(1)(C), 1341(a)(1)-(2).[1] As Petitioner Rio Hondo Land & Cattle Company ("Rio Hondo") explained in its Memorandum Brief in Support of Petition for Review, the challenged NPDES Permit in this matter is premised on the fantastical and irrational assumption that compliance with water quality standards can be assured when a point source discharger is allowed to double its discharge of a contaminant into a river known to be in non-attainment for that contaminant – with no offsetting decreases in discharges of the contaminant

[1] As this Board has previously explained, "[t]his statutory requirement has been implemented, in part, through long-standing regulations that prohibit issuance of an NPDES permit 'when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states.' 40 C.F.R. § 122.4(d)(1) (2001)." *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 335 (NPDES 2002) (emphasis in original).

elsewhere along the river. Even Respondent U.S. Environmental Protection Agency ("EPA") is forced to admit that Rio Hondo's argument in this matter has "intuitive appeal." EPA Response at 15.

In its quixotic effort to convince the Board that a rational fact finder could ever find that water quality in a non-attainment receiving river is improved when the point source discharge of a contaminant is doubled and there are no offsetting discharge decreases elsewhere, the EPA explains that this improbable and irrational determination is warranted in this case "based on adjusted assumptions for stream flow." *Id.* at 11. However, such "assumptions" are misplaced as they are simply inconsistent with the acknowledged fact set out in the administrative record in this matter which is that the flow in the receiving segment of the Rio Ruidoso is diminishing over time – and *not* increasing – as a result of climate change and increased river withdrawals. *See* Exhibit 2 to EPA Response Brief (2016 TMDL) at 17. Accordingly, the unvarnished reality in this case is that (1) the challenged NPDES Permit authorizes a 100% increase in the discharge of Total Nitrogen ("TN") from the Ruidoso wastewater treatment plant into a segment of the Rio Ruidoso which is (2) known to be in non-attainment for plant nutrients (including TN) and (3) known to be decreasing in flow over time despite the fact that (4) there are no offsetting decreases in TN discharge from other point

or non-point sources. Clearly, in this set of circumstances, a determination that the significant relaxation of the TN effluent limitation nonetheless assures attainment of New Mexico water quality standards for plant nutrients is irrational, arbitrary, and capricious.

Given the physical improbability of its position in this case, the EPA predictably argues that the Board should defer to its technical determinations. However, both this Board and reviewing courts have plainly held that the EPA is not entitled to blind deference, and that its decisions will be reversed and remanded in those circumstances where the administrative record for the decision does not support an adjudicative determination that the EPA "engage[d] in reasoned decision-making." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 241 (D.D.C. 2011) *see also In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 342 (NPDES 2002) (in an NPDES appeal the Board "look[s] to determine . . . whether the approach ultimately adopted by the Region is rational in light of all information in the record"). Where, as here, the EPA's permit writer for NPDES Permit No. NM 0029165 has failed to supply even a scintilla of evidence that he conducted any sort of independent analysis or assessment to assure that the challenged NPDES Permit contains effluent limitations that assure compliance with New Mexico's

water quality standards for plant nutrients, the Board "cannot properly perform any review whatsoever of that analysis, and, therefore, cannot conclude that it meets the requirement of rationality." *Id.*, 10 E.A.D. at 342-43.[2]

In an effort to shore up its irrational position in this matter, the EPA further argues that the significant relaxation in the TN effluent limitation incorporated into the challenged NPDES Permit is justified by one of the statutory exemptions to the Clean Water Act's anti-backsliding rule. 33 U.S.C. § 1313(d)(4)(A). However, this argument overlooks the fact that this statutory exemption simply

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[2] In this matter, the EPA's determination that the effluent limitations of the challenged NPDES Permit assure compliance with New Mexico's water quality standards for plant nutrients is premised entirely on the 2016 TMDL for plant nutrients, and is not supported by any analysis or assessment whatsoever by the permit writer. This Board's decisions indicate that such blind reliance on a collateral regulatory determination is impermissible "in a circumstance . . . in which there is a body of information drawing the [collateral regulatory determination] into question." *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 342-43 (NPDES 2002) (emphasis in original). In a similar vein, the court in *Anacostia Riverkeeper* has held that the EPA's reliance on collateral regulatory determinations in the rendering of a TMDL decision was arbitrary and capricious when the collateral regulatory determinations – in that case by the District of Columbia and Maryland – are themselves devoid of any "evidence or scientific basis to support the proposition" relied upon by the EPA. 798 F.Supp.2d at 240. Accordingly, in this case, in adjudging the validity of the EPA's determination as to assurances of compliance with water quality standards for plant nutrients, the Board must look at the entire "body of information" concerning non-attainment in the receiving water and the failure of past efforts to achieve compliance with applicable water quality standards in the receiving water – and not just the 2016 TMDL itself.

fails to apply in this case. Most importantly, the exemption applies narrowly only to those effluent limitations which are "based on a total maximum daily load or other waste load allocation." In this matter, the concentration effluent limitations for TP and TN set out in the 2007 and 2012 NPDES Permits for the Ruidoso wastewater treatment plant were *not* based on a total maximum daily load or other waste load allocation; rather, they are water quality based effluent limitations that reflect New Mexico's numeric and narrative standards for plant nutrients.

Additionally, the claimed exemption from the default rule prohibiting backsliding in NPDES Permit effluent limitations applies only in those circumstances where the relaxation of one discharger's effluent limitation is coupled with an offsetting decrease in another discharger's effluent limitation. Here, there is no offsetting decrease to act as a "counterbalance" to the backsliding effected by the 2017 NPDES Permit's TN limitation. Rather, the NPDES Permit authorizes a doubling of TN discharge into a stream that is already TN impaired with no offsetting decreases of TN discharge anywhere else along the river.

Rio Hondo concedes that it bears a heavy burden to show that reversal and remand of an EPA NPDES Permit decision is warranted in this case. *In re City of Moscow, Idaho*, 10 E.A.D. 135, 141 (NPDES 2001). However, the deference ordinarily accorded to the EPA's NPDES Permit decisions does not extend to

unsupported and irrational determinations underlying those decisions.

> When the Board is presented with technical issues we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the Region's determination.

In re Government of the District of Columbia Municipal Separate Storm Sewer System, 10 E.A.D. at 334. In this matter, the EPA's approach was irrational and its factual determinations are completely without any evidentiary support in the record. For this reason, Rio Hondo respectfully submits that its Petition for Review should be granted, and that the TP and TN effluent limitations of NMPDES Permit No. NM 0029165 should be reversed and remanded to the Region for modification.

II. The claimed exemption from the Clean Water Act's default rule prohibiting the relaxation of effluent limitations in successive iterations of NPDES Permits does not apply in this case

When it issued the 2017 NPDES Permit to the Ruidoso wastewater treatement plant which is challenged in this Petition for Review, the EPA acknowledged that the incorporated effluent limitations for plant nutrients resulted in "backsliding" from the effluent limitations of the 2012 iteration of the NPDES

Permit. However, the EPA argued that the acknowledged backsliding was justified by two statutory exemptions: the exemption relating to "new information" and the exemption relating to modified wasteload allocations. The EPA now admits that the "new information" exemption does not apply in this matter, and the agency now relies entirely on the modified wasteload allocation exemption. That exemption allows backsliding for NPDES Pemit effluent limitations controlling discharges into a non-attainment water in certain very narrowly defined circumstances:

> [W]here the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard . . . .

33 U.S.C. § 1313(d)(4)(A)(i).[3] Accordingly, by its express terms, the exemption applies only if (1) the effluent limitation to be revised is "based on a total maximum daily load or other waste load allocation" and (2) attainment of water quality standards is assured in light of the cumulative effect of all effluent

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[3] The statutory exemption also contains a provision for backsliding in those circumstances where the designated uses in the receiving water that are not being supported have been removed. 33 U.S.C. § 1313(d)(4)(A)(ii). That provision does not apply in this case.

limitation revisions. Neither of these two conditions is present in this case, and the exemption is therefore inapplicable.

A. The concentration effluent limitations of the 2007 and 2012 NPDES Permits for the Ruidoso wastewater treatment plant were *not* based on a total maximum daily load or other waste load allocation, and the claimed statutory exemption is therefore inapplicable

In its Memorandum Brief in in Support of Petition for Review, Rio Hondo explained that the concentration effluent limitations for TP and TN that were incorporated into the 2007 and 2012 iterations of NPDES Permit No. NM 0029165 – 0.1 mg/L and 1.0 mg/L respectively – were based on New Mexico's numeric and narrative water quality standards for plant nutrients, and *not* on a total maximum daily load or other waste load allocation. In its response brief, the EPA admits this critical point when it states that Rio Hondo's assertion in this regard is "not incorrect as a factual matter." Response Brief at 12. Since the TP and TN concentration limits were clearly based on New Mexico's water quality standards, the claimed statutory exemption is simply inapplicable. The EPA attempts to evade this result with a misguided two-pronged attack.

First, the EPA argues that even though the TP and TN concentration effluent limitations are water quality standard based, they are "also based" on a total maximum daily load because the total maximum daily load for the Rio

Ruidoso utilizes those water quality standards to calculate permissible daily loads of TP and TN. This is a "red herring" argument that is simply unsupported by the statutory language. Obviously, every total maximum daily load document must reflect applicable underlying water quality standards and must utilize those applicable standards to measure attainment or non-attainment. However, the mere recitation of a water quality standard in a total maximum daily load document – or the recitation of an effluent limitation based on a water quality standard in a total maximum daily load document – does *not* convert that concentration standard or concentration effluent limitation into an effluent limitation "based on a total maximum daily load or other waste load allocation" as required by the statutory exemption. Here, the concentration effluent limitations of the 2007 and 2012 iterations of NPDES Permit No. NM 0029165 exist exogenously from and independently of the wasteload allocations calculated and assigned in the 2006 and 2016 total maximum daily loads, and the statutory exemption is therefore inapplicable.

To salvage its argument, the EPA desperately claims that regardless of whether the concentration effluent limitations for TP and TN are water quality standard based – which it concedes that they are – or total maximum daily load based, the results "would not be meaningfully different." EPA Response at 13. Of

couse, the EPA's argument in this regard is nonsensical as it entirely overlooks the critical difference – insofar as the statutory exemption is concerned – between (1) concentration effluent limitations based on water quality standards on one hand and (2) mass load effluent limitations based on a total maximum daily load (or other waste load allocation) on the other hand. While mass load effluent limitations based on a total maximum daily load or other waste load allocation may be relaxed under the claimed statutory exemption (assuming that the other statutory conditions are met), concentration effluent limitations based on water quality standards cannot be relaxed pursuant to 33 U.S.C. § 1313(d)(4)(A)(i).

Second, and relatedly, the EPA attempts to rewrite the plain language of the statutory exemption under the guise of a purported "interpretation" of ambiguous statutory language. EPA Response at 13-14, 13 n. 10. Specifically, the EPA argues that the statutory exemption *could* be interpreted to mean that effluent limitations can be revised "irrespective of the basis for the prior effluent limit." EPA Response at 13 n. 10. However, such a reading is simply not possible in light of the plain language of the statute which clearly and unequivocally states that only "effluent limitation[s] based on a total maximum daily load or other waste load allocation . . . may be revised." 33 U.S.C. § 1313(d)(4)(A). In light of the pellucidly clear language of the narrow statutory exemption, the EPA's proposed

interpretation of the exemption – which essentially excises the important limiting condition of the exemption – must be rejected. Indeed, even the EPA admits in its response brief that the EPA's permit writer's manual is inconsistent with its newly minted interpretation of the statutory language. EPA Response at 13 n. 10.

In sum, 33 U.S.C. § 1313(d)(4)(A)(i) does not justify the deletion of concentration limits from the 2017 iteration of the NPDES Permit issued to the Ruidoso wastewater treatment plant. Those concentration limits are water quality standard based, and they exist separately and independently from the mass load limitations of the NPDES Permit and are intended to achieve a purpose that is distinct from the mass load limitations of the NPDES Permit. *See for example* 50 Fed.Reg. 1774, 1777-78 (Jan. 11, 1985) (the EPA explains the incremental value of incorporating concentration limits into NPDES permits). As Rio Hondo explained in its Memorandum Brief in support of Petition for Review, the concentration effluent limitations incorporated into NPDES Permit No. NM 0029165 are critical because effluent from the wastewater treatement plans constitutes a significant fraction of the total flow of water in the Rio Ruidoso downstream of the plant. Accordingly, incorporation of the concentration limits in the NPDES Permit assures compliance with applicable water quality standards in *all* flow conditions, and not just those flow conditions where a significant dilution

flow is present in the receiving segment of the Rio Ruidoso. The EPA's deletion of the concentration limits constitutes impermissible backsliding that is unjustified by any statutory exemption to the anti-backsliding provisions of the Clean Water Act.

B. Since there is no offsetting decrease in TN discharges into the Rio Ruidoso from other point or non-point TN sources, the claimed exemption does not apply to the restated TN mass load limit

The 2017 NPDES Permit for the Ruidoso wastewater treatment plant incorporates a daily mass load effluent limitation for TN of 37.8 pounds/day, exactly double the mass load limitation for TN of the 2012 NPDES Permit which as 18.9 pounds/day. Rio Hondo concedes that the TN mass load limit for TN incorporated into the 2017 iteration of NPDES Permit No. NM 0029165 *is* based on a total maximum daily load – unlike the concentration effluent limitations as explained above. Accordingly, the claimed statutory exemption from the default rule against backsliding might apply to that mass load limit – but *only* to the extent that the other statutory conditions for application of the exemption are met. Specifically, the exemption applies "only if the cumulative effect of all . . . revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of . . . water quality standard[s]." 33 U.S.C. § 1313(d)(4)(A)(i). The intent of this statutory provision could not be any clearer:

backsliding (or relaxation) of a mass load effluent limitation based on a total maximum daily load (or other waste load allocation) is permissible only in those instances where the increase in pollutants authorized pursuant to the backsliding is offset by a decrease in pollutants from other dischargers required by that same total maximum daily load. In other words, the statutory exemption does *not* permit the EPA to relax the effluent limitations in an NPDES Permit for a pollutant into a stream segment which is known to be in non-attainment for that pollutant when the net effect of that relaxation – taken together with other effluent limitations – will be an *increase* in the total load of that pollutant in the non-attainment receiving water. Here, the relaxation in the mass load limit for TN incorporated into NPDES Permit No. NM 0029165 will result in a net increase in the total amount of TN discharged into the Rio Ruidoso which is already in non-attainment for TN. This sort of relaxation of mass load limits into a non-attainment water – without an offsetting decrease in TN mass load limits from other point or non-point source dischargers – is simply not contemplated by the plain language of the statutory exemption.

III. The general "backstop provision" of the Clean Water Act – 33 U.S.C. § 1342(o)(3) – categorically prohibits all backsliding in NPDES Permit effluent limitations when such backsliding will result in a violation of applicable water quality standards

Even if the statutory exemption set out in 33 U.S.C. § 1313(d)(4)(A) otherwise permitted backsliding in the TP and TN concentration effluent limitations or in the TN mass load effluent limitation incorporated into NPDES Permit No. NM 0029165 – which is, as explained above, *not* the case – backsliding would nonetheless be prohibited by the Clean Water Act's "backstop provision" which provides, in pertinent part, as follows:

> In no event may . . . a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

33 U.S.C. § 1342(o)(3). In this case, the undisputed evidence shows that (1) the Rio Ruidoso has been in a state of non-attainment for plant nutrients since the 1990s, (2) *current* levels of TN discharge from the Ruidoso wastewater treatment plant contribute to the plant nutrient pollution in the Rio Ruidoso, (3) the flow in the Rio Ruidoso is diminishing over time as a result of climate change and increased water withdrawals. Under such circumstances, the EPA's decision to *double* the permitted effluent load of TN from the plant – in the absence of any offsetting decreases in TN discharge from other sources – constitutes a clear violation of the "backstop" prohibition. It is simply irrational, arbitrary, and capricious for the EPA to conclude that doubling the amount of TN discharged

into the Rio Ruidoso will assure attainment of New Mexico's TN water quality standard in this already TN-limited stream segment. And, as one would expect, the administrative record for the challenged decision is entirely devoid of any independent analysis or assessment by the permit writer of the manner in which an *increase* in the amount of pollutant could lead to the resolution of a non-attainment problem for that pollutant.

Obviously, even deference has its limits, and this Board holds as follows with respect to the limits of its deference when irrational EPA positions are concerned:

> When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised considered judgment. The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. As a whole, the record must demonstrate that the permit issuer duly considered the issues raised in the comments and ultimately adopted an approach that is rational in light of all information in the record. On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record.
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> In reviewing an exercise of discretion by the permit issuer, the Board applies an abuse of discretion standard. The Board will uphold a permit issuer's reasonable exercise of discretion if that decision is cogently explained and supported in the record . . . . *Motor Vehicles*

> *Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner * * *.").

In re Town of Concord Department of Public Works, 16 E.A.D. 514, 517 (NPDES 2014). In this case, the administrative record for the 2017 iteration of NPDES Permit No. NM 0029165 contains no analysis or assessment whatsoever – not even a scintilla – that purports to explain the basis for the EPA's determination that an *increase* in TN loading from the Ruidoso wastewater treatment plant will assure compliance with the applicable water quality standard for TN, despite the fact that the receiving water is *already* in a non-attainment state for TN at current (and lower) TN load limits.

In support of this illogical and irrational determination, the EPA merely refers to the waste load allocation of the 2016 total maximum daily loads for the Rio Ruidoso. However, such reliance on the 2016 total maximum daily load is misplaced for two reasons. First, there is simply no requirement that an effluent limitation in an NPDES Permit for a discharger be equivalent to the waste load allocation assigned to that discharger in a total maximum daily load:

> While the governing regulations require *consistency* [between waste load allocations and NPDES Permit effluent limitations], they do not require that the permit limitations that will finally be adopted in a final NPDES Permit be *identical* to any of the [waste load allocations] that may be provided in a [total maximum daily load. Total maximum

> daily loads] are by definition maximum limits; permit-specific limits like those at hand, which are more conservative than the [total maximum daily load] maxima, are not inconsistent with those maxima, or the [waste load allocation] upon which they are based.

In re City of Moscow, Idaho, 10 E.A.D. 135, 148 (NPDES 2001). Thus, there is simply no regulatory or statutory impediment that precludes the EPA from incorporating effluent limitations in an NPDES Permit that are more strict than underlying total maximum daily loads. Indeed, the incorporation of stricter effluent limitations is compelled if such limitations are required to assure compliance with water quality standards.

Second, the 2016 total maximum daily load for the Rio Ruidoso – and the associated mass load limitations calculated therein – does not insulate the EPA's NPDES Permit decision from arbitrary and capricious review. That is, those factual determinations underlying the EPA's decision to issue the 2017 NPDES Permit to the Ruidoso wastewater treatment plant with relaxed plant nutrient effluent limitations – including, most specifically, the determination that those relaxed plant nutrient effluent limitations will assure attainment of applicable water quality standards – must be rational and supported by evidence in the administrative record, regardless of the conclusions of the 2016 total maximum daily load. Conclusory statements by the EPA's NPDES Permit writer as to

attainment of water quality standards that are not supported by evidence in the record – particularly under the circumstances present here where water quality standards violations are already plainly apparent – are not entitled to this Board's considered deference.

IV. Conclusion

Sometimes, there is an alignment between the law and common sense: this is one of those situations. The water in the Rio Ruidoso downstream of the Ruidoso wastewater treatment plant does not comply with New Mexico water quality standards for plant nutrients, including TN. As the EPA admits, "intuition" suggests that increasing the discharge of a pollutant into a stream that is already in non-attainment for that pollutant cannot – in any rational manner – assure attainment of the water quality standard for that pollutant. The notion is irrational, arbitrary, and capricious. Furthermore, the narrow statutory exemption to the Clean Water Act's anti-backsliding rule (1) does not apply to the TP and TN concentration limits of the challenged permit because they are not based on a total maximum daily load or other waste load allocation and (2) does not apply to the TN mass load of the challenged permit because the increase in TN load is not offset by a corresponding TN load decrease from another discharger. And even if the exemption did apply to the concentration or the mass load limits – which it

does not – backsliding would nonetheless be prohibited by the Clean Water Act's "backstop" provision.

Respectfully submitted: March 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Reply Brief in Support of Petition for Review in the matter of NPDES Permit No. NM0029165 were served by on the following persons by e-mail on March 5, 2017:

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that I used the "Word Count" feature of WordPerfect X5 to count the number of words in this Reply Brief in Support of Petition for Review, and that the Word Count utility counted less than 7,000 words in this reply memorandum.

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