

**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)
)
NPDES Permit No. NM 0029165)
)
)

**MEMORANDUM BRIEF IN OPPOSITION TO
THE ENVIRONMENTAL PROTECTION AGENCY'S
MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

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I. Introduction

In this Petition for Review challenging the terms and conditions of NPDES Permit No. NM0029165 issued to the Ruidoso wastewater treatment plant, Petitioner Rio Hondo Land & Cattle Company (“Rio Hondo”) alleges that EPA’s Region 6 permit writer clearly erred as a matter of fact and law when he determined (1) that concentration limits for Total Phosphorous (“TP”) and Total Nitrogen (“TN”) are no longer necessary to assure attainment of New Mexico water quality standards despite the fact that the EPA has included such limits in Ruidoso’s permit since 2000¹ and (2) that doubling the facility’s mass load effluent limitation for TN from 18.9 lbs/day (in the 2012 permit) to 37.8 lbs/day (in the 2017 permit) will assure attainment of New Mexico water quality standards.

In response to Rio Hondo’s arguments, the EPA responds that the

¹ Rio Hondo represents that the permit writer does not expressly state that concentration limits are no longer necessary. In fact, he provides no explanation whatsoever for his decision to delete concentration limits from the 2017 iteration of the permit. However, since the permit writer’s core statutory duty in this matter was to issue a permit that assures attainment of New Mexico water quality standards, *see infra*, one must assume (in the absence of any explanation from the permit writer himself) that his decision to delete those limits – despite their incorporation into the 2000, 2007, and 2012 permits – was based on new analysis leading to his determination that concentration limits are no longer necessary.

challenged nutrient effluent limitations are based on and consistent with an EPA-approved 2016 Total Maximum Daily Load (“TMDL”) for the Rio Ruidoso that incorporates nutrient Waste Load Allocations for the permitted facility and are, therefore, conclusively valid. However, it has now become apparent that the permit writer did not even consider the EPA-approved 2016 TMDL for nutrients in the Rio Ruidoso when he made the permit decision, as the EPA-approved TMDL is not in the administrative record for this matter.² The EPA has moved the Board to supplement the administrative record in this matter with the EPA-approved 2016 TMDL. Rio Hondo opposes this motion. Rio Hondo respectfully submits that under the circumstances present here the appropriate course of action is for the Board to take official notice of the extra-record document.

II. Argument

When he re-issued NPDES Permit No. NM0029165 in 2017, the permit writer had two core substantive duties. First, he had a duty to incorporate effluent

² In its Motion to Supplement the Administrative Record, the EPA makes no representation that the EPA permit writer ever actually considered the EPA-approved TMDL when he issued the challenged decision. Accordingly, the ambiguity in the styling of the EPA’s motion – specifically, whether the EPA is seeking to augment the existing administrative record with a new document that was not before the permit writer or, on the other hand, is seeking to complete the compilation of the record by belatedly providing the Board with a copy of an inadvertently omitted document – need not be resolved by the Board.

limitations into the permit which assure attainment of state water quality standards throughout the entire permit term, taking into account any incorporated Compliance Schedules. *In re City of Moscow*, 10 E.A.D. 135, 151 (“[t]he Region has an independent duty to ensure that State water quality standards are implemented in NPDES permits”) *citing* 33 U.S.C. § 1311 (b)(1)(C) *see also* 40 C.F.R. § 122.44(d). Second, he had a duty to comply with the Clean Water Act’s anti-backsliding provisions, including the “safety clause” which the EPA has explained constitutes “an absolute limitation on backsliding” even in those cases where “one or more of the backsliding exceptions” set out in Act is met. *See* EPA NPDES Permit Writers’ Manual (2010) at p. 7-4 *explaining* 33 U.S.C. § 1342(o)(3).

In a matter like this one – where Rio Hondo claims that the permit writer clearly erred when he issued the challenged 2017 NPDES permit – the applicable standard of review requires this Board to look to the administrative record to determine whether or not the permit writer exercised his or her rational and considered judgment of the relevant issues:

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 his or her 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.

Similarly, the Board will uphold a permitting authority's reasonable exercise of discretion if that decision is cogently explained and supported in the record.

In re City of Taunton Department of Public Works, 17 E.A.D. 105, 112 (EAB 2016) (internal quotations and citations omitted). Accordingly, the administrative record plays a crucial role in this Board's review, as the Board looks to the record to assess the "sum and substance" of the permit writer's decision-making process. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

With respect to the EPA-approved 2016, Rio Hondo acknowledges that it is largely identical in its substance to the draft TMDL which is in the record. Nonetheless, the fact that the EPA-approved TMDL is *absent* from the record raises questions as to the timing and thoroughness of the EPA permit writer's decision-making process in this case, and thereby confirms Rio Hondo's basic argument that there is no reasoned analysis to which this Board can reasonably defer insofar as the alleged statutory violations are concerned. Specifically in this

case, where the permit writer endeavors to rely entirely and exclusively on the EPA-approved 2016 TMDL to justify impermissible back-sliding, and where there is no technical analysis whatsoever in the administrative record to justify or explain the significantly relaxed permit terms, the absence of the EPA-approved 2016 TMDL from the record raises serious questions as to the decision-making process that resulted in that back-sliding.

III. Conclusion

It is not permissible for the EPA to create a new record in this proceeding in an effort to buttress its arguments regarding the validity of re-issued NPDES Permit No. NM0029165. Rio Hondo respectfully submits that the EPA's Motion to Supplement the Record should be denied so that the record in this matter is clear that the permit writer did *not* consult the EPA-approved 2016 TMDL when he made the challenged permit decision. Instead of supplementing the record with

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extra-record evidence, this Board should take official notice of the 2016 EPA-approved TMDL for nutrients in the Rio Ruidoso.

Respectfully submitted,

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